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## In re Paplauskas, 228 A.3d 43 (R.I. 2020)

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**Professional Responsibility.** *In re Paplauskas*, 228 A.3d 43 (R.I. 2020). A non-attorney does not engage in the unauthorized practice of law when they: (1) conduct a real estate closing; (2) draft a residency affidavit; or (3) draft a limited durable power of attorney. A non-attorney does, however, impermissibly practice law when they draft a deed or conduct the examination of title without a licensed attorney. The Rhode Island Supreme Court retains the exclusive authority to determine what is, and what is not, the practice of law.

#### FACTS AND TRAVEL

The Unauthorized Practice of Law Committee (the Committee) issued three separate reports alleging that each of the Respondents—William Paplauskas, Jr., Daniel S. Balkun of Balkun Title & Closing, Inc., and SouthCoast Title and Escrow, Inc.—had engaged in the unauthorized practice of law.<sup>1</sup> In doing so, the Committee recommended the Rhode Island Supreme Court declare the following activities to be the practice of law: (1) conducting a residential real estate closing; (2) examining a title for marketability; (3) drafting a deed; (4) drafting a residency affidavit; and (5) drafting a durable power of attorney.<sup>2</sup>

#### A. *In re Paplauskas*

On July 21, 2015, William Paplauskas, Jr., conducted a residential real estate closing for property located at 528 Nanaquaket Road in Tiverton, Rhode Island.<sup>3</sup> Present at the meeting were Papslaukas, the buyers, and Attorney Munns, the then-associate of Attorney Pagliarini, who the sellers had contracted to help them with the process.<sup>4</sup> The meeting took place

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1. *In re Paplauskas*, 228 A.3d 43, 47 (R.I. 2020).

2. *Id.*

3. *Id.* at 48.

4. *Id.*

at Attorney Pagliarini's office in Tiverton.<sup>5</sup> Paplauskas, a notary public involved in the mortgage industry for over fifty years, testified that he understood his role in the closing to be one of an "impartial witness there to make sure that the person signs the documents, has some understanding of what he is doing, and is the person that's in front of [him]."<sup>6</sup> After the settlement agent sent the closing documents, Paplauskas printed two copies of each: one for execution at the closing and one for the buyers—Vincent and Rebecca Majewski—to retain for their personal records.<sup>7</sup> In addition to having the Majewskis sign the necessary closing documents, Paplauskas presented them with a one-page document titled "Notary Held Harmless" and explained his role, emphasizing that he was not holding himself out to be an attorney.<sup>8</sup> Paplauskas testified that he went on to present the buyers with twenty closing documents, giving them a brief overview of each before the buyers signed while making sure not to provide them with his opinion.<sup>9</sup> Nonetheless, on August 11, 2015, Attorney Pagliarini filed a complaint with the Committee alleging that Paplauskas may have engaged in the unauthorized practice of law by conducting the closing and advising the buyers in violation of Rhode Island General Laws section 11-27-2(2).<sup>10</sup> The Committee, by a three-to-two margin, agreed with Attorney Pagliarini, finding that Paplauskas had engaged in the unauthorized practice of law when he conducted the closing but recommended the Court forgo sanctions.<sup>11</sup>

#### B. *In re* Bulkun

Daniel Balkun, a non-attorney, was reported to the Committee for conducting certain activities in connection with a real estate closing for property located at 60 Pine Hill Road in Johnston, Rhode

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5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 48–49.

10. *Id.* at 49; *see also* 11 R.I. GEN. LAWS § 11-27-2 (2014) (defining "practice of law" to include "[t]he giving or tendering to another person for a consideration, direct or indirect, of any advice or counsel pertaining to a law question or a court action or judicial proceeding brought or to be brought").

11. *Paplauskas*, 228 A.3d at 49.

Island.<sup>12</sup> The property's sellers, a mother and son named Mary and Ronald Cellucci, engaged Balkun Title & Closing, Inc. (Balkun Title) as the title insurance agent to prepare the deed, draft the residency affidavits, and to draft a power of attorney for Mary in favor of Ronald.<sup>13</sup> Daniel Balkun testified that he was uncertain whether the attorney employed by Balkun Title as an independent contractor had reviewed those documents, which had been prepared by a paralegal, prior to the closing scheduled for December 2, 2016.<sup>14</sup> Before the closing took place, it came to the attention of Attorney Senerchia, Balkun Title's attorney, that two deeds had been recorded in respect to 60 Pine Hill Road.<sup>15</sup> The first deed, which conveyed the property to Mary and her husband, Carmino, specified the form of tenancy as a joint tenancy with the right of survivorship; the second, however, did not specify the form of tenancy at all, leading Attorney Senerchia to opine that the joint tenancy had been severed and, in its place, a tenancy in common formed.<sup>16</sup> A third deed was then discovered conveying the property to Mary and Ronald.<sup>17</sup> As such, Attorney Senerchia sought to discover whether Carmino was still alive.<sup>18</sup> A paralegal at Balkun Title learned from the Celluccis' real estate agent that Carmino was still living and relayed the information to Attorney Senerchia without looking into the matter any further.<sup>19</sup> Carmino had, in fact, passed away, a fact brought to Attorney Senerchia's attention only during the December 2 closing.<sup>20</sup> As a result, the closing had to be postponed until the following month to allow for Carmino's interest in the property to be resolved.<sup>21</sup> Attorney Senerchia subsequently filed a complaint against Balkun for the oversight, which ultimately cost the Celluccis \$5,000 due to the delay.<sup>22</sup> The

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12. *Id.* at 49–50.

13. *Id.* at 50.

14. *Id.*

15. *Id.* at 52.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

Committee voted unanimously that Balkun and Balkun Title had engaged in the unauthorized practice of law, but recommended no civil or criminal penalties be imposed.<sup>23</sup>

C. *In re* SouthCoast Title and Escrow, Inc.

The third report transmitted by the Committee was related to the same closing for the property at 60 Pine Hill Road.<sup>24</sup> In reaction to Attorney Senerchia's testimony against Balkun Title, Balkun's attorney filed a complaint against the company to which Senerchia serves as both shareholder and attorney, SouthCoast Title and Escrow, Inc. (SouthCoast).<sup>25</sup> In that complaint, Balkun's attorney alleged that Attorney Senerchia had, as an agent of SouthCoast, engaged in the unauthorized practice of law in conducting the closing by providing legal services on behalf of SouthCoast, a company which is not a law firm.<sup>26</sup> Attorney Senerchia holds a license to act as a title insurance agent, allowing him to perform title searches and examinations in addition to conducting closings for SouthCoast.<sup>27</sup> The Committee concluded—despite the fact that Senerchia is a licensed attorney—that he was impermissibly providing legal services for SouthCoast when he conducted title examinations and closings on their behalf, thereby resulting in SouthCoast's unauthorized practice of law.<sup>28</sup> The Committee further recommended the Court find the same and declare the activities of conducting title examinations and real estate closings to be the practice of law.<sup>29</sup>

ANALYSIS AND HOLDING

The Rhode Island Supreme Court “reserves to itself the ultimate and exclusive authority to determine what does and does not constitute the practice of law within the state and to regulate

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23. *Id.* at 52–53.

24. *Id.* at 53.

25. *Id.*

26. *Id.* at 53–54.

27. *Id.* at 53.

28. *Id.* at 53–54.

29. *Id.*

those people qualified to engage in the practice.”<sup>30</sup> The Court has refrained from defining specifically what the practice of law is, choosing instead to make the determination on a case-by-case basis in the interest of the public welfare.<sup>31</sup> The inquiry requires not only a determination of what lawyers in particular fields are trained to do, but also of whether it is in the public interest to have non-attorneys perform activities that might be considered the practice of law.<sup>32</sup>

While the Court reiterated its position as the exclusive authority on the issue of what the practice of law is, it relied on and afforded deference to enactments of the General Assembly attempting to codify a definition for the practice of law in its analysis to the extent that the legislature does not undermine the Court’s authority in this area.<sup>33</sup> The Court found that, in enacting section 11-27-16(a)(1), the General Assembly simply aimed to shield title insurers and their agents by preventing an interpretation of the law that infringed on their ability to carry out business activities in a lawful manner,<sup>34</sup> and further concluded the General Assembly had not transgressed the constitutional authority of the Court in enacting this legislation.<sup>35</sup> The statute merely authorizes non-attorneys acting as title insurance agents to

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30. *Id.* at 54 (quoting *Unauthorized Practice of Law Comm. v. State Dep’t of Workers’ Comp.*, 543 A.2d 662, 664–65 (R.I. 1988)).

31. *Id.* at 55 (citing *In re Town of Little Compton*, 37 A.3d 85, 92 (R.I. 2012); *R.I. Bar Ass’n v. Auto. Serv. Ass’n*, 55 R.I. 122, 126, (1935) (“[W]e adopt [the] view in refraining from any attempt at definition [of the practice of law] here.”)).

32. *Id.* at 55 (quoting *In re Opinion No. 26 of the Comm. on the Unauthorized Practice of Law*, 139 N.J. 323, 654 A.2d 1344, 1345–46 (N.J. 1995)).

33. *Id.* at 55–56 (quoting *Chambers v. Ormiston*, 935 A.2d 956, 966 (R.I. 2007); *Town of Johnston v. Santilli*, 892 A.2d 123, 133 (R.I. 2006)).

34. *Id.* at 56 (“(a) Nothing in §§ 11-27-2-11-27-11 or §§ 11-27-16-11-27-18 shall be construed to limit or prevent: (1) Any corporation, or its officers or agents, lawfully engaged in the insuring of titles to real property from conducting its business, and the drawing of deeds, mortgages, and other legal instruments in or in connection with the conduct of the business of the corporation.” (quoting 11 R.I. GEN. LAWS § 11-27-16(a)(1) (2013)).

35. *Id.* at 56. “After reviewing the relevant statutory framework and the record before us, we conclude that, for the most part, § 11-27 16(a)(1) and chapter 2.6 of title 27 aid, and do not subvert, this Court’s ultimate authority in this area.” *Id.*

execute certain actions associated with real estate transactions,<sup>36</sup> but does not address any of the five issues raised in the Committee's reports.<sup>37</sup>

To determine whether conducting a real estate closing constitutes the practice of law, the only issue common among all three reports, the Court took into account the decisions of other jurisdictions that have addressed that very question,<sup>38</sup> long-standing customs and practices within the State of Rhode Island,<sup>39</sup> and public policy considerations.<sup>40</sup> The Court concluded it was in the state's best interest to continue to allow title insurance companies to conduct closings in conjunction with the issuance of a title insurance policy provided that their agent "limits his or her activities to functions such as identifying a document, directing a party where to sign, and delivering copies of the signed documents after execution."<sup>41</sup>

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36. *Id.* at 57.

37. *Id.*

38. *Id.* at 57–59. The Court considered decisions from Massachusetts, New Jersey, and Kentucky, noting that each of the decisions falls on a spectrum. *Id.*

39. *Id.* at 59. After a review of the record, the Court concluded there is a long-standing practice in Rhode Island in which title insurance companies are permitted to conduct closings. *Id.*

40. *Id.* at 59–61. The Court's had three primary policy considerations. First:

[A]llowing title insurance companies and their agents to conduct closings benefits the public by increasing competition, which will result in decreased costs and potentially more choices as to how and where closings are conducted. Conversely, restricting the handling of closings to attorneys would have the opposite effect, thereby increasing cost and reducing choice and availability.

*Id.* at 60. Second, if only attorneys may conduct closings, the result is several unresolved questions, including whom the attorney represents, how many attorneys are necessary, and if an attorney is required for all types of real estate closings. *Id.* Third, the alleged harms to the general public in allowing non-attorneys to conduct closings were largely theoretical. *Id.*

41. *Id.* at 61. The Court detailed what a non-attorney must do before a closing begins in order to comport with the law, including: (1) communicate to the buyer and seller that the closing agent is not an attorney; (2) communicate to the buyer and seller that the agent does not represent either of them; (3) assert that the agent may not give any legal advice; and (4) encourage the buyer and seller to adjourn the closing and seek legal advice should a question arise during the process. *Id.* The agent must then present the buyer and seller

On the second issue—whether a non-attorney may conduct title examinations without engaging in the unauthorized practice of law—the Court held that title insurance companies and their agents must engage a licensed attorney to conduct their title examinations in order to protect buyers from risk.<sup>42</sup> As such, an attorney engaged by a title insurance company owes a duty of care to both the title insurance company and the buyer, further insuring the buyer against risk.<sup>43</sup>

Concerning the drafting of deeds, the Court agreed with the Committee and held that a non-attorney engages in the unauthorized practice of law by drafting a deed for another, finding it to be in the public interest for a licensed attorney to draft the deed or, at minimum, review it carefully.<sup>44</sup> The Court reasoned that the deed is the most important document at a real estate closing, and there exists evidence in the record that insurance companies and their agents, such as those in the *Balkun* matter, may be making crucial errors in drafting which have legal effect they may not fully understand.<sup>45</sup>

Last, the Court ruled—with limitations—that neither drafting a residency affidavit nor drafting a durable power of attorney constitute the unauthorized practice of law.<sup>46</sup> A residency affidavit, the Court reasoned, is a straightforward form that requires a seller's basic information, including “the seller's name, address, telephone number, social security number, the closing date, and the names of all the owners appearing on the deed.”<sup>47</sup> However, as this

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with a written notice—ideally designed either by the Rhode Island Department of Business Regulation or by the title insurance company itself—containing the foregoing warnings and ensuring that they read the document in its entirety before requiring them to sign it, acknowledging their understanding. *Id.* at 61–62. The closing agent, too, must sign the notice, confirming its terms have been articulated to the parties. *Id.* Copies of the executed document shall be given to the buyer, the seller, and retained by the agent. *Id.*

42. *Id.* at 62–63. A licensed attorney, and no other employee or agent, may perform title examinations on behalf of title insurance companies. *Id.* at 63.

43. *Id.* at 63 (citing *Credit Union Cent. Falls v. Groff*, 966 A.2d 1262, 1267 (R.I. 2009)).

44. *Id.* at 63.

45. *Id.* at 64. There exists a substantial risk of error in allowing non-attorneys unfamiliar with the law to draft a deed without an attorney's supervision or review. *Id.*

46. *Id.* at 65–66.

47. *Id.* at 65.

is not always the case, the Court stipulated that if the seller has a question over his or her residency, the seller must seek the advice of an attorney, and not the title insurance company or its agent.<sup>48</sup> Similarly, a durable power of attorney is a simple form document that can be completed by a title insurance company and its agents.<sup>49</sup> Considering the durable power of attorney document's ability to grant an individual significant power over the life and property of another person, the Court limited its scope to the closing in order to protect both buyers and sellers from substantial risk.<sup>50</sup>

Applying the Court's holding to the *Paplauskas* matter, the Court found William Paplauskas did not engage in the unauthorized practice of law because he limited his activities and did not provide any legal advice.<sup>51</sup> As for Daniel Balkun and Balkun Title, the Court held that Balkun and Balkun Title did not engage in the unauthorized practice of law when conducting closings, but would unlawfully practice law if someone other than their attorney provided title examinations and drafted deeds, residency affidavits, and powers of attorney for those transactions that Balkun Title is not issuing the title insurance policy.<sup>52</sup> Finally, SouthCoast did not engage in the unauthorized practice of law by conducting a closing or a title examination because it properly engaged a licensed attorney in accordance with the Court's ruling.<sup>53</sup>

#### COMMENTARY

The Rhode Island Supreme Court made clear that its primary interest in deeming a certain activity to be the practice of law is protecting the public from the harms associated with a non-attorney undertaking those tasks that require legal training and expertise. The Court balanced the policy considerations against, among others, the costs of engaging an attorney and the status quo of real estate transactions in the state. The outcome is pragmatic—the harm to the general public is more appropriately characterized

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48. *Id.*

49. *Id.* at 66.

50. *Id.* The Court specified the durable power of attorney must be limited to the closing. *Id.* Otherwise, the non-attorney who drafts the power of attorney is engaging in the unauthorized practice of law. *Id.*

51. *Id.* at 67.

52. *Id.* at 67–68.

53. *Id.* at 68.

as a risk of harm than actual harm and, as such, does not outweigh other practical considerations.<sup>54</sup>

The Court reiterated that it would continue to ascertain what constitutes the practice of law on an individual basis in furtherance of its goal to minimize potential harm to the community. A case-by-case analysis allows the Court to consider the context in each case rather than apply broad rules and impose sanctions on those who unwittingly violate them. Although the Court's reluctance to strictly define what is and what is not the practice of law may be framed as problematic for those involved in the mortgage industry and those who are susceptible to inadvertently engaging in the unauthorized practice of law, its decision in this case provides significant guidance and delineates limits for non-attorneys to ensure they are comporting with the law in their residential real estate dealings.

#### CONCLUSION

The Rhode Island Supreme Court held that title insurers and their agents do not practice law when they conduct real estate closings; draft residency affidavits; and draft limited durable powers of attorney. However, title insurers and their agents do engage in the unauthorized practice of law when they perform title examinations without a licensed attorney; and when they draft a deed on behalf of another without engaging a licensed attorney. The Rhode Island Supreme Court remains the sole authority on what constitutes the practice of law in Rhode Island. The Court advised that it is in the best interest of all parties to contract with an attorney to avoid any potential harm.

Amanda V. Reis

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54. *Id.* at 60. The Court concluded the Committee's references to harm to the public were in the abstract, noting that the record lacked evidence of this presumed harm actually materializing. *Id.*