



Attorneys At Law

2905 Corporate Circle

Flower Mound, TX 75028

Phone: 972-353-4174

Fax: 972-221-9316

**Partners**

Gregory S. Graham<sup>1</sup>

Shawn P. Black<sup>2</sup>

Ryan Black<sup>3</sup>

**Senior Lawyers**

David F. Dulock

Diane M. Gleason

Daniel S. Engle<sup>4</sup>

Margaret A. Noles

**Associates**

Nick Stevens<sup>5</sup>

Syndy Davis

Ambria Wilmore

Mehreen Nadeem

**Of Counsel**

David M. Tritter

Calvin C. Mann, Jr.

Thomas E. Black, Jr.<sup>6</sup>

**Retired Partner(s)**

Calvin C. Mann, Jr.

Thomas E. Black, Jr.<sup>6</sup>

<sup>1</sup> Also Licensed in Georgia

<sup>2</sup> Also Licensed in Kentucky and New York

<sup>3</sup> Also Licensed in District of Columbia

<sup>4</sup> Also Licensed in New York

<sup>5</sup> Also Licensed in Oklahoma

<sup>6</sup> Also Licensed in New York and  
Washington

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**To:** Clients and Friends

**From:** Daniel S. Engle

**Subject: Preparation of Documents Affecting Title to Real Property in the State of Texas and the Practice of Law<sup>1</sup>**

One major concern for multi-state mortgage lenders is the diversity of real estate law throughout the country. This includes the question of whether preparation of documents affecting title to real property, such as the security instrument securing the loan, is considered the practice of law. In general, each state falls into one of three categories.<sup>2</sup> The first category consists of states in which preparation of documents affecting title to real property is not considered the practice of law. In these states, any person may prepare these documents. In the second category, preparation of documents affecting title to real property is considered the practice of law, but there is an exception permitting a “party to the transaction” (that is, the lender or the borrower) to prepare the documents. In these second-category states, the documents may be prepared by the lender, the borrower, or an outside attorney. The last category consists of states in which preparation of documents affecting title to real property is considered the practice of law and there is not a “party to the transaction” exception. Texas falls within this category.

**Who May Practice Law in Texas and Who Regulates the Practice of Law**

The practice of law in Texas is restricted to Texas-licensed attorneys.<sup>3</sup> Texas attorneys may practice law as individuals or they may organize into professional corporations or entities dedicated to the practice of law—that is, law firms. Nonprofessional corporations or entities may not practice law.<sup>4</sup> This prohibition includes nonprofessional corporations or entities who have attorney employees, such as in-house counsel.<sup>5</sup> Regulation of the practice of law in Texas is the role of the judiciary.<sup>6</sup> The judiciary is aided by the Texas Legislature in defining the practice of law under the legislature’s police power.<sup>7</sup>

<sup>1</sup> Any discussion of the practice of law in Texas in relation to the preparation of documents affecting title to real property owes a debt of gratitude to Al Alsup, whose white paper on the matter is comprehensive and goes further into depth on matters such as public policy rationales. *See Preparation of Documents Affecting Title to Texas Real Property as the Unauthorized Practice of Law*, Alsup, J. Alton (2008)

<sup>2</sup> Specific discussion of states other than Texas fall outside the scope of this memo. Lenders are advised to seek legal counsel in those states for any questions regarding the practice of law.

<sup>3</sup> The Texas Supreme Court has the authority to permit law students, certain graduate students, and out-of-state attorneys to practice law on a limited basis. See Texas Government Code Section 81.102.

<sup>4</sup> *See* 7 Tex. Jur. 3d Attorneys at Law Section 105

<sup>5</sup> *See generally Unauthorized Practice of Law Committee v. American Home Assur. Co.*, 261 S.W.3d 24 (TX 2008) (discussing the practice of law and that corporate entities may not practice law even if they have attorney employees)

<sup>6</sup> *See generally Grievance Committee State Bar of Tex. V. Coryell*, 190 S.W.2d 130 (Court of Civil Appeals of Texas, Austin 1945)

<sup>7</sup> *Id.*; Texas Government Code Section 81.101.

## What Generally Constitutes the Practice of Law—Chapter 81 of the Texas Government Code

Generally, the practice of law in Texas is defined as providing legal services for another person. This is detailed in Chapter 81, Section 81.101 of the Texas Government Code, which text is an appendix to this memo. Preparation of documents affecting title to real property for another person is considered the practice of law by this section whether the service is provided for by a fee<sup>8</sup> or provided free of charge<sup>9</sup> as it would be considered a “rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument.”<sup>10</sup>

On the other hand, legal work done by a person on his own behalf is generally not considered the practice of law. As examples, an individual person may represent herself in court or prepare her own Will. In-house counsel for a corporate entity may perform legal work for the entity or represent the entity in court without it being considered the practice of law.<sup>11</sup> Read alone, Chapter 81 leaves open the question of whether a lender that is a party to the transaction may prepare documents affecting title to real property, as there would be an argument that the lender would be doing legal work on behalf of itself. However, Chapter 83 of the Texas Government Code supplements Chapter 81 and prohibits lenders from preparing documents affecting title to real property.

## Specific Definition of Practice of Law as Applied to Documents Affecting Title to Real Property—Chapter 83 of the Texas Government Code

The Texas legislature supplemented<sup>12</sup> the “general” definition of the practice of law in Texas by enacting a statute now found in Chapter 83 of the Texas Government Code, which text is an appendix to this memo.<sup>13</sup> Section 83.001(a) states that “[a] person, other than a person described in Subsection (b), may not charge or receive, either directly or indirectly, any compensation for all or 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.” This subsection imposes a ban on preparation of documents affecting title to real property for compensation—either direct or indirect—and Section 83.006 clarifies that a violation of this provision constitutes the unauthorized practice of law.

Texas-licensed attorneys are exempt from this prohibition per Section 81.001(b) and may charge a fee for preparation of documents affecting title to real property.<sup>14</sup> However, these must be third-party attorneys either practicing law as individuals or organized as a law firm.<sup>15</sup> A person who retains an attorney to prepare

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<sup>8</sup> *Hexter Title & Abstract Co. v. Grievance Committee*, 179 S.W.2d 946 (TX 1944) (preparation of legal documents, including deeds, by attorney employees of a title company was found to be the unauthorized practice of law).

<sup>9</sup> *Grievance Committee of the State Bar of Texas v. Dean*, 190 S.W.2d 126 (Court of Civil Appeals of Texas, Austin 1945) (preparation of legal documents, including deeds and deeds of trusts, for free was found to be unauthorized practice of law).

<sup>10</sup> Texas Government Code Section 81.101(a)

<sup>11</sup> As the furthest extent of this doctrine, the Texas Supreme Court has held that in-house counsel of insurance companies may represent insured customers in litigation matters without it being considered the practice of law if the insurance company and the insured have congruent interests. This unique exception likely applies only to the representation of insured customers of insurance companies as in nearly all other cases, a corporation will not have congruent interests with its customer. *See Unauthorized Practice of Law Committee v. American Home Assur. Co.*, 261 S.W.3d 24 (TX 2008).

<sup>12</sup> As noted in Section 83.004 of the Texas Government Code, Chapter 83 is “cumulative” and does not limit or restrict the definition of the practice of law in Chapter 81.

<sup>13</sup> This statute was originally codified as Article 320f, V.T.C.S and later recodified as Chapter 83 of the Texas Government Code.

<sup>14</sup> There are also limited exceptions for real estate brokers performing authorized activities of a real estate broker (e.g., filling out pre-approved purchase contract forms), “landmen” involved in mineral rights transactions, and persons filling out pre-approved lease forms and rental forms. *See* Texas Government Code Sections 83.001(b); 83.003. An attorney may also pay “secretarial, paralegal, or other ordinary and reasonable expenses” incurred in preparing documents. Texas Government Code Section 83.002.

<sup>15</sup> As nonprofessional corporations or entities may not practice law.

documents may seek reimbursement from another person for the cost—that is, a lender may pass on their attorney fee to a borrower.<sup>16</sup>

Unlike Chapter 81, which leaves open a question of whether it covers a party to the transaction, Chapter 83 applies to all persons, unless specifically exempted. This was highlighted by a 1988 opinion by the Texas Attorney General (JM-943) in which the Attorney General stated that “[w]hether such a person is a party to the real estate transaction to which the legal instruments relate is irrelevant to applying the statute, which by its terms covers any person, including parties to the transaction.”<sup>17</sup> The Attorney General noted that the legislative history of the statute: “quite plainly shows that the statute was meant to apply to lenders.”<sup>18</sup> Therefore, Chapter 83 prohibits parties to the transaction, including lenders, from preparing documents affecting title to real property unless the preparation of documents is done without any direct or indirect compensation.

The prohibition on direct compensation is clear. As for what constitutes prohibited indirect compensation, Texas courts have interpreted this broadly. In *Hexter Title & Abstract Co. v. Grievance Committee*, 179 S.W.2d 946, the Texas Supreme Court evaluated a scheme in which a title insurance agent had its attorney-employees prepare legal documents—such as deeds, mechanic’s lien contracts, deeds of trusts, and releases of lien—for customers so as to facilitate its role as a title insurance agent. The agent did not directly charge these customers a fee for these legal services, instead simply charging the usual fees and title insurance premiums.<sup>19</sup> However, the court found that the costs of the preparation of these legal documents were indirect charges that the title agent recouped from its general charges as a title insurer agent: “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 customers pay.”<sup>20</sup>

If a lender were to prepare the legal documents affecting title to real estate without directly charging a borrower a fee, a court would follow *Hexter Title* and find that the lender was indirectly compensated for the preparation of documents—whether this compensation was recouped via any sort of origination fee or via the interest rate.<sup>21</sup> And as this lender would have received indirect compensation, it would be in violation of Chapter 83 of the Texas Government Code and have engaged in the unauthorized practice of law in Texas.<sup>22</sup>

Overall, persons engaged in the business of mortgage lending cannot prepare legal documents affecting title to real property in the state of Texas. Instead, mortgage lenders must retain outside attorneys to prepare these documents.

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<sup>16</sup> Texas Government Code Section 83.001(c)

<sup>17</sup> Texas Attorney General Opinion (JM-943), August 22, 1988 (4). The Attorney General refers to the then-codification of the statute at Article 320f, V.T.C.S (see footnote 13).

<sup>18</sup> *Id.* Citing Bill Analysis, Tex. S.B.1075, 70th Leg. (1987).

<sup>19</sup> The court described the charges as “No separate charge is made by defendant for such service set forth in paragraph 3 [the preparation of legal documents] but defendant is obligated to and does charge premium rates for title insurance policies as fixed by the Insurance Commissioners of Texas. Such regulations prescribing the schedule of fees for title insurance include a provision that such charges include ‘the fee for insurance, title examination and closing of deal, no other services,’ and that ‘fees for all other services such as conveyancing, escrow and inspection shall be the customary fee for such services in the particular county in which the service is being rendered.’” *Hexter Title & Abstract Co. v. Grievance Committee*, 179 S.W.2d 946, 950

<sup>20</sup> *Id.* at 952.

<sup>21</sup> The Texas Attorney General also noted that the statute “envisages a liberal interpretation of what constitutes compensation.” Texas Attorney General Opinion (JM-943), August 22, 1988 (5).

<sup>22</sup> Some penalties are outlined in Chapter 83 and can include a private cause of action for the borrower as well as a court enjoining one from preparing documents. Texas Government Code Sections 83.005; 83.006. Potential penalties are not limited to those specified in Chapter 83. Texas Government Code Section 83.004.

**Appendix**  
**Subchapter G of Chapter 81 and Chapter 83 of the Texas Government Code**

**SUBCHAPTER G. UNAUTHORIZED PRACTICE OF LAW**

Sec. 81.101. DEFINITION. (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.

(b) The definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law.

(c) In this chapter, the "practice of law" does not include the design, creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney. 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.

Sec. 81.1011. EXCEPTION FOR CERTAIN LEGAL ASSISTANCE. (a) Notwithstanding Section [81.101](#)(a), the "practice of law" does not include technical advice, consultation, and document completion assistance provided by an employee or volunteer of an area agency on aging affiliated with the Health and Human Services Commission who meets the requirements of Subsection (b) if that advice, consultation, and assistance relates to:

(1) a medical power of attorney or other advance directive under Chapter [166](#), Health and Safety Code; or

(2) a designation of guardian before need arises under Section [1104.202](#), Estates Code.

(b) An employee or volunteer described by Subsection (a) must:

(1) provide benefits counseling through an area agency on aging system of access and assistance to agency clients;

(2) comply with rules adopted by the Texas Department on Aging regarding qualifications, training requirements, and other requirements for providing benefits counseling services, including legal assistance and legal awareness services;

(3) have received specific training in providing the technical advice, consultation, and assistance described by Subsection (a); and

(4) be certified by the Texas Department on Aging as having met the requirements of this subsection.

(c) The Texas Department on Aging by rule shall develop certification procedures by which the department certifies that an employee or volunteer described by Subsection (a) has met the requirements of Subsections (b)(1), (2), and (3).

Sec. 81.102. STATE BAR MEMBERSHIP REQUIRED. (a) Except as provided by Subsection (b), a person may not practice law in this state unless the person is a member of the state bar.

(b) The supreme court may promulgate rules prescribing the procedure for limited practice of law by:

(1) attorneys licensed in another jurisdiction;

(2) bona fide law students; and

(3) unlicensed graduate students who are attending or have attended a law school approved by the supreme court.

Sec. 81.103. UNAUTHORIZED PRACTICE OF LAW COMMITTEE. (a) The unauthorized practice of law committee is composed of nine persons appointed by the supreme court.

(b) At least three of the committee members must be nonattorneys.

(c) Committee members serve for staggered terms of three years with three members' terms expiring each year.

(d) A committee member may be reappointed.

(e) Each year the supreme court shall designate a committee member to serve as chairperson.

(f) All necessary and actual expenses of the committee should be provided for and paid out of the budget of the state bar.

Sec. 81.104. DUTIES OF UNAUTHORIZED PRACTICE OF LAW COMMITTEE.

The unauthorized practice of law committee shall:

- (1) keep the supreme court and the state bar informed with respect to:
  - (A) the unauthorized practice of law by lay persons and lay agencies and the participation of attorneys in that unauthorized practice of law; and
  - (B) methods for the prevention of the unauthorized practice of law; and
- (2) seek the elimination of the unauthorized practice of law by appropriate actions and methods, including the filing of suits in the name of the committee.

Sec. 81.105. LOCAL COMMITTEES. This chapter does not prohibit the establishment of local unauthorized practice of law committees to assist the unauthorized practice of law committee in carrying out its purposes.

Sec. 81.106. IMMUNITY. (a) The unauthorized practice of law committee, any member of the committee, or any person to whom the committee has delegated authority and who is assisting the committee is not liable for any damages for an act or omission in the course of the official duties of the committee.

(b) A complainant or a witness in a proceeding before the committee or before a person to whom the committee has delegated authority and who is assisting the committee has the same immunity that a complainant or witness has in a judicial proceeding.

CHAPTER 83. CERTAIN UNAUTHORIZED PRACTICE OF LAW

Sec. 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 transfer 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.

Sec. 83.002. EXPENSES. This chapter does not prevent an attorney from paying secretarial, paralegal, or other ordinary and reasonable expenses necessarily and actually incurred by the attorney for the preparation of legal instruments.

Sec. 83.003. FORMS. This chapter does not prevent a person from completing lease or rental forms that:

- (1) have been prepared by an attorney licensed in this state and approved by the attorney for the particular kind of transaction involved; or
- (2) have been prepared by the property owner or prepared by an attorney and required by the property owner.

Sec. 83.004. CUMULATIVE REMEDIES. This chapter is not exclusive and does not limit or restrict the definition of the practice of law in the State Bar Act (Chapter 81). This chapter does not limit or restrict any remedy provided in the State Bar Act or any other law designed to eliminate the unauthorized practice of law by lay persons and lay agencies.

Sec. 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.

Sec. 83.006. UNAUTHORIZED PRACTICE OF LAW. A violation of this chapter constitutes the unauthorized practice of law and may be enjoined by a court of competent jurisdiction.