ADVISORY OPINION 2010-002 (AMENDED)

The Unlawful Practice of Law Committee of the West Virginia State Bar has been presented with numerous complaints regarding the unauthorized practice of real estate law by lay persons and companies. Many of these complaints stem from real estate closings and events leading up to that closing. With the influx of multi-state, internet lending, and "one-stop" service providers engaging directly and indirectly through lay and attorney surrogates in activities which arguably constitute the practice of law, the public is increasingly in need of competent legal representation by lawyers subject to the discipline of the Supreme Court of Appeals of West Virginia.

Only an independent lawyer subject to that discipline has the obligation to be disinterestedly devoted to those clients who require the legal services, even if it means that he or she will not be paid for the services in those instances where the lawyer's opinion causes a transaction not to close.

Though individuals have the right to represent themselves, there is no right to represent another in legal matters unless the person seeking to represent that person is a licensed attorney at law. The West Virginia Supreme Court has the inherent power to define the practice of law in this State, and this committee acts as its agent. Prior opinions of this committee have clearly indicated that the activity of conducting a real estate title examination and real estate closing are the practice of law and cannot be conducted by a lay person unless (1) that person is under the direct supervision and control of a licensed lawyer, or (2) the lay person conducts such activities on behalf of his regular employer as set forth herein. An examination of the complaints before the committee over the last several years has demonstrated an alarmingly wide disparity in the degree of such supervision and control of persons engaged in these activities.

The Committee subsequently investigated the complaints and allegations, and determined that some of the activities that were routinely being performed in real estate settings by non-lawyers were, indeed, the practice of law as defined by the Supreme Court. After thorough review, and the receipt of comments on a draft advisory opinion by dozens of interested attorneys, laypersons, groups and industry representatives, the Committee approved its "Advisory Opinion 2010-0-002", and distributed it through the West Virginia State Bar on October 13, 2010. This Opinion attempted to particularly define what aspects of a real estate transaction constituted the practice of law.

Subsequent to the State Bar's release of Advisory Opinion 2010-002, the Committee was informed that a "Stipulation and Agreed Order" was entered on the 31st day of March, 2010 in the case of *McMahon v. Advanced Title Services*, Brooke County Circuit Court Civil Action No. 01-C-121. This "Stipulation and Agreed Order" dealt with many of the same issues the Committee addressed in its Advisory Opinion 2010-002 and, to avoid confusion or inconsistencies between the Committee's Opinion and the Circuit Court's Order, the implementation of Opinion 2010-2 was stayed pending an expected appeal by the plaintiff of the *McMahon* Order to the West Virginia Supreme Court.

By Order of the Supreme Court of Appeals of West Virginia entered November 17, 2010 (Case No. 101027) and modified by Order entered January 27, 2011, the Court refused the petition for appeal and, in the modification Order, further found that the findings of the Circuit Court of Brooke County were "plainly right".

Many of the rulings contained in the "Stipulation and Agreed Order" as entered by the Circuit Court of Brooke County were substantially similar to the provisions of this Committee's advisory opinion; however, this Committee has determined that to avoid confusion and possible inconsistent interpretations between the provisions of the "Stipulation and Agreed Order" and "Advisory Opinion 2010-002", the Committee has elected to defer to the findings and rulings of the Circuit Court of Brooke County, to the extent that they address the issues discussed in Opinion 2010-2 pertaining to the unauthorized practice of law by non-lawyers in the real estate practice. The Committee further adopts the rulings contained in the "Stipulation and Agreed Order" as if they were set forth in this advisory opinion in their entirety.

The committee notes that not all issues discussed in its original Advisory Opinion 2010-002 were judicially resolved in McMahan, and therefore it reserves action as to those issues.

McMahon Brooke County Order WVSC Order of Nov. 17, 2010 WVSC Order of Jan. 27, 2011

To view the orders amending AO 2010-002, (click here)

Mark H. Hayes, Chair West Virginia State Bar Unlawful Practice of Law Committee