Proposed Formal Advisory Opinion No. 10-R2

QUESTIONS PRESENTED:

1. Does an attorney who participates in the closing of a real estate transaction in Georgia in the limited role of a witness to the execution of documents conveying title become responsible as a supervising attorney for the direction and supervision of the performance of all of the other series of events through which land is conveyed where no other Georgia attorney performs or supervises the performance of such tasks?

2. Does an attorney who participates in the closing of a real estate transaction in Georgia in the limited role of a witness to the execution of documents conveying title thereby aid and abet the unauthorized practice of law where none of the other series of events through which land is conveyed, and which constitute the practice of law in Georgia, are performed by attorneys licensed to practice in Georgia?

3. Does an attorney who participates in the closing of a real estate transaction in Georgia in the limited role of a witness to the execution of documents conveying title receive any funds delivered at the closing that must be deposited into an IOLTA account maintained by the attorney or another attorney licensed to practice in Georgia?

SUMMARY ANSWER:

An attorney who participates in the closing of a real estate transaction in Georgia in a limited role, such as overseeing the execution of instruments of conveyance and the transmittal of documents to third parties for recordation and delivery, becomes responsible as a supervising attorney for the supervision of the performance of all parts of the transaction which constitute the practice of law in Georgia, where the remaining parts of the series of events required for the conveyance of title to real property, and which constitute the practice of law in Georgia, are not performed by or under the direction and supervision of another attorney licensed in Georgia. The attorney's limited participation without supervising the performance of the remaining parts of the transaction constitutes aiding and abetting the unauthorized practice of law. An attorney who receives any monetary instruments or funds at closing may not deliver such instruments or funds to a third party who is not a Georgia attorney. The attorney must either deposit such funds into an IOLTA account maintained by the attorney or ensure that the funds are deposited into another Georgia attorney's IOLTA account.

OPINION:

Introduction

The determination of the questions presented and addressed in this opinion involves a consideration of several disciplinary rules, prior opinions of this Board and the Standing Committee on the Unlicensed Practice of Law, legislation addressing the

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definition of the practice of law in Georgia in the context of real estate conveyancing, and relevant decisions of the Georgia Supreme Court. While there is no scarcity of sources of information available to provide guidance to attorneys and others seeking direction as to proper conduct in this area, no comprehensive opinion exists that provides definitive answers to the questions posed and guidance as to what parts of the whole continuum of tasks that must (or should) be completed to initiate, conduct and conclude a real estate transaction involving the conveyance of title in Georgia constitute the practice of law. While the *de novo* determination of that issue is clearly beyond the purview of this Board, to the extent that the activities constituting the practice of law in this area have already been identified piecemeal by the Supreme Court, a comprehensive statement of what is and is not the practice of law in this area is appropriate, and must of necessity be addressed in this opinion.

The Existing Landscape: Disciplinary Rules, Prior Advisory Opinions, Legislation and Precedents

Relevant Disciplinary Rules

The issues raised by the questions posed and addressed in this opinion require consideration of several of the Georgia Rules of Professional Conduct. Rule 5.3(b),(c) makes an attorney responsible for the supervision and conduct of nonlawyers associated with the attorney and requires the attorney to make reasonable efforts to ensure the nonlawyer's conduct is compatible with the professional obligations of the attorney. Rule 5.5(a) prohibits an attorney from practicing law in a jurisdiction in violation of the laws regulating the practice of law in that jurisdiction, and from assisting another in doing so. While this rule does not prohibit an attorney from using nonlawyers to assist in the performance of legal tasks, as long as the attorney supervises the work delegated and retains responsibility for the work, it does prohibit an attorney from aiding and abetting the unauthorized practice of law by nonlawyers, where the attorney does not supervise and assume responsibility for such work otherwise appropriately delegated.

Rule 8.4(a) prohibits an attorney from engaging in professional conduct involving deceit or misrepresentation, and a violation of this rule could arise from a "witness only" closing lawyer's implicit representation that the attorney has overseen the entire closing process when in fact that is not the case. Finally, Rule 1.15(II) requires an attorney who "receives money...in any...fiduciary capacity" to deposit such funds into an IOLTA account and administer these funds from that account only.[1]

Prior Opinions, Legislation and Precedents

Several prior opinions of this Board and the Standing Committee on the Unlicensed Practice of Law ("UPL") provide guidance in this matter. In Formal

[1] This rule applies where the closing proceeds are nominal in amount or are to be held for a short period, as is typically the case. However, where the funds are not nominal in amount and are to be held for a longer period, they must be placed in an interest bearing escrow account with interest payable to the client. Rule 1.15(II)(c); In Re Formal Advisory Opinion 04-1, 280 Ga. 227, 228 (2006).

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Advisory Opinion No. 86-5, issued by the Supreme Court on May 12, 1989, [2] the court considered whether an attorney may delegate to a nonlawyer the "closing" of a residential real estate transaction. After noting that O.C.G.A. § 15-19-50 defines the "practice of law" to include "conveyancing", "the giving of legal advice," and "any action taken for others in any matter connected with the law," the court concluded that the "closing" of a real estate transaction constitutes the practice of law. The court went on to adopt a very expansive definition of a "closing," to include "the entire series of events through which title to the land is conveyed from one party to another party...". The court then opined that to avoid running afoul of the prohibition against aiding a nonlawyer in the unauthorized practice of law, an attorney delegating activities which ordinarily comprise the practice of law to a nonlawyer must maintain a direct relationship with the client, supervise and direct the work delegated, and "assume complete ultimate professional responsibility for the work product," citing State Bar Advisory Opinion 21. The opinion concludes that:

> [I]t would be ethically improper for a lawyer to aid nonlawyers to "close" real estate transactions. This does not mean that certain tasks cannot be delegated to nonlawyers, subject to the type of supervision and control outlined in State Bar Advisory Opinion No. 21. The lawyer cannot, however, delegate to a non-lawyer the responsibility to "close" the real estate transaction without the participation of an attorney.

See also, Formal Advisory Opinion No. 00-3, issued by the Supreme Court on February 11, 2000, holding that an attorney must be physically present at the closing of a transaction and may not supervise a nonlawyer officiating at the closing telephonically.

Formal Advisory Opinion No. 04-1 was approved, with comments, by the Supreme Court on February 13, 2006, after the grant of a petition for discretionary review by the State Bar. In Re Formal Advisory Opinion No. 04-1, 280 Ga. 227 (2006). That opinion instructs that the closing of a real estate transaction in the State of Georgia (as broadly defined by the Supreme Court in Formal Advisory Opinion No. 86-5) constitutes the practice of law, and that when a nonlawyer conducts a closing without the supervision of an attorney, the nonlawyer is engaged in the unauthorized practice of law. Similarly, where an attorney "participates in but does not supervise" the closing, the nonlawyer is still engaged in the unauthorized practice of law, and the participating attorney assisting the nonlawyer does so in violation of Rule 5.5(a). Where an attorney supervises the closing, the attorney is a fiduciary with respect to the closing proceeds, and any funds

[2] Prior to 1986, advisory opinions were drafted and issued by the State (Bar) Disciplinary Board, and were not reviewed or issued by the Supreme Court. In 1986, the State Disciplinary Board was divided into three parts, the Investigative Panel, the Review Panel, and the Formal Advisory Opinion Board. Since 1986, advisory opinions have been drafted and promulgated by the Formal Advisory Opinion Board. From 1986 through 2002, every Formal Advisory Opinion issued by this Board went to the Supreme Court for review and either modification, rejection, or approval. Since 2002, opinions issued by this Board are only reviewed by the Supreme Court on a petition for discretionary review or *sua sponte*.

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received "by the lawyer or persons or entities supervised by the lawyer" must be administered in accord with Rule 1.15(II).

In adopting Formal Advisory Opinion No. 04-1, the court held:

> [A] lawyer directing the closing of a real estate transaction holds money which belongs to another (either a client or a third-party) as an incident to that practice, and must keep that money in an IOLTA account. ... Under no circumstances may the closing proceeds be comingled with funds belonging to the lawyer, the law office, or any entity other than as explicitly provided in [Rule 1.15(II)]....
>
> The closing of a real estate transaction in this state constitutes the practice of law, and, if performed by someone other than a duly licensed Georgia attorney, results in the prohibited unauthorized practice of law. [Citation omitted]. The attorney participating in the closing is a fiduciary with respect to the closing proceeds, which must be handled in accordance with the trust account and IOLTA provisions in Rule 1.15(II).

In Re Formal Advisory Opinion No. 04-1, 280 Ga. 227, 228 (2006).

In UPL Advisory Opinion No. 2003-2, approved by the Supreme Court on November 10, 2003, the Standing Committee on the Unlicensed Practice of Law considered whether the preparation and execution of any instrument conveying title is the unlicensed practice of law if someone other than a Georgia attorney prepares or facilitates the execution of the instrument. The Committee concluded that the preparation of any document conveying title, whether a warranty deed, quitclaim deed, or deed to secure debt, is the practice of law in Georgia. The execution of such an instrument, "because it is an integral part of the real estate process, is also the practice of law." In reaching this conclusion, the Committee considered O.C.G.A. § 15-19-50 defining the practice of law. The Committee also considered certain limited statutory exceptions permitting title insurance companies to prepare papers to be executed in connection with the issuance of title insurance, the preparation of abstracts of title by nonlawyers, and the performance of legal tasks by nonlawyers where an attorney maintains full professional and direct responsibility for the services received. See e.g., O.C.G.A. § 15-19-52, § 15-19-53, § 15-19-54. The Committee concluded that these exemptions were inapplicable where an instrument of conveyance was prepared by a nonlawyer for the use of a third-party, and no attorney oversaw the preparation and ultimate execution of the instrument.

This opinion was designed to deal with nonlawyer "witness only" closing agents, otherwise described in the opinion as "notary closers" and "signing agents." The opinion stands for the proposition that both the preparation of instruments of conveyance and overseeing the execution of these instruments constitute the practice of law. Clearly,

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where these activities are performed by a Georgia lawyer, that by itself does not raise a disciplinary issue. However, a disciplinary issue does arise where a Georgia lawyer does not oversee the "entire series of events" that constitutes a closing. As the Committee stated, "a Georgia lawyer who conducts a witness only closing does not, of course, engage in the unlicensed practice of law. There may well exist, however, professional liability or disciplinary concerns that fall outside the scope of this opinion." It could be argued that the existence of this opinion is what has caused a proliferation of "witness only" lawyer closings.

In a separate advisory opinion, the Committee has also concluded that the preparation of any lien is the practice of law, and may not be performed by a nonlawyer. UPL Advisory Opinion No. 2004-1 (August 6, 2004).

As noted above, several Georgia statutes addressing the practice of law are relevant to a determination of the issues presented. O.C.G.A. § 15-19-50 defines activities which constitute the practice of law, as discussed previously. Certain exemptions for particular activities and parties are set forth in O.C.G.A. §§ 15-19-52 through 15-19-54. O.C.G.A. § 15-19-51 makes it illegal for a nonlawyer to engage in activities constituting the practice of law. While the Supreme Court has ultimate authority to regulate and define what constitutes the practice of law, the court has indicated that these statutes continue to aid the court with regard to defining the practice of law in Georgia. In Re UPL Advisory Opinion 2003-2, 277 Ga. 472, 474 (2003). See also In Re UPL Advisory Opinion 2002-1, 277 Ga. 521, 522 (2004).

On April 5, 2012 the Georgia General Assembly passed Senate Bill 365, which included amendments to O.C.G.A. § 44-14-13, the Georgia "Good Funds" Act. Ga. Laws 2012, p. _____, § 15 (Act 744, May 2, 2012). As originally introduced, S.B. 365 contained numerous provisions requiring that the closing of residential real estate transactions be handled by Georgia attorneys, and sought to define the practice of law to include all aspects of the closing of residential real estate transactions. This bill was supported by the requester of this opinion. As passed, the Act amended the "Good Funds" Act to provide that only a lender or an active member of the State Bar of Georgia can serve as the settlement agent responsible for conducting the settlement and disbursement of the proceeds of any purchase money loan or refinance loan secured by residential real property within the state of Georgia containing not more than four units. This Act further provided that any person or entity acting as the settlement agent who is neither the lender nor an active member of the State Bar of Georgia is guilty of a misdemeanor. This legislation was signed by the governor on May 2, 2012, and becomes effective July 1, 2012. Thereafter, any funds representing the proceeds from a loan for the acquisition of residential real property, or the refinancing thereof, must either be disbursed by the lender or through an IOLTA account maintained by a Georgia attorney, and third-party closing agents who handle the loan proceeds would be guilty of a misdemeanor.

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Discussion

From an analysis of the above authority, it is clear that under the expansive definition of what constitutes the closing of a real estate transaction in Georgia adopted by the Supreme Court, all of the "series of events" that are involved in initiating, conducting, and concluding the process by which title to real property is conveyed in Georgia constitutes the practice of law. While the Supreme Court has not explicitly enumerated what all of those events are, it is apparent that, at a minimum, they include: (i) rendering an opinion as to title and the resolution of any defects in marketable title; (ii) preparation of deeds of conveyance, including warranty deeds, quitclaim deeds, deeds to secure debt, and mortgage deeds; (iii) overseeing and participating in the execution of instruments conveying title; (iv) supervising the recordation of documents conveying title; and (v) collecting and disbursing funds exchanged in connection with the closing of the transaction. When an attorney touches any part of this process, the attorney assumes responsibility for performing or supervising the performance of all other parts of the process, as a supervising attorney, unless those tasks are performed by or under the supervision of another attorney licensed to practice in Georgia. Rule 5.3. If an attorney participates in the process in a limited role, such as attending and overseeing the execution of deeds of conveyance at a "witness only" closing, and any of the remaining parts of the process are not performed by or under the direction and supervision of another Georgia attorney, the "witness only" attorney aids those performing the remaining tasks in the unauthorized practice of law, in violation of Rule 5.5(a). Further, under Rule 1.15(II), an attorney attending the physical closing of a transaction, even in the limited role of overseeing the execution of instruments conveying title, "receives" any funds exchanged or disbursed at the closing in a fiduciary capacity, and must deposit and administer all funds in an IOLTA account maintained by the attorney or another Georgia attorney, or otherwise in accord with the rule. Such funds include all sums paid or received by the parties to the transaction at the closing. In summary, the answer to all three questions addressed in this opinion is yes.

CONCLUSION:

In furtherance of the long-established principle that the public interest is best served by ensuring that all aspects of the process by which title to real property in Georgia is conveyed are conducted by or under the direct supervision of a Georgia attorney, the Supreme Court has repeatedly indicated, implicitly and explicitly, that all phases of a real estate transaction constitute the practice of law. The determination of what constitutes the practice of law is inherently and exclusively within the domain of the Supreme Court. The court has adopted an expansive view of what is the practice of law in this area. All attorneys in Georgia, including this Board, are bound by that determination.

This opinion merely recognizes what the court has repeatedly indicated: all of the continuum of activities that are part of the process by which real estate transactions are closed and land is conveyed constitute the practice of law in Georgia. By enumerating

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those tasks, this Board seeks only to make explicit that which is already inherent and implicit in the pronouncements of the court defining the practice of law in this area.

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ATLANTA BUSINESS CHRONICLE

October 5-11, 2012

Business Court helps local companies

Georgia's political and business leaders continuously make great efforts to bring businesses to, and to retain businesses in, Georgia. One factor often overlooked by companies, however, is the quality and ability of the local court system to resolve business disputes in a timely fashion and convenient forum.

VIEWPOINT
Cynthia Wright

In 2005, the Fulton County Superior Court, in partnership with leaders of the State Bar of Georgia, launched the Business Case Division as a pilot program designed to take complex business litigation out of the regular flow of criminal and civil cases. They deemed creation of a specialized docket critical for our State to remain competitive with other states in bringing business to, and keeping them in, Georgia.

Prior to the creation of the "Business Court," Georgia's businesses were saddled with the unpredictability of congested court calendars. Now, the Business Case Division takes complex business litigation out of the usual stream (more like a raging river) of criminal and civil cases heard by active Superior Court Judges and processes them in a far more efficient and timely manner with judges who have received specialized training in complex business issues. However, certain criteria must be met for a case to be assigned to the Business Case Division, as it does not handle routine business cases. Cases eligible for transfer include large contractual disputes and issues involving securities, corporate, limited liability or partnership law, and other complex commercial litigation with at least $1 million in controversy.

Since its inception, the Business Case Division has handled approximately 200 cases involving more than 500 businesses. According to several business litigants, the uncertainty of the time involved for the court to reach a final resolution of a business dispute was often worse than receiving an unfavorable result. No one wins when it takes years to resolve a dispute and businesses grind to a halt waiting for a decision. The cost of litigation is expensive, but the cost of uncertainty can be prohibitive.

Louis Cohan of the Cohan Law Group summarizes the benefit of the Business Case Division as follows: "It is critical for my business clients to have prompt rulings from the court because they need answers to make swift business decisions. If my clients can get a quick decision, regardless of the outcome, they can act. This ability impacts, jobs, bottom lines, and ultimately, even tax dollars." Cohan notes that swift rulings on pending motions save tens of thousands of dollars for a business litigant and generally produce a settlement agreement more quickly than if the case plodded through a general jurisdiction docket.

The Fulton County Superior Court and the State Bar of Georgia are pleased to discover that the business community is taking note of the benefits of staying in Fulton County to litigate their disputes. Some companies have begun writing venue provisions into their contracts to ensure that any litigation will be resolved locally in Fulton County, as opposed to courts outside Georgia. Litigating in a home forum has obvious economic benefits: (1) it reduces costs for travel and outside counsel; (2) from the court's perspective, it is an investment by the business community in the Fulton County Superior Court; and (3) it is an investment by the Fulton County Superior Court in the business community. The Business Case Division is an important part of attracting and retaining companies in Georgia, and it provides further fuel to the engine for economic growth.

Wright is chief judge of Superior Court of Fulton County.