Chicago-Kent Law Review

Volume 37 | Issue 1 Article 4

April 1960

Attorney and Client - Practitioners Not Admitted or Not Licensed - Whether Real Estate Brokers Selecting and Completing Prepared Forms as Incident to Closing Real Estate Transactions in Which They Are Acting as Brokers Are Practicing Law

L. D. Snow

ATTORNEY AND CLIENT—PRACTITIONERS NOT ADMITTED OR NOT LICENSED—WHETHER REAL ESTATE BROKERS SELECTING AND COMPLETING PREPARED FORMS AS INCIDENT TO CLOSING REAL ESTATE TRANSACTIONS IN WHICH THEY ARE ACTING AS BROKERS ARE PRACTICING LAW—That the stresses of great economic expansion tend to expose latent problems has been demonstrated repeatedly. Hence, it is not surprising that such a problem, one inherent in the real estate brokerage profession, has recently reappeared in the form of the case of *Arkansas Bar Association* v. *Block*.[1] The plaintiff in that case, representing attorneys as a class, brought suit against the defendant, representing real estate brokers as a class, for a declaration that real estate brokers, when engaged in filling out prepared forms incident to the closing of real estate transactions, were practicing law, notwithstanding that such forms had previously been approved by attorneys, had been selected in accordance with the expressed desires of the principals concerned, and the brokers were, in fact, acting solely as brokers, with no additional charge being made. The case was heard on an agreed statement of facts which permitted of a precise definition of the issues. The trial court held that the activities complained of were incident to the regular course of the brokerage business and were, therefore, not the practice of law. On appeal, the Supreme Court of Arkansas reversed and held that the elicitation, consideration, evaluation and selection involved constituted the practice of law[2] except as to the preparation of instruments of offer and acceptance which contemplate the preparation of additional instruments prior to the completion of the transaction.

The problem is not new but, like the revival of an old favorite on the stage, the scenery and the actors are. As in revivals of classic plays, the latest performance can be isolated and evaluated by itself, but competent actors, like courts, generally acquit themselves in workmanlike manner, their interpretation being sound from the standpoint of the effect sought to be achieved. To carry the simile but a step further, perhaps the better basis of evaluation is a comparison of other interpretations of the same script by other casts. The instant case has had its counterpart adjudicated in other forums with both the same and opposite results. But to say there have been only two interpretations would be a gross over-simplification, since the reasoning supporting those results has been varied indeed. The very fact that a relatively well-defined issue lends itself to such a variety of treatment by courts applying law, generally similar in back-

1 — Ark. —, 323 S. W. (2d) 912 (1959), cert. den. 361 U. S. 836, 80 S. Ct. 87, 4 L. Ed. (2d) 76 (1959).

2 People v. People's Stock Yards Bank, 344 Ill. 462, 176 N. E. 901 (1931); In re Opinion of Justices, 289 Mass. 607, 194 N. E. 313 (1935); People v. Alfani, 227 N. Y. 334, 125 N. E. 671 (1919); In re Duncan, 83 S. C. 186, 95 S. E. 210, 24 L. R. A. (N. S.) 750 (1909).

ground and development, under reasonably similar circumstances, is provocative of the question, why? That question is not answered by dissection of the reasoning and the niceties of the individual result because, having thus determined the "true rule," adverse reflection is cast on the competence of other forums, and moreover, too many other forums. Such variety, under the circumstances, cannot reasonably be achieved by mere application, or misapplication, of "true rules," but is more logically the product of broader considerations to which a given forum responds in the light of its own experience and environment.

To illustrate, the Supreme Court of Colorado, in the nearly identical case of *Conway-Bogue Realty Investment Company* v. *Denver Bar Association,*[3] was in accord with the Supreme Court of Arkansas that the practices complained of amounted to the practice of law but they refused to enjoin the practitioners, as prayed, and dismissed the complaint. The case is particularly important and significant to the instant discussion since the court there did not shilly-shally but boldly announced that, in Colorado, there were broader considerations to which the court would respond, to-wit: public convenience. The reasoning proceeded on the ground that real estate brokers, whose business was both lawful and important, had been completing such instruments for almost fifty years; that the legislature, comprised of persons from all walks of life, with full knowledge of the practice, had not seen fit specifically to take action; that actual injury to any member of the public had not been shown; and that the public had chosen to conduct its affairs in that manner and still had a choice that it was free to exercise. The result, therefore, was substantially opposite to that in Arkansas, yet it is this opposition, operating on a fact situation of agreed legal significance, that dramatizes the idea that in the area of law practice the courts feel less reluctant to pronounce policy.

Nor does the Arkansas decision itself detract from this idea. Having decided that the conduct of real estate brokers, as stipulated, amounted to the practice of law, the Supreme Court of Arkansas excepted from its holding the same conduct as applied to offers and acceptances on the ground that such instruments contemplated subsequent documentary preparation before completion of the transaction. While this expression has the ring of logic, it is difficult to understand how legal rights become less fixed in an enforceable contract than they do in a so-called final document. An equally valid explanation might be that the court chose to follow a well supported line of reasoning until that course transgressed its concept of public convenience.

[3] 135 Colo. 398, 312 P. (2d) 998 (1957).

In the case of *Cowern* v. *Nelson*,[4] the Supreme Court of Minnesota frankly remarked that it was its duty to regulate the practice of law in a common-sense way to afford protection to the public and yet not unduly burden legitimate business with technical restraints. It described a gray area of dual function between the practice of law and the activities of brokers. However, that court condemned, as a species of practice of law, the same activities by the same brokers where separate compensation was involved or where the activity was outside of or independent from a brokerage transaction. In the case of *Hulse* v. *Criger*,[5] the Supreme Court of Missouri pointed to the fact that, while the real estate broker earns his commission when the buyer is found, as a practical matter he does not collect it until the deal is closed and, therefore, acts in part in his own interest. Further, it was in the interest of those he represented to have contracts concluded, particularly contracts drawn on the spot, and that so much brokerage business had been done with so little harm resulting, that the public interest was best served by preserving the situation as it stood. Again, however, the court, when delineating the sanctioned area of brokerage activity, excluded the preparation of all but present, direct conveyances on "standard" forms.[6] It distinguished these from specially drafted documents and from those conveying more complicated estates, such as those subject to contingencies. In view of the variety of rights that can be created by insertions in "standard" printed forms, this distinction seems unique. Similarly, it has been held that the practice of law was not involved where the conduct was incident to the business of the person complained about[7] or where the documents were "simple."[8] An additional criterion has sometimes been the question of whether or not the draftsman merely acted as a clerk in writing down the requests of his principals.[9]

[4] 207 Minn. 642, 290 N. W. 795 (1940).

[5] 363 Mo. 26, 247 S. W. (2d) 855 (1952).

[6] It is interesting to note that the court making these pronouncements did so in a case which held that a real estate broker who prepared documents not incident to a brokerage transaction and for compensation was engaged in practicing law. See note 12, post.

[7] Childs v. Smeltzer, 315 Pa. 9, 171 A. 883 (1934); Northampton County Bar Ass'n v. Young, 1 Mon. L. R. 94, 26 North. Co. 363 (Pa., 1938). Statements to the same effect appear in Merick v. American Security & Trust Co., 107 F. (2d) 271 (1939), cert. den. 308 U. S. 625, 60 S. Ct. 380, 84 L. Ed. 521 (1940), and in People v. Title Guarantee & Trust Co., 227 N. Y. 366, 125 N. E. 666 (1919).

[8] Gustafson v. V. C. Taylor & Sons, Inc., 138 Ohio St. 392, 20 Ohio Op. 484, 35 N. E. (2d) 435 (1941). See also the dictum in the cases of Re Eastern Idaho Loan & Trust Co., 49 Ida. 280, 288 P. 157, 73 A. L. R. 1323 (1930), and Cain v. Merchants National Bank & Trust Co., 66 N. D. 746, 268 N. W. 719 (1936).

[9] See, for example, People v. Sipper, 61 Cal. App. (2d) 844, 142 P. (2d) 960 (1943); Hobson v. Kentucky Trust Co., 303 Ky. 493, 197 S. W. (2d) 454 (1946); State ex rel. Wright v. Barlow, 131 Neb. 294, 268 N. W. 95 (1936). In the case of LaBrum v. Commonwealth Title Co., 358 Pa. 239, 56 A. (2d) 246 (1948), the court purported to make a distinction between practicing and conveyancing.

If the practice of law was wholly a matter of definition, courts would logically treat conduct objectively since it is the conduct itself that is subject to definition unaffected by extrinsic circumstances. The fact that courts are not insensible to the environment producing the conduct leads irresistibly to the conclusion that courts are not dealing with definitions alone, but are prescribing rules. As a result, analysis of the cases, while interesting, is productive of little more than an indication of the attitude of the individual jurisdictions toward the regulation of the practice of law.

Some instances would appear to limit this conclusion. In those cases, the courts would more nearly seem to be defining conduct *per se*. For example, the Supreme Court of Illinois, in the case of *People ex rel. Illinois State Bar Association* v. *Schafer*,[10] has said that if real estate brokers elicit facts and consider, advise or act thereon, they are in all probability practicing law. In the Florida case of *Keyes Company* v. *Dade County Bar Association*,[11] the brokerage activity was described as preliminary only, so the subsequent selection of forms or the filling in of blanks therein was a species of practice of law. However, even in those instances, the courts viewed the conduct from the standpoint of public protection so it is at least consonant with their pronouncements that they, too, were regulating law practice.

No criticism is intended by this conclusion for it is the inherent prerogative of the judiciary to so regulate.[12] In considering the problem generally, however, it is an important preliminary to understand that there is no universally applicable measure available. It remains, therefore, to isolate those considerations which have prevailed in the various jurisdictions and to appraise their potential persuasiveness for the future. The prime consideration has, of course, been the degree of protection afforded the public. In this connection, it has been pointed out that real estate titles are complex and are likely to become more complex in the future;[13] that brokers, as a matter of requirement or exposure, may be

[10] 404 Ill. 45, 87 N. E. (2d) 773 (1949).

[11] 46 So. (2d) 605 (Fla., 1950).

[12] In re Opinion of Justices, 289 Mass. 607, 194 N. E. 313 (1935); New Jersey State Bar Ass'n v. Northern New Jersey Mortgage Ass'n, 55 N. J. Super. 230, 150 A. (2d) 496 (1959). The idea of judicial prerogative offers a possible explanation for the fact that courts have, collaterally to the issues for decision, laid down rules relating to the practice of law which have later been respected as binding: Hulse v. Criger, 363 Mo. 26, 247 S. W. (2d) 247 S. W. (2d) 855 (1952); Childs v. Smeltzer, 315 Pa. 9, 171 A. 883 (1934); Northampton County Bar Ass'n v. Young, 1 Mon. L. R. 94, 26 North. Co. 363 (Pa., 1938).

[13] People ex rel. Illinois State Bar Association v. Schafer, 404 Ill. 45, 87 N. E. (2d) 773 (1949). See particularly, the concurring opinion in Washington State Bar Ass'n v. Washington Association of Realtors, 41 Wash. (2d) 697, 251 P. (2d) 619 (1952).

familiar with the mechanics of real estate transactions but are likely to fall far short, as protectors, of the legal profession wherein the members, in addition to possessing essential skill and knowledge, stand in a position of trust to both courts and clients and are bound by a system of canons of professional ethics.[14]

Absent from the cases is any indication that wide-spread harm has resulted from brokers pursuing the activities complained about. While that absence is far from conclusive, it is a consideration not without some weight. Public convenience, which can include the element of additional expense, has been an influence and the fact that the public has continuously spurned the protection available has been viewed as a realistic factor.[15] The interests of attorneys in their proprietary capacity have obviously, if silently, been considered. It would appear, as a very real and practical matter, that the activities of real estate brokers in the disputed area have made substantial inroads into a prime source of law business. It has not always been a satisfactory answer that the source has been continually denied to them.[16] In a very real sense, the area defined is a competitive one and attorneys, bound by the ethics of their profession, must fight in the only arena available to them, *i.e.*, the courtroom.

Almost without exception,[17] courts have not permitted brokers to capitalize on that handicap by allowing them to charge for the disputed services. Nevertheless, the interests of brokers have been accorded due consideration. Nearly all jurisdictions[18] have, by some process, conceded that brokers may draw the contract underlying the real estate transaction, thus giving substance to the argument that delay in obtaining the services of an attorney at the crucial, and perhaps peculiar, moment of agreement would make the broker's position sufficiently tenuous to work real financial

[14] State Bar Ass'n of Connecticut v. Connecticut Bank & Trust Co., 145 Conn. 222, 140 A. (2d) 863 (1959).

[15] Conway-Bogue Realty Investment Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P. (2d) 998 (1957); Ingham County Bar Ass'n v. Neller Co., 342 Mich. 214, 69 N. W. (2d) 713, 53 A. L. R. (2d) 777 (1955).

[16] Commonwealth v. Jones & Robbins, 186 Va. 30, 41 S. E. (2d) 720 (1947).

[17] In re Matthews, 58 Ida. 772, 79 P. (2d) 535 (1938), is one exception. The court there also distinguished the filling in of blanks from "preparation" of the instrument which, it said, involved something more.

[18] Notable exceptions are to be found in In re Gore, 58 Ohio App. 79, 11 Ohio Op. 495, 151 N. E. (2d) 968 (1937); Gustafson v. Jestrat, 17 Ohio Op. 83, 31 Ohio L. Abs. 123 (1940). See also Collacott Realty, Inc. v. Homuth, 13 Ohio Op. 250, 28 Ohio L. Abs. 211 (1939). However, the case of Gustafson v. V. C. Taylor & Sons, Inc., 138 Ohio St. 392, 20 Ohio Op. 484, 35 N. E. (2d) 435 (1941), which held that the act of a broker in supplying the date, price, name of purchaser, location of property, date of possession, and duration of the offer, in a contract form drafted by an attorney especially for that broker's particular operation, was not practicing law, appears to be an apparent limitation on the earlier Ohio cases.

harm.[19] Much less effect has been given the argument that the broker is typically paid when the transaction is closed, regardless of the time when the commission is earned, and that it is a matter of practical expediency that he should control the transaction to its conclusion.

Against the background of the present increased activity of the real estate market and the admittedly long-continued practice of brokers in the selection and completion of prepared forms incident to the closing of real estate transactions, the Supreme Court of Arkansas has spoken and thus appraised the public interest while resolving the proprietary conflict between brokers and attorneys. It is apparent that the circumstances presented are not peculiar to Arkansas so it is not illogical to suggest that similar controversies will arise, either again or for the first time, in other jurisdictions. The significance of the instant decision lies in the fact that it is the latest one. Since it has viewed all considerations in the light of the expanded activity, it behooves potential parties to similar disputes, including the courts which will hear them, to ponder the reasons for this pronouncement.

Real estate brokers might well consider the obvious fact that, without regard to the reasons supporting their activity, they are competing with attorneys. They might well carefully weigh their own convenience and necessities against the possible alienation of a prominent segment of society, with a view toward diminishing, where possible, the area of conflict. Attorneys, on the other hand, would do well to evaluate the possibility that the public will construe their attitude as a manifestation of selfishness or greed; understandably so since the public will ultimately have to pay for any change. Despite this, attorneys should not forget that it remains their responsibility to originate dispute when the public interest is threatened. Since the embers of controversy are continually being fanned by economic pressures, it would be well for both sides, in consideration of public as well as private interests, on their own initiative, to adopt some common-sense policies to prevent, or at least to mitigate, future flare-ups.

L. D. SNOW

HUSBAND AND WIFE—CONVEYANCES TO HUSBAND AND WIFE—WHETHER THE PROCEEDS FROM THE SALE OF REAL ESTATE OWNED IN JOINT TENANCY BY HUSBAND AND WIFE ARE ALSO HELD IN JOINT TENANCY—The question of whether the proceeds from the sale of land held in joint tenancy were also held in joint tenancy was presented to an Illinois reviewing court for

[19] Ingham County Bar Association v. Neller Co., 342 Mich. 214, 69 N. W. (2d) 713, 53 A. L. R. (2d) 777 (1955); Caneer v. Martin, 238 S. W. (2d) 828 (Tex. Civ. App., 1951).