

Unauthorized Practice of Law for Wyoming Real Estate Licensees

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Background

The Wyoming Supreme Court has recently approved a Consent Agreement in the matter of *The Unauthorized Practice of Law Committee, Wyoming State Bar v. Razor City Realty*, D-17-0001. The matter came before the Court upon a Report and Recommendation for Approval of Consent Agreement based upon a violation of the Wyoming Supreme Court's Rules of Procedure Governing Unauthorized Practice of Law (UPL). The relevant facts of the case are that Razor City Realty was approached by a computer store manager to sell some of the computer store's assets. In entering into the agreement, an agent of Razor City used a Contract to Buy and Sell Real Estate (Commercial) to set the terms of the agreement between Buyer and Seller. The agent then made *significant* modifications to the general Wyoming Association of Realtors® ("WAR") form including striking out entire clauses and provisions that related specifically to a sale of real estate. The sale went forward and the drastically modified WAR form was executed by both parties. The seller's assets (none of which were real property) were sold to the buyer, and the process was overseen by the agent of Razor City. Though the agent did provide disclosures and notice to the purchaser of the right to consult with an attorney, the Committee for the Unauthorized Practice of Law deemed the changes to the attorney-approved WAR form to be so significant as to constitute the unauthorized practice of law. Two issues are raised by the case: 1) consideration of *significant* modifications made to WAR Form(s) by real estate licensees, and 2) the sale of business assets (non-real property) by real estate licensees.

Applicable Law

There are some general guiding principles that will serve as the bedrock for the following discussion. First, Wyoming law, both Wyoming Statutes and the Wyoming Court Rules Governing the Unauthorized Practice of Law forbid the "practice of law" by anyone not licensed as an attorney by the State of Wyoming. Wyo. Stat. § 33-5-117 provides that it is unlawful for anyone not a member of the Wyoming State Bar to hold himself out as an attorney. In relevant part, the "practice of law" is defined as: "providing any legal service for any other person, firm or corporation, with or without compensation, or providing professional legal advice or services where there is a client

relationship of trust or reliance, including appearing as an advocate in a representative capacity; drafting pleadings or other documents.” *Rule 7, R. Gov. UPL*. The Wyoming Supreme Court has also provided guidance on the matter, stating that the “practice of law” means “advising others and taking action for them in matters connected with law. It includes preparation of legal instruments...” *Jones v. State*, 902 P.2d 686, 695 (Wyo. 1995). The Rules and Procedures Governing Admission to the Practice of Law have also defined the “active, authorized practice of law” in Rule 303(b) which states the following:

Rule 303. Definition of the Active, Authorized Practice of Law.

(b) For the purposes of this section, the "active, authorized practice of law" shall consist of the following primary duties:

- (1) Furnishing legal counsel;
- (2) Drafting legal documents and pleadings;**
- (3) Interpreting and giving advice regarding the law and legal issues;** and
- (4) Preparing, trying or presenting cases before courts, departments of government, bureaus or administrative agencies.

The UPL Rules further clarify: “(c) Whether or not they constitute the practice of law, the following are not prohibited: (3) Statutorily authorized acts by a real estate agent or broker licensed by the Wyoming Real Estate Commission.” *Rule 7(c)(3), R. Gov. UPL*. Wyoming Statutes pertaining to real estate brokers and salesmen provide: “A licensee may complete real estate forms and shall explain to the parties the effects thereof if the licensee is performing real estate activities in the transaction in which the forms are to be used.” Wyo. Stat. § 33-28-302(f). Therefore, brokers and agents must balance two duties. Said differently, brokers and agents must fulfill their statutory duties as licensees while toeing the line of UPL, and not exceeding their explicit statutory authority as licensees.

It is perhaps most important to remember that, as a licensee, you are licensed to oversee real estate transactions. Statutory commissions payable to licensees are only payable on real estate transactions, and the required errors and omissions insurance covers only real estate activity. *See* Wyo. Stats. §§ 33-28-102, 33-28-104. All non-real estate transactions are likely not covered by the errors and omissions insurance and are not covered by various statutory exemptions set forth in this Article.

Modification of WAR form

What really constitutes the unauthorized practice of law? What types of actions are considered as practicing law? As a practical matter, many real estate transactions include the striking out of portions of WAR forms. In a cash only transaction, for instance, the loan terms are inapplicable. The actions of blacking out of the loan terms would not be considered practicing law. However, any modifications of the form which changes the general or specific intent would be deemed the Unauthorized Practice of Law.

These definitions can seem ambiguous, especially considering the current discussion regarding filling out standard attorney-approved forms. The pivotal question becomes: when are real estate licensees crossing the line into practicing law by making modifications (additions or deletions) to WAR forms? Wyoming's first case in this area, *The Unauthorized Practice of Law Committee, Wyoming State Bar v. Razor City Realty*, has opened the door for trying to figure out where that line stands. However, the discussion within the case does not make an exact distinction between the alteration of a form versus the *substantial* alteration of a form, nor does it define "substantial" in any workable manner. So for real estate licensees and WAR forms, how much of an alteration is too much?

The applicable law and history on this topic for Wyoming leaves something to be desired, however, there has been much discussion amongst academics and lawyers in other jurisdictions across the country in regards to real estate licensees and the unauthorized practice of law. By referencing other state's methods and dealings with real estate licensees and unauthorized law practice, we can begin to discern some workable general rules that could be useful to keep real estate licensees from crossing that sometimes-blurry line into the unauthorized practice of law.

Arizona has oft been referenced and cited to in this discussion for real estate licensees, and the Arizona Supreme Court defined the practice of law as, "acts ... which lawyers have customarily carried on from day to day through the centuries."¹ The Arizona Association of Realtors® also agreed that simply filling in the blanks on a standard purchase contract did NOT constitute UPL. A majority of cases in the courts across the country have followed Arizona's line of thinking and have similarly held that the mere filling in of blanks on a document that has been drafted by an attorney will not constitute the practice of law.² However, some states take a different position. For instance, in states like New York it has been held that "salespersons are prohibited from

¹ State Bar of Arizona, Report of the Unauthorized Practice of Law Committee 4 (1991).

² 53 A.L.R.2d 788 (Originally published in 1957)

providing legal advice to customers ... that *includes* the use of “fill-in-the-blank” purchase contracts and leases.”³ New York is very strict in the regulation of what a real estate agent may or may not do, requiring them to use forms that have been approved by both the New York Bar Association and the New York Realtors® Association, and strictly prohibiting real estate licensees from filling out any section of such forms that may require legal expertise or explanation.

Another state, Texas, has a statute which may provide some helpful insight as to what is *not* UPL. The Texas statute reads in part, “A license or certificate holder who completes a contract form for the sale, exchange, option, or lease of an interest in real property incidental to acting as a broker is *not* engaged in the unauthorized or illegal practice of law in this state if the form was:

- (1) adopted by the commission for the type of transaction for which the form is used;
- (2) prepared by an attorney licensed in this state and approved by the attorney for the type of transaction for which the form is used; or
- (3) prepared by the property owner or by an attorney and required by the property owner.”⁴

New Jersey has also implemented certain statutory safeguards to protect real estate licensees from engaging in UPL. Similar to Arizona, New Jersey law allows real estate licensees to use contracts in which they may fill in blanks, but the state does require that each real estate contract contain an “attorney review” clause.⁵ These clauses will be discussed further, but it is worth noting that they appear to provide an extra level of protection for each party to a real estate transaction. While nearly each state has a slightly different view as to what constitutes the practice of law in regards to real estate licensees and real estate transactions; a more common consensus among the states is that “courts refuse to propound comprehensive definitions, preferring to deal with situations on the individual facts.”⁶

Contemplating other state’s laws along with the *Razor City* decision, it would benefit one to consider that a legally binding form drafted by a Wyoming licensed attorney may be allowed to have blanks for certain areas to be filled out. Common areas would include a money amount, type of payment, property address/legal description, etc., SO LONG AS those blanks that are left to fill

³ *Duncan & Hill Realty, Inc. v Department of State*, 62 A.D.2d 690, (4th Dept. 1976).

⁴ Tex. Occ. Code Ann. § 1101.654 (West)

⁵ *New Jersey State Bar Ass’n v. New Jersey Ass’n of Realtors*, 452 A.2d 1323 (N.J. 1982).

⁶ *Miller v. Vance*, 463 N.E.2d 250, 251 (Ind. 1984).

in do not change the legal nature or substance of the document itself. It would make sense that a real estate agent could fill in something like a money amount, which would obviously change from real estate transaction to real estate transaction, but could not take out or add entire clauses that would affect the legal rights of the person signing the form as well as the legal nature of the form itself.

As previously discussed, another safeguard that is gaining popularity and that Wyoming would strongly benefit from implementing, is the requirement of all real estate contracts to include an “attorney review” clause (The Contract to Buy and Sell currently states “This is a legally binding contract. If you do not understand the terms and conditions, consult legal or other counsel before signing.”). The attorney review clause goes the next step and can easily be written into real estate contracts by the drafting attorney. The attorney review clause allows either party’s attorney to disapprove a contract within a state period of time, often three days, and a broker may not modify that provision unless an attorney was present at the time of the modification.⁷ This type of clause would provide additional protections to all parties and would strongly protect the agent who is selling the property by allowing the contracts to be reviewed by each party’s attorney before the contract becomes binding. Though this is not a current requirement of real estate contracts in Wyoming, it can be included by the drafting attorney and can serve to save a lot of issues down the road. Such a provision gives the attorney representing either of the parties the opportunity to advise his or her client of the legal problems with their transaction.⁸

As all real estate licensees are aware, there is not one contract to fit all real estate transactions and therefore additional provisions will need to be added on many occasions. If those additional provisions have been reviewed and approved by counsel, the clauses can be inserted into the additional provision section of the contracts. I have provided many of my Broker clients approved clauses to insert into contracts under various circumstances. These clauses are deemed approved by counsel for insertion into the contracts and therefore do not constitute the unauthorized practice of law. Many of these clauses are inserted into every contract from various Broker firms.

Sale of Assets

⁷ See *Freedman v. Clonmel Const. Corp.*, 246 N.J. Super 397.

⁸ *Calvert v. K. Hovnanian at Galloway, VI, Inc.*, 607 A.2d 156

The line between dealing in real estate and dealing in non-real estate assets is likewise often blurred due to the fact that in real estate transactions there is often a sale of non-real estate assets along with the larger real estate purchase. According to Rule 7(c)(3) of the UPL, an agent or Broker is *not* practicing law if they are completing an “authorized act.” Such authorized acts include “any real estate activity” which Wyoming State Statute § 33-28-102 illustrates as:

“Real estate activity” occurs when an individual for another *and* for compensation performs any one or more of the following:

- (A) Sells, exchanges, purchases, rents, manages or leases **real estate**;
- (B) Offers to sell, exchange, purchase, rent, manage or lease **real estate**;
- (C) Negotiates, offers, attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of **real estate**;
- (D) Lists, offers, attempts or agrees to list **real estate** for sale, lease or exchange;
- (E) Auctions, offers, attempts or agrees to auction **real estate**;
- (F) Collects, offers, attempts or agrees to collect rent for the use of **real estate**;
- (G) Advertises or holds himself out as being engaged in the business of buying, selling, exchanging, auctioning, renting or leasing **real estate**;
- (H) Engages in the business of charging an advance fee in connection with any contract undertaken to promote the sale, auction or lease of **real estate** either through its listing in a publication issued for that purpose or for referral of information concerning the real estate to brokers;
- (J) Buys, sells, offers to buy or sell or otherwise deals in options on **real estate** or improvements thereon;
- (K) Assists or directs in the procuring of prospects calculated to result in the sale, exchange, lease or rental of **real estate**;
- (M) Assists or directs in the negotiation of any transaction calculated or intended to result in the sale, exchange, lease or rental of **real estate**;
- (N) Deals in time shares;
- (O) Provides a broker's price opinion as provided in W.S. 33-28-125.

W.S. §33-28-102(xiv)(emphasis on “real estate” added).

As you can see, the transactions and activities refer to real estate. “Real Estate: means leaseholds, as well any other interest or estate in land, whether corporeal, incorporeal, freehold or nonfreehold, and whether the real estate is situated in this state or elsewhere but shall not apply to nor include mineral lands, rights or leases.” The sales of business assets or any non-real estate assets are *not* a real estate transaction and therefore is not exempt under Rule 7 (c)(3).

Therefore, if a real estate licensee is selling non-real estate assets, he or she should not provide any professional legal advice or services or draft any documents associated with the transfer, lease, sale, exchange or auction of non-real estate.⁹ If a real estate licensee is involved in non-real estate transactions, they need to ensure the parties use legal counsel to draft and complete the transactions. The licensee should clearly inform the Buyer or Seller to seek counsel in the transaction. The licensee can market the non-real property assets and bring the parties together and receive compensation for this marketing effort but should use legal counsel to draft the actual asset purchase agreement and associated closing documents.

Again, as the line between practicing law with regard to modifications and additions to WAR forms is not completely clear, the line between a real estate transaction and non-real estate transaction can also be blurry. For example, most real estate transactions include the sale of assets such as lawn mowers, propane tanks, extra refrigerators, etc. Those are non-real estate assets but clearly associated with a larger real estate transaction. In addition, many real estate licensees sell mobile homes which may not be deemed real property. The sale of such mobile homes is not always covered as a real estate transaction and therefore potentially not included under the exemption of Rule 7(c)(3).

However, while the rule appears to be clear in describing what exactly an authorized act is, it is worth noting that not every case is going to be as black and white, or as clear cut, in how the law *should* apply. Most notable is the concern regarding the sale of mobile homes, which under Wyoming case law can sometimes constitute real estate depending on certain criteria. Wyoming does recognize the general rule that a chattel, or moveable, may become a fixture that becomes a part of the real estate on which it is affixed.¹⁰ Wyoming does tend to recognize that although a

⁹ See *Definition of Practice of Law*.

¹⁰ *Wyoming State Farm Loan Board v. FCSCC*, 759 P.2d 1230, 1234 (Wyo. 1988).

mobile home being mobile in nature and therefore not real property, can become so affixed to real property and be made immobile so as to constitute a “home” that can be taxed, sold, and mortgaged as real property. Case law has held that when an owner or mortgagor attaches a tangible item to real estate, a presumption arises that it was annexed with the intention of enriching the freehold and thus, it becomes a part of the realty.¹¹ Thus the issue then becomes whether or not certain fixtures and mobile homes are a part of the real property or not.

Again, issues like these arise because there is not one bright line rule and the facts of individual cases are not always so clear cut. This article hopes to shed some light on the current issues amongst real estate licensees and the unauthorized practice of law in Wyoming and to help create a better system in which brokers and buyers are protected from the problems associated with bad real estate transactions. As previously stated, it would greatly benefit real estate licensees to have attorney drafted contracts in which they can fill in the blanks for the common information that changes from transaction to transaction. It is also wise to include in every real estate contract an “attorney review” clause so that layperson buyers are conferring with an attorney before binding themselves into a contract for the purchase of real estate.

The *Razor City* case was the first of its kind and was a wake-up call for many real estate licensees and attorneys regarding the unauthorized practice of law. This article is to present the information currently known to the author as adjudicated in the State of Wyoming as well as other states. The Unauthorized Practice Law is like many other areas of law that you know it when you see it or it doesn't pass the smell test. The general warning is that real estate licensees should be careful when selling any non-real estate assets unless directly associated with a real estate transaction and not a major part of the transaction. In addition, licensees should carefully consider when he or she can cross-out sections of the WAR forms or add additional provisions without requesting the assistance of counsel.

Providing Legal Advice

An item not discussed in the *Razor City* case was providing legal advice to Buyers or Sellers by licensees. As a reminder, Rule 7 defines practice of law as: “providing any legal service for any other person, firm or corporation, with or without compensation, **or providing professional legal advice** or services where there is a client relationship of trust or reliance, including appearing as an advocate in a representative capacity; drafting pleadings or other documents; or performing

¹¹ *Capital Corp.*, 759 P.2d 1230, 1239 (Wyo. 1988).

any act in a representative capacity in connection with a prospective or pending proceeding before any tribunal.” (Emphasis added). As an attorney doing private real estate transactions, I personally have witnessed real estate licensees explaining the contents and intents of WAR forms or other non-WAR forms. As an example, I recently sat through a closing on a transaction wherein both buyer and seller were represented by counsel. The Listing Broker was at the closing and took the attorney reviewed and approved lease and explained each clause to the Seller and advised that certain clauses should be removed as they were weighted in favor of the Buyer. This type of action by the real estate licensee is a direct violation of Rule 7 as the Realtor was “providing professional legal advice” as to the legal ramifications of the clauses. A licensee is perceived by the general public as a professional with expertise in various real estate matters so when the licensee is giving advice it would be deemed by the general customer to be proper legal advice. In addition, the Statutes require “a licensee ... shall explain to the parties the effects thereof if the licensee is performing real estate activities in the transaction in which the forms are to be used.” Wyo. Stat. § 33-28-302(f). As with filling out forms or the sale of non-real estate assets, all licensees should be very cautious to provide legal advice to any customer, buyer, seller, lessor or lessee. The balance is explaining the “effects” of the various clauses versus “providing legal advice” on the various clause. That is a line that has not and may never be fully defined. With that, remember, it is easier to tell someone to seek legal or other professional advice and put that recommendation in writing then to defend an action for the unauthorized practice of law or some other civil suit. Upon recommending legal advice if there are questions on clauses, the ball transfers over to the Buyers/Sellers court.