

## **DRAFTING DOCUMENTS AND THE UNAUTHORIZED PRACTICE OF LAW**

More and more real estate agents across the country are beginning to offer an array of “unbundled” services from which a customer can select. Often times, these services include the “closing” of a FSBO sale. In these arrangements, the agent may prepare the purchase agreement, order an inspection, obtain title work, assist with financing and/or prepare or review closing documents. Often this is done for a flat fee.

For years, we have cautioned against this type of activity in Michigan. Our specific concern has been with the real estate agent’s preparation of purchase agreements and other real estate documents. As REALTORS® may be aware; there is no definitive statutory definition of the unauthorized practice of law. Rather, in Michigan and elsewhere, this definition is left to the courts to determine. On the one hand, it is quite clear that a non-lawyer may not set up an office and advertise his or her services in drafting real estate documents for a fee. On the other hand, at least since the 1955 Walter Neller decision, it has been clear that in Michigan, a licensed real estate agent can “fill in the blanks” on real estate forms if he does so in connection with a transaction that also involves a commission, and if he does not charge a separate fee for this service.

In June of 2003, the Michigan Supreme Court was faced with a case in which a bank charged the borrower a \$400 fee for “document preparation.” Dressel v Ameribank, 468 Mich 557 (2003). It turned out that “document preparation” consisted of the completion of standard mortgage forms by a non-lawyer bank employee. The Supreme Court rejected the plaintiff-borrower’s claim that this practice constituted the unauthorized practice of law:

Plaintiffs do not assert that the bank’s preparation of their mortgage document was in conjunction with anything other than an ordinary transaction in the normal course of the bank’s business. The bank’s employees did not draft the mortgage document. They merely completed a standard form document that the federal government compiled and that is readily available to the public.

In performing the act of completing the standard form mortgage, defendant was acting as an amanuensis, a kind of secretary for plaintiffs. No legal knowledge or discretion was involved in the document’s completion. The bank did not counsel plaintiffs with regard to the legal validity of the document or the prudence of entering into the transaction. In general, the completion of standard legal forms that are available to the public does not constitute the practice of law.

The Court went on to hold that it was immaterial that the bank charged a fee for this service because “charging a fee for non-legal services does not transmogrify those services into the practice of law.”

It should be noted that the State Bar had filed an amicus brief in this case in which it asserted that the correct standard for determining whether a particular activity

involves the practice of law should be whether the activity involves the “application of legal discretion.” According to the State Bar’s brief, “when there is a range of legal documents with different legal consequences available to accomplish a particular purpose, the act of choosing a document is discretionary.”

The Dressel court did not adopt the standard urged by the State Bar. Rather, the Supreme Court ruled that, "a person engages in the practice of law when he counsels or assists another in matters that require the use of legal discretion and **profound legal knowledge.**"

Many attorneys and REALTORS® disagree about how the Dressel decision should be interpreted. It is clear that the basic rule in Walter Neller decision is still good law. That is, REALTORS® can continue to fill in forms incidental to transactions in which they are otherwise involved. After Dressel, it would appear that REALTORS® may now charge a separate fee for this service. It is our belief, however, based upon the language in the Dressel decision, that it is still the case that REALTORS® can only safely prepare documents incidental to their regular business of buying and selling real estate.

REALTORS® must keep in mind, however, that a transaction may arise that is sufficiently complex or unique such that it is not possible to simply “fill in the blanks.” REALTORS® should always refer these matters to attorneys - - not only to avoid

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participating in the unauthorized practice of law, but also to protect their client or customer and to avoid a negligence claim if things later go wrong.