

# Real Estate Lawyers Sue Brokers for Recommending In-House Lawyers

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For years, residential real estate lawyers have been losing work to real estate brokerage firms that offer "one-stop shopping" - and now a group of Illinois lawyers has decided to do something about it.

A lawsuit recently filed by the 800-member Illinois Real Estate Attorneys Association could prevent brokers in that state from urging customers not to seek outside legal advice.

The suit claims that Koenig & Strey, a leading Chicago real estate brokerage, engaged in the unauthorized practice of law (UPL) and seeks injunctive relief.

The issue has taken on added significance since the ABA passed a resolution during its annual meeting this summer that urges states to review their UPL policies. Since then, the Illinois case has "taken the state by storm," according to John O'Brien, president of the Illinois lawyers' group.

Meanwhile, the Illinois State Bar Association has allocated \$20,000 to beef up enforcement of the state's UPL rules.

"That money is basically going to cover the cost of lawsuits such as ours," says O'Brien. "The state bar association has realized that consumers are suffering [as a result of] UPL, it's going to crack down on those who are engaging in it."

Professor Harold Levinson, who teaches legal ethics at Vanderbilt University, confirms that UPL is a "very hot topic now, nationwide."

"Some other states are enforcing their existing rules, so we'll be watching to see what happens [in Illinois]," says Levinson.

Koenig & Strey president Christopher J. Eigel declined to comment.

## **A Dangerous Trend?**

Real estate lawyers believe that homebuyers lose a level of protection when they fail to have their transactions reviewed by independent legal counsel. They say there is a built-in conflict of interest when a lawyer works for the company that stands to profit from the sale.

"When we allow others to do things that we consider the practice of law, it always ends up with some poor schmoo losing his life savings," says O'Brien, who has practiced real estate law for 28 years. "We need to stop this from happening."

O'Brien says that the real estate lawyers' organization is concerned that an attorney beholden to Koenig & Strey wouldn't necessarily look out for the best interest of the buyer or seller.

"It's not just the big five accounting firms that wave the banner of the one-stop shop," says Dennis Rendelman, general counsel for the Illinois State Bar Association. "Main Street entities – whether they're a bank or a real estate firm – seek to provide legal services on top of whatever other services they provide. With implicit language, they argue to clients that they don't need an independent lawyer because the company can do it all."

According to Rendelman, over the past decade Illinois real estate brokerage firms have gotten "more and more aggressive in doing all aspects of real estate deals."

"The industry sees that brokers handle every aspect of real estate transactions in California, and they want to do it here, too," says Rendelman.

### **The Koenig & Strey E-Mail**

The Illinois suit was prompted by an internal e-mail, sent on Feb. 9 at Koenig & Strey, which found its way into the hands of local real estate lawyers.

Entitled "Closing myth number 1," the e-mail advises brokers to answer 'no' when clients ask whether they need an attorney to represent them at closing. (To read the entire e-mail, see shaded box.)

"The preparation of closing documents such as a deed, bill of sale, affidavit of title and transfer declarations can be prepared by one of our staff attorneys...The only thing that we will not provide the sellers with will be a bill," the memo reads.

Sometime after the memo was circulated, a lawyer was representing the buyers in a closing of a Koenig & Strey property.

"After the closing, he contacted the [seller's] lawyer who prepared the deed," says O'Brien. "He was suspicious because typically the seller's lawyer contacts the buyers' attorney during the deed's drafting, but he was never contacted. Well, this lawyer told the [buyer's lawyer] that a title insurance company – which is wholly owned by Koenig & Strey – hired him to prepare the deed and gave him all the necessary information. He admitted that he never contacted the sellers, which is also customary in Illinois.

"So we filed suit, alleging that, in essence, the title insurance company prepared the deed, because they hired the attorney and gave him all the information. We're contending that Koenig & Strey engaged in the unauthorized practice of law because ethical opinion 94-1 says that solely preparing a deed is aiding and abetting in the unauthorized practice of law." To read the opinion, go to the Illinois State Bar Association's website at [www.isba.org](http://www.isba.org).

The suit further alleges that Koenig & Strey gives legal advice by recommending against the use of an attorney and it "solicits" clients to use its own lawyers by saying the company can "manage" the transaction from beginning to end.

O'Brien also says that there is a fundamental conflict of interest in the brokerage firm's practices.

"Koenig & Strey is selling, and [independent lawyers] should be representing," says O'Brien. "You can't give independent advice to a seller or a buyer if your paycheck comes from someone who gets a very, very big paycheck if the deal closes."

Rendelman agrees.

"When brokers do lawyers' work, it's sloppy and it hurts consumers," he says. "Sure, 80 percent of the time, no one gets hurt, but what about the other 20 percent?"

O'Brien adds that while Koenig & Strey implies that it offers free closing services, those savings are false.

"Studies conducted by [our organization] show that in states where brokerage firms handle closings, clients end up paying more than in those where they don't," says O'Brien. He says that the combined costs of the title insurance process on a \$150,000 home – including recording fees, lender's title insurance and escrow fees – run about \$900 in Chicago and \$3,800 in Los Angeles.

"Given that buyers and sellers are not represented by lawyers in Los Angeles, the cost increase is because someone's adding on garbage fees that naïve first-time buyers wouldn't recognize unless they had independent representation," says O'Brien. "An independent lawyer knows what's typical and customary and what's not, and looks out for the clients so the costs don't escalate when they aren't looking."

According to the suit, Koenig & Strey implies that "in-house lawyers are available at a substantial savings – without disclosing the precise and limited nature of services that may be provided, the scope of the conflict of interest, the money that will be charged and the profits that will be collected" by the company.

In an answer filed on Aug. 24, Koenig & Strey denies the allegations, saying that the company encourages clients to seek independent counsel.

The answer cites an Illinois Supreme Court decision in *Chicago Bar Association v. Quinlan and Tyson Inc.* (34 Ill. 2d 116 (1996).) The Quinlan decision says it's okay for real estate brokerage firms to fill out lines in a document, but not okay for them to prepare documents. Koenig & Strey therefore argues that because it didn't prepare the deed in question, it didn't engage in UPL.

## The Debate

Although the court has yet to rule in the matter, Professor Levinson says that unless the brokerage firm guarantees to its clients that its in-house and contract lawyers are professional independents, it is opening itself up to more lawsuits.

"That guarantee clearly needs to be in writing," says Levinson. "But the organization should also establish a climate in which independence is respected."

Lynda Shely, chair of the ABA standing committee on client protection, isn't sure whether Koenig & Strey violated Illinois' UPL guidelines. But she does question whether Koenig & Strey's in-house lawyers or contract attorneys are keeping the clients' best interests in mind.

"A term which underlines all ethical rules and all disciplinary codes is 'independent professional judgment,'" says Shely, who also serves as the State Bar of Arizona's director of legal ethics. "So if a lawyer is beholden to someone other than the client, that relationship could affect his or her ability to use independent professional judgment."

Attorney Charles Ammeson, a real estate attorney who runs an ancillary real estate brokerage firm, says he has successfully avoided being sued since he opened his real estate firm earlier this year.

"I always tell my clients that they have no obligation to use our real estate firm, and always tell my real estate clients they're not obligated to use our law firm," says Ammeson, who practices in St. Joseph, Mich. "And I always give my real estate clients at least three attorney referrals so they can seek independent counsel."

Ammeson also suggests opening ancillary real estate businesses as an ideal way for lawyers who handle residential real estate work – which is quickly becoming a loss leader – to increase their revenues. Previously, Ammeson's law firm was bringing in between \$750 and \$1,500 for real estate closings on homes worth more than half a million dollars. Now, the side business generates between \$10,000 and \$20,000 per customer. (See, "Lawyers Can Add Revenues And Serve Clients Better By Creating a Side Business," 2000 LWUSA 585, Search Words for LWUSA Archives: Zevitas and Ammeson.)