

LAW OFFICES
MADDIN, HAUSER, WARTELL,
ROTH & HELLER, P.C.
THIRD FLOOR ESSEX CENTRE
28400 NORTHWESTERN HIGHWAY
SOUTHFIELD, MICHIGAN 48034-8004

(248) 354-4030
(248) 355-5200
TELEFAX (248) 354-1422

MAILING ADDRESS
POST OFFICE BOX 215
SOUTHFIELD, MI 48037-0215

MEMORANDUM

TO: ELEVENTH ANNUAL REAL ESTATE SYMPOSIUM ATTENDEES

FROM:

RE: IS A LENDER ENGAGED IN THE UNAUTHORIZED PRACTICE OF LAW
BY COMPLETING STANDARD MORTGAGE DOCUMENTS?

DATE: May 4, 2004

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In Michigan, statutes govern the practice of law. MCL 450.681 prohibits "any corporation or voluntary association to practice or appear as an attorney-at-law for any person other than itself in any court in this state or before any judicial body, or to make it a business to practice as an attorney-at-law, for any person other than itself." MCL 600.916 forbids individuals from engaging in the unauthorized practice of law. But what constitutes the practice of law? Historically, Michigan courts have been reluctant to come up with a specific definition "for the reason that under our system of jurisprudence such practice [of law] must necessarily change with the ever-changing business and social order." *State Bar of Michigan v. Cramer*, 399 Mich 116, 133, 249 NW2d 1 (1976), quoting *Grand Rapids Bar Ass'n v. Denkema*, 290 Mich 56, 64, 287 NW 377 (1939). Recently, however, the Michigan Supreme Court concluded in *Dressel v. Ameribank*, 468 Mich 557 (2003) that it is possible to formulate a definition based on the purposes of the unauthorized practice of law statutes. The *Dressel* Court found that the unauthorized practice of law statutes were implemented to protect the public from "the danger of unskilled persons practicing law." See *Comment, Unauthorized practice of law – The full service bank that was: Bank cashier enjoined from preparing real estate mortgages to secure bank loans*, 61 KY L J 300, 301-302 (1972). With this purpose in mind, the

Dressel Court examined whether the completion of a mortgage and note by a lender constituted the unauthorized practice of law.

The specific facts before the *Dressel* Court were as follows: Defendant Ameribank charged plaintiffs Four Hundred and 00/100 (\$400.00) Dollars for the preparation of an adjustable rate note and a mortgage. Plaintiffs filed suit alleging that the charging of a fee for preparation of mortgage documents constituted the unauthorized practice of law. The Circuit Court disagreed and dismissed that portion of the Plaintiffs' complaint. However, on appeal, the Court of Appeals favored the Plaintiffs and remanded the case. Thus, the case was brought before the Michigan Supreme Court on appeal by the lender.

Having determined that the purpose of the unauthorized practice of law statutes is to protect the public from unlicensed practitioners, the *Dressel* Court explored what conduct amounts to the practice of law. Relying on the reasoning of the trial judge which cites earlier decisions, the Michigan Supreme Court noted:

"It is too obvious for discussion' that 'the conduct of cases in courts' is the practice of law as is 'the preparation of pleadings and other papers incident to actions...' " *Detroit Bar Ass'n v. Union Guardian Trust Co.*, 282 Mich 216, 222, 276 NW 365 (1937), quoting *In re Duncan*, 83 SC 186, 65 SE 210 (1909), and quoting *Grand Rapids Bar Ass'n v. Denkema*, 290 Mich 56, 63, 287 NW 377 (1939). It is likewise obvious that, for the same reason, the practice of law includes "the giving of legal advice in any action taken for others in any matter connected with the law. *Id.*... More problematic is the drafting of documents...Only some documents...have actually been held to constitute the practice of law.'" *Denkema*, *supra*. When composing a document requires "the determination of the legal effect of special facts and conditions," that activity is the practice of law. *Ingham Co. Bar Ass'n v. Walter Neller Co.*, 342 Mich 214, 228, 69 NW2d 713 (1955)[citations omitted] "...The practice of law does not, on the other hand, encompass drafting the "ordinary run of agreements used in the every day activities of the commercial and industrial world..." *Detroit Bar Ass'n*, *supra* at 229. "...Drafting simple documents, which drafting does not entail giving advice or counsel as to their legal effect and validity, is not the practice of law." *Denkema*, *supra* at 66. "Specifically, the preparation of ordinary leases, mortgages and deeds do not involve the practice of law..." *Walter Neller Co.*, 342 Mich 226-227. They have become so "standardized that to complete them for usual transactions requires only ordinary intelligence rather than legal training." *Id.* at 224, quoting *Hulse v. Criger*, 363 Mo 26, 44, 247 SW2d 855 (1952). To insist that only a lawyer can draft such documents would impede numerous commercial transactions without protecting the public.

The *Dressler* Court applied these principles to the case at hand. It was noted that plaintiffs did not allege that the lender's preparation of documents were related to any transaction that was outside of the scope of its normal business. Furthermore, the lender's employees did not draft the documents but merely completed standard

boilerplate documents compiled by the federal government and readily available to the public. As such, the lender's employees were merely acting as a secretary for the plaintiffs and no legal knowledge or discretion was imparted during the document completion. Consequently, the lender was not engaged in the unauthorized practice of law when it completed the documents at issue. Moreover, the charging of a fee for non-legal services does not transform such services into the practice of law.

Although the *Dressler* decision creates some breathing room, its ruling is rather limited. The lenders in our audience should be mindful of this decision when completing documentation for borrowers. Procedures should continue to be implemented to make certain that no legal advice is tendered at the time or during the preparation of these documents. Additionally, documents should be of standard boilerplate forms so that there is no opportunity for employees to provide legal advice or use discretion during completion.

It should be noted, however, that the holding of the Michigan Supreme Court in *Dressler* is not universal in that other jurisdictions in close geographic proximity to Michigan have rendered opinions directly contrary to this decision.

If you would like any additional information regarding the unauthorized practice of law, please contact me at (248) 359-7501 or e-mail me at kxb@maddinhauser.com.