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PRACTICE OF LAW: REAL ESTATE BROKERS AUTHORIZED TO COMPLETE TRANSACTION FORMS—*Cultum v. Heritage House Realtors, Inc.*, 103 Wn. 2d 623, 694 P.2d 630 (1985).

In *Cultum v. Heritage House Realtors, Inc.*,¹ the Washington Supreme Court carved out a limited exception to the statutory prohibition against the unauthorized practice of law.² This new exception represents a proper balancing of the interests of real estate brokers, lawyers and the public. However, flaws in the majority's reasoning may lead to confusion in the future application of the ruling unless greater attention is paid to the underlying rationale of the decision and the arguments made by the concurrence.

I. BACKGROUND

The controversy over the extent to which a real estate broker can prepare and complete documents is a recent one.³ Most states, including Washington, have statutes prohibiting the unauthorized practice of law,⁴ and brokers "practicing law" without authorization are subject to injunctions and tort liability.⁵ Quite recently the Washington Supreme Court held that "the selection and completion of form legal documents or the drafting of such documents, including deeds, mortgages, deeds of trust, promissory notes and agreements modifying these documents constitutes the practice of law."⁶

1. 103 Wn. 2d 623, 694 P.2d 630 (1985).

2. WASH. REV. CODE § 2.48.190 (1984) states that:

No person shall be permitted to practice as an attorney or counselor at law or to do work of a legal nature for compensation, or to represent himself as an attorney or counselor at law or qualified to do work of a legal nature, unless he . . . has been admitted to practice law in this state.

The *Cultum* Court affirmed its earlier declarations of complete judicial dominion over the practice of law by treating this legislation as advisory only. 103 Wn. 2d at 631, 694 P.2d at 635.

3. Payne, *Title Insurance and the Unauthorized Practice of Law Controversy*, 53 MINN. L. REV. 423, 424 (1969).

4. Michelman, *Guiding the Invisible Hand: The Consumer Protection Function of Unauthorized Practice Regulation*, 12 PEPPERDINE L. REV. 1, 6 (1984).

5. The various statutes have generally been held to be nonexclusive; the weight of authority is that the judiciary has the inherent power to define and regulate the practice of law. Note, *Conveyancing—The Roles of the Real Estate Broker and the Lawyer in Ordinary Real Estate Transactions—Wherein Lies the Public Interest?*, 19 DE PAUL L. REV. 319, 328 (1969) (sources cited therein). Washington follows this approach. See *Washington State Bar Ass'n v. Washington Ass'n of Realtors*, 41 Wn. 2d 697, 251 P.2d 619 (1952). One result of the power to define and regulate is that the court or legislature can authorize a non-lawyer to "practice law"; for example, WASH. REV. CODE § 2.48.190 (1984) allows for pro se legal work, and the majority decision in *Cultum* gives limited authorization for practice by real estate brokers. It is better to take the authorization approach rather than to define practice of law so narrowly as to exclude the activities in question.

6. *Washington State Bar Ass'n v. Great Western Union Fed. Sav. & Loan Ass'n*, 91 Wn. 2d 48, 55,

Several reasons have been advanced to justify the statutory and judicially imposed prohibitions. First, the public should be protected from the possible ignorance or incompetence of non-lawyers. Second, a broker is more likely to disserve the public because of divided loyalties.⁷ Third, courts wish to preclude the litigation that might result from unprofessional work.⁸

Most jurisdictions recognize, however, that public convenience is ill-served by forcing lawyers to prepare all documents in a simple real estate closing.⁹ A court-ordered prohibition not only thwarts the expectations of consumers,¹⁰ but also encourages a public perception of the bar as "self-protective, monopolistic, or greedy."¹¹ Thus most decisions in this area of law require a delicate balancing process, weighing the relative importance of public convenience and public protection.¹²

II. THE *CULTUM* DECISION

Diane Cultum was assisted in the selection of a home by Heritage House Realtors, Inc. An agent for Heritage prepared for her a standardized real estate purchase and sale agreement.¹³ Because Cultum wanted to have the house inspected and to be entitled to withdraw her offer based on the inspection, the agent drafted an addendum providing: "This offer is contingent on a Satisfactory Structural Inspection, To be completed by Aug. 20, 1980."¹⁴

The inspection turned up some defects and Cultum tried to withdraw her offer. The seller contended that the inspection was generally "satisfactory."¹⁵ During the six-month dispute Heritage held Cultum's earnest money. Cultum filed suit against Heritage seeking damages for loss of the use of her money for six months and a permanent injunction restraining

586 P.2d 870 (1978), cited in *Bowers v. Transamerica Title Ins. Co.*, 100 Wn. 2d 581, 586, 675 P.2d 193, 195 (1983).

7. The fear is that a broker's interest is only in "closing the deal," thus the broker will urge both sides to compromise too soon. A lawyer retained by one side or the other usually has no monetary interest in closing and is under a duty to zealously guard the client's interests.

8. Comment, *Unauthorized Practice of Law—Limited Practice of Law for Real Estate Closing Officers?*, 57 WASH. L. REV. 781, 793 (1982).

9. Comment, *Document Preparation by the Real Estate Broker: How Far is Far Enough?*, 14 WILLAMETTE L.J. 475, 492 (1978).

10. Stoebuck, *Unauthorized Practice; A Better Answer?*, 33 WASH. STATE BAR NEWS No. 12, 25, 27 (1979).

11. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 40 (1981).

12. Note, *supra* note 5, at 319.

13. *Cultum*, 103 Wn. 2d at 625, 694 P.2d at 632.

14. *Id.* at 625, 694 P.2d at 632.

15. *Id.* at 626, 694 P.2d at 632. The broker apparently failed to foresee disagreement about what "satisfactory" meant to the parties to the contract.

Heritage from practicing law. She also sought attorney fees under Washington's Consumer Protection Act.¹⁶ The trial court found that Heritage had engaged in the unauthorized practice of law and had violated the Consumer Protection Act. It awarded damages, attorney fees and injunctive relief.¹⁷ The supreme court reversed on the issues of unauthorized practice of law and violation of the Consumer Protection Act and remanded for a determination of contractual attorney fees.¹⁸

The court acknowledged that the trial court had engaged in a logical extension of Washington precedent and said its holding was "not surprising."¹⁹ The court held, however, that the activity complained of, while within its definition of "the practice of law," was nevertheless authorized.²⁰ The court did not retreat from its earlier holdings that preparation of closing documents was practicing law,²¹ but decided that it was in the public interest to permit such preparation by licensed real estate brokers and salespersons. The court based its decision on several considerations, including the fact that brokers would charge no additional fee for the service, that brokers are available at more convenient times, and that they could perform such "incidental" services without delay.²²

The court limited the new exception to a small range of factual situations. It held that the broker could complete "simple printed standardized real estate forms"²³ that had been approved by a lawyer, could use them only for "simple real estate transactions" actually handled by that broker and then only without charging for the service.²⁴ To protect the public from the possible dangers arising from such services, the court also held that brokers engaging in such newly authorized practice would be held to the standard of care demanded of an attorney.²⁵

16. WASH. REV. CODE § 19.86.090 (1984). The Consumer Protection Act prohibits unfair or deceptive trade practices. *Id.* § 19.86.020. Persons injured by such practices may bring an action to recover damages and the costs of the suit, including attorney fees. Although determined on a case-by-case basis, there is strong Washington precedent for finding a violation of the act in the unauthorized practice of law regarding real estate transactions. *See Bowers v. Transamerica Title Ins. Co.*, 100 Wn. 2d 581, 591, 675 P.2d 193, 200 (1985).

17. *Cultum*, 103 Wn. 2d at 624, 694 P.2d at 631.

18. *Id.* at 625, 694 P.2d at 632. The contractual fees issue arose from a clause in the agreement providing that "in the event that either the Buyer, the Seller, or Agent shall institute suit to enforce any rights hereunder, the successful party shall be entitled to court costs and a reasonable attorney's fee." Because it had found a Consumer Protection Act violation the trial court did not reach the issue of contractual fees. *Id.* at 633, 694 P.2d at 636.

19. *Id.* at 627, 694 P.2d at 633.

20. *Id.*

21. *Id.*

22. *Id.* at 628, 694 P.2d at 634.

23. *Id.* at 630, 694 P.2d at 634.

24. *Id.*

25. *Id.* at 628, 694 P.2d at 633.

III. ANALYSIS

A court confronted with the unauthorized practice issue must engage in a balancing process. Because it is free to authorize brokers to practice law in limited situations, the court need not interpret the legislature's word nor follow other states' decisions. Rather, as the *Cultum* majority correctly did, the court must use its best judgment in balancing the public convenience resulting from expanded authority against the public protection afforded by restricted authority. Although the majority struck the proper balance, its opinion tends to downplay the risks borne by the public.

A. *Public Convenience*

The public benefits in three ways if brokers are allowed to practice law in limited situations. Brokers generally are more convenient to find, cause less delay, and cost less money than lawyers. Although the court cites no empirical authority to support these generalizations, they are nonetheless borne out by the fact that given a choice, consumers pick non-lawyers to complete simple real estate transactions.²⁶ Public preferences unquestionably weigh heavily in the court's determination. However, public willingness to take the risk of non-lawyer closings should not end the issue of authorization because the risks may be hidden from common knowledge²⁷ and the harms may fall on innocent parties.²⁸

The *Cultum* court stated that public convenience is served in part because it is hard to find a lawyer during the odd hours during which closings sometimes occur.²⁹ There may be some merit to this assertion, but it would be surprising if underworked lawyers in a glutted market would not be readily available.³⁰ It may be true, however, that finding a lawyer to complete part of a transaction would result in some delay; the broker has the distinct advantage of having a stake in getting the parties together and in being there to finish the deal. Since, as the court noted, the closing agreements are "necessary to the effective completion"³¹ of the broker's

26. See Stoebuck, *supra* note 10, at 25 ("[r]ightly or wrongly, ill advised or well, the public has in fact been choosing Brand X [non-lawyers] over the real thing to do its legal work in these closings").

27. For example, a badly written contract clause may appear good or adequate to the layman; only a lawyer might recognize the potential injury to the client. The public may not be aware of the precision sometimes necessary for competent drafting.

28. Harm can befall other participants in closings or other persons having an interest in the property. If many lawsuits result from incompetent practices, parties lose money and time while the courts shoulder a greater burden of civil litigation.

29. *Cultum*, 103 Wn. 2d at 629, 694 P.2d at 634.

30. Stoebuck, *supra* note 10, at 27, convincingly argues that the best response the bar could make to the competition of expanded broker services would be to establish efficient specialized real estate closing practices, serving the public better and more inexpensively.

31. *Cultum*, 103 Wn. 2d at 629, 694 P.2d at 634.

job, authorization to complete the agreements certainly is desirable, even if not logically required,³² because it allows the transaction to proceed uninterrupted. Finally, public convenience is undoubtedly served when brokers charge less money or nothing for doing the lawyer's work. The cost may be included in the commission the broker charges, but at least the limited amount of legal practice will not amount to an additional fee.³³ After sensing that the public is, if left to its own devices, unwilling to pay for the greater security of lawyer involvement, the court properly decided to authorize and legitimate the activity.

B. Public Protection

The court narrowed its holding to cover the completion of only "simple printed standardized" form agreements approved by an attorney.³⁴ The concurrence correctly questioned the reasoning behind the restrictions.³⁵ Even in simple transactions the agreement is a contract and must establish a number of terms, including: representations, conditions for default, attorney fee liability, and time of possession. That the form is printed rather than typewritten or handwritten is irrelevant to the consequences it may bring about. Standardization of forms is effective only if it conforms to the intent of the parties. No matter how simple a particular transaction is, the contract may not be so simple, as the *Cultum* case illustrates.

Approval of the form by an attorney will probably help prevent the dangers of ambiguity and misunderstanding, at least in the printed text, but it does not address the problem of filling in the blanks. As the concurrence noted, filling in blanks may well require skill in drafting language in the context of a large body of statutory and common law.³⁶ Better than

32. The court erroneously implied that because the agreements are necessary, brokers are qualified to execute them. Professionals may be competent to perform a given service or they may need to rely on others; it should make no difference that the service is necessary for completing everyday business. Thus, for example, engineers and architects must work in conjunction, and nurses and even personal injury lawyers must work with doctors in their everyday business.

33. It is true that compensation to brokers might make it appear that brokers are beginning to practice conveyancing and legal drafting as a business. Nonetheless, "the presence, or absence of consideration is not a proper distinguishing element by which to determine the existence of unlawful practices. Whether or not it is present in no way limits the injury to the [legal] profession, or, what is more important, to the public." 60 A.B.A. REPORTS 521, 533 (1935).

34. *Cultum*, 103 Wn. 2d at 630, 694 P.2d at 634.

35. *Id.* at 634, 694 P.2d at 637 (Brachtenbach, J., concurring).

36. As one court put it:

"[N]o distinction can be made between filling in blanks in a pre-selected drafted legal form and the drafting of the entire instrument . . . the legal form must be skillfully adapted to the transaction Since it is necessary to use legal knowledge and judgment in the selection and completion of a legal form, it is as if the party drafted the form himself."

Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 53 Ill. App. 2d 388, 396, 203 N.E.2d 131, 136 (1964).

adherence to the unsatisfactory distinction between form and filler would be forthright acknowledgement of a broker's right to do limited drafting in situations they are competent to handle.³⁷

The court further protected the public interest in competent draftsmanship by holding that a real estate broker practicing law in the limited situations now authorized must conform to an attorney's standard of care.³⁸ Although brokers, like other professionals, must comply with the licensing requirements of the state³⁹ and a common law tort standard of the profession for service performed as a broker, additional safeguards are warranted when brokers practice law.

The concurrence recognized that "the ultimate protection to the public is the requirement that the broker/salesperson be held to the standard of care of a practicing lawyer."⁴⁰ When a broker fails to recognize an issue that a competent lawyer would diagnose, negligently completes a form or, as was done in the present case, fails to follow the instructions of a client,⁴¹ the broker will be liable for all damages proximately caused by such negligence.⁴² Although the broker is not an attorney and therefore not directly subject to the Code of Professional Responsibility, its directives on the conflicts arising from multiple employment,⁴³ should be relevant in a suit based on breach of the attorney standard of care. Holding brokers to such standards should serve the public interest in an affordable, yet competent, service.

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37. For example, a broker might well be qualified, after sufficient training and experience, to draft an inspection clause in a closing agreement avoiding the pitfalls illustrated by the *Cultum* case. Integral to greater authority of brokers should be emphasis on further education of brokers so they may recognize matters beyond their expertise. In addition, Washington's Admission to Practice Rule 12, establishing a limited practice rule for closing officers, should go far to aid the resolution of line-drawing in this area of law. The rule authorizes "certain lay persons to select, prepare and complete legal documents" relating to real estate closings. WASH. ADMISS. PRAC. R. 12(a). It also establishes a supervisory board, provides for a certification exam, continuing education, and disciplinary procedures. *Id.* R. 12(b). Closing officers would have to obtain the agreement of both parties to their services and would have to advise the parties that the document affects their legal rights, that the officer's and the parties' interests may differ, and that the officer cannot give legal advice on how the documents affect those rights and interests. *Id.* R. 12(e). The rule became effective October 28, 1983.

38. *Cultum*, 103 Wn. 2d at 628, 694 P.2d at 633.

39. See WASH. REV. CODE § 18.85.010-.920 (controlling licensing of real estate brokers and salespersons in Washington).

40. *Cultum*, 103 Wn. 2d at 636, 694 P.2d at 637 (Brachtenbach, J., concurring).

41. *Id.* at 632, 694 P.2d at 636.

42. See also *Bowers v. Transamerica Title Ins. Co.*, 100 Wn. 2d 581, 586-87, 675 P.2d 193, 198 (1983) (citing *Mattieligh v. Poe*, 57 Wn. 2d 203, 356 P.2d 328 (1960) (escrow agent failed to avoid pitfall of unsecured sale that an attorney would have avoided)).

43. See, e.g., *Bowers*, 100 Wn. 2d at 589, 675 P.2d at 199 (citing Model Code of Professional Responsibility DR 5-105 and EC 5-16 (1979)).