

PREPARATION OF DOCUMENTS AFFECTING TITLE TO TEXAS REAL PROPERTY AS THE UNAUTHORIZED PRACTICE OF LAW¹

By J. Alton Alsup²

“I am unable to rest any satisfactory test on the distinction between simple and complex instruments. The most complex are simple to the skilled, and the simplest often trouble the inexperienced.”

*Chief Justice Alexander of the Texas Supreme Court
in Hexter Title & Guaranty Co., Inc. v. Grievance Committee on the issue of whether a
layman could engage in the practice of law if it involves only the preparation of simple instruments*

I. INTRODUCTION – TEXAS LAW AND PUBLIC POLICY

Preparation of legal instruments affecting title to real property constitutes the practice of law in Texas and, with few exceptions, Texas law reserves to licensed Texas attorneys the exclusive authority to prepare and charge for such instruments as deeds, mortgages and deeds of trust, real estate notes, and transfers and releases of liens.

This brief article examines the relevant body of Texas law supporting this legal conclusion, including variously its statutes, judicial decisions enjoining unauthorized practices, and attorney general and professional ethics opinions considering particular practices. Texas regulates the practice of law by statute, principally Chapters 81 and 83 of the Texas Government Code, and through the inherent power of the courts of this state to determine in a proper case what constitutes the practice of law independent of statutory definitions.

While Texas law in this regard is uniformly applicable to all commercial and residential real property transactions and to both first- and subordinate-lien mortgage loan transactions, this article examines the law particularly from the perspective of Texas attorneys and their role in representing mortgage lenders in connection with the common and multitudinous home mortgage loan transaction – an arena of commerce where thousands of home loans are closed each business day throughout the state. Texas public policy favors protection of consumers in their dealings with creditors – particularly with respect to transactions secured by the family homestead. To this end, the Texas Constitution establishes the most protective homestead rights in the nation, and our legislature notably has enacted aggressive consumer protection legislation that provides for private actions by consumers and public enforcement by the Texas Attorney General for the commission of deceptive trade practices in transactions with consumers. Section 83.001 of the Texas Government Code, which reserves the authority to prepare documents affecting title to real property to licensed Texas attorneys, is a further expression of that public policy and was enacted for the protection of the public against the incompetent or unethical conduct of unlicensed persons who lack sufficient legal knowledge, training, skill, or accountability for the task.

¹ Originally published and presented March 8, 2007 at the 18th Annual Advanced Real Estate Drafting Course sponsored by the State Bar of Texas.

² J. Alton (“Al”) Alsup is a principal of Houston-based Brown, Fowler & Alsup P.C. and practices residential mortgage banking and real estate law exclusively. He is a graduate of The University of Texas School of Law and is Board Certified in Residential Real Estate Law by the Texas Board of Legal Specialization. He is the author of numerous articles on Texas and federal law and regulation of home mortgage finance.

II. BACKGROUND: THE STATE BAR ACT – REGULATING THE PRACTICE OF LAW

A. Inherent Power of the Supreme Court to Regulate the Practice of Law

The Supreme Court of Texas has inherent power to regulate the practice of law in Texas for the benefit and protection of the justice system and the people as a whole. The court inherently may determine as a matter of law on a case-by-case basis whether particular practices constitute the unauthorized practice of law. *State Bar of Texas v. Cortez*, 692 S.W. 2d 47, 51 (Tex. 1985) cert. denied, 474 U.S. 980 (U.S. Tex. Nov. 12, 1985); *Crain v. Unauthorized Practice of Law Committee*, 11 S.W.3d 328 (Tex. App. – Houston [1st Dist.] 1999) cert. denied, 532 U.S. 1067 (U.S. Tex. Jun. 4, 2001). The Supreme Court’s inherent power is derived in part from Article II, Section 1 of the Texas Constitution, which divides State governmental power among three departments, including the Judicial Department, and has been held to authorize the Supreme Court to regulate judicial affairs and the administration of justice in the Judicial Department. Within this authority is the power to regulate the practice of law, which is assisted by statute, principally the State Bar Act. [Tex. Gov’t Code, Chapter 81]. See *In re: Nolo Press/Folk Law, Inc.*, 991 S. W. 2d 768 (Tex. 1999) and cases therein cited. The State Bar Act was enacted for the purpose of protecting the public “by eliminating from the practice of law those morally unfit to enjoy the privileges and those lacking in proper training and other qualifications necessary to perform the services required of an attorney.” *Hexter Title & Abstract Co., Inc. v. Grievance Committee, Fifth Congressional District, State Bar of Texas et al*, 179 S.W. 2d 946 (Tex. 1944) The practice of law in Texas is restricted to members of the State Bar of Texas, with limited exceptions permitted by the Supreme Court (such as limited practices by bona fide law students and appearances by attorneys licensed in other states).

B. Enforcement Through the Unauthorized Practice of Law Committee

Unauthorized practice of law enforcement is delegated to the Unauthorized Practice of Law Committee, a standing committee of the State Bar, through rule adopted by the State Bar and approved by the Supreme Court, which appoints its nine committee members, three of whom must be non-lawyers, for staggered three-year terms. [Tex. Gov’t Code, §81.103] The Committee is charged with the duty, among others, of seeking the elimination of the unauthorized practice of law by action and methods it deems appropriate for that purpose, including the filing of suits in the name of the Committee seeking a permanent injunction. The Committee has no power of adjudicating whether activities under investigation may constitute the unauthorized practice of law or to issue advisory opinions in that regard, but instead is empowered only to seek adjudication in an appropriate forum, such as a court of law. To enable its investigatory powers, the Committee may subpoena witnesses and tangible evidence. Its investigatory records generally may only be disclosed in its enforcement proceedings or to assist law enforcement agencies. Committee members are granted immunity from liability for any damages for an act or omission occurring in the course of the official duties of the Committee, and complainants and witnesses appearing before the Committee have the same immunities as in a judicial proceeding. The Committee is assisted by local unauthorized practice of law sub-committees in each State Bar District to carry out its purposes. See discussion *In re: Nolo Press/Folk Law, Inc.*, 991 S. W. 2d 768 (Tex. 1999) Most of the judicial decisions discussed *infra* are actions initiated by the Unauthorized Practice of Law Committee or other arm of the State Bar of Texas.

Actions by the Committee generally seek to permanently enjoin the alleged unlawful practices as the sole remedy. These actions are a proper subject for summary judgment, and when facts are uncontested, the court may make a determination as a matter of law whether the complained of activities constitute the unauthorized practice of law. A permanent injunction is enforceable under the penalty of

contempt, for which a defendant may be fined and/or jailed. See *Ex Parte Bowers*, 886 S.W. 2d 346, (Tex. App. – Houston [1st Dist.] 1994 writ dismissed w.o.j.)

III. DEFINING THE PREPARATION OF LEGAL DOCUMENTS AS THE PRACTICE OF LAW

A. Chapter 81 – Rendering of Services Requiring the Use of Legal Skill or Knowledge.

The State Bar Act (Tex. Gov't Code, Chapter 81) in pertinent part defines the practice of law to include the preparation of legal instruments requiring the use of legal skill or knowledge:

- (a) In this chapter the “practice of law” means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined. [Tex. Gov't. Code, §81.101(a)]

Under this broad definition, the “practice of law” may include the rendering of *any service* requiring the use of legal skill and knowledge, including preparing a contract or other instrument “the legal effect of which under the facts and conclusions involved must be carefully determined” – including a contract or instrument affecting title to real property. Moreover, Texas courts have held that the preparation of legal instruments of all kinds involve the practice of law, including in the case of *Palmer v. Unauthorized Practice of Law Committee*, 438 S.W. 2d 374 (Tex. App. – Houston, 1969 no writ) the sale of will forms containing blanks to be filled in by the user, along with instructions for completion of the forms, that according to the court constituted “almost a will itself.” The Palmer court further held in this regard that “the exercise of judgment in the proper drafting of legal instruments, or even the selecting of the proper form of instrument, necessarily affects important legal rights, and thus is the practice of law.” See also *Stewart Abstract Co. v. Judicial Commission*, 131 S.W. 2d 686 (Tex. App. – Beaumont 1939, no writ)

In 1999, however, the Texas Legislature amended §81.101 to add a new subsection (c) clarifying that the practice of law does not include the sale and distribution of legal “self help” books, written materials, computer software, or similar products if the products are clearly and conspicuously labeled that the products are not a substitute for the advice of an attorney. This amendment overrides the decision of federal district judge Barefoot Sanders of the Northern District-Dallas in January, 1999, granting summary judgment for the plaintiff in *Unauthorized Practice of Law Committee v. Parsons Technology, Inc. d/b/a Quicken Family Lawyer* [1999 WL 47235 (N. D. Tex.)], which in reliance in part on *Palmer* found that the Quicken Family Lawyer software program went beyond the mere publishing of a sample form book with instructions and constituted the unauthorized practice of law. Quicken Family Lawyer acted as a “high-tech lawyer by interacting with its ‘client’ while preparing legal instruments, giving legal advice, and suggesting legal instruments that should be employed by the user.” The software conducted an interview of the user and customized legal instruments depending upon the particular responses of the user by adding or removing entire clauses. Furthermore, the packaging of the software represented that “the forms are valid in 49 states and that they have been updated by legal experts.” The court found that this interactivity and these representations created “an air of reliability about the documents, which increases the likelihood that an individual user will be misled into relying on them.”

After enactment of §81.101(c) and while pending appeal, the judgment in *Parsons Technology* was accordingly vacated and remanded by the Fifth Circuit Court of Appeals in light of the amended statute. *Unauthorized Practice of Law Committee v. Parsons Technology, Inc. d/b/a Quicken Family Lawyer*, 179 F.3d 956 (5th Cir. 1999) Nevertheless, such “self help” sample forms, software, and similar

materials may not be used by non-attorneys to prepare documents affecting title to real property in violation of §83.001. While authorizing the publication and sale of self-help legal materials, §81.101(c) expressly preserves the prohibitions of §83.001 by providing: “This subsection does not authorize the use of the products or similar media in violation of Chapter 83 and does not affect the applicability or enforceability of that chapter.”

B. Other Statutory Definitions of the Practice of Law are Cumulative

The State Bar Act’s statutory definition of the practice of law was augmented in 1987 by the enactment of Chapter 83 of the Texas Government Code discussed *infra* prohibiting, with few exceptions, any person other than a licensed Texas attorney from charging or receiving, directly or indirectly, any compensation for all or any part of the preparation of a legal instrument affecting title to real property and providing for a recovery of treble damages and costs by any person who pays such a prohibited fee. By its own terms, Chapter 83 is cumulative of the definitions and remedies for the unauthorized practice of law under Chapter 81 and expressly does not limit or restrict any remedy provided for in the State Bar Act or any other law designed to eliminate the unauthorized practice of law by lay persons or lay agencies. Among such laws extraneous to the State Bar Act are criminal statutes defining the unauthorized practice of law in terms of falsely holding one’s self out as an attorney to effect a financial benefit and contracting with or advising any person regarding claims or settlements of personal or property injuries, which in a proper case may constitute a Class A misdemeanor or a felony of the third degree if twice convicted of the offense. [Tex. Penal Code §§38.122 and 38.123]

C. Inherent Power of the Courts to Define the Practice of Law

The statutory definitions of the practice of law by their own terms are not exclusive and do not deprive the judicial branch of the power or authority to determine whether other services and acts not enumerated in Chapters 81 or 83 may constitute the practice of law. [Tex. Gov’t. Code, §81.101(b)] “The practice of law is a profession affected with a public interest and the Texas Legislature, under its police power, and to protect the public interest may legislate reasonably to that end. In doing so, it acts in aid of the judiciary and not to the exclusion of, or in denial of, the constitutional powers of the judicial branch of the government.” *Grievance Committee of the State Bar of Texas, Twenty-First Congressional District v. Dean*, 190 S.W. 2d 126 (Tex. App. – Austin 1945, no writ) “It has been said that it is impossible comprehensively to define the practice of law, and that each case must be decided upon its own particular facts. Certainly, the Supreme Court of Texas does not and cannot comprehensively define beforehand what constitutes the practice of law in Texas.” *Palmer v. Unauthorized Practice Committee of the State Bar of Texas et al*, 438 S.W. 2d 374 (Tex. App. – Houston [14th Dist.] 1969, no writ)

IV. THE REACH AND APPLICABILITY OF CHAPTER 83

A. The Statute and its Limited Exceptions

Chapter 83 of the Texas Government Code, with limited exceptions, prohibits persons other than licensed Texas attorneys from charging or receiving, either directly or indirectly, any compensation for all or any part of the preparation of a legal instrument affecting title to real property, including a deed, deed of trust, note, mortgage, and transfer or release of lien:

Section 83.001. PROHIBITED ACTS

- (a) A person, other than a person described in Subsection (b), may not charge or receive, either directly or indirectly, any compensation for all or any part of the

preparation of a legal instrument affecting title to real property, including a deed, deed of trust, note, mortgage, and transfers or release of lien.

- (b) This section does not apply to:
 - (1) an attorney licensed in this state;
 - (2) a licensed real estate broker or salesperson performing the acts of a real estate broker pursuant to Chapter 1101, Occupations Code; or
 - (3) a person performing acts relating to a transaction for the lease, sale, or transfer of any mineral or mining interest in real property.
- (c) This section does not prevent a person from seeking reimbursement for costs incurred by the person to retain a licensed attorney to prepare an instrument.

The Texas Legislature in enacting Chapter 83 [S. B. 1075, 70th Legislature, 1987] clearly demonstrated its intent that the statute would apply to mortgage lenders. The Bill Analysis in Committee on Judicial Affairs under the heading Background Information informed the Committee as follows:

BACKGROUND INFORMATION

The preparation of notes, deeds of trust and other instruments affecting title to real property constitutes the practice of law. Because of the complexity of the law involved, the potential for consumer abuse is great. However, many lenders are unaware that Texas prohibits such documentation.

Section 83.002 makes limited exceptions to the general application of §83.001 for licensed real estate brokers and salespersons to complete standardized forms of Earnest Money Contracts and related forms prepared by attorneys and adopted by the Texas Real Estate Commission (TREC) and for petroleum landmen to negotiate sales and leases of mineral and mining interests. Section 83.003 similarly makes a limited exception for landlords and their agents to complete lease or rental forms that have been prepared by an attorney and approved by the attorney for the kind of transaction involved. Exceptions in these cases are made in the public interest of convenience and limiting costs where typically these parties are merely filling in the blanks of standardized and preprinted forms prepared by attorneys and work under field conditions in which it would be impractical and burdensome on the transactional process to require the intervention of an attorney for that limited purpose. However, a mortgage broker or salesperson who is not a licensed Texas attorney is nevertheless prohibited by §83.001 and otherwise by the Real Estate License Act, under penalty of suspension or revocation of his or her license, from engaging in the unauthorized practice of law by completing any instrument that transfers or otherwise affects an interest in real property other than official standardized forms adopted by the Commission or by advising any person regarding the validity or legal sufficiency of an instrument or the validity of title to real property. [Tex. Occ. Code, §1101.654] Similarly, petroleum landmen are restricted to a limited practice of completing forms relating only to the lease, purchase, sale or transfer of mineral or mining interests in real property or easements in connection with such mineral or mining interests and must not hold themselves out as attorneys in their dealings with land owners. [Tex. Occ. Code, § 954.001]

B. No Exception for Parties to the Real Property Transaction

Parties to a real property transaction are not exempt from the unauthorized practice prohibitions of §83.001 as acting *pro se*. It is immaterial in applying §83.001 whether a person preparing such a legal instrument is a party to the transaction. This was the conclusion of the Attorney General of Texas in Opinion JM-943 dated August 22, 1988 responding to the request of the Commissioner of the Texas Savings and Loan Department regarding the applicability of art. 320f, V.T.C.S. (since re-codified as Chapter 83, Tex. Gov't Code), effective September 1, 1987, regulating the preparation of legal instruments affecting title to real property as the practice of law. Op. Tex. Atty. Gen. JM-943, WL

406255 (1988) The Commissioner had formally asked (RQ-1434) if savings and loan associations would be construed under these provisions to be charging a fee either directly or indirectly in violation of art. 320f when, in connection with mortgage loans made by the savings and loan associations, the association (i) is an interested or signatory party to the instruments evidencing the transaction; (ii) performs only the clerical tasks of “filling in the blanks” on appropriate loan documents previously prepared and selected by its attorneys; (iii) charges interest and various loan fees normally associated with extending a loan; and (iv) does not intend to charge and does not charge a specific fee for the preparation of the loan documents.

The Attorney General in this 1988 opinion concluded that whether the person preparing the legal instruments in any case is a party to the real estate transaction to which the instruments relate is irrelevant to applying the statute, which by its terms covers *any* person, including mortgage lenders and other parties to a real estate transaction. And it is not sufficient for compliance that a person preparing such a legal instrument simply purports not to charge any compensation for the service. The Attorney General observes that by prohibiting *any* compensation, direct or indirect, art. 320f envisages a liberal interpretation of what constitutes compensation. Citing *Hexter Title & Abstract Co. v. Grievance Committee*, 179 S.W. 2d 946, 952 (Tex. 1944), discussed *infra*, the Attorney General observed that the Supreme Court of Texas had taken an extremely liberal view of what constitutes a charge for the preparation of legal documents and cautioned that if compensation for the work of persons other than an attorney for preparation of legal documents is recouped in a charge, regardless of how the charge is labeled or denominated, the prohibitions of the statute against the unauthorized practice of law apply.

C. No Exception for Corporate Staff Attorneys.

Corporations cannot practice law even when acting through licensed staff attorneys. In *Hexter Title & Abstract Co., Inc. v. Grievance Committee*, 179 S.W.2d 946 (Tex. 1944) discussed *infra*, the title company employed four licensed attorneys in its legal department who supervised the preparation and execution of the legal instruments in question and advised interested parties of the purpose and effect of the instruments (but performed no other legal services on behalf of the title company’s customers). The attorneys were employed at regular salaries and the work they performed in the preparation of conveyancing and other real property instruments was suggested by and performed under the direction and control of the executive officers of the title company to whom the attorneys reported. The executive officers simply told the attorneys what kinds of instruments to draw and what to put into them, and the attorneys typically had no contact with the parties for whom the instruments were drawn. The fact that the title company had the attorneys in its employment did not alter the court’s finding that it was engaged in the unauthorized practice of law. Even if the attorneys had not been acting under the direction and supervision of the company’s executive officers, the court concluded that the attorneys were acting as the agents of the corporation employing them. According to the court, the attorneys’ first obligation is loyalty to their corporate employer and their acts are the acts of the corporation, and accordingly “even though the corporation acts through an attorney, it is nevertheless practicing law.”

Under similar facts a decade later in *Rattikin Title Company v. Grievance Committee of the State Bar of Texas*, 272 S.W. 2d 948 (Tex. App. – Fort Worth, 1954 no writ), the appellant title company was enjoined from preparing legal instruments for its title insurance customers as part of any transaction for which it was not a party in privity with the parties to the transaction and from providing advice as to the purpose and effect of the instruments. The facts here differed from *Hexter Title* only in that, instead of acting through staff attorneys, an independent law firm, Rattikin & Spiller, Attorneys, purported to do all the things that the court in *Hexter Title* found to constitute the practice of law, for which services the law firm separately charged the parties to the transaction at closing. However, the record reflected that both attorney members of Rattikin & Spiller were also administrators of Rattikin Title Company, and Mr. Rattikin was its chief executive officer. In practice, the law firm had many employees who were also employees of the title company, and many of those employed by the law firm intermingled and worked

indiscriminately among and alongside the numerous employees of the title company. No separation of the businesses apparent to the public was maintained, and the members of the law firm conducted the affairs of the title company from the very same desks from which they conducted business as a law firm. Moreover, the record reflected frequent instances in which exclusive employees of the title company were directed to do things that constituted the practice of law and could only be properly done by a licensed attorney. As a result, the court found that Rattikin Title Company profited from performing such acts in the same manner that the title company had in *Hexter Title* and that their activities were properly enjoined so long as the title company continued to conduct business in this manner by commingling the employees of the title company with those of the law firm.

It should be noted, however, that *Hexter Title* was distinguished in *Unauthorized Practice of Law Committee v. Nationwide Mutual Insurance Company*, 155 S.W. 3d 590 (Tex. App. – San Antonio, 2004, pet. filed), which holds generally that insurance companies that have the duty to defend insureds under liability policies may use salaried staff attorneys licensed in Texas to defend the insured persons without engaging in the unauthorized practice of law and that staff attorneys who accept such engagements are not aiding and abetting the unauthorized practice of law. See also *American Home Assurance Company, Inc. and the Travelers Indemnity Company v. Unauthorized Practice of Law Committee*, 121 S.W. 3d 831, (Tex. App. – Eastland, 2003, review granted April 8, 2005)

As a perplexing footnote to this analysis, the Texas Commission on Professional Ethics in its Opinion 490 concluded that a bank's salaried staff attorney working in a newly formed mortgage department may not prepare "loan application documents" for bank customers if the bank charges the customer a specific fee for the attorney's services (because to do so would violate disciplinary rule DR 5.04 prohibiting an attorney from sharing fees with a non-lawyer i.e., the employer bank) but may in absence of such a specifically identified fee charged to the loan applicant. Op. 490, V. 57 Tex. B. J. 563 (1994) Presuming that "loan application documents" include a deed of trust securing the loan, the Commission seemed oblivious to the very existence of controlling §83.001, Tex. Gov't Code, which then had been in effect for six years, or the Texas Supreme's Court's *Hexter Title* determination of what constitutes indirect compensation under the facts.

D. The Meaning of "Compensation" for Preparation of Legal Documents

The Supreme Court of Texas has taken a liberal view of what constitutes a charge for preparation of legal documents in the landmark decision *Hexter Title & Abstract Co., Inc. v. Grievance Committee*, 179 S.W.2d 946 (Tex. 1944). The title company in this case, utilizing the services of four salaried staff attorneys, routinely prepared legal documents for transactions in which it was to issue an abstract or policy of title insurance and contended that it was not practicing law in violation of Texas law because it was not charging for the service. The Supreme Court found, however, that even though a separate charge was not set out and denominated as legal fees, the legal services performed by the title company "constitutes a part of the total service for which the customer pays" and there is therefore "a consideration, reward, or pecuniary benefit flowing to the defendant for the legal services so rendered":

The defendant apparently advertises and holds itself out as furnishing this legal service without charge. However, it is not true in fact that such services are furnished free of cost to the consumer. This legal service is advertised as a leader to induce prospective customers to come in and transact other business in which there is a greater profit. It is offered as an inducement to contract for an abstract of title, for which a direct charge is made, or to allow the defendant's principal to insure the title to the property involved, for which the defendant receives a commission. The furnishing of such legal services constitutes a part of the cost of obtaining the business transacted by the defendant. Evidently it pays, or the practice would be discontinued. It constitutes a part of the total service for which the customer pays. There is

therefore “a consideration, reward or pecuniary benefit” flowing to the defendant for the legal services so rendered.

Because of the liberal interpretation under Texas law of what constitutes compensation, §83.001 of the Texas Government Code effectively prohibits mortgage lenders from preparing their own legal instruments affecting title in Texas real estate sales and mortgage transactions even when purporting not to charge for the service. Under the *Hexter Title* rationale, the interest, discount points, and yield-enhancement fees routinely charged by mortgage lenders and denominated variously as an underwriting fee, processing fee, review fee, and the like would constitute compensation for purposes of §83.001, Texas Government Code.

E. Compensation Not Required to Constitute the Unauthorized Practice of Law under Chapter 81

Beyond the issue of indirect compensation found under the *Hexter Title* rationale, there remained the question generally whether acts otherwise constituting the practice of law are unauthorized only when done for compensation; but not so if done gratuitously. In *Grievance Committee of the State Bar of Texas, Twenty-First Congressional District v. Dean*, 190 S.W. 2d 126 (Tex. App – Austin 1945 no writ), the court of civil appeals concluded the trial court erred and accordingly reformed its declaratory judgment which erroneously concluded that the acts of the appellee Dean did not constitute the unauthorized practice of law when he admittedly had frequently prepared for others deeds of conveyance to real property, deeds of trust granting liens on real property, and other conveyancing instruments because he did not charge or receive any direct or indirect consideration or compensation for the services. The appellate court kindly allowed that the trial court was trying to apply the *Hexter Title* rationale to this case, but that because the *Hexter Title* court had found indirect compensation it did not reach and pass upon the question of whether compensation is necessary to a finding of the unauthorized practice of law:

The precise question here involved was not, however, passed upon in that [*Hexter Title*] case. There the Supreme Court decided that compensation was charged which inured to the benefit of the corporation; and that the corporation was, therefore, engaged in the practice of law. However, the objective sought to be attained by the legislature in the exercise of the police power is the protection of the public against injury from acts or services, professional in nature, and deemed both by the legislature and the courts as the practice of law, done or performed by those not deemed by law to be qualified to perform them. It is well known that most licensed attorneys, as do doctors and other licensed professional men, often perform gratuitously professional services in their respective fields. The character of such services is none the less professional, and the welfare of the public as much involved in the one case as in the other. The weight of authority, where such issue has been presented, is that the character of the service and its relation to the public interest, determines its classification,— not whether compensation be charged therefor.

In *Grievance Committee of the State Bar of Texas, Twenty-First Congressional District v. Coryell*, 190 S.W. 2d 130 (Tex. App. – Austin 1945 no writ), a companion case to *Dean*, the court elaborated:

We think the decision must turn upon the nature of the acts and transactions done rather than upon whether they were done for or without consideration or compensation. . . . Manifestly the reason or purpose of the law in requiring that those who desire to engage in the practice of law shall meet certain tests and requirements is not the fact that a fee or consideration may be charged for rendering such legal services. The controlling purpose of all laws, rules, and decisions with regard to the licensing of lawyers is to protect the public against persons inexperienced and unlearned in legal matters from attempting to perform

legal services. Wrong legal advice by a layman is equally injurious whether given for or without consideration or compensation. The instances are legion where litigation could have been avoided and expense saved had the deed, mortgage, will, or contract involved been drawn by an attorney instead of a layman inexperienced and unlearned in the legal effect of the language used in such instruments. The paramount purpose of licensing practitioners of law is the protection of the people for the inexperienced and unlearned in law who attempt to practice law without first qualifying themselves in the course of study and as to character requirements prescribed for lawyers.

Therefore, although a violation under §83.001 requires a finding of either a direct charge or receipt of indirect compensation under the *Hexter Title* rationale, payment or receipt of compensation is not an element of a violation of the unauthorized practice of law under §81.101(a) or under facts that a court may determine constitute the unauthorized practice of law independent of the statute.

F. Permissible Charging of Document Preparation Fees to Buyer and Seller for Services of Lender's Counsel

A mortgage lender may properly select its own attorneys and require that its attorneys prepare the mortgage, promissory note and related legal instruments evidencing and securing a loan, and the attorneys so selected may properly accept such an engagement. Comm. On Professional Ethics, Op. 228, 18 Baylor L. Rev. 258 (1966) May, 1957 The mortgage lender, moreover, may require that its attorneys' fees in connection with a mortgage loan be charged to, and paid by, the borrower at loan closing. If the lender's attorney represents only the mortgage lender, as is the usual case, either the lender or the attorney must fully advise the borrower that the lender's attorney does not represent the borrower and that the borrower should obtain advice and representation of another attorney.

A deed of conveyance may be regarded as a loan document if it reserves a vendor's lien that by its terms is assigned to the mortgage lender to secure the loan. However, the lender's attorney may not properly prepare the deed for use in the mortgage loan transaction financing the purchase of the secured property without having been requested or authorized to by the seller of the property *unless* the attorney provides written notice to the seller that the attorney has prepared the deed at the request of the lender, that the attorney represents only the lender in the transaction, and that the seller should consult his own legal counsel before signing the deed. If the lender's attorney knows that the seller is represented by another attorney, the lender's attorney must send the draft deed to the seller's attorney for approval. Comm. On Professional Ethics, Op. 525, V. 61 Tex. B.J. 460 (1998)

G. Class Actions and Measure of Damages under Chapter 83

Any person who pays a prohibited fee for the preparation of instruments affecting title to real property has standing and may file suit seeking to recover the fee, treble damages, and costs under §83.005, Tex. Gov't Code, which provides:

Section 83.005 RECOVERY

A person who pays a fee prohibited by this chapter may bring suit for and is entitled to:

- (1) recovery of the fee paid;
- (2) damages equal to three times the fee paid; and
- (3) court costs and reasonable and necessary attorney's fees.

Treble damages under this provision were sought in two recent class action suits brought against Countrywide Home Loan, Inc, a California-based national home mortgage lender, and its Texas counsel.

The two suits alleged violations of §83.001 and sought recovery of actual damages, treble damages, attorneys fees and costs under §83.005. Federal district courts in San Antonio and Houston trying the suits had granted class certifications. On consolidated appeal, the Fifth Circuit in *O'Sullivan et al and Maynard et al v. Countrywide Home Loans, Inc. and Ruiz v. Countrywide Home Loans, Inc. and Peirson & Patterson L.L.P.*, 319 Fed. 2d 732 (5th Cir. 2003) reversed the class certification orders and remanded the two suits for disposition by the lower courts.

These suits against Countrywide and the two Texas law firms engaged by Countrywide to prepare and review their home mortgage loan documents in Texas involved claims of both the unauthorized practice of law and violations of the federal Real Estate Settlement Procedures Act (RESPA) arising out of the same facts. The putative plaintiffs, borrowers who had obtained home mortgage loans from the lender, alleged in each case that Countrywide had violated the unauthorized practice of law statute by performing services related to the document preparation process that lawfully could only be performed by the law firms and by accepting monetary reimbursements from the law firms that were in part compensation for those services.

The facts showed that under the Countrywide's arrangements with its law firms, trial sets of documents for each loan were produced utilizing Countrywide's own proprietary computer system, known as EDGE, on which resided electronic forms of legal and ancillary documents that comprise the loan package for each of the many types of loan programs offered by the lender. In the *O'Sullivan* case, the law firm maintained its own personnel on site at the lender's offices to perform the function of selecting the proper document forms, keying into the EDGE system some of the variable data unique to each loan, and printing out the hard copy mortgage package for legal review and approval. In the *Ruiz* case, no law firm personnel worked on site. Instead, Countrywide's own personnel selected the proper document forms (by keying in program codes), keyed variable data into the system, printed out an initial set of documents, and faxed the documents to the law firm for review and approval. In both cases, the law firms periodically remitted fixed amounts per loan to Countrywide to reimburse the lender for the law firms' use of Countrywide's goods, facilities, and services, including use of its Edge computer system, paper and supplies, and related personnel services, which amounts Countrywide contended represented the fair market value of all such goods, facilities, and services provided. The law firms in each case collected their full fees at closing, as reflected on the HUD-1 settlement statement disclosures, and after closing reimbursed Countrywide in amounts, for example, equal to \$130 out of each \$225 document preparation fee charged by one law firm and \$100 out of each \$200 fee charged by the other.

The plaintiffs alleged that the role Countrywide played in the document preparation process constituted the unauthorized practice of law and specifically that the practice amounted to Countrywide's receiving compensation for part of the preparation of legal instruments affecting title to real property in violation of §83.001. Countrywide defended by asserting that the provisions of §83.002 authorized the law firms' reimbursements to Countrywide as payments for "secretarial, paralegal, or other ordinary and reasonable expenses necessarily and actually incurred by the attorney for the preparation of legal instruments." Although a detailed analysis of the court's reasoning in reversing the class certifications in these cases is beyond the scope of this brief article, its findings suggest that certification of a class in any future action brought under the Texas unauthorized practice of law statutes would be difficult to sustain because individual issues necessarily predominate over class issues under any consideration of a §83.002 defense. When asserting a §83.002 defense that reimbursements in question were ordinary and reasonable compensation for secretarial or clerical assistance, the court concluded, a case-by-case, loan-by-loan determination must be made of what particular services the lender actually performed and the value of those services. Without deciding on its merits whether any of the services performed constituted the practice of law, the court observed that a finding in any case that any one of the services provided by the lender, standing alone, requires the "use of legal skill or knowledge" would be sufficient to confer liability under §83.001.

Although the parties disputed whether the “use of legal skill and knowledge” is a necessary requisite to §83.001 violations, the court concluded that the very reason secretarial, paralegal, and related services are not proscribed by the statute is because they do not require the use of “legal skill or knowledge.”

Given that Subchapter G is entitled “Unauthorized Practice of Law” and §81.101 defines “practice of law” as “any service requiring the use of legal skill or knowledge,” it appears that the Texas Legislature sought to prohibit nonlawyers from exercising legal skill or knowledge in the preparation of legal documents. This view is supported by an interpretative opinion issued by the Texas Attorney General. See Op. Tex. Atty. Gen. JM 943, 1988 WL 406255, at *2 (1988) (“What is meant in [Chapter 83] by the ‘preparation of legal instruments’ must be decided with reference to the practice of law.”).

Moreover, given the court’s measure of damages, recoveries under future class actions brought under §83.005 based on these or similar facts would hardly seem worth pursuing. In measuring damages, the court considered whether the term “fee” should be interpreted as (1) the full amount charged the plaintiffs on their loan settlement statement, (2) the amount reimbursed to the lender, or (3) the portion of the reimbursement actually spent on unauthorized services. The court found that §83.005 provides for recovery of only that portion of the fee prohibited by Chapter 83, and Countrywide would be entitled to retain the reasonable value of its secretarial or clerical services even if the other practices violate Chapter 83. Thus, the “fee” for purposes of trebling damages under §83.005 would be only the net amount, if any, of the reimbursement that under the facts adduced could not be apportioned as the reasonable value of those secretarial, paralegal, and related services permitted under §83.002.

V. SUMMARY AND CONCLUSIONS — TEXAS LAW AND ITS PUBLIC BENEFIT

Texas law, including Chapters 81 and 83 of the Texas Government Code, reserves the preparation of legal instruments affecting title to real property to licensed Texas attorneys. Persons other than licensed Texas attorneys preparing such instruments as deeds of conveyance, promissory notes secured by real property security interests, mortgages, deeds of trust and other liens, and transfers and releases of lien violate Chapter 83 regulating the unauthorized practice of law, even if the person is or purports to be a party to the transaction to which the legal instruments pertain. Corporations are prohibited from practicing law, even when acting through licensed Texas attorneys employed as staff attorneys by the corporation. Limited exceptions to Chapter 83 prohibitions are provided for licensed real estate brokers and sales agents to complete standardized forms of sales contracts and addenda prepared by attorneys and adopted by the Texas Real Estate Commission, for petroleum landmen to prepare instruments to lease, transfer, and sell mineral and mining interests, and for landlords and their agents to complete lease or rental forms earlier prepared by an attorney and approved for those kinds of transactions.

Although a violation of Chapter 83 requires the element of charging or receiving compensation, directly or indirectly, for all or any part of the preparation of such a legal instrument, the meaning of compensation for this purpose has been construed broadly by the Texas Supreme Court under the *Hexter Title* rationale to include not just direct fees but also any indirect pecuniary benefit derived through other charges or profitability from the transaction to which the instrument pertains. Moreover, it is not sufficient for a person in fact to prepare such an instrument on behalf of another entirely gratuitously, without direct or indirect pecuniary benefit, because a violation of Chapter 81 does not similarly require the element of compensation. Under the *Grievance Committee v. Dean* rationale discussed in this article, it is the character of the service and its relation to public interest that determines if a service constitutes the unauthorized practice of law under Chapter 81 and not whether compensation was charged for the service.

Furthermore, any service, including the preparation of instruments affecting title to real property, requiring “the use of legal skill or knowledge” may be found by the courts to constitute the unauthorized practice of law. Statutory definitions of the practice of law are not exclusive and do not deprive the courts of their inherent power and authority in a proper case to determine if other services and acts not set forth by statute nevertheless constitute the unauthorized practice of law. The use of legal skill or knowledge by a person does appear to be a necessary element for any violation of Texas law regulating the practice of law and, although not a defining element of Chapter 83 prohibitions, was inferred by the court in the *O’Sullivan et al v. Countrywide et al* decision discussed in this article in determining that persons, including the mortgage lender in that case, may perform services that do not require the use of legal skill or knowledge, including computer, secretarial, clerical, and paralegal services, and may be lawfully compensated by Texas attorneys under Chapter 83 for the reasonable value of such services performed in support of the attorneys’ preparation of real property instruments. Such support services are not proscribed by the statute, according to the court, for the very reason that they do not require the use of legal skill or knowledge. The necessary corollary of that finding is that any service performed by mortgage lenders related to the preparation of their loan documents that do require the use of legal skill or knowledge are prohibited by the statute as the unauthorized practice of law.

Texas law regulating the practice of law is founded in sound public policy of protection of the public. In the context of home mortgage loan transactions on which this article focuses, the proper preparation of legally sufficient instruments of conveyance and encumbrance requires an expert’s understanding of Texas’ complex marital, community property, and uniquely protective homestead laws, including the Texas Constitution, its implementing statutes, the Property Code, Probate Code, and Family Code, and a body of interpretive judicial decisions and regulatory rules. Texas homeowners benefit from the legal expertise and oversight that the Texas attorney lends to the documentation and closing process under traditional Texas practices, even when the Texas attorney represents the mortgage lender. Attorney oversight is of particular importance in consumer transactions in which the family home is mortgaged and placed at risk. Homeowners entering into what is typically the most significant transaction of their lives often lack sophistication in such financial matters or equal bargaining power with the mortgage lender – yet seldom engage their own counsel when purchasing or refinancing their homes. Texas attorneys provide significant protections to the consumer under our traditional Texas practices by policing compliance of the documents and closing process with state and federal consumer protection laws and by assuring that the documents affecting title accurately and fairly reflect agreed contract terms and are legally sufficient. Attorneys are uniquely trained and qualified to prepare these legal documents through education, experience, and licensure and are held accountable to a high standard of care and ethical conduct in performing these services as officers of the legal system. This accountability of the Texas practitioner to such a high standard of performance serves the public interest by assuring that Texas practitioners will carry out their duties ethically and competently and will strive to assure that mortgage lenders’ conduct complies with applicable law and regulations as well. ■