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SUBJECT: Document Preparation as Constituting the Unauthorized Practice of Law in Texas

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Mortgage lenders and brokers customarily engage licensed Texas attorneys to perform loan document preparation and related legal services for their Texas mortgage loan transactions. Attorneys fees for these document preparation services are most often invoiced to the borrower and disbursed to the attorney by the settlement agent at loan closings.

The preparation of documents affecting title to real property constitutes the practice of law in Texas. The Texas Government Code, § 83.001, regarding the unauthorized practice of law, 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.

Some mortgage lenders have questioned whether these prohibitions apply to them as parties to a transaction. The Attorney General of Texas in Opinion JM-943 dated August 22, 1988, (when construing virtually identical provisions contained in V.T.C.S. Art. 320f, the predecessor statute to Tex. Gov't Code Ann. § 83.001) found 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 lenders and other parties to a real estate transaction.

Mortgage lenders have also questioned whether they may nevertheless prepare their own mortgage loan documentation if they simply do not charge any compensation for the service. The Attorney General in his 1988 opinion observes that by prohibiting *any* compensation, direct or indirect, the statute envisages a liberal interpretation of what constitutes compensation. 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 Attorney General cautioned, the prohibitions of the statute apply.

The Supreme Court of Texas has also taken a liberal view of what constitutes a charge for preparation of legal documents in the landmark case of *Hexter Title & Abstract Co., Inc. v. Grievance Committee,* 179 S.W.2d 946 (Tex. 1944). The title company in this case 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. However, the Supreme Court found 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":

> *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 this 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. Under the *Hexter Title* rationale, the interest rate, discount fees, and yield-enhancement fees routinely charged by mortgage lenders would likely be construed to constitute compensation for purposes of § 83.001.

However, it appears that mortgage lenders could lawfully prepare certain of their ancillary or lender-specific documents in connection with a loan closing, such as the various affidavits, disclosures, and compliance agreements that supplement the legal documents and are not intended to be recorded in the deed records because the prohibitions of § 83.001 apply only to the preparation of legal instruments affecting title to real property. Even here, however, mortgage lenders should be cautioned that the regulations to the federal Real Estate Settlement Procedures Act (RESPA) prohibit a lender's charging for the preparation or distribution of the HUD-1 or HUD-1A Settlement Statement, escrow account statements required under RESPA, or disclosure statements required by the Truth in Lending Act, and that the HUD Guide prohibits FHA-approved mortgagees from charging the borrower any fee for preparation of loan documents.

Finally, under the general definition set out in § 81.101 of the Texas Government Code, the "practice of law" may include the rendering of *any service* requiring the use of legal skill or knowledge, including preparing a contract or other instrument *the legal effect of which under the facts and conclusions involved must be carefully determined* — even a contract or instrument not affecting title to real property. Moreover, Texas courts have held that the preparation of legal instruments of all kinds involves 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. In 1999, 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 appears to override the decision of a Dallas federal District Court 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 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. 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. New § 81.101(c), while authorizing the publication and sale of self-help legal materials, 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."