

WEST VIRGINIA STATE BAR
UNLAWFUL PRACTICE COMMITTEE
ADVISORY OPINION NO. 06-01

INTRODUCTION

Over the last several months the Committee has received an increasing number of complaints about inadequate attorney supervision of non-lawyers doing “title examinations” for another person. These non-lawyers are not employed by the attorneys who are approving their abstract work. The reason this issue is important to all West Virginians is because the examination of real estate titles requires expert legal knowledge and skill. Therefore, title examinations cannot be conducted unless they are under the direct supervision of a licensed West Virginia attorney.

A “title examination” was defined in Advisory Opinion 2003-01 as “the process of evaluating at county courthouses recorded legal instruments such as Deeds and Wills, to establish a history of ownership (chain of title); reviewing other legal instruments such as rights- of-way, leases, deeds of trust, and other liens; making a determination of the attachment of these liens and encumbrances to the subject real estate; reviewing tax records to determine proper assessment; and reporting the results of that examination, by various means, to another.” For purposes of this opinion, a “non-lawyer” is any person, firm, association or corporation not licensed or authorized to practice law in West Virginia.

The Committee, in Advisory Opinion 93-003, said that a title search is the practice of law and that a lay person may not conduct such a search for another unless under the direct control and supervision of an attorney. The Committee in Advisory Opinion 2003-01 concluded that it was “the unlawful practice of law for a lay person to prepare any documents or make an oral report that explains the legal status of title to real estate, the legal effect of anything found in the chain of title,

or the legal effects of other matters found of record that could effect the marketability of title, unless under the direct control and supervision of an attorney.” That Advisory Opinion also stated that a title company could not employ staff attorneys to provide this service to others, as that would constitute the unauthorized practice by a corporation or association.

Advisory Opinion 2003-01 addressed the issue of what the Committee meant when it said that a lay person may not conduct a title examination unless this examination is under the direct supervision and control of an attorney:

“A lawyer may employ a non-lawyer assistant in the representation of the attorneys client; so long as:

- a. The attorney retains a direct relationship with the client;
- b. The client understands that a non-lawyer will be conducting the title examination;
- c. The lawyer, based on the certification, education, training, experience of the searcher, reasonably supervises the searcher throughout; and
- d. The lawyer remains solely responsible for the work-product, including all actions taken or not taken by the searcher to the same extent as if such search had been furnished entirely by the lawyer.”

This Advisory Opinion focuses upon the direct supervision of a non-lawyer who is not employed by the supervising licensed West Virginia attorney.

OPINION

HAVING A LICENSED WEST VIRGINIA ATTORNEY REVIEW AN INDEPENDENT NON-LAWYER’S TITLE EXAMINATION AND VOUCHING FOR ITS LEGAL SUFFICIENCY ARE

NOT SUFFICIENT DIRECT SUPERVISION TO PROTECT THE GENERAL PUBLIC OR TO SATISFY RULE 5.3 OF THE WEST VIRGINIA RULES OF PROFESSIONAL CONDUCT. THEREFORE, GUIDELINES ARE HEREBY ESTABLISHED TO PROTECT THE PUBLIC AND TO SUPPLEMENT RPC 5.3 FOR LAWYERS SUPERVISING INDEPENDENT NON-LAWYERS PERFORMING TITLE EXAMINATIONS.

COMMENT

RPC 5.3 applies to all independent non-lawyers associated with a lawyer, as well as to those that are employed or retained by the lawyer. After investigating and considering numerous complaints about insufficient attorney supervision of non-lawyer abstract work, the Committee concludes that attorney supervision of independent real estate title abstractors is a problem in West Virginia. The Committee also concludes that RPC 5.3 and the existing unlawful practice Advisory Opinions are inadequate to insure that the abstract work of independent non-lawyers is being done under the ultimate direction and supervision of licensed West Virginia attorneys.

It is the Committee's opinion that the attorney who reviews the work of an independent non-lawyer abstractor cannot satisfy RPC 5.3 in the same manner as the attorney with direct supervisory authority over a non-lawyer employed by the attorney. The separation and independent nature of the non-lawyer's relationship with the attorney weakens the attorney's ability to supervise and control the non-lawyer's work. The Committee is also concerned that the attorney approving the abstract work of the non-lawyer may not be experienced in real estate law and could not, therefore, be responsible for the work product that is being approved. An attorney cannot supervise an independent non-lawyer who is working in a field unfamiliar to the attorney. Without adequate supervision the non-lawyers are engaging in the unauthorized practice of law and the lawyers are in violation of RPC 5.3.

Although the Committee believes that the public is better protected when the non-lawyer is employed by the attorney, because the attorney can make decisions concerning those matters that require direct hands-on work by the attorney and is directly involved in the hiring and training of the non-lawyer, we are not, at this time, taking the position that non-lawyers doing title examinations must be employed by the supervising attorney. However, the Committee believes that we need to impose appropriate guidelines on those licensed West Virginia attorneys who are responsible for the supervision of non-lawyers who perform work to assist in the lawyer's representation of a client. These guidelines will, of course, only supplement the requirements of RPC 5.3. However, compliance with these guidelines should also be useful to West Virginia attorneys facing the ethical dilemmas created by RPC 5.3 and the supervision of independent abstractors. The guidelines to be imposed are mandatory and are as follows:

No later than January 14 of each year, every attorney who has approved a non-lawyer's title examination report submitted for the attorney's review by an independent abstractor, must submit to the West Virginia State Bar, for each of those title examinations, a report for the previous calendar year ending on December 31. That report must have the name, address, telephone number and company (if any) of every independent abstractor, and it is to particularize:

- a. That the Attorney has retained a direct relationship with the client and that the client has been informed that the attorney is available to the client and that the attorney maintains control of all client matters.
- b. That the attorney informed the client that a non-lawyer would be conducting the title examination.
- c. That the attorney has informed the client that the attorney remains fully responsible for such representation, including all actions taken or not taken in connection therewith

by the non-lawyer, to the same extent as if such representation had been furnished entirely by the attorney.

- d. That the attorney has ascertained the non-lawyer's abilities, limitations and training, and that the attorney has supervised the search throughout the title examination, and has limited the non-lawyer's duties and responsibilities to those that can be competently performed in view of those abilities, limitations and training.
- e. That attorney has educated and trained the non-lawyer with respect to the ethical standards which apply to the attorney and has instructed the non-lawyer concerning the standards of client confidentiality.
- f. That none of the services performed by the non-lawyer required the exercise of unsupervised legal judgment.
- g. That the attorney has continuously monitored and supervised the work of non-lawyer in order to assure that the services rendered by the non-lawyer were performed competently and in a professional manner.
- h. That the attorney is responsible for assuring that the non-lawyers do not engage in the unauthorized practice of law.
- i. That the attorney assumes responsibility for the improper conduct of non-lawyers and has, if applicable, assumed responsibility and taken appropriate action to prevent recurrence of improper behavior or activities.
- j. That the attorney has required all non-lawyers who deal directly with the attorney's clients to be identified to those clients as non-lawyers, and that the attorney is responsible for obtaining the understanding of the clients with respect to the role of those assistants and their limitations.

- k. That the attorney is responsible for monitoring and supervising the conduct of non-lawyers to prevent the violation of the ethical standards which apply to the attorney, and the attorney is responsible for assuring that non-lawyers do not do anything which the attorney could not do.
- l. That the attorney agrees that the services performed by the non-lawyer supplement, merge with and become part of the attorney's work product.
- m. That the attorney has complied with Rule 5.3 of the Rules of Professional Conduct.