

Commission on the Unauthorized Practice of Law

Title Insurance Advisory Opinion 2010-001

An advisory opinion has been requested by an attorney on behalf of the Nebraska Land Title Association. The request was made pursuant to Rule 3-1012 (D) of the Rules on Unauthorized Practice of Law. There are 10 separate questions contained in the request. The questions will each be addressed in this advisory opinion. The applicable court rules governing the answers are found at 3-1001 through 3-1021. This opinion will set forth only the relevant rules needed to answer the questions presented by the Nebraska Land Title Association.

§3-1001. General definition.

The “practice of law,” or “to practice law,” is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person which require the knowledge, judgment, and skill of a person trained as a lawyer. This includes, but is not limited to, the following:

(A) Giving advice or counsel to another entity or person as to the legal rights of that entity or person or the legal rights of others for compensation, direct or indirect, where a relationship of trust or reliance exists between the party giving such advice or counsel and the party to whom it is given.

(B) Selection, drafting, or completion, for another entity or person, of legal documents which affect the legal rights of the entity or person.

(C) Representation of another entity or person in a court, in a formal administrative adjudicative proceeding or other formal dispute resolution process, or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.

(D) Negotiation of legal rights or responsibilities on behalf of another entity or person.

(E) Holding oneself out to another as being entitled to practice law as defined herein.

§ 3-1002. Other definitions.

(A) Definition of "Nonlawyer": The term "nonlawyer" means any person not duly licensed or otherwise authorized to practice law in the State of Nebraska. The term also includes any entity or organization not authorized to practice law by specific rule of the Supreme Court whether or not it employs persons who are licensed to practice law.

(B) Definition of "Entity": The term "entity" means a sole proprietorship, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, limited liability company, or association, two or more persons having a joint or a common interest, or any other legal or commercial entity.

(C) Definition of "Organization": The term "organization" means two or more entities characterized by common administrative and functional structure or common ownership and/or control.

§ 3-1003. General prohibition.

No nonlawyer shall engage in the practice of law in Nebraska or in any manner represent that such nonlawyer is authorized or qualified to practice law in Nebraska except as may be authorized by published opinion or court rule.

§ 3-1004. Exceptions and exclusions.

Whether or not they constitute the practice of law, the following are not prohibited:

(A) Title insurance companies authorized to do business in the State of Nebraska and their licensed agents, real estate rental agencies, licensed real estate brokers and their affiliated licensees, and employees of such entities, preparing certain documents that would normally involve the practice of law subject to the following:

- (1) The transaction involved is merely incidental to their lawful business as a title insurance company or licensed agent thereof, rental agency, real estate broker, or affiliated licensees of a real estate broker.
- (2) The transaction arises in the usual course of business for the title insurance company issuing title insurance, the rental agency as agent for the lessor or the lessee, the broker who is the listing or selling broker, or the real estate licensee affiliated with the broker.
- (3) Licensed real estate brokers and their affiliated licensees, as agents for the seller and/or buyer, may prepare purchase agreements and contracts of sale.
- (4) Real estate rental agencies representing the lessor and/or lessee may prepare residential, commercial, or farm leases.
- (5) In closing a real estate sale, licensed real estate brokers and title insurance companies and their licensed agents may prepare deeds, releases which do not affect judgment liens, deeds of reconveyance, title affidavits, closing statements, and related documents.
- (6) The documents referred to in §3-1004 (A)(3), (4) and (5) to be prepared by nonlawyers shall be on standardized forms which may contain various blanks to be filled in, the completion or selection of which does not require the knowledge, judgment, or skill of one trained as a lawyer.
- (7) No counsel or advice shall be given with respect to the meaning, validity, or legal effect of the document or regarding the rights and obligations of the parties.

(B) Licensed abstractors preparing or extending abstracts without rendering opinions as to the character of the title. A title insurance company authorized to do business in the State of Nebraska, including its licensed agents, may review public records and specify any curative work or describe conditions which must be fulfilled before it will issue a title insurance policy in connection with a proposed real estate transaction, but may not render opinions, counsel, and advice to others regarding the marketability or status of titles.

(G) Nonlawyers selling legal forms in any format, so long as they do not advise or counsel another regarding the selection, use, or legal effect of the forms.

(J) Nonlawyers providing information about the application of the law to a product or service which the nonlawyer is otherwise lawfully authorized to provide to the public.

(L) Nonlawyer employees of an entity or organization preparing legal documents that are incidental to the entity's or organization's business and connected with any transaction in which the entity has a direct, primary, and nonfiduciary interest, or a fiduciary interest required by federal law.

(O) A nonlawyer entity or organization which employs lawyer employees to perform the activities described in § 3-1001 for such entity, other entities within the organization, or in the case of privately held entities or organizations, for owners and their families, officers, directors, or employees of the entity or organization.

(P) A nonlawyer entity or organization acting through lawyer employees to the extent such lawyers perform pro bono legal services for nonprofit organizations, low-income clients, or otherwise in the public interest.

(Q) A nonlawyer entity or organization acting through lawyer employees providing legal services, without direct payment therefore, to a party other than a party described in § 3-1004(0), in a manner consistent with the Nebraska Rules of Professional Conduct (including, without limitation, the provisions relating to conflicts of interest and fee sharing), so long as the entity or organization has a financial interest in the outcome of the legal services, there is a commonality of purpose between the entity or organization and the third party, and the entity or organization is not otherwise in the business of providing legal services except as provided in these rules.

(R) An entity or an organization in the business of insurance, guarantee or indemnity utilizing a lawyer employee or captive lawyer admitted to the bar in Nebraska or otherwise authorized to practice law in Nebraska to represent its insured, principal, or a noninsured for whom a defense is provided under a reservation of rights, so long as there is a commonality of purpose between the entity or organization and the insured, principal, or noninsured, and the lawyer employee or captive lawyer is able to comply with the Nebraska Rules of Professional Conduct.

1. ***May a title insurance agent provide a blank purchase agreement to the parties for a For Sale by Owner (FSBO) transaction?***

Section 3-1004 (G) provides that it is not UPL for a nonlawyer to sell legal forms in any format so long as they do not advise or counsel another regarding the selection, use or legal effect of the forms. Similarly, it is not UPL for a title insurance agent to give away a blank purchase agreement to the parties for a FSBO transaction so long as the agent does not provide any advice or counsel regarding the selection, use or legal effect of the form.

2. ***May a title insurance agent provide instructions to parties to FSBO transactions as to where they can obtain blank Purchase agreement forms (other than going to an attorney)?***

A title insurance agent may refer a party to a FSBO transaction as to where they can obtain blank purchase agreement forms. As stated in answer “1”, selling legal forms is permitted under Section 3-1004 (G) which states, “Nonlawyers selling legal forms in any format, so long as they do not advise or counsel another regarding the selection, use, or legal effect of the forms.

3. ***May a title insurance agent assist or advise the parties to a FSBO transaction in the preparation of a purchase agreement?***

A title insurance agent may not assist or advise the parties to a FSBO transaction in the preparation of a purchase agreement. Section 3-1004 (A) (7) provides, “No counsel or advice shall be given with respect to the meaning, validity, or legal effect of the document or regarding the rights and obligations of the parties.” The preparation of the purchase agreement would require the title insurance agent to assist or advise in the preparation of the document and, therefore, violate 3-1004 (A) (7). The rules do provide in Section 3-1004 (A) (3) that “Licensed real estate brokers and their affiliated licensees, as agents for the seller and /or buyer, may prepare purchase agreements and contracts of sale.” The rules do not provide the same exception from UPL for a title insurance agent.

Note, however, that at closing, a title insurance company and their licensed agents may prepare deeds, releases which do not affect judgment liens, deeds of reconveyance, title affidavits, closing statements, and related documents. See 3-1004 (A) (5). The documents referred to in (A) (5) need to be on standard preprinted forms which may contain various blanks to be filled in, the completion or selection of which does not require the knowledge, judgment, or skill of one trained as a lawyer. See 3-1004 (A) (6).

4. ***May a title insurance agent assist or advise the parties to a FSBO transaction in the preparation of an addendum to a purchase agreement?***

No, the title insurance agent may not assist or advise the parties to a FSBO transaction in the preparation of an addendum to a purchase agreement for the reasons set for in the answer to “3”.

5. **Which of the following real estate documents may a title insurance agent prepare in any transaction?**

- **Deed of Trust (fill in blanks)**
- **Mortgage (fill in blanks)**
- **Easement**

A title insurance agent may prepare only the documents that are set forth in 3-1004 (A) (5) which are limited to, “In closing...deeds, releases which do not affect judgment liens, deeds of reconveyance, title affidavits, closing statements, and related documents.” 3-1004 (A) (7) provides, “No counsel or advice shall be given with respect to the meaning, validity, or legal effect of the document or regarding the rights and obligations of the parties.” The selection of the appropriate document whether a mortgage or a deed of trust is a decision that affects the legal rights of the entity or person. See 3-1001 (B). Thus, the selection and preparation of a deed of trust or a mortgage even if it is just to fill in the blanks is considered the unauthorized practice of law. It would be impossible to prepare an easement without violating 3-1004 (A) (7) with regard to giving advice with respect to the meaning, validity, or legal effect of the document or the rights and obligations of the parties. Thus, a licensed attorney and not a title agent should prepare the mortgage, deed of trust and easement. A title insurance agent would be committing the unauthorized practice of law if he/she prepared these documents for a party to a transaction.

6. **With regard to “title affidavits” referred to in Section 3-1004(A) (5) of UPL, would the following fall within that category?**

- (a) **Marketable title affidavit**
- (b) **Scrivener’s affidavit**
- (c) **Name discrepancy affidavit**

Yes.

7. **May an attorney who is an active member, in good standing, of the Nebraska Bar, an employee of a title agency and is a title insurance agent, prepare any of the following either on behalf of the title agency or one of the parties to a real estate transaction:**

Purchase agreement, addendums to purchase agreements, documents listed in 5. above, affidavits not permitted under section 3-1004 (A) (5) of UPL.

A title company, even if acting through an attorney employee in good standing with the Nebraska Bar, may not engage in work that exceeds the limitations set forth in the UPL Rules. The title company is a “nonlawyer” as defined in 3-1002(A). The lawyer is certainly not held to a more restrictive level of document preparation than is the nonlawyer. Therefore, a title company acting through an attorney employee in good standing with the Nebraska Bar may engage in any of the activities permitted by 3-1004 (A) (1) through (7).

There are other exceptions in 3-1004 that address whether an entity or organization acting through an in-house lawyer is engaged in the unauthorized practice of law, including, without limitation, 3-1004 (O) through (R).

For example, under 3-1004 (O), the title company would not be engaged in unauthorized practice of law if its lawyer employee provides document preparation or other legal services for the title company or other entities within the same organization (as defined in 3-1002(C)), or, if the title company is privately held, for the other parties described in 3-1004 (O).

However, unless permitted by a specific exception in 3-1004, the preparation of the documents described in question number 7 by a title company on behalf of the parties to a real estate transaction would constitute the unauthorized practice of law. This conclusion is true whether or not the title insurance company is acting through an employee who is a member of good standing of the Nebraska Bar.

If a lawyer is an employee of a title company and has an attorney/client relationship, independent of the title insurance company’s relationship, with a party to the transaction in which the title company is involved, the lawyer may prepare documents that may not be prepared by the title company. The lawyer may bill, his client, the party to the transaction, for the service of preparing the documents. If, however, the title company charges a fee for the preparation of such documents, for the reasons stated above, the title company is engaging in the unauthorized practice of law. This opinion does not address any issues of professional responsibility that may arise in this situation.

8. ***May a licensed abstractor prepare, for compensation, a title report purporting to identify the record titleholder and any liens or encumbrances against a parcel of real estate?***

An abstractor can report what has been filed but not render an opinion as to priority or validity of title. See 3-1004 (B). “Licensed abstractors preparing or extending abstracts without rendering opinions as to the character of the title. A title insurance company authorized to do business in the State of Nebraska, including its licensed agents, may review public records and specify any curative work or describe conditions which must be fulfilled before it will issue a title insurance policy in connection with a proposed real estate transaction, but may not render opinions, counsel, and advice to others regarding the marketability or status of titles.”

9. ***May a Register of Deeds or any employee of a Register of Deeds provide information regarding the effects of any document presented for recording, or advice as to statutory requirements related to such document?***

A Register of Deeds or an employee of a Register of Deeds may not provide information regarding the legal effects of any document presented for recording or advice as to statutory requirements related to such documents except to the extent that the Register of Deeds needs to explain the requirements for a document to be recorded or to otherwise comply with the statutory duties of that office.

10. ***May a Register of Deeds or any employee of a Register of Deeds provide, suggest, advice with response to, or assist in the preparation of, any blank form or document to be recorded?***

Duties of Register of Deeds and their employees are set forth in Neb. Rev. Stat. §23-1506 and question regarding their duties should be referred to appropriate legal counsel.