

Spring 1989

## What Does and What Does Not Constitute the Unauthorized Practice of Law in a Residential Real Estate Transaction in South Carolina

Luther C. Kissam IV

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

---

### Recommended Citation

Luther C. Kissam IV, What Does and What Does Not Constitute the Unauthorized Practice of Law in a Residential Real Estate Transaction in South Carolina, 40 S. C. L. Rev. 733 (1989).

This Note is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact [digres@mailbox.sc.edu](mailto:digres@mailbox.sc.edu).

# WHAT DOES AND WHAT DOES NOT CONSTITUTE THE UNAUTHORIZED PRACTICE OF LAW IN A RESIDENTIAL REAL ESTATE TRANSACTION IN SOUTH CAROLINA

## I. INTRODUCTION

The practice of law is a time-honored profession that has prerequisites designed to provide protection to the public and ensure justice for all people. Under the South Carolina Code of Professional Responsibility<sup>1</sup> and South Carolina case law, laymen are prohibited from practicing law. The reason for this prohibition is clear:

[I]t is not amiss to observe that the policy of prohibiting laymen from practicing law is not for the purpose of creating a monopoly in the legal profession, nor for its protection, but to assure the public adequate protection in the pursuit of justice, by preventing the intrusion of incompetent and unlearned persons in the practice of law. We may add that a dual trust is imposed on attorneys at law, they must act with all good fidelity to the courts and to their clients. They are bound by canons of ethics which have been the growth of long experience and which are enforced by the courts.<sup>2</sup>

While the prohibition against the practice of law by laymen perhaps is most obviously needed in a courtroom setting, it is equally essential to prevent the untrained from orchestrating potentially complex and far-reaching transactions. While many have attempted to draw some distinction between simple and complex tasks, none, in fact, exist. Judge Cuthbert Pound of the New York Court of Appeals noted the futility of such efforts long ago when he stated: "I am unable to rest any satisfactory

---

1. The South Carolina Code of Professional Responsibility is South Carolina's adaptation of the American Bar Association's (ABA) Code of Professional Responsibility. The South Carolina Supreme Court adopted the 1976 ABA Code as part of its rules in 1973. See S.C. Sup. Ct. R. 32. The South Carolina Code was amended last in 1984.

2. *State v. Wells*, 191 S.C. 468, 481, 5 S.E.2d 181, 186 (1939).

test on the distinction between simple and complex instruments. The most complex are simple to the skilled, and the simplest often trouble the inexperienced.”<sup>3</sup>

The prohibition against a layman practicing law is not universal in application; a layman, after all, may represent himself in any legal matter.<sup>4</sup> Thus, one is not forced to avail himself of the protection afforded by having a trained professional handle his legal problems. If, however, the layman seeks assistance in dealing with legal matters, he must obtain the help of a licensed attorney.<sup>5</sup> While regulation of the unauthorized practice of law may appear relatively simple in concept, application of those rules to residential real estate transactions present a myriad of issues that only recently have been addressed in South Carolina.

In 1987 in *State v. Buyers Service Co.*<sup>6</sup> the State of South Carolina sued a commercial title company alleging that its assistance to homeowners in purchasing residential real estate amounted to the unauthorized practice of law. The South Carolina Supreme Court found that the following actions of Buyers Service constituted the unauthorized practice of law: (1) the providing of forms, opinions, and certificates concerning the status of titles to real estate and mortgage liens; (2) the preparing of documents affecting title to real property; (3) the handling of real estate and mortgage loan closings; and (4) the physical transporting or mailing of documents to the recording office when those acts were part of a real estate transfer.<sup>7</sup>

Although *Buyers Service* addressed many issues, the opinion left other important questions unanswered. Additionally, the court’s broad language could lead to a misapplication of its holding. Nevertheless, applying the underlying principles of *Buyers Service* to various factual situations provides some guidance to those who participate in residential real estate transactions about what constitutes the practice of law in South Carolina.

---

3. *People v. Title Guarantee & Trust Co.*, 227 N.Y. 366, 379, 125 N.E. 666, 670 (1919) (Pound, J., concurring).

4. See S.C. CODE OF PROFESSIONAL RESPONSIBILITY EC 3-7 (1984).

5. See *id.* EC 3-1.

6. 292 S.C. 426, 357 S.E.2d 15 (1987) (per curiam).

7. See *id.* at 432-34, 357 S.E.2d at 17-19.

## II. THE DEFINITION OF THE PRACTICE OF LAW UNDER THE SOUTH CAROLINA CODE OF PROFESSIONAL RESPONSIBILITY

In determining what is and what is not the unauthorized practice of law in South Carolina, the most appropriate place to begin is the South Carolina Code of Professional Responsibility. While the Code contains no specific definition of the practice of law, Ethical Consideration (EC) 3-5<sup>8</sup> attempts to mark the parameters of the practice of law:

It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, non-lawyers, such as court clerks, police officers, abstractors, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a law are essential in the public interest whenever the *exercise of professional legal judgment* is required.<sup>9</sup>

Thus, Ethical Consideration 3-5 appears to conclude that when a nonlawyer holds himself out as having special expertise in an area requiring the professional judgment of a lawyer, he is engaged in the unauthorized practice of law. The Code of Professional Responsibility, like the court in *Buyers Service*, cites protection of the public as the principal reason for prohibiting a nonlawyer from practicing law. An attorney is educated to relate the general law to a client's specific problem. When a person untrained in the law attempts to do so, the public is as much in danger as when a person untrained in medicine attempts to di-

---

8. The Ethical Considerations (ECs) are "aspirational in character and represent the objectives toward which every member of the [legal] profession should strive," SOUTH CAROLINA CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1984), while the Disciplinary Rules (DRs) are "mandatory in character" and "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." *Id.*

9. *Id.* EC 3-5 (emphasis added).

agnose an injury or disease. While the latter may seem more dangerous, the principle is the same.

The prohibition against the unauthorized practice of law does not prevent a layman from representing himself.<sup>10</sup> In such an instance, a layman exposes only himself to possible injury. Although the purpose of prohibiting a layman from engaging in the practice of law is to protect the public, anyone who does not desire such protection is not required to avail himself of it. On the other hand, a layman who does desire this protection may not seek to have another layman represent him in a legal matter. In that case, the second layman would be engaged in the unauthorized practice of law.

In addition to the South Carolina Code of Professional Responsibility, several South Carolina Bar Ethics Advisory Opinions and ABA informal opinions aid in determining what constitutes the practice of law.<sup>11</sup> As noted by the *Buyers Service* court, the fact that an attorney reviews the work of laymen does not save actions that otherwise constitute the unauthorized practice of law. An attorney must maintain a "direct relationship with his client."<sup>12</sup> The ABA has stated that "[a]n attorney may not properly prepare deeds, contracts, and mortgages when there is no personal contact with the client-purchaser, the information pertaining thereto having been forwarded by a real estate broker or a title insurance company."<sup>13</sup> In essence, there must be some sort of meeting between the attorney and the client, and the attorney must keep in direct contact with the client.

One particular South Carolina Bar Ethics Advisory Opinion deals with a corporation owned by one attorney and five laymen.<sup>14</sup> This corporation acted as a "closing agent" for real estate transactions by preparing and providing deeds and mortgages to lenders and sellers, preparing and providing title opinions to ti-

---

10. See *id.* EC 3-7.

11. While ABA opinions are "merely advisory opinions," they "have been frequently cited in state disciplinary cases and state ethics committee decisions." See H. HAYNSWORTH, HANDBOOK ON LEGAL ETHICS FOR SOUTH CAROLINA LAWYERS, at v (1986); see also ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1420 (1978) (noting that opinions of ABA Committee on Ethics and Professional Responsibility are advisory and that no mechanism for their enforcement exists).

12. S.C. CODE OF PROFESSIONAL RESPONSIBILITY EC 3-6 (1984).

13. See ABA Comm. on Professional Ethics, Informal Op. 508 (1962).

14. See S.C. Bar Ethics Advisory Op. 84-3 (1985).

the insurance companies, and having its abstractors prepare and abstract titles to determine the status of the various lien holders. All these services were performed under the direction and control of a layman. The South Carolina Bar Ethics Advisory Committee concluded that these activities constituted the unauthorized practice of law:

[W]e are of the opinion that the corporation is engaged in the unauthorized practice of law because it is preparing deeds, mortgages, rendering title opinions and abstracts of title, areas which demand the actions of only a licensed attorney. We are not unmindful of the need for affordable services, however, [sic] in an effort to protect the public, the services being provided by the corporation are those which only attorneys should ultimately provide.<sup>15</sup>

Thus, even though an attorney was part-owner of the corporation, that alone was not enough to keep the corporation as an entity from liability for the unauthorized practice of law. In fact, the attorney himself was guilty of an ethical violation in "aid[ing] a non-lawyer in the unauthorized practice of law."<sup>16</sup>

The South Carolina Code of Professional Responsibility and the opinions of the South Carolina Bar Ethics Committee fully recognize the danger of a layman, unskilled in the application of general law to specific legal problems, engaging in the practice of law. Protection of the public is the paramount concern dictating such a prohibition.

### III. THE CASE LAW IN SOUTH CAROLINA PRIOR TO Buyers Service

#### A. *In re Duncan*

In a 1909 case, *In re Duncan*,<sup>17</sup> a disbarred attorney received a fee for his services in obtaining the release of a prisoner from the county chain gang. The South Carolina Supreme Court held that these services constituted the unauthorized practice of law. In so doing, the court laid down a relatively broad definition of the practice of law:

---

15. *Id.*

16. S.C. CODE OF PROFESSIONAL RESPONSIBILITY DR 3-101(A) (1984).

17. 83 S.C. 186, 65 S.E. 210 (1909).

It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country, it embraces the preparations of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts and, in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients, and all action taken for them in matters connected with the law.<sup>18</sup>

The court reasoned that the disbarred attorney had contracted to render the service of proving to the magistrate that the prisoner should be released upon payment of the fine. The court also noted that it made no difference that this service could have been performed by the prisoner's wife:

[T]he conclusive fact is that Duncan [the disbarred attorney] advised Nita Saunders [the prisoner's wife] and acted for her, as his client, for the consideration of \$5, in a matter not only connected with the law, but unconnected with any other subject except administration of the criminal law. This was practicing law in violation of the order of this court."<sup>19</sup>

The *Duncan* court broadly defined the practice of law, emphasizing the performance of a law-related service for a fee. Even so, one still may be engaged in the unauthorized practice of law even though he has not charged a fee for his services; charging a fee merely highlights the violation.

### B. State v. Wells

In *State v. Wells*,<sup>20</sup> decided in 1939, the South Carolina Supreme Court prohibited a nonlawyer employee of American Mutual Liability Insurance Company from appearing at worker's compensation hearings on behalf of the company. The South Carolina Industrial Commission had adopted a rule that allowed only licensed attorneys to appear before the full Commission; the rule, however, allowed a layman to appear before a single

---

18. *Id.* at 189, 65 S.E. at 211.

19. *Id.* at 190, 65 S.E. at 211.

20. 191 S.C. 468, 5 S.E.2d 181 (1939).

commissioner.<sup>21</sup> The court noted that there should be no difference between appearing before the full Commission and appearing before a single commissioner. "If appearing before the full Commission requires legal skill," the court stated, "such requirement would apply with equal force to a hearing before the individual commissioner. Knowledge of legal principles is just as essential in the one as the other."<sup>22</sup>

The employee had contended that since nothing prohibited an individual from representing himself, there was no prohibition against a company representing itself. Because the company could act only through its employees or agents, the company could represent itself only through its employees. The employee further argued that while he acted on behalf of the insurance company, the insurance company was not his client.<sup>23</sup> The court, however, distinguished between an individual representing himself and an employee representing a corporation:

The law recognizes the right of natural persons to act for themselves in their own affairs, although the acts performed by them, if performed for others, would constitute the practice of law. A natural person may present his own case in court or elsewhere, although he is not a licensed lawyer. A corporation is not a natural person. It is an artificial entity created by law. Being an artificial entity it cannot appear or act in person. It must act in all its affairs through agents or representatives. In legal matters, it must act, if at all, through licensed attorneys.<sup>24</sup>

The court noted that a corporation had a legal existence apart from its employees, and therefore, the appearance of an employee at a judicial proceeding involved the legal representation of another.

The holding in *Wells* raises several questions about what services an employee of a corporation or savings and loan may perform in a residential real estate transaction without either the corporation or the employee engaging in the unauthorized practice of law. *Wells* seems to say that any time a corporation acts in a legal matter, it must do so through licensed attorneys.

---

21. See *id.* at 474, 5 S.E.2d at 183.

22. *Id.* at 477, 5 S.E.2d at 185.

23. See *id.* at 479, 5 S.E.2d at 186.

24. *Id.* at 480, 5 S.E.2d at 186 (quoting *Clark v. Austin*, 340 Mo. 467, 478, 101 S.W.2d 977, 982 (1937) (en banc)).



A better interpretation, however, is to limit *Wells* to its facts. The court was not confronted with a corporate employee preparing documents relating to real estate transactions but with an insurance company allowing an employee to appear before the Industrial Commission. The exact language in *Wells* seems to make its holding a narrow one: "If a corporation *could appear in court* through a layman upon the theory that it was appearing for itself, it could employ any person, not learned in the law, to represent it in any or all judicial proceedings."<sup>25</sup> Clearly, the *Wells* court addressed only the issue of a corporation's employee appearing in a judicial or quasi-judicial proceeding on behalf of the corporation.

### C. *In re Easler*

More recently in the 1980 decision *In re Easler*,<sup>26</sup> a disbarred attorney was charged with the unauthorized practice of law for preparing a deed, having it executed, and filing it with the court for a fee. Easler admitted that he had performed these services, but he contended that he was performing only the work of a paralegal.<sup>27</sup> In discussing the role of a paralegal, the court noted that:

[t]he activities of a paralegal do not constitute the practice of law as long as they are limited to the work of a preparatory nature, such as legal research, investigation, or the composition of legal documents, which enable the licensed attorney-employer to carry a given matter to a conclusion through his own examination, approval, or additional effort.<sup>28</sup>

The court held that Easler was engaged in the unauthorized practice of law because he failed to show either that his final work was subject to approval by a licensed attorney before the recording of the deed or that the parties to the deed conferred with a licensed attorney concerning the deed. In a footnote, the court reminded South Carolina Bar members of their responsibilities when assigning a task to a lay person:

---

25. *Id.* (emphasis added).

26. 275 S.C. 400, 272 S.E.2d 32 (1980).

27. *See id.* at 401, 272 S.E.2d at 32.

28. *Id.* at 401, 272 S.E.2d at 32-33 (citing *Florida Bar v. Thomson*, 310 So. 2d 300 (Fla. 1975); *State ex rel. Oregon State Bar v. Lenske*, 284 Or. 23, 584 P.2d 759 (1978)).

The attention of members of the South Carolina Bar is directed to Ethical Consideration 3-6 of the Code of Professional Responsibility which provides:

A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal service more economically and efficiently.<sup>29</sup>

Thus, an attorney may delegate tasks to clerks, paralegals, or secretaries. Nevertheless, the lawyer must maintain a direct relationship with his client, must supervise the delegated work, and must remain totally responsible for the work product.

#### IV. State v. Buyers Service Co.

##### A. *Factual Introduction*

Buyers Service Company (Buyers Service) was a commercial title agency that closed residential real estate transactions. For a fee, it rendered various services involving real estate transactions to homeowners. The State sued Buyers Service alleging that several of its practices constituted the unauthorized practice of law.<sup>30</sup>

Buyers Service obtained its clients, who were predominantly prospective homeowners, largely through referrals from local real estate agents. Once the client was referred, Buyers Service received an executed contract of sale from the realtor. If the sale involved a mortgage, the buyer made an application to a lender. If the lender approved the loan, it notified Buyers Service and sent a letter of commitment, stating the terms of the loan, to the buyer. Buyers Service then ordered a loan package from the lender, containing a set of instructions, a note and mortgage, a Truth-in-Lending Act disclosure statement, a HUD-1 statement, miscellaneous affidavits regarding employment, and other forms. The documents arrived in various degrees of completion, depending upon the particular lender. Buyers Service subsequently

---

29. 275 S.C. at 401 n. 2, 272 S.E.2d at 32 n. 2.

30. For a list of the unauthorized practices, see 292 S.C. at 428, 357 S.E.2d at 16. See also *supra* note 7 and accompanying text.

would fill in the mortgagor and mortgagee on the mortgage, the grantor and grantee on the deed, consideration, the legal description, and any other blank spaces in the documents. Buyers Service then sent the completed forms to the buyer for his examination and signature and returned the loan package to the lender for its examination. Once the lender released the loan funds, Buyers Service deposited the proceeds check in its own escrow account and disbursed the money according to the HUD-1 statement in the closing instructions. Buyers Service also prepared settlement statements after the loans were closed.<sup>31</sup>

If a title search was necessary, a Buyers Service employee abstracted the title for an additional fifty-dollar fee. The abstract was reviewed by another lay employee of Buyers Service, who determined if the seller had a fee simple title to the property. A lay employee also answered any legal questions that a purchaser might have regarding the state of the title. The purchasers then explained to Buyers Service how they wished to hold title to the property. No licensed attorney was involved at any stage of this process. Only after the State brought suit did Buyers Service retain an attorney to review its closing document. Even then, however, the attorney had no direct contact with the purchasers.<sup>32</sup>

Additionally, Buyers Service conducted the actual real estate closings without any attorney present. The majority of these closings were handled by mail; Buyers Service simply sent written instructions to the parties describing the manner of executing the legal documents. When the closing was held in the offices of Buyers Service, a lay employee supervised signing of the documents. If the purchaser had any questions, the employee either answered them or referred the purchaser to the mortgage lender.<sup>33</sup>

After the closing, Buyers Service had all the legal instruments hand carried or mailed to the courthouse for recording. It sent a form instruction letter with each set of documents, but it did not take responsibility for insuring proper recording because Buyers Service maintained that such recording was a responsibility of the clerk of court.

---

31. See *id.* at 428, 357 S.E.2d at 16.

32. See *id.* at 429, 357 S.E.2d at 16-17.

33. See *id.* at 429, 357 S.E.2d at 17.

In 1984 Buyers Service handled three hundred real estate closings, eighty-five percent of which were conducted through the mail. All involved single family homes.<sup>34</sup> The average closing involved property valued at approximately \$100,000 with the largest transaction involving property valued at roughly \$350,000.<sup>35</sup> Buyers Service charged \$300 for closing transfers with mortgages, \$200 for cash transactions, and \$50 for title searches.<sup>36</sup>

### *B. Preparation of Documents*

The court first addressed the issue of Buyers Service's preparation of documents used in a real estate transaction. Buyers Service employees had prepared such documents as deeds, powers of attorney, notes, mortgages, adjustable rate riders, condominium riders, assignments, and other instruments for real estate closings by filling in blanks — including filling in the legal description of property.<sup>37</sup> Buyers Service argued that the forms it used to "prepare" the needed documents were standard and required no creative writing. It also contended that this activity was permissible because it essentially acted as a scrivener and because it had retained licensed attorneys to review the closing documents.<sup>38</sup>

The court rejected that argument and held that Buyer Service's preparation of deeds, mortgages, notes, and other legal instruments related to mortgage loans and transfers of real property constituted the unauthorized practice of law.<sup>39</sup> The court cited protection of the public as the principal reason for prohibiting a layman from drafting legal instruments: "[The prohibition against the unauthorized practice of law] is for the protection of the public from the potentially severe, economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law."<sup>40</sup>

The court also rejected Buyers Service's contention that re-

---

34. See Amicus Curiae Brief for the South Carolina Bar, at v.

35. See *id.*

36. See *id.*

37. See *id.* at vii-viii.

38. See 292 S.C. at 431-32, 357 S.E.2d at 17.

39. See *id.* at 432, 357 S.E.2d at 18.

40. *Id.* at 431, 357 S.E.2d at 18.

view of the documents by licensed attorneys removed its activities from the ambit of the unauthorized practice of law.<sup>41</sup> In doing so, the court relied on *State Bar v. Arizona Land Title & Trust Co.*<sup>42</sup> There, a title company had employed staff counsel to prepare legal instruments. The Arizona Supreme Court noted that the title company's counsel owed its first allegiance to the company and its nonlegal employees.<sup>43</sup> "If the customer's legal rights are affected by an instrument prepared by . . . a company lawyer," the court added, "the customer must expect allegiance equal to that owed by the attorney to the title company."<sup>44</sup> Given the generally adverse interests of the parties to the transaction, the Arizona court concluded that a title company attorney would have difficulty "maintain[ing] the proper professional posture" toward both the company and its customer.<sup>45</sup> The *Buyers Service* court adopted this reasoning wholesale, concluding the "conflicts of interest inherent in [a residential real estate transaction] . . . make it extremely difficult for the attorney[s] [employed by Buyers Service to review documents]" to represent the interests of all parties adequately.<sup>46</sup> The court also noted that South Carolina, by statute, has prohibited corporations from performing legal work for any other person.<sup>47</sup>

### C. Preparation of Title Abstracts

The court next addressed the issue of Buyers Service's preparation of title abstracts for persons other than attorneys. Buyers Service charged fifty dollars for title searches, but the resulting title abstract was furnished to the mortgagee to certify that

---

41. See *id.*

42. 90 Ariz. 76, 366 P.2d 1 (1961) (en banc), *supplemented*, 91 Ariz. 293, 371 P.2d 1020 (1962) (en banc).

43. See *id.* at 90, 366 P.2d at 10-11.

44. *Id.* at 90, 366 P.2d at 11.

45. See *id.*

46. See 292 S.C. at 432, 357 S.E.2d at 18.

47. See *id.* at 431-32, 357 S.E.2d at 18. The statute prohibiting corporations from practicing law provides:

It shall be unlawful for any corporation or voluntary association . . . to practice or appear as an attorney at law for any person other than itself in any court in this State or before any judicial body, . . . or furnish legal services or advice . . . of any kind in actions or proceedings of any nature.

S.C. CODE ANN. § 40-5-320 (Law. Co-op. 1986).

fee simple title would be vested in the buyer. The title abstract, however, was not furnished to the buyer.<sup>48</sup> Once again citing protection of the public as its primary rationale, the court held that the preparation of title abstracts for persons other than attorneys constituted the unauthorized practice of law:

We affirm the circuit court's injunction which provides Buyers Service may conduct title examinations and prepare abstracts only for the benefit of attorneys. The examination of titles requires expert legal knowledge and skill. For the protection of the public such activities, if conducted by lay persons, must be under the supervision of a licensed attorney.<sup>49</sup>

In using the term "abstract," the court referred to a title report that summarizes the status of the title. In other states the term "abstract" is simply the chain of title as established by a review of the public record indexes and recorded documents. An abstract generally contains both a listing and copies of all conveyances in the chain of title. Quite arguably, the mere assembling of information for public records does not require any specific legal judgment and would not constitute the practice of law. Yet, conclusions about the effect of documents contained in a summary on the status of title necessarily require legal judgment and would constitute the practice of law.

If a title report, a report drawing conclusions about the effect of documents contained in a summary on the status of title, is prepared by layman, it must be done under the supervision of a licensed attorney. *Buyers Service* allows an attorney to delegate such a task to a clerk or other lay person — provided the lawyer maintains a direct relationship with the buyer, supervises the delegated work, and maintains complete professional responsibility for the work product.<sup>50</sup> Thus, an attorney still may hire a business such as *Buyers Service* to examine the title and prepare the title report. In such situations the attorney must consider the degree of his supervision over the title abstractor and consider whether, ethically, he must disclose to the client that he has employed a layman to examine the title. In other words, the need for disclosure would depend on the degree of supervision to

---

48. See 292 S.C. at 432, 357 S.E.2d at 18.

49. *Id.* at 432-33, 357 S.E.2d at 18-19.

50. See S.C. CODE OF PROFESSIONAL RESPONSIBILITY EC 3-6 (1984).

some extent.

#### D. Conducting Real Estate Closings

The third issue that the court addressed was Buyers Service's practice of handling real estate and mortgage loan closings. The circuit court's injunction permitted Buyers Service to continue its practice of handling real estate and mortgage loan closings with the restriction that no legal advice be given to the parties during the closing sessions.<sup>51</sup> Although apparently agreeing with this approach in theory, the supreme court could find no practical means of assuring that lay persons conducting the closings would adhere to such a restriction.<sup>52</sup> It noted that "one handling a closing might easily be tempted to offer a few words of explanation, however innocent, rather than risk losing a fee for his or her employer."<sup>53</sup> Additionally, mere silence on the part of the layman arguably might constitute approval. This, in itself, would be rendering legal advice. Therefore, the court concluded that "real estate and mortgage loan closings should be conducted only under the supervision of attorneys, who have the ability to furnish their clients legal advice should the need arise and fall under the regulatory rules of this court."<sup>54</sup> Once again, the court cited protection of the public as its "paramount concern."<sup>55</sup>

The court's holding must be interpreted solely in the context of the particular factual scenario found in *Buyers Service*. Buyers Service was a third party that held itself out to buyers as having expertise in the area of real estate closings<sup>56</sup> and received fees for its services. In this particular situation, it essentially acted as a lay substitute for a licensed attorney. Whether *Buyers Service* mandates that a lawyer be present any time a buyer and a seller sit down to close a real estate transaction will be ex-

---

51. See 292 S.C. at 433, 357 S.E.2d at 19.

52. See *id.*

53. *Id.* at 433-34, 357 S.E.2d at 19.

54. *Id.* at 434, 357 S.E.2d at 19.

55. See *id.*

56. See Amicus Curiae Brief of the South Carolina Bar, at iv. Buyers Service advertised in local periodicals, which included *Home and Land of Hilton Head Island*, *The Islander*, and *The Island Packet*, that it was a full-service company handling complete real estate closings. See *id.*

plored later.

### *E. Recording Instruments*

Finally, the court addressed Buyers Service's practice of mailing or hand-carrying instruments to the courthouse for recording. The circuit court's order had permitted Buyers Service to continue performing this service.<sup>57</sup> While noting that the physical transportation or mailing of documents to the courthouse was not considered the practice of law, the court held that

when this step takes place as a part of a real estate transfer it falls under the definition of practice of law as formulated by this court in *In re Duncan*. . . . It is an aspect of conveyancing and affects legal rights. The appropriate sequence of recording is critical in order to protect a purchaser's title to property.<sup>58</sup>

Once again citing protection of the public, the court concluded that "instructions to the Clerk of Court or Register of Mesne Conveyances as to the manner of recording, if given by a lay person for the benefit of another, must be given under the supervision of an attorney."<sup>59</sup> Thus, it is acceptable for an attorney to allow his law clerk, paralegal, or secretary to carry documents to the courthouse for recording, provided that he supervises and remains ultimately responsible for the recording process.

### *F. Summary*

In summary, the court held that all activities of Buyers Service constituted the unauthorized practice of law. In each instance, the court cited protection of the public as its paramount concern. *Buyers Service*, however, must be viewed in light of its particular facts. More egregious violations of the ban on the unauthorized practice of law than those present in *Buyers Service* are difficult to imagine. Nevertheless, the apparently broad holding must be limited to its facts. The court's language can be attributed largely to two factors: (1) Buyers Service's particularly flagrant violations of the law and (2) the substantial losses suf-

---

57. See 292 S.C. at 434, 357 S.E.2d at 19.

58. *Id.* (citation omitted).

59. *Id.*



ferred by innocent persons as a result of those violations. A non-lawyer still has a role in real estate closings. *Buyers Service* simply defines this role.

## V. THE ROLE OF THE LAYMAN IN REAL ESTATE TRANSACTIONS AFTER *BUYERS SERVICE*

Many services must be performed in a typical real estate transaction. Someone must draft and execute a contract of sale, write legal descriptions, abstract titles, issue title opinions and title insurance, draft closing statements, prepare deeds and loan documents, conduct the closing, and record the documents. While some of these services may be performed only by an attorney, the holding in *Buyers Service* does not dictate that all of them be performed by a licensed attorney.

### A. *Contracts of Sale*

With regard to contracts of sale, a realtor or broker apparently may obtain signatures on the usual printed form contract and offer to purchase real estate.<sup>60</sup> Under a strict interpretation of *Buyers Service*, however, these printed forms must be prepared under the supervision of a licensed attorney. The question then arises whether modification of terms in a contract of sale constitutes the unauthorized practice of law if undertaken by a nonattorney. Arguably, if such documents must be drafted under the supervision of attorney, agreements modifying these terms also should be accomplished only under the supervision of an attorney.<sup>61</sup> On the other hand, if all parties involved in the transaction agree to the modifications and to the particular language to be used and would otherwise have inserted that language themselves, it makes little sense to prohibit a realtor or broker from acting merely as a scrivener and inserting the

---

60. See *Chicago Bar Ass'n v. Quinlan & Tyson, Inc.*, 34 Ill. 2d 116, 214 N.E.2d 771 (1966) (broker may obtain signatures on the usual forms of a preliminary contract or offer to purchase real estate, but may not draw or fill in the blanks on deeds, mortgages, or other legal instruments).

61. See *Bowers v. TransAmerica Ins. Co.*, 100 Wash. 2d 581, 675 P.2d 193 (1983) (drafting of agreements modifying documents such as deeds, deeds of trust, and promissory notes by laymen who are not parties to the transaction, constitutes the unauthorized practice of law).

language.

Practical justifications for allowing a realtor or broker to obtain signatures on printed form contracts also exist. The broker is not holding himself out as having some special legal expertise in the field, nor need he offer legal advice. Additionally, most printed forms state that the document should be reviewed by an attorney. Thus, the buyer is on notice that an attorney should review the contracts, and the goal of protecting the public is maintained. If, however, the broker charges a separate fee for the preparation of a contract for sale, the activity may become the practice of law because the broker then is holding himself out as providing a service normally performed by a lawyer.

Although practical considerations suggest that modifying documents ought not be considered the practice of law, the South Carolina courts may hold otherwise. Since the paramount concern supporting the ban on the unauthorized practice of law is protection of the public, the logical conclusion is that the public needs as much protection when an unskilled layman drafts a contract modification as it does when the layman drafts the original contract; the potential harm is the same in both situations. The result in such a case probably would depend on the severity of the injury and the degree of the layman's culpability.

### *B. Legal Descriptions*

Legal descriptions are simply narrative descriptions of surveys as shown on plats. The preparation of a legal description may not be the practice of law, particularly if an attorney reviews the sufficiency of the description. Passing judgment on the sufficiency of the legal description, however, *does* constitute the practice of law because in doing so a lawyer must exercise "his educated ability to relate the general body and philosophy of law to a specific legal problem of a client."<sup>62</sup>

### *C. Title Abstracts*

Abstracting title, according to *Buyers Service's* definition of a "report of title," requires exercise of some legal judgment in order to reach a conclusion. Therefore, a layman's making such a

---

62. S.C. CODE OF PROFESSIONAL RESPONSIBILITY EC 3-5 (1984).

report would constitute the unauthorized practice of law. A layman, however, could undertake activities related to title examinations on behalf of an attorney and under the attorney's supervision.<sup>63</sup> True title abstracting — assembling information by reviewing public record indexes and recorded documents and listing and copying all conveyances in the chain of title — probably does not constitute the practice of law. Thus, a layman may gather all information concerning the title to the property, but may not render an opinion about the state of that title. Rendering title opinions clearly constitutes the practice of law and can be undertaken only by licensed attorneys.<sup>64</sup>

#### *D. Issuing Title Insurance*

Because a title insurer assumes the risks of title defects, merely issuing a title policy is not the practice of law. Nevertheless, a title report or opinion issued to the title insurance company in order to obtain issuance of a title policy may constitute the practice of law because it requires a legal judgment about the sufficiency of title. On the other hand, a court might decide that it simply is unnecessary to prohibit a title agent from making a determination about the status of title within the course of his employment. Because the paramount purpose of the prohibition on unauthorized practice is to protect the public, no need exists to protect a title insurance company from its own employees. In fact, any such effort would be tantamount to attempting to protect the title company from itself. Therefore, such actions on the part of the title agent most likely do not constitute the practice of law.

#### *E. Drafting Closing Statements*

Drafting a closing statement generally requires more accounting expertise than legal expertise. The preparation of such a statement is a ministerial task requiring simple mathematical computations. Since legal judgment generally is not involved, a

---

63. See *id.* EC 3-6.

64. See *Union City & Obion County Bar Ass'n v. Waddell*, 30 Tenn. App. 263, 205 S.W.2d 573 (1947) (layman's certification that he has examined title and rendering of opinion that title is vested in certain persons and has no defects constitutes unauthorized practice of law).

layman should be entitled to draft closing statements because the activity does not call for the professional judgment of a lawyer. If, however, a layman performs these activities without being supervised by an attorney, such activities may rise to the level of the practice of law.

### *F. Deed Preparation*

Deed preparation constitutes the practice of law and is reserved for an attorney.<sup>65</sup> Nevertheless, a Florida court has held that:

[u]nder the current state of case law in Florida title insurers are permitted to prepare deeds, mortgages, satisfactions and other documents affecting the legal title to be insured and perform other acts necessary to fulfill conditions described in commitments for title insurance issued by them. The preparation of these documents and other acts normally constitute the practice of law and would be unauthorized if not done as a mere necessary incident to honor a title insurance commitment and to issue a title policy or if a charge was made for such services separate and apart from the "regular title insurance premium" which the insurer is authorized to charge.<sup>66</sup>

This holding must be construed strictly and confined to the particular factual situation in that case. The court noted that if the title insurer's actions had not been necessary incidents to the title insurance commitment or if the insurer had charged a separate fee for those services, the insurer would have been engaged in the unauthorized practice of law.<sup>67</sup>

The reason an attorney must prepare a deed is obvious: a deed has a dramatic effect on title. Therefore, an attorney must take full responsibility for the preparation of such a document.

---

65. See, e.g., *Beach Abstract & Guar. Co. v. Bar Ass'n of Arkansas*, 230 Ark. 494, 326 S.W.2d 900 (1959); *Florida Bar v. Irizarry*, 268 So. 2d 377 (Fla. 1972); *Chicago Bar Ass'n v. Quinlan & Tyson, Inc.*, 34 Ill. 2d 116, 214 N.E.2d 771 (1966); *Darby v. Mississippi State Bd. of Bar Admissions*, 185 So. 2d 684 (Miss. 1966); *Cape May County Bar Ass'n v. Ludlam*, 45 N.J. 121, 211 A.2d 780 (1965); *State v. Buyers Serv. Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987); *Union City & Obion County Bar Ass'n v. Waddell*, 30 Tenn. App. 263, 205 S.W.2d 573 (1947); *Bowers v. TransAmerica Ins. Co.*, 100 Wash. 2d 581, 675 P.2d 193 (1983).

66. *Preferred Title Serv., Inc. v. Seven Seas Resort Condominium, Inc.*, 458 So. 2d 884, 886 (Fla. Dist. Ct. App. 1984) (citations omitted).

67. See *id.*

While a layman may be able to draft a deed for an attorney to review, the attorney must closely supervise and review every aspect of the deed and must be professionally responsible for the finished product.

Although an attorney must draft or at least supervise the drafting of a deed, whether a layman may fill in blanks on a form deed drafted under an attorney's supervision is unclear. Many jurisdictions will not allow a layman to fill in the blanks in a form deed, mortgage, or other similar documents.<sup>68</sup> Others, however, have held that merely filling in blanks on a legal document drafted by an attorney does not constitute the unauthorized practice of law.<sup>69</sup> The New Mexico Supreme Court has further complicated the issue. It held that filling in blanks in legal documents drafted by an attorney is not the unauthorized practice of law when the layman needs to use only common knowledge in completing the task.<sup>70</sup> On the other hand, if filling in the blanks affects a substantial legal right and requires skill and knowledge greater than that of the average citizen, the document may be completed only by a licensed attorney.<sup>71</sup> This rule promotes uncertainty. By failing to draw any clear lines, the New Mexico court necessarily must make determinations on a case-by-case basis.

*Buyers Service* did not specifically address the issue of filling in blanks on preprinted forms. Nevertheless, the court cited *Pioneer Title Insurance & Trust Co. v. State Bar*,<sup>72</sup> a Nevada case it read as holding that the "preparation of instruments, even with *preprinted forms*, involves more than a mere scrivener's duties."<sup>73</sup> Therefore, in South Carolina a layman who fills in the blanks of a preprinted legal form may be engaging in the unauthorized practice of law.

Logically, as with modifying contracts of sale, if the parties

---

68. See, e.g., *Coffee County Abstract & Title Co. v. State ex rel. Norwood*, 445 So. 2d 852 (Ala. 1983); *Florida Bar v. Irizarry*, 268 So. 2d 377 (Fla. 1972); *Cooperman v. West Coast Title Co.*, 75 So. 2d 818 (Fla. 1954); *Chicago Bar Ass'n v. Quinlan & Tyson, Inc.*, 34 Ill. 2d 116, 214 N.E.2d 771 (1966).

69. See, e.g., *Pope County Bar Ass'n v. Suggs*, 274 Ark. 250, 624 S.W.2d 828 (1981) (permissible for real estate brokers to fill in forms).

70. *State Bar v. Guardian Abstract & Title Co.*, 91 N.M. 434, 575 P.2d 943 (1978).

71. See *id.*

72. 74 Nev. 186, 326 P.2d 408 (1958).

73. See 292 S.C. at 430, 357 S.E.2d at 17 (emphasis in original).

to the deed consent to and would have inserted the same language into the blanks in the deed, the goal of protecting the public is only marginally advanced by holding that a lay scrivener has engaged in the unauthorized practice of law. Indeed, the *Pioneer* court distinguished between “clerical preparation of instruments” and “judg[ing] . . . the legal sufficiency of . . . instruments.”<sup>74</sup> Regardless, if the scrivener acted under the supervision of an attorney, his filling in the blanks of a deed should not constitute the unauthorized practice of law.<sup>75</sup>

### F. Conducting Closings

When read in its proper context, *Buyers Service* holds that a layman may not take the place of an attorney at a real estate closing.<sup>76</sup> Even so, that holding does not absolutely preclude a layman from participating in a real estate closing “under the supervision of attorneys.”<sup>77</sup> Escrowed closings, in which a title agent operates under detailed written instructions from an attorney, may be permissible. Care must be taken, however, to ensure that the layman discharges only ministerial functions. At no time should a layman offer any legal advice. In fact, disclaimers should be made about the layman’s lack of ability to provide any legal advice even when he is acting under the close supervision of an attorney.

---

74. 74 Nev. at 192, 326 P.2d at 411. Some language from the *Pioneer* case suggests that the *Buyers Service* court’s reading may be oversimplified:

The difficulty with the company’s position [that drafting the instruments was not the practice of law because it was purely clerical] is that its services did not end with the clerical preparation of the instruments by the escrow officer and stenographer. It was the company itself which judged of the legal sufficiency of the instruments to accomplish the agreement of the parties. In the drafting of any instrument, simple or complex, this exercise of judgment distinguishes the legal from the clerical service.

*Id.* (citations omitted).

75. This assumes, of course, that the supervising attorney has an attorney-client relationship with the party on whose behalf the drafting is done. In *Pioneer* the title company’s attorney *did* supervise the preparation of documents, but he did not have an attorney-client relationship with the company’s customers. The absence of this relationship was determinative in that case. *See id.*

76. *See* 292 S.C. at 434, 357 S.E.2d at 19.

77. *See id.*

### G. Recording Documents

Recording of documents may be accomplished by an attorney or by a layman under an attorney's supervision. An attorney should give a layman written instructions concerning the recording, especially if a fee is involved. The practice of an attorney's law clerk or paralegal carrying documents to the courthouse for recording clearly is permissible because the attorney supervises the activity. Therefore, the attorney who uses this practice must establish a procedure that ensures proper recording. Of course, parties to a transaction may record their own documents without an attorney's supervision.<sup>78</sup>

## VI. ROLES OF A TITLE AGENT IN A RESIDENTIAL REAL ESTATE TRANSACTION

A title agent plays an integral part in virtually every real estate transaction in South Carolina. *Buyers Service* appears to restrict the services that a title agent can provide without engaging in the unauthorized practice of law, while still allowing title agents to perform a number of services in such transactions.

A title agent may not hold himself out as having any special expertise in an area that requires the exercise of legal judgment. Moreover, if a title agent receives a separate fee for performing any services related to a transaction, his activities may constitute the practice of law. *Buyers Service* mandates that all nonlawyers must refrain from the *business* of providing services directly to parties engaged in a real estate transaction if these services require the exercise of legal judgment. Inherent in such a prohibition is the desire to protect the public from unlicensed individuals. By charging a fee for certain services or holding himself out as an expert regarding legal questions arising during transactions, the title agent crosses the line between legitimate conduct and the unauthorized practice of law.

In *Buyers Service* the court specifically held that conducting title examinations and preparing abstracts "must be under the supervision of a licensed attorney."<sup>79</sup> Thus, a title agent, under an attorney's supervision, may prepare: (1) a title

---

78. See S.C. CODE OF PROFESSIONAL RESPONSIBILITY EC 3-7 (1984).

79. See 292 S.C. at 432-33, 357 S.E.2d at 19.

report; (2) a legal description; (3) a closing statement; (4) a deed; and (5) a loan document. Admittedly, *Buyers Service* addressed only abstracts of title prepared by a layman,<sup>80</sup> but the logic of decision seems to apply equally to the other areas noted above. The *Buyers Service* court did not address the degree of supervision an attorney must provide. At a minimum, however, an attorney likely must review and be responsible for the title agent's work. Furthermore, an attorney may be under an obligation to disclose to his client the fact that a layman actually prepared the document. Once again, the necessity of disclosure may hinge on the degree of supervision.

The attorney also must discharge all of his ethical responsibilities.<sup>81</sup> Both the lawyer and the title agent would be accountable for the agent's unauthorized practice of law if the attorney: (1) has not established a direct relationship with the client and employs the title agent merely to provide assistance under the attorney's supervision;<sup>82</sup> (2) does not directly and substantively supervise the title agent;<sup>83</sup> (3) is actually an employee or agent of the title agent;<sup>84</sup> or (4) engages in what amounts to a fee-splitting arrangement under which the title agent participates in the attorney's business.<sup>85</sup>

## VII. THE ROLE OF PARALEGALS AND LAW CLERKS IN A RESIDENTIAL REAL ESTATE TRANSACTION

### A. *Advisory Opinion 88-02*

Recently the South Carolina Bar Ethics Committee decided that *Buyers Service* allows an attorney's nonlegal staff to fill out preprinted real estate forms as long as the staff is under the direct supervision of the purchaser's attorney and the attorney reviews the staff's work.<sup>86</sup> That decision is mandated both by *Buyers Service* and the South Carolina Code of Professional

80. See *id.* at 432-33, 357 S.E.2d at 18-19.

81. See S.C. CODE OF PROFESSIONAL RESPONSIBILITY EC 3-6 (1984).

82. See *id.*

83. See *id.*

84. See *Pioneer Title Ins. & Trust Co. v. State Bar*, 74 Nev. 186, 326 P.2d 408 (1958).

85. See S.C. CODE OF PROFESSIONAL RESPONSIBILITY DR 3-102(A).

86. See S.C. Bar Ethics Advisory Op. 88-02 (1988).



Responsibility. Quite obviously, an attorney may assign certain activities to paralegals, law clerks, and other nonlawyers provided the attorney has a direct relationship with the client, supervises the work, and remains professionally responsible for the work product.<sup>87</sup>

### *B. The Development of Real Estate Closing Businesses*

In many of the nation's larger cities, new business organizations — which are, in essence, real estate closing firms — have emerged in recent years. Such businesses employ a small number of attorneys and forty or fifty paralegals. They can complete many more real estate transactions, for a much lower fee, than most law firms. Apparently, the proposed justification for such an entity is that since the paralegals are working under the supervision of the attorneys, the business is not engaged in the unauthorized practice of law.

Whether such companies may operate legally in South Carolina is unclear. Such a determination, obviously, would depend upon the particular facts of a case. Nevertheless, certain judicial decisions and ethical opinions are vitally important to analyzing the question.

In *Buyers Service* the court noted that the fact that Buyers Service had retained attorneys to review the closing documents “did not save its activities from constituting the unauthorized practice of law.”<sup>88</sup> Buyers Service, however, was a commercial title company. These new real estate closing businesses generally are partnerships of licensed attorneys. The business entity may not be a partnership of licensed attorneys and paralegals because the Code of Professional Responsibility prohibits formation of such partnerships.<sup>89</sup> Thus, these business entities must be treated as any other law firm.

If a lawyer delegates a task to a paralegal, such delegation is proper only “if the lawyer maintains a direct relationship with his client.”<sup>90</sup> Whether a phone call would be sufficient or

---

87. See S.C. CODE OF PROFESSIONAL RESPONSIBILITY EC 3-6 (1984).

88. See 292 S.C. at 431, 357 S.E.2d at 18.

89. Disciplinary Rule 3-103 of the S.C. CODE OF PROFESSIONAL RESPONSIBILITY states that “[a] lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.”

90. See S.C. CODE OF PROFESSIONAL RESPONSIBILITY EC 3-6 (1984).

whether a face-to-face conference would be necessary is unclear. Additionally, the attorney must "supervise the delegated work."<sup>91</sup> Clearly, the attorney's actions must be more than a cursory review of the work product. Therefore, an attorney must supervise the entire process, not merely perform a final review of the process.<sup>92</sup> The attorney also must be professionally responsible for the work product.<sup>93</sup> He must discharge all of his ethical obligations, disclosing to the client the extent, or lack thereof, of his participation in the process and the dangers inherent in such a system.

To date, no such business entity has emerged in South Carolina. The attraction of such an entity is its ability to perform a large volume of real estate closings at a lower cost to the public. Whether such an entity would be involved in the unauthorized practice of law remains to be seen. On one hand, it is hard to imagine why these businesses should be treated any differently from an ordinary law office with many real estate paralegals. On the other hand, the supreme court's emphasis in *Buyers Service* on "protection of the public"<sup>94</sup> seems to indicate that the South Carolina courts would scrutinize more closely the activities of such a business.

#### VIII. AN INDIVIDUAL LAYMAN'S ADVERTISING FOR SALE OF "How-To" KITS RELATING TO RESIDENTIAL REAL ESTATE TRANSACTIONS

Many jurisdictions have addressed whether a nonlawyer's advertising and selling certain kits that allow a layman to perform a legal task for himself constitute the unauthorized practice of law. These kits advise a layman on obtaining a divorce,<sup>95</sup> drafting a will,<sup>96</sup> or performing a real estate transaction.<sup>97</sup>

---

91. See *id.*

92. See *Buyers Service*, 292 S.C. at 431, 357 S.E.2d at 18.

93. See S.C. CODE OF PROFESSIONALLY RESPONSIBILITY EC 3-6 (1984).

94. See 292 S.C. at 434, 357 S.E.2d at 19.

95. See *State Bar v. Cramer*, 399 Mich. 116, 249 N.W.2d 1 (1976); *In re Thompson*, 574 S.W.2d 365 (Mo. 1978); *New Jersey State Bar Ass'n v. Divorce Center of Atlantic County*, 194 N.J. Super. 532, 477 A.2d 415 (Ct. Ch. Div. 1984).

96. See *New York County Lawyers' Ass'n v. Dacey*, 28 A.D.2d 939, 283 N.Y.S.2d 984, *rev'd*, 21 N.Y.2d 694, 234 N.E.2d 459, 287 N.Y.S.2d 422 (1967).

97. See *Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1978).

In *Florida Bar v. Brumbaugh*<sup>98</sup> a Florida court held that a layman may sell forms and general printed information dealing with divorce and may type instruments completed solely by her client.<sup>99</sup> The layman, however, may not advise her client about different legal remedies available or otherwise assist in preparing forms. She may not answer questions about which form would be best, how best to complete the form, how to file the form, or how to present the necessary evidence at trial.<sup>100</sup> *Brumbaugh* is relevant to residential real estate transactions because the court specifically stated that its “specific holding with regard to the dissolution of marriage also applies to other unauthorized legal assistance such as the preparation of wills or real estate transaction documents.”<sup>101</sup>

The Florida courts apparently would employ a similar analysis if a bank, lender, or real estate broker sells a do-it-yourself kit for a loan closing or a real estate transaction. This raises the possibility that by providing a booklet to its customers containing forms on how to close a real estate transaction or mortgage loan, a bank would be engaged in the unauthorized practice of law. South Carolina courts, however, have not indicated whether they would adopt the Florida analysis. Nevertheless, as indicated previously, authority does exist for holding that an entity that produces a “how-to” kit involving a legal task is engaged in the practice of law.

With respect to these kits, the law generally allows a layman to sell forms and general printed information concerning a legal task. He, however, may not offer any legal advice. Under *Brumbaugh* the term “legal advice” would include advice about which forms to use, how to complete a form, how to file a form, or how best to present evidence at trial.<sup>102</sup> South Carolina courts likely would adopt a similar analysis. A layman only may gather information, but he cannot offer any legal advice.

---

98. 355 So. 2d 1186 (Fla. 1978).

99. *See id.* at 1194.

100. *See id.*

101. *See id.*

102. *See id.*

## IX. A BUSINESS' PREPARATION OF ITS OWN DOCUMENTS INVOLVING A RESIDENTIAL REAL ESTATE TRANSACTION.

### A. Corporations

#### 1. Introduction: *State v. Wells*

That an individual layman may represent himself in any legal task is settled law. This right to self-representation, however, raises interesting questions when a corporation attempts to represent itself. As discussed previously, the South Carolina Surpeme Court in *State v. Wells* held that a corporation employee engaged in the unauthorized practice of law when he represented his corporate employer in front of the Industrial Commission.<sup>103</sup> This fact notwithstanding, the court limited its holding to those corporate employees who "appear[] in court" on behalf of the corporation.<sup>104</sup> Clearly, then, a lay corporate employee may not appear in court on behalf of his corporate employer. The question then arises about whether an employee or officer of a corporation can prepare legal documents to which the corporation is a beneficial party without the employee's actions constituting the unauthorized practice of law.

#### 2. The Kentucky Approach

In *Kentucky State Bar Association v. Central Kentucky Enterprises*<sup>105</sup> a corporate officer drafted a real estate mortgage to which the corporation was a beneficial party. The court held that

the drafting of a deed or a real estate mortgage by a corporation which is a beneficial party to it does not constitute the unlawful practice of law by the corporation, but it does constitute the unlawful practice of law by the corporate agent who drafts it unless he is a member of the bar.<sup>106</sup>

In so holding, the court followed its own holding in *Kentucky*

---

103. See *supra* notes 17-22 and accompanying text.

104. See *Wells*, 191 S.C. at 480, 5 S.E.2d at 186.

105. 503 S.W.2d 483 (Ky. 1972).

106. *Id.* at 483.

*State Bar Association v. Tussey*.<sup>107</sup> In *Tussey* a bank officer prepared a real estate mortgage to which the bank was a party. The court held that the officer was engaged in the unauthorized practice of law and “a layman may not enter into the practice of law through becoming an officer or employee of a corporate client.”<sup>108</sup> The court explained that since the bank was a party to the mortgage, it could draft the mortgage. Because the bank can act only through its officers and employees, however, the bank officer engaged in the unauthorized practice of law when he drafted the mortgage.<sup>109</sup> The *Tussey* court relied upon the holding in *Frazee v. Citizens Fidelity Bank & Trust Co.*<sup>110</sup> and explained its reasoning by distinguishing between beneficial parties and real parties in interest:

The reasons a trustee cannot do the things prohibited to it under *Frazee* is that unless it is a beneficial party to the instrument drawn it is not the real party in interest and therefore is drawing the instrument for someone else who is. This distinction is not obscured by the close relationship between trustee and beneficiary. Neither may it be obscured by the relationship between master and servant, principal and agent, employer and employee, corporation and officer. If the nonprofessional trustee may not prepare an instrument for his or its beneficiary, the nonprofessional officer or employee may not prepare it for his employer.<sup>111</sup>

### 3. *The Illinois and North Carolina Approaches*

Illinois and North Carolina courts have held contrary to the Kentucky rule. In *Johnson v. Pistakee Highlands Community Association*<sup>112</sup> an Illinois court held that a nonlawyer corporate financial secretary does not engage in the unauthorized practice of law by filing a claim for a lien on behalf of the corporation.<sup>113</sup> The corporate entity in *Johnson* was a nonprofit entity whose

---

107. 476 S.W.2d 177 (Ky. 1972).

108. *See id.* at 180.

109. *See id.* at 179.

110. 393 S.W.2d 778 (Ky. 1965) (bank or trust company acting only in fiduciary capacity may not draft deeds and mortgages).

111. 476 S.W.2d at 179.

112. 72 Ill. App. 3d 402, 390 N.E.2d 640 (1979).

113. *Id.* at 404, 390 N.E.2d at 642.

membership included all landowners in the Pistakee Highlands subdivision. The corporation derived its powers from covenants that ran with the land, and the corporate bylaws provided that "it take appropriate legal action to collect delinquent dues and assessments [the corporation] imposed and directed that the financial secretary file liens against any lots in the subdivision if the payments of assessments were delinquent."<sup>114</sup>

The North Carolina Supreme Court reached a similar result in *State v. Pledger*.<sup>115</sup> Pledger, a layman, was in charge of the New Bern offices of Century Home Builders, a corporation engaged in the business of selling shell homes. He solicited sales of these shell homes, and when a sale was consummated, prepared a deed of trust on Century's behalf. Pledger used preprinted forms, inserting the parties' names, a description of the land, and terms of the agreement in the blanks.<sup>116</sup> The State charged him criminally with eight counts of engaging in the unauthorized practice of law.<sup>117</sup> The jury found Pledger guilty on all eight counts,<sup>118</sup> but the supreme court reversed, holding that Pledger's activities did not constitute the unauthorized practice of law.<sup>119</sup> The court reasoned that because Pledger's corporate employer was a party to the transaction, it was permissible for Pledger to prepare the deed of trust on behalf of the corporation:

A person who, in the course of his employment by a corporation, prepares a legal document in connection with a business transaction in which the corporation has a primary interest, the corporation being authorized by law and its charter to transact such business, does not violate the statute [North Carolina General Statutes section 84-2.1], for his act in so doing is the act of the corporation in the furtherance of its own business.<sup>120</sup>

---

114. *Id.* at 404, 390 N.E.2d at 641.

115. 257 N.C. 634, 127 S.E.2d 337 (1962).

116. *See id.* at 636, 127 S.E.2d at 338.

117. *See id.*

118. *See id.*

119. *See id.* at 639, 127 S.E.2d at 340.

120. *Id.* at 637-38, 127 S.E.2d at 339-40.

#### 4. *A Comparison of the Two Approaches*

The North Carolina and Illinois approaches — that a corporation can act only through its agents or employees — are the most sensible. Under the Kentucky approach, a corporate employee may draft documents for the corporation only if he is a licensed attorney. After *State v. Wells*, in South Carolina a lay employee may not appear in court on behalf of his corporate employer; however, the state courts never have decided whether a lay corporate employee may draft documents to which the corporation is a beneficial party.

Section 40-5-320 of the South Carolina Code makes it unlawful for any corporation “to practice or appear as an attorney at law for any person *other than itself* in any court in this state or before any judicial body.”<sup>121</sup> Under the *Wells* holding, however, a corporation may not appear in court on behalf of itself; a corporation can act only through its agents, and under *Wells*, a lay agent would be engaged in the unauthorized practice of law.

Two alternatives address the conflict between the statute and the holding in *Wells*. First, one might read the statute as overruling the *Wells* decision. The statute<sup>122</sup> was passed seven years after *Wells* and, thus, may be read as legislative disapproval of the holding insofar as it prohibits a lay employee from representing his corporate employer in any judicial or quasi-judicial proceeding. Second, the statute may be reconciled with the holding in *Wells*. Under this reading, a corporate employee may represent the corporation in judicial or quasi-judicial proceedings only if he is a licensed attorney.

Neither alternative is completely satisfactory. The first makes no attempt to reconcile the conflict and discards a case cited favorably by the *Buyers Service* court.<sup>123</sup> That court certainly gave no indication that it thought *Wells* had been reversed by subsequent legislation. The second reading fares no better, for it renders the statute superfluous. If a licensed attorney is the only corporate employee who may represent the corporation in court, then the statute does nothing more than codify the holding in *Wells*.

---

121. S.C. CODE ANN. § 40-5-320 (Law. Co-op. 1986) (emphasis added).

122. 1946 S.C. Acts 867, § 4.

123. 292 S.C. at 430, 357 S.E.2d at 17.

One cannot be certain how a South Carolina court would rule given a factual situation similar to the Kentucky, Illinois, and North Carolina cases. *Buyers Service* does not prohibit a lay corporate employee from drafting documents for transactions in which the corporation is a beneficial party. In *Buyers Service* the lay employee drafted legal documents for transactions in which the corporation was *not* a beneficial party. The Code seems to indicate that such actions would be permissible, but a court might interpret the statute in light of *Wells* as prohibiting such actions. A South Carolina court probably would look more favorably on a corporate employee's completion of a blank corporate form drafted by an attorney than on his drafting the document from scratch. The court's ruling, however, would depend on the particular facts presented to it.

### *B. Banks and Savings and Loans*

Banks and savings and loans usually are involved in residential real estate transactions. Rarely will such a transaction be completed without some financial institution providing financing. Thus, one must attempt to determine what functions financial institutions may fulfill without engaging in the practice of law.

#### *1. Preparation of Loan Documents*

Preparation of a loan document is much like preparation of a deed. No one except a party to the loan or an attorney should draft the loan documents. Therefore, a lender, as a party to the transaction, possibly may prepare its own loan documents. Surely a lawyer need not be involved every time an individual borrows money from another individual or from a bank.

No South Carolina cases directly address the point. The Arizona Supreme Court, however, has held that a "[c]orporation lending money has an interest in the transaction and may prepare those documents necessary in connection with such loan."<sup>124</sup> If the lender charges a separate fee to prepare these loan documents, it may be engaging in the unauthorized practice

---

124. *State Bar v. Arizona Land & Title Co.*, 90 Ariz. 76, 92-93, 366 P.2d 1, 12 (1961) (en banc), *supplemented*, 91 Ariz. 293, 371 P.2d 1020 (1962) (en banc).



of law. Additionally, documents that are not to be reviewed by an attorney may be viewed differently from those documents approved by an attorney prior to their use. Nevertheless, the Arizona case provides at least some authority permitting a bank to draft its own documents. If a South Carolina court adopts the reasoning of the Arizona court and limits *Wells* to appearances in court by a layman, then a bank permissibly may draft its own loan documents. *Buyers Service*, however, indicates the South Carolina Supreme Court's desire to protect innocent home buyers who have been injured by a layman's questionable conduct. While it may be possible for a financial institution to prepare its own loan documents, if the loan finances the purchase of a home, the prudent course seems to require that, at a minimum, an attorney supervise and review the bank's drafting of the documents.

## 2. Closing Home Equity Loans

Many financial institutions lend money to homeowners and retain a lien on the homeowner's property as security. This raises questions about whether an attorney must be present at the closing.

Once again, the holding in *State v. Wells* seems to present substantial problems for financial institutions. While a court might interpret the legal matters mentioned in *Wells* as more than "appearing in court," the better approach is to limit *Wells* to its specific facts and allow financial institutions to close their own loans, *provided* that no legal advice is given. *Buyers Service* does not bar financial institutions from performing the mere formalities of closing, but it clearly dictates that *no* legal advice be given. If a lending institution were to charge a separate fee for closing, it may be engaging in the practice of law. Furthermore, the lending institution may be required to make certain disclosures to the borrower, including disclosing that the borrower has the right to have an attorney represent him at the closing and to review all legal documents. The financial institution also must tell the borrower that it may offer no legal advice at closing or at any other time.

Although a financial institution properly may close its own home equity loans, a different result probably will be reached when a transfer of real property is involved. Transfers necessa-

rily involve conveyancing and likely would constitute the unauthorized practice of law. *Buyers Service* shows that the South Carolina Supreme Court looks unfavorably upon layman performing "legal tasks" that result in injuries to innocent purchasers. For financial institutions that finance transactions requiring any sort of conveyancing, the cautious approach would be to have the documents prepared and the closing performed under the supervision of a licensed attorney.

## X. CONCLUSION

The holding in *Buyers Service* follows the majority rule regarding the unauthorized practice of law. Because of *Buyers Service*'s flagrant abuses, however, the supreme court wrote a broad opinion. Whether its broad language is applicable to less egregious factual situations remains to be seen.

While *Buyers Service* and its logical deductions allow one to predict intelligently what tasks an individual layman, a corporation, or a bank may perform in a residential real estate transaction, no definitive lines separate acceptable practices from the unauthorized practice of law. The cases, however, provide several important rules. Under no circumstances may a layman give any legal advice to anyone. Additionally, a layman may not perform any task calling for the exercise of any legal judgment. The courts apparently allow a layman to perform ministerial functions, but they distinguish between tasks requiring legal judgment and tasks that are merely ministerial. Finally, charging a separate fee highlights the layman's unauthorized practice of law.

In the final analysis, the South Carolina Supreme Court could reach no other decision in *Buyers Service*. Clearly, the public would be at peril if the court allowed nonlawyers to perform the complicated and complex procedures involved in residential real estate transactions. Prior law and the South Carolina Code of Professional Responsibility also compelled the court to reach the conclusion it did. The court's holding rightfully signals its concern for protecting the public from the untrained layman engaging in the unauthorized practice of law.

*Luther C. Kissam, IV*

