REPORT OF THE
JOINT SUBCOMMITTEE STUDYING

REAL ESTATE SETTLEMENT PRACTICES

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

HOUSE DOCUMENT NO. 91

COMMONWEALTH OF VIRGINIA
RICHMOND
1997

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Table of Contents

APPENDICES

Report of the
Joint Subcommittee Studying
Real Estate Settlement Practices

To
The Governor and the
General Assembly of Virginia
Richmond, Virginia
1997

TO: The Honorable George F. Allen, Governor,
and
The General Assembly of Virginia

I. INTRODUCTION

A. INTRODUCTION AND SUMMARY OF JOINT SUBCOMMITTEE ACTIVITIES

House Joint Resolution 210 (1996) (*Appendix A)* established a joint subcommittee to study the real estate settlement market and to determine whether its current mix of participants and regulatory oversight provides sufficient protection for the general public. Real estate settlements encompass the administrative, financial, and legal activities required to complete the purchase and sale of real estate. The joint subcommittee members focused on the Virginia State Bar Council's formal opinion that the conduct of real estate settlements should be restricted to licensed attorneys in order to prevent the unauthorized practice of law by nonlawyer settlement agents. Currently, both attorneys and nonattorneys are permitted to conduct such settlements in Virginia.

The following General Assembly members served on the joint subcommittee: Delegates Barlow of Smithfield, Keating of Franconia, Moore of Portsmouth, and Van Yahres of Charlottesville appointed by the Speaker of the House, together with Senators Barry of Fairfax, Benedetti of Richmond, and Saslaw of Springfield appointed by the Senate Committee on Privileges and Elections. Delegate Barlow chaired the joint subcommittee, and Senator Benedetti served as its vice-chairman.

Over the course of three meetings convened in July, October and December 1996, the joint subcommittee received testimony from settlement attorneys, title insurance companies, banking institutions, and independent settlement agents. A public hearing was also convened to receive testimony from members of the public concerning their experiences with nonlawyer and lawyer settlement agents in real estate settlement transactions. The joint subcommittee also received regular

briefings and updates from Virginia State Bar representatives concerning the development of its council's opinion that the conduct of real estate settlements by nonlawyers constitutes the unauthorized practice of law.

B. LEGISLATIVE PROPOSALS BEFORE JOINT SUBCOMMITTEE

The joint subcommittee concluded its work at a final meeting in December just prior to the 1997 General Assembly Session. This meeting was convened to receive and review legislation proposed by one of its members and by the Coalition for Choice in Real Estate Closings ("the coalition"), an association representing title companies, banks, realtors and lay settlement agents. Senator Saslaw requested the joint subcommittee's endorsement of a bill prohibiting the Supreme Court's issuance of any rule limiting the conduct of real estate closings to attorneys. A motion to recommend failed three to four.

The coalition's proposal, entitled "The Consumer Real Estate Settlement Protection Act," or CRESPA, required all persons engaged in conducting real estate settlements as settlement agents to be licensed as attorneys, title insurance companies, title insurance agents, or as real estate brokers. The proposal, applicable to transactions involving four or fewer residential units, also established settlement agent financial responsibility requirements, and it mandated disclosure to parties to real estate transactions that (i) they may choose their own settlement agent, and (ii) only licensed attorneys may give legal advice in connection with real estate transactions. The joint subcommittee agreed to continue studying these proposals.

C. JOINT SUBCOMMITTEE RECOMMENDATION

The joint subcommittee ultimately approved a motion recommending to the 1997 General Assembly that the HJR 210 study be continued during the 1997 interim. It recommended that the subcommittee's 1997 activities include further examination of the coalition's proposal; an analysis of controlled business relationships among title insurers, realtors and lenders; and continued discussion concerning general public protection in real estate settlements.

D. 1997 SESSION ACTIVITY

Two measures concerning real estate settlements were introduced in the 1997 General Assembly Session. The first, a resolution introduced by Delegate Barlow (HJR 584) continuing the HJR 210 real estate settlement market study, was not approved. The second, introduced by Senator Barry as SB 1104 and containing the coalition's CRESPA proposal, was approved by the 1997 Session.

CRESPA, as enacted, embodied much of the coalition's proposal detailed above. However, it also required all settlement agents to register with the Virginia

State Bar and to comply with bar-promulgated guidelines concerning the unauthorized practice of law in real estate closings. The bill directed the bar to develop these guidelines in consultation with the Virginia State Corporation Commission (the regulator of title insurers and their agents) and the Virginia Real Estate Board, which regulates realtors.

II. PERSPECTIVES: REAL ESTATE SETTLEMENT INDUSTRY

A. REAL ESTATE ATTORNEYS

The purchase and sale of real estate within the Commonwealth is big business. According to the Virginia Association of Realtors, in 1995 approximately $7.1 billion in real estate settlements took place. This figure does not include commercial transactions, sales by owners, or refinancings. Representatives of the Virginia Real Estate Attorney's League (VaREAL), an association of real estate settlement attorneys, told the joint subcommittee that unlicensed title and escrow companies handle a substantial portion of these funds without regulation or accountability, and that this phenomenon presents a risk to the public *(Appendix B)*. Furthermore, they said, it is impossible for a real estate settlement to be conducted without legal advice being offered. Consequently, nonattorneys conducting real estate closings may find themselves responding to legal questions that are properly answered only by a licensed attorney who is (i) answerable to the Virginia State Bar and (ii) covered by legal malpractice insurance. Moreover, VaREAL noted, a practicing attorney stands in a fiduciary relationship with the buyer/borrower and is legally and ethically obligated to protect the interest of the buyer/borrower.

B. COALITION FOR CHOICE IN REAL ESTATE CLOSINGS

The Coalition for Choice in Real Estate Closings, an association of Virginia banks, realtors, title insurers, mortgage bankers, and home builders, told the joint subcommittee that the buyer/borrower is legally and practically protected by the general regulatory oversight of banks and title insurance companies. Citing the recent guilty plea of a Northern Virginia attorney to bank fraud and other related criminal charges stemming from his misuse of thousands of dollars in real estate escrow funds, coalition representatives also noted that attorney licensure is no guarantee of public protection. Insofar as the practice of law is concerned, a Virginia Association of Realtors representative pointed out that standardized forms and real estate attorneys' extensive use of clerks and paralegals to accomplish most of the work suggest that the actual amount of lawyering in a typical real estate transaction is very limited *(Appendix C)*.

C. VIRGINIA'S BANKING AND TITLE INSURANCE COMMUNITY

The Virginia Bankers' Association, a member of the coalition, reminded the joint subcommittee that banks have been closing real estate loans for 15 years without major incident, suggesting that the practice poses no threat of harm to the public. The association's representative cited a recent search of Division of Consumer Affairs files for complaints about real estate closings by banks and said the division's staff had uncovered no such complaints. The issue before the joint subcommittee, he stated, was actually one of market share and not of public protection.

Representatives of the Virginia Land Title Association, also a coalition member, and associated title insurance companies and settlement agents echoed the sentiments expressed by the realtors and bankers. A representative of Lawyer's Title, a major Virginia title company, stated that both lawyers and nonlawyers should continue to participate in the business of settling real estate transactions, thereby affording the general public a choice. He suggested, however, that parties to real estate transactions should be informed of the legal capacities and limitations of their settlement agents.

III. UNAUTHORIZED PRACTICE OF LAW (UPL) COMMITTEE OPINION #183

A. ACTION BY THE VIRGINIA STATE BAR COUNCIL

The Virginia State Bar licenses and regulates the professional activities of the approximately 21,000 attorneys licensed to practice law in Virginia. The joint subcommittee was briefed on an important opinion of the bar's unauthorized practice of law (UPL) committee related to real estate closings. UPL Opinion #183, issued in response to a formal inquiry, stated that conducting real estate closings constitutes the practice of law *(Appendix D)*.

When first discussed before the joint subcommittee in July by the UPL committee's chairman, UPL #183 was subject to further review by the Virginia State Bar Council—the bar's governing body. Such review and formal adoption are prerequisites to an opinion's submission to the Virginia Supreme Court as a proposed rule governing the practice of law in Virginia. The joint subcommittee concluded that the Bar Council's prompt review of UPL #183 would assist the joint subcommittee in its deliberations.

By letter from its chairman dated July 25, the joint subcommittee formally requested the Bar Council to expedite its action on UPL #183 so as to ensure a debate and vote on the opinion at the council's October 1996 meeting *(Appendix E)*. The Bar Council subsequently acted on the opinion, bringing the matter to a vote at

an October 17 meeting in Roanoke. The Virginia State Bar's president subsequently briefed the joint subcommittee on the Bar Council's activities at that meeting which resulted in a 50 to 12 vote approving the UPL opinion, with revisions *(Appendix F)*.

The council revised UPL #183, but retained the UPL committee's fundamental position that the settlement of a real estate transaction is the practice of law. The opinion did, however, clarify the authority of Virginia lending institutions to conduct the settlements of their own loans--although a Virginia Bankers' Association representative advised the subcommittee that this was limited to refinancing and home equity loans and did not apply to original purchases.

The joint subcommittee expressed an interest in learning whether any states had placed restrictions on nonlawyer settlement closings. The Virginia State Bar's ethics counsel offered its assistance in furnishing research it compiled on this question *(Appendix G)*. The counsel's findings were, however, disputed by the coalition, which furnished the joint subcommittee its research on the issue *(Appendix H)*. As evident from the research submitted from both sources, answering the question is complicated since few states have enacted legislation directly on this issue. The range of nonlawyer real estate closing activities permitted in each state is commonly the blended product of judicial decisions, bar advisory opinions, and selected statutes.

B. RESPONSES TO UPL #183

The Coalition for Choice in Real Estate Closings criticized the Bar Council's action, challenging the propriety of attorneys determining the scope of the practice of law. According to the coalition, UPL #183 was opposed by Virginia's Attorney General, the Federal Trade Commission, and the U.S. Department of Justice as imposing an undue restraint on competition for real estate settlement services. Coalition representatives urged the joint subcommittee to recommend and support legislation in the 1997 Session voiding UPL #183 and further averting potential rulemaking by the Virginia Supreme Court between the 1997 and 1998 Sessions of the General Assembly that might put lay settlement companies and their employees out of business.

The real estate section of the Virginia Bar Association, a voluntary lawyer professional association, also commented on UPL #183. In January 1996, the real estate section originated the inquiry that prompted UPL committee action on real estate settlement--the action that resulted in UPL opinion #183. The section represented that it favors regulation of all companies and individuals, including nonlawyers, involved in the real estate settlement process. The subcommittee was furnished with a copy of a model settlement agent act prepared by the National Association of Insurance Commission (NAIC) *(Appendix I)*. This NAIC model act was, however, criticized by VaREAL as furnishing no protection to the public.

IV. PUBLIC COMMENT ON REAL ESTATE SETTLEMENT PRACTICES

The joint subcommittee received substantial public comment on the study issues at a public hearing convened during its December meeting. Appearing at the public hearing were real estate attorneys, nonlawyer settlement agents, citizens with complaints about lawyer and nonlawyer settlement agents, realtors, and title insurance company representatives. Citizen complaints ranged from outright theft of settlement proceeds to settlement agent failure to identify important legal issues in their real estate transactions. Citizens who, as sellers of real estate, had their settlement proceeds misappropriated by settlement agents noted that sellers have no control over selecting settlement agents, a choice uniformly made by purchasers.

One seller testified that a nonlawyer settlement agent's late payoff on his FHA mortgage resulted in the accrual of an additional month's interest. A purchaser testified that a nonlawyer settlement agent's ignorance of local zoning laws necessitated--upon subsequent resale of the property--the purchase of adjacent property to satisfy the locality's sideyard setback requirements. The property was in violation of these requirements (because of a garage addition constructed too close to the property line) at the time of the initial purchase, but the violation and its legal significance were not discovered at that time. Another citizen recounted her family's experience with a Lynchburg settlement attorney who, she said, had misappropriated closing funds in connection with their purchase of a home. This resulted in protracted litigation as well as a lengthy administrative proceeding in filing a claim against the Virginia State Bar's Client Protection Fund.

Nonlawyer settlement agents warned the joint subcommittee that if, by rule, the Virginia Supreme Court adopted UPL #183, lay settlement companies would be put out of business, the employment they provide would be eliminated, and consumers would be denied access to a cost-saving alternative. Real estate settlement attorneys rejoined, however, that in those states where only lawyers are permitted to conduct real estate settlements, the overall cost of closing is generally less expensive; although lawyers charge slightly more for settlement services, they furnish less expensive title insurance.

V. VAREAL AND COALITION SETTLEMENT DEMONSTRATIONS

A. VaREAL SETTLEMENT DEMONSTRATION

VaREAL coordinated a real estate settlement demonstration and discussion at the joint subcommittee's October meeting, reviewing with the joint subcommittee an array of documents that comprise the typical real estate transaction. These documents included a sales contract, a deed of trust, the HUD-1 settlement statement, a property survey, and lender closing instructions. A VaREAL spokesman identified the potential legal issues that can arise at each stage of a transaction, beginning with deed issues generated by the typical sales contract and continuing through the effect of certain provisions in the mortgage note and deed of trust.

Coalition representatives were invited by the joint subcommittee to comment on the VaREAL settlement demonstration. They stated that nonlawyer settlement agents routinely distinguish between furnishing general legal information on the one hand, and giving actual legal advice on the other. The joint subcommittee was told by a coalition member representing lay settlement agents that the former is permitted in real estate closings under Virginia State Bar UPL Opinion #177.

Another coalition member representing a major title insurance company told the joint subcommittee that his industry prefers to use both lawyer and nonlawyer settlement agents. Title insurers are the so-called "deep pocket" in real estate transactions, he added, emphasizing that if the use of nonlawyer settlement agents had resulted in significant liabilities for his company or the title insurance industry as a whole, title insurers would not be using them at present. If protecting the public is nevertheless an issue, he noted, legislation establishing a regulatory scheme for settlement agents could be beneficial if it focused on (i) disclosing nonlawyer status, where appropriate, (ii) settlement agent certification, (iii) regulatory agency oversight, (iv) financial requirements, and (v) requiring that settlement funds be placed in separate escrow accounts.

B. COALITION SETTLEMENT DEMONSTRATION

A videotaped nonlawyer settlement demonstration was presented by the coalition at the joint subcommittee's December meeting. The videotape showed an actual real estate closing conducted by a lay settlement agent who was also licensed as a title insurance agent. The presentation featured the settlement agent's summary of the purpose and content of various closing forms, including an explanation of the purchaser and seller disbursement items contained in the HUD-1 settlement statement.

Responding to joint subcommittee questions, coalition representatives stated that many lawyer and nonlawyer settlement agents are licensed as title insurance agents. Consequently, a settlement agent might concurrently collect from a real estate purchaser (i) a settlement fee and (ii) a title insurance agent's commission on the sale of title insurance to the purchaser. Moreover, the title insurance agent's commission may be as much as 60 percent of the title insurance premium.

VI. CONTROLLED BUSINESS RELATIONSHIPS

An emerging issue in the real estate settlement industry is controlled business relationships. A Northern Virginia real estate attorney told the joint subcommittee that closing functions are increasingly integrated in vertical arrangements among title insurers, lenders, settlement agents, and realtors *(Appendix J)*. These affiliations are established through subsidiaries, joint ventures and exclusivity arrangements. Additionally, real estate purchasers are reportedly given financial incentives to utilize designated lenders, title insurers and settlement agents within these affiliated structures. These controlled referrals, he emphasized, may deny purchasers an opportunity to shop for these services on the basis of price and quality in a competitive market.

For example, some real estate lenders now have affiliated title or settlement companies. The lenders' loan officers, he said, are paid referral fees to steer real estate mortgage customers to title and settlement companies that are affiliated with the lender. Similarly, he said, some real estate brokerage firms have established mortgage lending and title/settlement affiliates. In this context, brokerage firm managers are paid referral fees when their real estate agents steer mortgage lending business to lenders and title/settlement companies affiliated with the brokerage. A Virginia Association of Realtors representative responded, however, that while realtors may and do refer business to settlement agents and lenders, actual referral fees are prohibited by federal and state anti-kickback statutes

Members of the joint subcommittee expressed interest in learning more about this issue, noting that continuing this study in 1997 would provide an opportunity for its examination.

VII. CONCLUDING ACTIVITIES AND RECOMMENDATIONS

The joint subcommittee concluded its work by reviewing legislation proposed by one of its members as well as a measure proposed by the coalition. Senator Saslaw requested the joint subcommittee's endorsement of a bill prohibiting the Virginia Supreme Court's issuance of any rule limiting the conduct of real estate closings to attorneys *(Appendix K)*. The motion to recommend failed three to four.

The coalition's proposal, titled the "Consumer Real Estate Settlement Protection Act," or CRESPA, required all persons engaged in conducting real estate settlements as settlement agents to be licensed as attorneys, title insurance companies, title insurance agents, or as real estate brokers *(Appendix L)*. The proposal was applicable to transactions involving four or fewer residential units. State and federally regulated financial institutions (and their subsidiaries and affiliates) were exempt from the proposal's licensing requirements.

The coalition's proposal also required settlement agents to (i) maintain at least $100,000 in errors and omissions or malpractice insurance coverage, (ii) secure fidelity bonds or employee dishonesty insurance providing at least $100,000 in coverage, and (iii) submit to annual escrow account audits. Settlement agents are required by the proposal to maintain separate escrow accounts for depositing settlement funds; settlement funds may be disbursed only pursuant to a written agreement. The joint subcommittee agreed to continue studying this proposal.

The joint subcommittee ultimately approved a motion recommending to the 1997 General Assembly that the HJR 210 study be continued during the 1997 interim. It further recommended that the joint subcommittee's 1997 activities include (i) further examination of the coalition's proposal, (ii) an analysis of the controlled business relationships issue, and (iii) continued discussion concerning protection for the general public in real estate settlements. In approving this motion, the joint subcommittee concluded its 1996 activities.

VIII. 1997 GENERAL ASSEMBLY ACTIONS CONCERNING REAL ESTATE SETTLEMENTS

Two measures concerning real estate settlements were introduced in the 1997 General Assembly Session. The first, a resolution introduced by Delegate Barlow (HJR 584) continuing the HJR 210 real estate settlement market study, was not approved *(Appendix M)*. The second, introduced by Senator Barry as SB 1104 and incorporating the coalition's CRESPA proposal, was approved by the 1997 Session and signed into law by the Governor *(Appendix N)*.

CRESPA, as enacted, embodied the coalition's proposal to the joint subcommittee while further requiring all settlement agents to register with the Virginia State Bar and to comply with bar guidelines concerning the unauthorized practice of law in real estate closings. The bill directs the bar to develop these guidelines in consultation with the Virginia State Corporation Commission (as regulator of title insurers and their agents) and the Virginia Real Estate Board, which regulates realtors.

IX. SB 1104, THE CONSUMER REAL ESTATE SETTLEMENT PROTECTION ACT

A. General Provisions

Senate Bill 1104 (CRESPA) passed by the 1997 Session stipulates that only persons licensed as attorneys, title insurance companies, title insurance agents and real estate brokers may conduct real estate settlements. Financial institutions, together with their affiliates and subsidiaries, are exempt from this restriction when they are parties to such settlements, e.g., furnishing mortgage loan proceeds.

Settlement agents subject to CRESPA are required to maintain minimum insurance and bonding coverage as follows: (i) $250,000 in errors and omissions or malpractice insurance, (ii) $100,000 in fidelity bonds or employee dishonesty insurance, and (iii) $100,000 in surety bonding. Additionally, they must maintain separate escrow accounts for the deposit of settlement proceeds, and may not receive any of the interest from such accounts. These accounts are made subject to annual audits by independent certified public accountants, except that (i) lawyers' accounts will audited by the Virginia State Bar and (ii) title insurers will audit the escrow accounts of title insurance agents. Title insurers' accounts will be audited by their licensing authority.

B. Virginia State Bar Registration Requirements

CRESPA also requires all settlement agents to register with the Virginia State Bar within 90 days of its effective date, and once every two years thereafter. It further directs the Virginia State Bar, in consultation with the Virginia Real Estate Board and the Virginia State Corporation Commission, to adopt regulations establishing settlement agent guidelines. These guidelines (i) are intended to assist settlement agents in avoiding and preventing the unauthorized practice of law in conjunction with real estate settlements and (ii) will be furnished to settlement agents concurrently with their registration (and any renewal thereof); state and federal regulators of financial institutions; and members of the general public, upon request. The bar is also directed to receive and investigate complaints concerning settlement agent or financial institution noncompliance and may assess penalties of up to $5,000 for willful violations of the bill's State Bar registration and guideline provisions described above.

C. CRESPA's Real Estate Contract Disclosures

Real estate contracts encompassing the sale of not more than four residential units must contain language stating that copies of the Virginia State Bar guidelines are available upon request from the parties' settlement agents. These contracts must also disclose that (i) parties have the right to select their own settlement

agent and (ii) settlement agents may not provide legal advice to parties to real estate transactions unless such agents are licensed attorneys. With the exception of the Virginia State Bar's exercise of authority over the unauthorized practice of law, CRESPA's provisions will be enforced by settlement agents' licensing authorities, e.g., the Virginia State Corporation Commission in the case of title insurers and agents.

D. PENALTIES AND ENFORCEMENT

In addition to any penalties they may otherwise issue pursuant to statute or regulation, these licensing authorities are authorized to assess penalties of up to $5,000 for each violation of the act, and to revoke or suspend settlement agents' licenses issued by such authorities. Settlement agents are allowed 90 days from the effective date of this act to (i) be appropriately licensed to serve as settlement agents and (ii) comply with CRESPA's escrow account provisions.

Respectfully submitted,

William K Barlow, Chairman
Joseph B. Benedetti, Vice-Chairman
Gladys B. Keating
William S. Moore
Mitchell Van Yahres
Warren E. Barry
Richard L. Saslaw

GENERAL ASSEMBLY OF VIRGINIA -- 1996 SESSION

HOUSE JOINT RESOLUTION NO. 210

Establishing a joint subcommittee to study the real estate practices of attorneys, title insurance companies, title insurance agents and others in Virginia.

Agreed to by the House of Delegates, March 4, 1996
Agreed to by the Senate, February 29, 1996

WHEREAS, there exist in the Commonwealth various persons or entities, including attorneys, title insurance companies, and title insurance agents, conducting the settlement of real estate transactions and the disbursements of funds; and

WHEREAS, there is no single regulatory body which oversees all of these entities and individuals in the conduct of their services in real estate transactions; and

WHEREAS, questions exist regarding a settlement agent's obligations and services to his client or customer including the provision of legal advice; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That a joint subcommittee be established to study the real estate practices of attorneys, title insurance companies, title insurance agents and others in Virginia. The joint subcommittee shall be composed of seven members to be appointed as follows: four members of the House of Delegates to be appointed by the Speaker of the House; and three members of the Senate to be appointed by the Senate Committee on Privileges and Elections.

The joint subcommittee shall (i) determine what types of entities and individuals in Virginia are providing settlement services and handling escrow funds established pursuant to those services; (ii) determine the existence or nonexistence of state regulation of the entities providing real estate settlement practices; (iii) determine the practices of the various entities handling, escrowing and distributing funds; and (iv) review those closing and escrow practices to determine whether significant risk of harm to the public exists or if illegal activities are occurring.

The direct cost of this study shall not exceed $5,250.

The joint subcommittee shall complete its work in time to submit its findings and recommendations to the Governor and the 1997 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

Implementation of this resolution is subject to subsequent approval and certification by the Joint Rules Committee. The Committee may withhold expenditures or delay the period for the conduct of the study.

VAREAL
Virginia Real Estate Attorney's League
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(804) 499-9601

January 17, 1996

Buying a home is a consumer's largest and most important transaction. The process is fraught with technicalities and conflicts among the buyer, seller, real estate agent, title insurance company and lender. We are the Virginia Real Estate Attorney's League, a voluntary group of practicing real estate attorneys. We know and understand the closing process and we believe unregulated non-lawyer real estate closings endanger Virginia consumers.

We are concerned that, in Virginia, unlicensed title and escrow companies handle billions of dollars of other people's money without regulation or accountability. According to the Virginia Association of Realtors® , 1995 saw 65,418 sales for a total of $7,119,506,358 of consumer and lender funds passing through the closing process. The true amount is much higher as the VAR figure does not include commercial transactions, for-sale-by-owners or re-finances.

Traditionally, attorneys, licensed and regulated by the Commonwealth, conducted real estate closings. You may have already received a letter from a Coalition of lenders, title insurance and real estate interests asking you to support "choice" in the selection of a settlement service. The Coalition asserts "that non-lawyer settlement services have handled closings in a competent and efficient manner" and "there is virtually no evidence that consumers have been harmed by non-attorney settlement agencies." This is simply not true as proved by the enclosed article from *Virginia Lawyers Weekly*.

What would the Coalition tell this immigrant family defrauded by an unregulated non-lawyer title and escrow company? The company is out of business and the judgment is most likely not collectible. Since no lawyer was involved in the closing, there is no client-recovery fund. Contrary to what the Coalition would have you believe, title insurance does not cover this loss. Contrary to what the Coalition would have you believe, no state agency has jurisdiction or licensing authority over title and escrow companies . This nuance is at the heart of our concern and one the Coalition would rather not talk about. Members of the Coalition may be regulated and licensed, but their title and escrow company affiliates dealing with the public are not.

We believe it is a mistake to allow unlicensed and unregulated title and escrow companies access to these vast sums of money. Please read the enclosed article describing the catastrophe that befell consumers when the state of Missouri let abuses go unchecked. It would be a shame to see a similar disaster repeated in Virginia.

Let's look at another of the Coalition's claims; "lay settlement companies generally handle closings at a lower price than lawyers." We believe any difference is *de minimus* and not due to any special efficiency but rather corner-cutting and questionable arrangements that harm consumers. The Coalition would rather you didn't know their affiliates earn interest on customer's funds, don't have to carry malpractice insurance, meet continuing education requirements or contribute to a client-recovery fund.

In addition, title and escrow companies can't do the whole job because they aren't supposed to give legal advice; advice we feel is an integral part of every real estate closing. We are concerned because we see consumers hurt as non-lawyer settlement companies routinely trample on long-standing Unauthorized Practice of Law Rules approved by the Virginia Supreme Court.

The Coalition would ask you to believe a majority of other states have "consistently affirmed the right of non-lawyers to perform closing services." This sweeping generalization fails to account for mandatory attorney participation in contract drafting and title certifications as well as regulation of title and escrow companies in other states.

Finally, let's debunk the myth that title insurance underwriters and lenders "have the expertise to handle closings by the very nature of their business." Their business is not real estate closings. The Commonwealth licenses, regulates and establishes reserves for title insurance companies to insure risks associated with title to real estate and that is all. Lenders are licensed, regulated and have reserves to cover risks associated with lending money. Handling real estate closings introduces new risks and responsibilities without oversight or regulation and threatens the financial stability of those institutions.

What the Coalition really wants is the opportunity to assure the "choice" is their own affiliated, but unlicensed and unregulated, title and escrow company. Consumers in Virginia will pay more for closing services and receive less protection when these interests circumvent the normal competitive process and steer business to in-house affiliates.

The arguments for non-lawyer closings are wrong. We're asking for your support of legislation to protect Virginia's consumers by assuring continued professionalism and accountability in the closing process. Thank you for your time and attention to our plea.

Very truly yours,

Craig E. Buck, Esq. for the
Virginia Real Estate Attorneys League

WHAT YOU DON'T KNOW CAN HURT YOU!

10 REASONS AN ATTORNEY SHOULD NOT BE EXCLUDED FROM THE RESIDENTIAL CLOSING TABLE

The standard posture of the various interests aligned to oppose VaReal's position on the real estate settlement process routinely toss out catchy phrases such as "A closing is just a bunch of paper shuffling and signing." or "If there's a problem, title insurance will cover it." Such pithy phrases are convenient myths propagated by all the various parties in the transaction who often have interest that may be quite different from that of the buyer or borrower. In fact a residential transaction may be fraught with land mines for the unaware. VaReal believes at least one person at the table should have a legal **fiduciary** obligation to the buyer or borrower. What follows are a few of the reasons.

Agency Relationships. Beginning October 1, 1995 the common law of agency was abrogated by statute for real estate brokerage. It has been replaced several new statutory relationships which reduce by various degrees the real estate broker or salesperson's liability to the seller or buyer. Home buyers often confuse the nature of there relationship with a real estate broker or salesperson not fully understanding that the broker or salesperson is not working for them but actually owes a fiduciary relationship to the seller.

Statute of Frauds. This legal doctrine holds that any contract for the sale of real estate must be in writing to be binding. This means any negotiated contingencies must be written into the sale contract or they are meaningless. The vast majority of real estate sale contracts are prepared by real estate brokers or salespeople without any attorney review. The effect of the statute of frauds can be devastating to a home buyer when they discover days before closing that the seller is not obligated to make any of the repairs the buyer bargained for because no provision was made for them in their written agreement.

Junk Fees. This is the industry term for fees often charged by the lender in addition to the loan origination fee or discount points for items such as document preparation, tax service fees, flood certification fees, etc. These items are usually disclosed to the borrower in the fine print of the "Good Faith Estimate of Settlement Costs" provided to the borrower a few days after loan application. Few borrowers understand that these fees are often negotiable.

Lender vs. Owner Title Insurance. Institutional lenders uniformly require title insurance to protect the lender. A policy for the owner is optional, but the title insurance company is not obligated to provide the same coverage to the owner it provides the lender, and less coverage is frequently provided if a potential title problem exists.

Insured Closing Protection. This issue is currently under scrutiny from the State Corporation Commission, but currently attorneys closing a real estate transaction for a lender must receive coverage for errors in the closing process from a title insurer. Some title insurance companies have denied coverage for closing problems when the closing was conducted by an escrow company. (Sam v. Velasquez, Fairfax Circuit Court, 1990)

Right of Anticipation. This is a right to pay the mortgage loan off early without a penalty. Advising a borrower as whether their loan contains this provision by a lay closer or escrow company employee is the unauthorized practice of law under the current regulations. (Rules of Supreme Court of Virginia, Part 6, § I, Rule 7)

Due on Sale Clause. This is a clause contained in many deeds of trust that requires the borrower to pay off the loan in the event the property is sold or transferred. Again explaining such a clause in a deed of trust constitutes legal advice under existing rules, and it is prohibited for lay person to give such advice. (Rules of Supreme Court, *supra*)

Waiver Right to Presentment, Notice of Dishonor and Homestead Exemption. Again more clauses contained in most mortgage notes that waive certain of the borrower's rights regarding collection actions by the lender. Advice on these is legal advice. (Rules of Supreme Court, *supra*)

Advice on Matters of Title. A title insurance policy only sets out what the company will or will not cover. It is not an opinion of title, and advice on title matters can only be provided by and attorney. (Rules of Supreme Court, *supra*)

Fiduciary Obligations Regarding Client Funds. Attorney Disciplinary Rules strictly govern a lawyer's handling of a client's funds. Disciplinary penalties invariably flow from even minor breaches of these duties, such as failure to maintain proper trust-account records, failure to deposit funds into a trust account, depositing funds into a trust account with notice of existing deficit created by another lawyer in the firm, failure to furnish accounting for settlement proceeds, failure to maintain financial integrity of each client's funds in a trust account (which usually results in disbarment or suspension), unreasonable delay in satisfying existing liens or encumbrances, entrusting funds to seller-client and then relying in "good faith" upon client's representation that he or she used such funds to satisfy liens and encumbrances, unreasonable delay in disbursing title insurance premiums, failure to obtain title insurance or refund premiums received in trust, and premature payment of real estate commission out of settlement proceeds. Lawyers must maintain all escrowed funds in accounts in which the bank has contractually agreed to notify the State Bar whenever, under particular circumstances, the institution dishonors or returns a check drawn by the lawyer on such account. Absent consent of the client, a lawyer may not withdraw from proceeds for a real estate settlement an amount legitimately owed to the lawyer from the client in an unrelated matter. Lawyers may not retain any interest earned on client funds. All of these rules govern attorneys in their conduct of real estate transactions. There are **no** such regulations controlling the maintenance of other persons funds by escrow and settlement companies.

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REAL ESTATE SETTLEMENT SERVICES AND THE PRACTICE OF LAW IN VIRGINIA

ISSUE

The debate over who will be the primary provider of real estate settlement services in Virginia may be reduced to one word, "fiduciary". The only true question is, will the buyer/borrower in the average real estate transaction routinely have a legal representative, knowledgeable in the relevant issues, and with a **fiduciary** obligation to the buyer/borrower, or will such a legal representative be generally excluded from the transaction?

Why is this fiduciary obligation so important in a real estate transaction? Black's Law Dictionary defines a fiduciary as "A person having a duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking." By law an attorney has a fiduciary relationship with his or her client. A lawyer must always abide the special confidence reposed in the attorney who in equity and good conscience is bound to act in good faith and with due regard to the interest of one reposing the confidence. Breach of an attorney's fiduciary obligation to the client can result in civil or criminal penalties and lead to disbarment. All other parties involved in the typical residential real estate transaction (the real estate agent, the lender, the title insurance company, etc.) may have a duty not to commit fraud upon the buyer/borrower, but only the lawyer stands in the position of an attorney-client (and therefore fiduciary) relationship with the buyer/borrower.

Because only the attorney, hired to act as the settlement agent for the buyer/borrower, has this legal, moral and ethical obligation to act in the best interest of the buyer/borrower, VaReal fervently believes it is essential for attorney conducted settlements to be the norm in Virginia real estate transactions.

BACKGROUND

Until fairly recently (the past fifteen years), real estate settlements were conducted exclusively by attorneys in Virginia. Lawyers drafted the legal documents, examined the title to the property, orchestrated the events for settlement and closed the transaction. Attorneys typically delegated many ministerial functions in the settlement process to legal assistants within their office. These legal assistants typed documents and conducted much of the routine communication with the lenders, surveyors, real estate agents, etc. Additionally, some title insurance companies began to offer title abstracting services during the early

1980's. These practices were formally sanctioned by the Bar with Unauthorized Practice of Law Rules in 1981. It is important to understand, however, that these rulings merely approved standard practices within lawyers' offices and that all these ministerial acts were performed either under the direct supervision of an attorney, or were reviewed by the buyer/borrower's attorney. Most importantly, the lawyer's fiduciary obligation to the client was not impinged by the performance of these acts by lay persons because they were performed under the auspices of the buyer/borrower's attorney; that attorney remained responsible and liable for the work performed. Furthermore the buyer/borrower remained entitled to the legal advice which only an attorney is permitted to dispense.

Since the promulgation of the 1981 unauthorized practice rules some parties involved in the real estate industry have taken the position that the rules permit attorneys to be eliminated from the settlement process and allow the entire transaction, from contracting to closing, to be conducted entirely by lay persons. Title insurance companies in particular have set up agencies to fill the role of settlement agent. As such, lay persons employed by these title and escrow settlement companies review and interpret the purchase contract, examine the title to the property, receive and complete the lender's loan documents and deed of trust, and close the transaction. All of this is ostensibly done without giving any legal advice to the buyer/borrower or the seller as this would of course be a violation of the unauthorized practice of law rules promulgated by the Virginia Supreme Court and is a Class 1 misdemeanor. (Virginia Code Section 54.1-3904, 1950, as amended)

Based on the collective experience of practicing real estate attorneys across Virginia, VaReal believes it is utterly impossible for a real estate settlement to be conducted without legal advice being provided. Hence we believe it imperative that such advice be offered only in the confines of the attorney-client relationship where the giver of such advice is a licensed, practicing attorney who stands in a fiduciary relationship with the buyer/borrower and is legally and ethically obligated to protect the interest of the buyer/borrower.

When faced with this exact issue in 1987, the Supreme Court of South Carolina opined that only by restricting settlement services to attorneys could the public truly be protected. The court noted that case law from several sister states held that lay persons could conduct closings, but they uniformly noted that the giving of legal advice as to the effect of the various instruments required to be executed constituted the practice of law and if a legal question arose the lay settlement company should stop the proceeding and instruct the parties to consult an attorney. In response the South Carolina court stated, "We agree this approach, in theory, would protect the public from receiving improper legal advice. However, there is in practice no way of assuring that lay persons conducting a closing will adhere to the restrictions. One handling a closing might easily be tempted to offer a few words of explanation, however innocent, rather than risk losing a fee for his or her employer." (State of South Carolina v. Buyers Service Company, Inc., 292 S.C. 426; 357 S.E.2d 15, 1987)

PARTIES

To understand the role of and need for attorneys in the settlement process it is

necessary to know the players involved in the typical real estate transaction and their respective interest. The primary parties to a normal residential transaction are, in addition to the buyer and seller, the real estate agent, the lender, the title insurer and the settlement agent.

The real estate agent fills the role of a broker for the deal. In most transactions he or she is hired by the seller to list and sell the property. Often other brokers will show the property to prospective buyers and bring an offer from such a buyer to the listing broker. Although some buyers will enter into a contractual relationship with a broker to act a their exclusive representative, typically the selling broker is acting as a sub-agent of the listing broker and is therefore legally bound to represent the seller's interest. The real estate agent is normally paid by a commission from the sale proceeds of the property. Thus the real estate agent's legal obligations and incentives are to realize the best price for the seller and close the transaction as quickly as possible in order to move on to the next transaction where another commission may be earned.

The lender is typically a financial institution. Today most mortgage lenders merely originate the loan and sell it to another institution who actually services the loan. The bulk of the original lender's profits are earned in the form of the up front fees charged to the borrower such as loan origination fees, points, processing or document preparation fees, and by pooling large numbers of mortgages to sell on the secondary market on favorable terms. The employee of the lender most borrowers deal with is a loan officer. Like the real estate agent, this individual usually works on commission and receives nothing unless the transaction closes. The lender of course has an interest in seeing that the loan is properly closed and its lien is in a first position on the property, but this interest is primarily to protect the lender's security interest in the property. An interest which will no longer be of great concern once the loan is sold (often within days of the closing).

The title insurer's function is to provide insurance for matters of title for the lender, and if requested, for the buyer. As with all insurance companies, the title insurer's primary obligation is to its shareholders. It generates profits for those shareholders by obtaining a steady stream of premiums and suffering a minimum number of claims. Correspondingly, the company's interest is in drafting a policy which limits its risk to the greatest extent possible. Financial institution lenders today almost uniformly require the borrower to purchase a lender's title insurance policy. Because the lender deals in the mortgage business on a routine basis, it is familiar with the coverage available and will insist upon adequate coverage for itself. If the buyer desires title insurance coverage, a separate owner's title insurance policy must be purchased, and the coverage need not be equivalent to the lender's policy. If an attorney represents the buyer, the attorney will often bargain with the title insurer on the buyer's behalf for increased coverage. Without an attorney the buyer is on his or her own in a highly technical field.

Finally there is the settlement agent. Before lay settlement service companies arose, only attorneys served in this capacity. It is the settlement agent's responsibility to review matters of title and close the transaction in accordance with the purchase contract and the lenders' instructions. If a lay settlement company acts as settlement agent, any employee of

that company is barred by law from giving legal advice to the buyer/borrower, even if that employee is an attorney. This is because that employee is working for and representing the interest of the settlement company not the buyer/borrower. Obviously their primary interest is in protecting their employer and generating repeat business from real estate agents and lenders. If an independent attorney acts as settlement agent, there exist and attorney-client and thus a fiduciary relationship with the buyer/borrower. Thus the attorney is legally and ethically obligated to look after the buyer/borrower's interest. By Virginia State Bar ethical rules, any alteration in that arrangement must be undertaken only with the client's full understanding and consent. Title and escrow settlement companies by contrast are using the absence of strict regulation to engage in practices the Virginia State Bar has ruled to be unethical for attorneys to participate in, such as earning and retaining interest on escrow accounts containing home buyers' money.

CONCLUSION

Why should attorneys remain as the primary providers of real estate settlement services in Virginia when lay persons may provide similar services and perhaps at less cost? VaReal believes it is the same reason doctors are the primary providers of diagnoses and prescriptions for medical care, to protect the public. Health insurer employees could undoubtedly prescribe drugs at a lesser cost than physicians, but we as a civilized society have made a public policy decision that it is in our collective interest to put such a task in the hands of a professional trained at the graduate school level and licensed, after extensive examination, by the state. The purchase of a home is usually the largest single investment the average person makes in their life. It is a complicated transaction involving many people who routinely function in the real estate business, and who have interest that are often different and sometimes contrary to that of the home buyer. For these reasons VaReal feels it should be required that at least one party to the transaction be a trained, licensed professional who is legally obligated to protect the buyer/borrower's interest. That person is the private practicing attorney. The attorney acting as settlement agent is licensed by a state regulatory agency, must meet continuing education requirements and is bound by a standing code of ethics. Additionally, attorneys approved to close by institutional lenders must carry adequate malpractice insurance and there is a state maintained client recovery fund to provide recovery for the client should an attorney mishandle the transaction. By contrast title and escrow settlement companies fall under the insurance commission which regulates matters of insurance, not loan closings, there are no ethical guidelines for such companies, no continuing education for lay closers, no malpractice insurance and no client recovery fund. Furthermore it is rather impractical to believe the already bewildered home buyer will be able to adequately investigate all these issues when the settlement services market is largely driven by the advice give to buyers by real estate agents. In a state where the courts have generally held steadfast to the doctrine of "caveat emptor" (buyer beware), VaReal ask, who is the best coach for the buyer/borrower to have in a real estate transaction---the real estate agent working for the seller, the lender who will pocket the loan origination fee and sell the loan, the title insurer who wants to limit coverage, or the licensed attorney who has a **fiduciary** obligation to his or her client--the buyer/borrower?

HJR 210 STUDY

Remarks by: Chip Dicks
Mays & Valentine
Representing The Virginia Association of Realtors
Telephone: (804) 697-1485; (703) 519-0185

My Background:

- Practiced real estate law for 18 years
- When I was in the General Assembly and managed my own small law office, I handled 30-40 residential real estate transactions per month.
- I owned an interest in a title agency.
- I owned an interest in a settlement company.
- I am married to a real estate broker.
- I represent the VAR and dozens of real estate companies with thousands of Realtors.
- So, I have a baseline of knowledge on this subject.

Take a look at the inside of the law office of a real estate practitioner:

- Most have a real estate legal assistant/paralegal/secretary who handles 90% of the work.
- UPL opinions provide that transactions are to be conducted under the supervision of an attorney. What constitutes supervision is not clear and the practice varies. But most attorneys have their non-lawyer staff prepare the documents, handle the coordination for closing and take care of all the client contact. It's not even required that the attorney actually be present in the room at the settlement table!
- There is nothing to prohibit attorneys from routinely running the monies through their settlement company escrow account -- not their legal escrow account.
- Residential real estate is not profitable for attorneys -- unless you have a high volume and you make your real money off collateral business.
    - There is a huge profit in the fees earned by lawyers who own their own title agencies. You can actually make more money here than in handling the actual settlements.

- Residential real estate is a good feeder business -- wills, traffic cases, etc. It is common practice to discount services on these collateral services. But, VA REAL might have shot itself in the foot with HB 1229 -- discounts to someone who refers a transaction will make that lawyer a criminal!

- I wonder how many real estate attorneys actually look at the deeds that go out of their offices at say, $50 a whack. In the real world, they often are prepared and reviewed by a competent secretary or paraprofessional.

- Ask yourself: Are there conflicts of interest when the real estate attorney represents a home builder seller and the buyers in the same transaction? How about when the lender uses a particular attorney and imposes fees and requirements not in the best interests of the buyers for whom the attorney is closing the transaction?

- The bottom line is that this Committee needs to carefully examine the practices of real estate attorneys and determine what legislation will be necessary to protect the public interests.

Take a look at what Realtors do to facilitate the transaction:

- There is a major difference between a real estate licensee and a professional Realtor. Realtors are committed to a code of ethics, training, compliance with all laws and regulations, and the highest in professional standards.

- A common myth is that a Realtor just lists the property, someone else actually sells it and the Realtor does nothing but collect a fee at closing. If it could only be that way -- I would go into real estate myself!

- Realtors, in today's competitive world, provide a full range of professional services from the initial contact with the client up through the closing. Whether the Realtor is representing a seller or buyer who are both consumers, the Realtor explains the process and helps the client work through the process until the transaction closes. Without closing, the Realtor earns nothing!

- In representing a seller, the Realtor explains the process, lists a house for sale, markets the property at the Realtor's expense, and tries aggressively to sell the property to a qualified buyer.

- In representing a buyer, the Realtor pre-qualifies the buyer to maximize the buyer's time in the house search process. The buyer will only be looking at homes the buyer is

qualified to buy. The Realtor helps the buyer address any credit challenges and interfaces with a mortgage lender.

- The Realtor negotiates the contract on behalf of their client and from the point of contract, the Realtor coordinates home inspection, repairs, termite inspection, homeowners association documents, surveys, title insurance, preparation of the deed, early occupancy, lender package and the list goes on and on. The Realtor reviews the settlement package including the settlement statement with their client and attends settlement.

- Realtors help to resolve business and legal issues all the way through the process so that the closing, generally with standard uniform documents, is nothing more than an administrative process. To hear the lawyers talk about it, there are problems and legal issues in every transaction. In our experience, with proper preparation, this is simply not the case.

Realtors Care About This Study

- For Realtors, it's an issue of choice -- a restraint of trade in the marketplace. Some of VAR's members use attorneys and some use lay settlement companies.

- VAR supports a regulation of settlement companies by some state agency, as the General Assembly will decide in its wisdom -- but regulation that is balanced and fair considering the level of regulation of the details of practice of real estate law in the Commonwealth.

- We look forward to working with this Committee as you consider these important issues.

Thank you.

Virginia State Bar

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UNAUTHORIZED PRACTICE OF LAW

MEMORANDUM

FROM: James M. McCauley
Ethics Counsel

RE: UPL Opinion #183 (Non-Lawyers Conducting Real Estate Closings)

DATE: May 28, 1996

Attached is a copy of UPL Opinion #183. The Standing Committee on the Unauthorized Practice of Law is charged with the responsibility of issuing advisory opinions such as UPL Opinion #183 whenever members of the Bar request them. Thus, the Committee did not issue this opinion on its own initiative, but on the request from a member of the Virginia State Bar.
Although UPL Opinion #183 is an application of existing law and rules, it declares explicitly for the first time that certain activity is the unauthorized practice of law. As a result, the opinion must be approved, following press release and public comment, by the Virginia State Bar Council and the Supreme Court of Virginia. Until that process is completed, UPL Opinion #183 is not final and neither the Virginia State Bar nor any other party may rely upon the opinion as binding authority.

Until such time as the opinion is final, the Virginia State Bar cannot enforce the position taken in the opinion.

The UPL Committee and the Virginia State Bar recognize that a joint legislative subcommittee is undertaking to study real estate settlement practices by attorneys, title companies and other non-lawyer entities. Nevertheless, the request for UPL Opinion #183 has been pending for over a year, and the Committee was obliged, under the rules of the Supreme Court of Virginia, to render an advisory opinion to the requesting party.

If you have any questions or comments concerning the opinion, you may contact me at (804) 775-0565.

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UNAUTHORIZED PRACTICE OF LAW

May 24, 1996

PERSONAL AND CONFIDENTIAL

Re: UPL Opinion #183

Dear [illegible]

I am writing in response to your request dated February 7, 1995, seeking an Unauthorized Practice of Law Advisory opinion as to whether a non-lawyer (who may or may not be licensed as a title agent in Virginia and may or may not be employed by a title and escrow company) may conduct a closing[1] of the sale of real estate or a loan secured by real estate. Whether non-lawyers should conduct real estate closings has been the subject of considerable debate. The Committee, however, only issues opinions upon request. Your inquiry is the first time the Committee has been called upon to render a written advisory opinion on this important issue.

The Committee has studied your inquiry extensively and has informally sought input from numerous segments of the real estate industry and other interested parties. The Committee has directed me to transmit its conclusions to you. The Committee observes, at the outset, that there is no legal authority in Virginia which either *per se* bans or authorizes a non-lawyer to conduct a real estate

[1] The term "closing" as it relates to the purchase and sale of real estate is defined as "[t]he final steps of the transaction where consideration is paid, mortgage is secured, deed is delivered or placed in escrow, etc." *Black's Law Dictionary* (5th ed. 1979) at 231.

closing[2]. However, the current practice implicitly requires the involvement of an attorney. The activities of the non-lawyer in connection with the closing are restricted. The Committee has, over the course of time, issued numerous advisory opinions concerning specific activities incident to a real estate closing and has opined as to whether each specific activity constitutes the practice of law.

For purposes of this opinion, the Committee defines "non-lawyer" to be any person not licensed and authorized to practice law in Virginia. However, in appropriate circumstances under the direct supervision of a licensed attorney having an attorney-client relationship with the buyer and/or seller, a legal assistant may perform certain tasks[3] incident to a real estate closing. In addition, this opinion assumes that the non-lawyer is conducting a closing for buyers and sellers who are not represented by counsel.

I. Non-lawyers May Not Conduct Real Estate Closings

UPR 6-104(A) provides that "[in] connection with a real estate closing, a non-lawyer shall not give legal advice to another, or prepare for or advise another in the preparation of legal instruments, for compensation, direct or indirect." UPR 6-101 provides that "[a] non-lawyer shall not undertake for compensation, direct or indirect, to advise another in any matter involving the application of legal principles to the ownership, use, disposition or encumbrance of real estate. . . ."

Therefore, it follows that a non-lawyer may not opine or explain to a party to the transaction the meaning or application of legal principles to any aspect of the closing. This would prohibit a non-lawyer from explaining, interpreting or giving an opinion on the meaning of legal terms or principles relevant to, for example, the sales contract, settlement statement, loan documents, instruments conveying title, title binder, seller's mechanics lien, default under any document, title exceptions found on the title binder, or the legal terms or import of any other document presented at the settlement. This is not to say that a non-lawyer may not perform any tasks

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[2] The committee is well aware of the extensive debate in 1979 and 1980 over whether the conduct of real estate closings is the practice of law, and whether non-lawyers should be authorized to close a real estate transaction. Our review of the record of the Virginia State Bar Council proceedings and the rule changes ultimately approved by the Virginia Supreme Court reveals that this hotly contested issue was never decided. Those who advocate or perform non-lawyer settlement services claim that this issue was decided as a result of the 1980 proceedings and that lay settlement services have been authorized by the Virginia State Bar to perform closings since then. We find no support for this conclusion. There is no UPR, UPC or UPL Opinion which states that a real estate closing may be conducted by a non-lawyer or that all of the activities necessary to close a real estate transaction may occur without the supervision of a lawyer representing the buyer and/or seller.

[3] *See* UPC 6-7 at pp. 8-9. *infra.*

associated with these documents, only that a non-lawyer may not explain or express an opinion as to the meaning of legal terms in such documents, the legal effect of such documents, or the legal principles applicable to each.

The Supreme Court of Virginia has defined the practice of law to include the undertaking, for compensation, direct or indirect, of advising another, in any matter involving the application of legal principles. Va. S. Ct. R., Pt. 6: §II(B)(1). This definition is broad and extends beyond litigation to activities in other fields which entail specialized legal knowledge and ability. For this reason, a non-lawyer may not, with or without compensation, prepare for another legal instruments of any character affecting the title to or use of real estate, unless the non-lawyer is (1) an owner of the subject real estate; (2) a regular employee who prepares such legal instruments for use by his or her employer, other than in aid of the employer's unauthorized practice of law; (3) a real estate agent preparing a contract of sale, lease, exchange or option arising out of the negotiation of a transaction incident to the regular course of conducting his or her licensed business; and (4) a lending institution preparing a deed of trust or mortgage on real estate securing the payment of its loan. UPR 6-103. The drafting, selection, preparation or completion of deeds, deeds of trust, mortgages, deeds of release and other similar instruments affecting title to real estate requires the possession and use of legal knowledge and skill. The prohibition against a non-lawyer preparing such documents applies even where a form of deed or deed of trust prepared by a lawyer may be followed or filled in. In addition, it does not matter whether the instrument is deemed simple or complex. Legal knowledge and skill are required, in any event, in the selection and completion of the proper form to fit the particular real estate transaction. UPC 6-4.

Following these Rules of the Supreme Court of Virginia, this Committee has previously opined that it is the unauthorized practice of law for a title company or real estate settlement service to prepare deeds of bargain and sale, deeds of trust, promissory notes and deeds of release. UPL Ops. 141, 91, 86 and 80. This is true even if the documents are sent to an attorney of either the buyer or seller for review. UPL Ops. 86, 76. Nor can the title or settlement company employ the services of an attorney to perform the services which the lay agency is not authorized to perform. The lawyer may not aid a non-lawyer in the unauthorized practice of law. DR 3-101(A). Thus, it is improper for an attorney employed by a lay corporation to assist the corporation in the unauthorized practice of law. UPL Op. 57. *See also* Richmond Ass'n of Credit Men v. Bar Ass'n of City of Richmond, 167 Va. 327, 189 S.E. 153 (1937)(lay corporation may not ordinarily employ an attorney to provide legal services to customers or clients of the corporation). Further, UPC 6-1 provides that "[a] lawyer employed by a lay agency to render services for others is restricted to the doing of acts in the course of his employment that a non-lawyer can lawfully do." Hence, a Virginia attorney employed by a title agency may not perform any of the tasks, incident to a real estate closing, that a non-lawyer may not perform.

Aside from the preparation of legal instruments, the Committee believes that, by necessity, the settlement agent is not merely a scrivener for the parties to a real estate closing. He or she

must also pass upon the legal sufficiency of the prepared documents, whether complex, simple or pre-printed, to accomplish the contractual agreement of the parties. State v. Buyer's Service Co., 292 S.C. 426, 429, 357 S.E.2d 15, 17 (1987). Whether stated or not, the person conducting the closing vouches for the legal sufficiency of the documents executed by the parties.

The Committee is informed that, particularly in the Northern Virginia area, over the past 15 years title and escrow companies and other laypersons have conducted real estate closings. The Committee has never condoned such activity and, prior to your inquiry, has not had an occasion to render an advisory opinion as to whether a closing conducted by a non-lawyer is the unauthorized practice of law. In addition, the Committee's review of pertinent statutory authority does not find that authority dispositive of the question raised in your inquiry. Those who favor title companies and other non-lawyers conducting closings point out that the typical residential closing has become so standardized that the specific legal instruments selected and filled out are fixed by custom. Notwithstanding the standardization of procedures and forms, in a transaction of such importance as the acquisition of a home, the Committee is concerned with situations where an attorney-client relationship in connection with the legal rights of the parties is completely lacking. The non-lawyer settlement agent, independently or as an employee of the title company, does not conduct the closing, nor examine the required documents with an eye toward protecting the independent legal rights of the buyer and/or seller. Only an attorney can perform that function with the degree of undivided loyalty and accountability required of a member of the bar.

The Committee is aware that other states have granted authority to real estate brokers, title agents and other laypersons to conduct real estate closings.[4] Nevertheless, many legal

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[4] The Committee studied with curiosity the most recent reported decision on the subject, In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 139 N.J. 323, 654 A.2d 1344 (1995). The New Jersey Supreme Court noted that:

> . . . this transaction in its entirety, the sale of real estate, especially with a home on it, is one that cannot be handled competently except by those trained in the law. The most important parts of it, without which it could not be accomplished, are quintessentially the practice of law. The contract of sale, the obligations of the contract, the ordering of a title search, the analysis of the search, the significance of the title search, the quality of title, the risks that surround both the contract and the title, the extent of those risks, the probability of damage, the obligation to close or not to close, the closing itself, the settlement, the documents there exchanged, each and every one of these, to be properly understood must be explained by an attorney.

139 N.J. at 339, 654 A.2d at 1351. Given the Court's analysis above, the Committee is perplexed at the Court's conclusion that real estate brokers may close residential transactions

authorities agree that much of the activity undertaken by such laypersons, in conducting real estate closings, involves the practice of law which can only be performed by a licensed attorney. In re First Escrow, Inc., 840 S.W.2d 839 (Mo. 1992)(escrow companies may not draft legal documents, select form of documents to be used, or give advice or opinions as to the legal rights of their customers, legal effect of instruments, or validity of titles to real estate); Bowers v. Transamerica Title Ins. Co., 100 Wash.2d 581, 585, 675 P.2d 193, 197 (1983)(selection and completion of form legal documents, or drafting of such documents, including deeds, mortgages, deeds of trust, promissory notes and agreements modifying these documents constitutes practice of law); Coffee County Abstract & Title Co. v. State of Alabama, 445 So.2d 852 (Ala. 1983)(filling out or completion of blanks of deed is practice of law despite claim that task is clerical in nature and title company employee giving opinion regarding the effect or manner of purchasers taking title is unauthorized practice of law); and State v. Buyer's Service Co., Inc., *supra* (title company's handling of real estate closings and mortgage loan closings constituted unauthorized practice of law; attorney must be present during closing); Georgia Bar Ass'n v. Lawyers Title Ins. Corp., 222 Ga. 657, 151 S.E.2d 657 (1966)(title company enjoined from advertising legal services and giving advice in the handling and closing of real estate transactions); State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962)(mere completion of deeds of trusts by filling in blanks is unauthorized practice of law by employee of new construction builder); Pioneer Title v. State of Nevada, 74 Nev. 186, 326 P.2d 408 (1958)(prohibiting title companies from drafting any document that involves a judgment of legal sufficiency).

This Committee must apply and interpret the law as it exists in Virginia. The Committee adopts the reasoning embraced in some of the authorities cited above that the real estate closing should be viewed in its entirety. A closing in the context in which the question is presented is the culmination of a real estate contract involving the transfer of real property and typically the establishing of liens in favor of others against the property. While a closing is the sum of many different and varied activities, some of which non-lawyers are authorized to perform, the closing takes place when appropriate parties meet together to execute the required legal documents. The explanation, execution and delivery of the necessary documents inherently involves legal advice and therefore must be done by an attorney. Some individual components leading up to the closing could be appropriately handled by laypersons under certain circumstances, but the closing itself must be done by an attorney. The Committee is also mindful of the inherently coercive nature of a real estate settlement. Prior to closing, with the expectation that all is in order, both the buyer and seller have typically made commitments with other parties and have invested significant time and money in reliance on the closing of the transaction. The title company's interest is to conclude the transaction. If a problem arises during closing, and there is no attorney-client relationship, the parties are without the benefit of independent counsel and may lack the leverage or will to halt a transaction that is not in their best interest.

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without an attorney to represent the buyer and seller.

In addition, the significance of the closing to the parties cannot be overlooked. For most individuals, the purchase of a home represents the most important financial investment or transaction of their lives. Extreme care needs to be taken that legal issues or questions that the parties may have are competently answered or addressed by a professional having the requisite legal knowledge and skill. Such questions may include, for example:

> Exactly what real and personal property conveys with the transaction?
> How should title be taken and why?
> Do any easements or covenants restrict the use of the property and in what manner?
> What local land use regulations affect the property?
> What happens if a builder fails to deliver as/when promised?
> What are the rights and responsibilities of the parties under the contract? Deed of Trust? Deed of Trust Note?

Other issues or problems may include walk-through disputes, disagreement over an obligation in the contract, problems with the legal description as revealed by a survey, defects in the title not insured over by the title insurance. Potential disputes or conflicts may and do arise under circumstances that frequently involve duress. Either the buyer or seller, or both, may be under pressure to close, having already expended substantial time and resources, when to do so may not be in their best interest.

The Supreme Court of South Carolina, in State v. Buyers Service Co., Inc., *supra*, ruled that real estate and mortgage loan closings should be conducted only under the supervision of an attorney for the reason that the parties to the transaction may raise a legal question, and there is no way of assuring that non-lawyers would not attempt to offer an explanation. Based on this sound reasoning, and our Supreme Court's definition of the practice of law which includes "advising another in any matter involving the application of legal principles to facts or purposes or desires," it follows that a non-lawyer may not advise a party that the conditions of a closing have or have not been met. Therefore, if a non-lawyer is to conduct a closing without an attorney present, the non-lawyer closing agent would have to advise the seller and/or buyer that they would have to determine for themselves whether the documents and conditions are in order to go forward with the closing, even when the non-lawyer closing agent has obviously concluded that all conditions precedent to closing have been met. If this is the case, then the lay settlement company is providing no service to the parties, other than marshalling the required documents to close, an activity which the parties might perform themselves.

The Committee also believes that it is unrealistic and naive to assume that, in all instances, the lay settlement agent can present important legal documents to buyer and seller at a real estate closing without legal questions being asked and without the giving of legal advice. Even if this were a realistic assumption to make, the Committee believes that the preparation and presentation of a package of documents necessary to close a transaction is an implied

representation that the documents fulfill the requirements of the contract and the law, and that the non-lawyer closing the transaction has reviewed them and found them legally sufficient.

Notwithstanding the standardization of residential real estate closings, we have concluded that the conduct of settlement activities inevitably involves legal judgments which constitute the practice of law. As long as a lawyer is involved in the representation of a party to the transaction, however, a non-lawyer might conduct certain activities.

We believe, for example, the contract of sale must be reviewed and interpreted to determine whether all the conditions expressed therein have been met. Where a survey has been ordered, a determination must be made of whether the legal description and the plat are compatible; and the plat must be reviewed and interpreted to determine whether encumbrances not allowed by the terms of the contract, or by covenants or restrictions, are disclosed by the plat. A title opinion or title insurance policy must be reviewed and interpreted in order to inform the purchaser of its meaning and potential risks, as well as the effect of covenants, conditions, restrictions, encumbrances and other matters set forth in the opinion or policy. A person responsible for a closing must be able to interpret and evaluate the terms of a loan commitment and accompanying documents to determine whether they conform to the contract and whether they comply with applicable federal and state laws or regulations. Inquiries should be made regarding whether special legal requirements apply and whether they have been fulfilled, i.e., execution of certain documents by a spouse or an executor. Also, inquiries concerning the rights of mechanics and materialmen to liens must be made and decisions should be made as to the advisability of waivers by such potential claimants.

In any case, the typical real estate closing, in our judgment, cannot proceed from start to finish without legal judgments and conclusions being made. Thus, while it is true that certain activities incident to a real estate closing can, in isolation, be performed by a non-lawyer, the closing as a whole is a legal service which must be done by or under the supervision of an attorney with whom the parties have an attorney-client relationship. This means that an attorney must attend the closing at which the parties execute the documents required to close the transaction or be readily available to respond to any inquiries or issues that may arise.

II. Tasks Which a Non-lawyer May Perform Incident To a Real Estate Closing

UPR 6-104(A) provides that a non-lawyer may: (1) Make abstracts of title (i.e., copy salient portions of what the public record shows as distinguished from expressing an opinion on the legal consequences of what the records show); (2) Act as an agent or broker in connection with the issuance of title insurance commitments, binders and policies; and (3) Provide such other services of a clerical nature as may assist the parties in the settlement of a contract, commitment or other agreement with respect to the sale or encumbrance of property.

Thus, for example, a non-lawyer may compile and report factual information as disclosed by the public records (i.e., make an abstract of title); but he may not express an opinion or issue

a certificate as to the legal consequences of what his investigation of the public records may show. Incident to his investigation of the facts, an abstracter may give to his regular employer or, upon request, to a lawyer his opinion as to the status of legal title as disclosed by his investigation. However, neither the abstracter nor his employer may give a certificate or title or opinion to a third party, or otherwise hold themselves out as possessing legal knowledge or skill unless that individual is a lawyer or entity registered and authorized to practice law. UPC 6-3.

A title insurance company may issue its title insurance commitment, binder or policy; but these documents, or the provisions thereof, cannot be held out as a legal opinion based on the examination of title. UPR 7-101(B),(C). Nor may a title insurance company through its agents or employees give legal advice or express an opinion to any person other than, upon request, to a lawyer, as to the status or marketability of title to real property in Virginia, or as to the legal effect of documents comprising the chain of title. UPR 7-101(A).

A real estate agent may prepare a contract for the sale of real estate incident to a transaction in which he or she negotiated in the ordinary course of conducting his or her licensed business. UPR 6-103(A)(3); UPC 6-6; UPL Ops. 63, 96. However, the agent may not do so if he or she was not involved in the negotiation of the transaction, as this constitutes the unauthorized practice of law. UPL Op. 75.

UPC 6-7 states that non-lawyers may perform the following tasks in connection with a real estate closing:

> A. Order a survey, but not give an opinion as to the adequacy of such survey or with respect to matters reflected therein.
>
> B. Obtain copies of leases, easements, restrictions, building codes, zoning ordinances and the like, but not give an opinion as to the legal effects thereof or any party's legal obligation to comply therewith.
>
> C. Order termite or other inspections, but not give an opinion as to whether the results thereof comply with the terms of the contract.
>
> D. Ascertain the status of utility services and assist in their transfer, but not give legal advice as to a party's legal obligation with respect thereto.
>
> E. Arrange for the issuance of casualty insurance coverage, as requested by a party in interest.
>
> F. Provide lien payoff figures as asserted by the lienholder, but not give advice as to a party's obligation to pay the amount claimed.

G. Make mathematical computations involving the proration of taxes, insurance, rents, interest and the like in accordance with the terms of the contract or local custom.

H. Obtain lien waivers from mechanic or materialmen in a form acceptable to the party in interest, but not prepare such waiver or give advice as to the legal sufficiency thereof.

I. Prepare settlement statements.

J. Receive and disburse settlement funds, and serve as escrow agent, to the extent licensed to do so.

K. Prepare receipts and certificates of release, but not deeds, deeds of trust, deed of trust notes, or deeds of release.

In UPL Op. 147, the Committee distinguished those activities which may properly be done by an independent real estate paralegal company and those which must be performed by the closing attorney. The closing attorney reviews the real estate contract to determine its requirements and what tasks can be delegated to non-lawyers. The settlement company requests title search, orders survey, notifies lender, receives lender's package and completes non-legal documents, i.e., tax information, name affidavit, W-9 forms, commitment letter, HUD-1 statement and forwards any legal instruments prepared by the lender to the closing attorney for review prior to closing. Thus, the closing attorney may delegate to laypersons those tasks which do not require legal skill or knowledge, but the closing attorney must actively oversee all aspects of the closing.

It is also permissible for a non-lawyer to prepare certificates of satisfaction to be executed by a mortgage company. UPL Op. 80, UPC 6-7(K).

This Committee has also opined that an escrow and title company or real estate settlement service may charge a release fee or closing fee for its services. UPL Ops. 141, 91, 80. The fee, however, may not be charged for the preparation of legal instruments or the provision of legal services. *Id.*, Legal Ethics Op. 1329. The title agency may not mask attorneys legal fees under the guise of a "settlement fee" or "document preparation fee." LEO 1329.

III. Conclusion

The real estate closing, as addressed herein, when viewed in its entirety, is an undertaking which requires the application of legal skill, knowledge, and principles to a particular situation. The determination that all the requirements to close a real estate transaction have or have not been met is a legal judgment or conclusion which a non-lawyer is not authorized to make.

Handling and conducting a real estate closing is the practice of law even though some of its component tasks may be performed by non-lawyers.

This opinion is subject to review by Bar Council after the requisite press release and period for public comment. Council has the authority to approve, modify or disapprove this opinion. Va. S. Ct. R., Pt. 6: §IV: ¶10(c)(iv). Should Council approve the opinion, it will then be reviewed by the Virginia Supreme Court pursuant to Pt. 6: §IV: ¶10(f)(iii).

Very truly yours,

James M. McCauley
Ethics Counsel

JMM:lcf

cc: Yvonne DeBruyn Weight, Esq.
Sharon E. Pandak, Esq.
Committee Members

COMMONWEALTH OF VIRGINIA
HOUSE OF DELEGATES
RICHMOND

WILLIAM K. BARLOW
P.O. BOX 180
SMITHFIELD, VIRGINIA 23430

SIXTY-FOURTH DISTRICT

COMMITTEE ASSIGNMENTS:
GENERAL LAWS
FINANCE
CORPORATIONS, INSURANCE AND BANKING
AGRICULTURE

July 25, 1996

VIA FAX

Virginia State Bar
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Richmond, VA 23219-2083

IN RE: HJR-210 - The Joint Subcommittee Studying the Real Estate Practice of Attorneys, Title Insurance Companies, Title Insurance Agents and Others in Virginia

Gentlemen:

I appreciate Mike Smith, as Immediate Past President of the Virginia State Bar, writing me, and the other members of the Joint Subcommittee, on June 28th on the above subject. In that letter Mike indicated "Should the Subcommittee think it useful for its purposes for the Bar to expedite its process so as to ensure a State Bar Council debate and vote at its October meeting, we would appreciate knowing your preference by August 1."

The Joint Subcommittee had its first meeting Wednesday, July 24th. The Committee elected me Chairman and we elected Senator Joe Benedetti Vice Chairman. During the meeting we voted to have me as Chairman write you this letter requesting that the Virginia State Bar expedite its process so as to ensure a State Bar Council debate and vote at its October, 1996, meeting. Later in our meeting a motion to reconsider the earlier vote was defeated.

Therefore, we look forward to your forwarding to our

committee the results of your State Bar Council meeting of October 1996. For their information I am mailing a copy of this letter to the other six subcommittee members. I am faxing a copy of this letter to Arlen Bolstad of the Legislative Services staff and to Mary Giesen of the Courts of Justice staff.

Very truly yours,

William K. Barlow

WKB/mrn

cc: Honorable Warren E. Barry
Honorable Joseph B. Benedetti
Honorable Richard L. Saslaw
Honorable Gladys B. Keating
Honorable William S. Moore, Jr.
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Public Service

October 22, 1996

Honorable William K. Barlow
Commonwealth of Virginia
House of Delegates
P. O. Box 406
Richmond, VA 23218

Re: HJR-210 - The Joint Subcommittee Studying the Real Estate Practice of Attorneys, Title Insurance Companies, Title Insurance Agencies and Others in Virginia

Dear Delegate Barlow:

The Virginia State Bar Council met on October 17, 1996, and voted 50-12 in favor of UPL Opinion 183, as revised by the Unauthorized Practice of Law Committee. The opinion will now be forwarded to the Virginia Supreme Court for their consideration.

Enclosed is a copy of UPL Opinion 183 and a copy of the Unauthorized Practice of Law Committee's report to the Virginia State Bar Council.

Please let me know if you need additional information or have questions about this issue.

Very truly yours,

Robert B. Altizer

RBA:lcf
Enclosures

cc: Arlen Bolstad, Legisl. Services Staff (w/enc.)
Thomas A. Edmonds, Esq.
Yvonne D. Weight, Esq.
James M. McCauley, Esq.

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UNAUTHORIZED PRACTICE OF LAW

October 17, 1996

PERSONAL AND CONFIDENTIAL

Re: UPL Opinion #183

Dear

I am writing in response to your request dated February 7, 1995, seeking an Unauthorized Practice of Law Advisory opinion as to whether a non-lawyer (who may or may not be licensed as a title agent in Virginia and may or may not be employed by a title and escrow company) may conduct a closing[1] of the sale of real estate or a loan secured by real estate. Whether non-lawyers should conduct real estate closings (or "settlements") has been the subject of considerable debate. The Committee, however, only issues opinions upon request. Your inquiry is the first time the Committee has been called upon to render a written advisory opinion on this important issue.[2]

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[1] The term "closing" as it relates to the purchase and sale of real estate is defined as "[t]he final steps of the transaction where consideration is paid, mortgage is secured, deed is delivered or placed in escrow, etc." *Black's Law Dictionary* (5th ed. 1979) at 231.

[2] In his comments in opposition dated September 20, 1996, Bar Counsel Michael L. Rigsby cites two prior UPL Opinions, both of which were repealed, stating that real estate closings do not involve the practice of law. Neither of these opinions were reviewed by the Supreme Court of Virginia.

The Standing Committee on the Unauthorized Practice issues written opinions pursuant to its statutory authority conferred by Virginia Code § 54.1-3910. The procedures under which the Committee issues written opinions are set forth in the Rules of the Supreme Court of Virginia, Pt. 6, § IV, ¶ 10, Vol. 11, Code of Virginia ("Paragraph 10"). The Committee does not issue written advisory opinions on its own initiative. Opinions are issued only pursuant to a written request meeting the requirements of Paragraph 10. In cases where, as here, the Committee concludes that the conduct in question constitutes the unauthorized practice of law, the advisory opinion must be sent to the Council of the Virginia State Bar for approval, disapproval or modification. Paragraph 10(c)(iv).

The Committee has studied your inquiry extensively and has informally sought input from numerous segments of the real estate industry and other interested parties. The Committee has directed me to transmit its conclusions to you.

There are two underlying principles established by the Virginia Supreme Court with respect to the practice of law. First, "the right of individuals to represent themselves is an inalienable right common to all natural persons. But no one has the right to represent another; it is a privilege to be granted and regulated by law for the protection of the public." Second, "the services of a lawyer are essential and in the public interest whenever the exercise of professional legal judgment is required. The essence of such judgment is the lawyer's educational ability to relate the general body and philosophy of law to a specific legal problem. The public is better served by those who have met rigorous educational requirements, have been certified of honest demeanor and good moral character, and are subject to high ethical standards and strict disciplinary rules in the conduct of their practice." Va. S. Ct. R. Pt. 6: § I (Introduction).

The Committee observes, at the outset, that there is no legal authority in Virginia which either *per se* bans or authorizes a non-lawyer to conduct a real estate closing[3]. However, the current

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Council may not act on the advisory opinion however, until a press release has been issued notifying the general public of the pending opinion and providing a period for public comment. Paragraph 10(d)(i). In addition, prior to the Council meeting at which final action is taken, the Attorney General of Virginia must submit comments which analyze any restraint on competition that may result from the promulgation and enforcement of the advisory opinion. Paragraph 10(e)(iii). Bar Counsel also must submit comments in favor of, or in opposition to, the proposed advisory opinion. Paragraph 10(e)(ii). If the Council approves the advisory opinion, with or without modification, the opinion must then be sent to the Supreme Court of Virginia for review. Paragraph 10(f)(iii). Another press release is issued after the opinion is filed with the Court, and another opportunity for public comment is provided. Paragraph 10(g)(ii). Upon modification or approval, the advisory opinion becomes a decision of the Court. Paragraph 10(g)(v).

Although this is the first time the Committee has been requested to issue an advisory opinion on whether the conduct of a real estate closing is the practice of law, this opinion does not overrule or modify any prior opinions issued by the Committee relating to real estate activities.

[3] The committee is well aware of the extensive debate in 1979 and 1980 over whether the conduct of real estate closings is the practice of law, and whether non-lawyers should be authorized to close a real estate transaction. Our review of the record of the Virginia State Bar Council proceedings and the rule changes ultimately approved by the Virginia Supreme Court reveals that this hotly contested issue was never decided. Those who advocate or perform non-lawyer settlement services claim that this issue was decided as a result of the 1980 proceedings and that lay settlement services have been authorized by the Virginia State Bar to perform closings since then. We find no support for this conclusion. There is no UPR, UPC or UPL Opinion which states that a real estate closing may be conducted by a non-lawyer or that all of the activities necessary to close a real estate transaction may occur without the supervision of a lawyer representing the buyer and/or seller.

Bar Counsel and others disagree with the Committee's review and interpretation of the Council proceedings in 1980-81. The initial draft of UPC 6-7 expressly permitted a non-lawyer to close a real estate transaction, and was rejected by Council at its February 8, 1980 meeting. The second draft proposed that only

practice implicitly requires the involvement of an attorney. The activities of the non-lawyer in connection with the closing are restricted. The Committee has, over the course of time, issued numerous advisory opinions concerning specific activities incident to a real estate closing and has opined as to whether each specific activity constitutes the practice of law.

For purposes of this opinion, the Committee defines "non-lawyer" to be any person, firm, association or corporation not licensed or authorized to practice law in Virginia. However, in appropriate circumstances under the direct supervision of a licensed attorney having an attorney-client relationship with the buyer and/or seller, a legal assistant may perform certain tasks[4] incident to a real estate closing. In addition, this opinion assumes that the non-lawyer is conducting a closing for buyers and sellers who are not represented by counsel.

I. Non-lawyers May Not Conduct Real Estate Closings

UPR 6-104(A) provides that "[in] connection with a real estate closing, a non-lawyer shall not give legal advice to another, or prepare for or advise another in the preparation of legal instruments, for compensation, direct or indirect." UPR 6-101 provides that "[a] non-lawyer shall not undertake for compensation, direct or indirect, to advise another in any matter involving the application of legal principles to the ownership, use, disposition or encumbrance of real estate. . . ."

Therefore, it follows that a non-lawyer may not opine or explain to a party to the transaction, the meaning or application of legal principles to any aspect of the closing. This would prohibit a non-lawyer from explaining, interpreting or giving an opinion on the meaning of legal terms or principles relevant to, for example, the sales contract, settlement statement, loan documents, instruments conveying title, title binder, seller's mechanics lien, default under any document, title exceptions found on the title binder, or the legal terms or import of any other document presented at the settlement. This is not to say that a non-lawyer may not perform any tasks

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lawyers could close real estate transactions. At its June 18, 1980 meeting, Council could not reach an agreement on this version, and voted to send both proposals to the Court for advice and guidance. The Court declined and returned the petition to the Bar, leaving the issues undecided. Yet a third draft of UPC 6-7 was submitted by the UPL Committee to Council in June 1981. This version of UPC 6-7 was finally adopted as part of UPR 6 on October 16, 1981 and became effective on January 1, 1982. No changes to these rules have been made since that time. The full text of the current rules [UPR 6-104 and UPC 6-7] are set out at pages 11-13, *infra*. Neither of these rules state whether an non-lawyer may conduct the closing of a real estate transaction.

The historical account given by Bar Counsel and the final rules adopted by the Bar and Court lead only to the conclusion that the existing rules and opinions fail to answer the question of whether non-lawyers may actually perform the closing of a real estate transaction. By this opinion, the Committee states that the conduct of a real estate closing inherently involves the giving of legal advice and the application of legal skill and knowledge to a particular transaction. Therefore, the Committee places this principal issue squarely before the Council and the Court.

[4]*See* UPC 6-7 at pp. 11-13, *infra*.

associated with these documents, only that a non-lawyer may not explain or express an opinion as to the meaning of legal terms in such documents, the legal effect of such documents, or the legal principles applicable to each.

The Supreme Court of Virginia has defined the practice of law to include the undertaking, for compensation, direct or indirect, of advising another, in any matter involving the application of legal principles. Va. S. Ct. R., Pt. 6: §I(B)(1). This definition is broad and extends beyond litigation to activities in other fields which entail specialized legal knowledge and ability. For this reason, a non-lawyer may not, with or without compensation, prepare for another legal instruments of any character affecting the title to or use of real estate, unless the non-lawyer is (1) an owner of the subject real estate; (2) a regular employee who prepares such legal instruments for use by his or her employer, other than in aid of the employer's unauthorized practice of law; (3) a real estate agent preparing a contract of sale, lease, exchange or option arising out of the negotiation of a transaction incident to the regular course of conducting his or her licensed business; and (4) a lending institution preparing a deed of trust or mortgage on real estate securing the payment of its loan. UPR 6-103. The drafting, selection, preparation or completion of deeds, deeds of trust, mortgages, deeds of release and other similar instruments affecting title to real estate requires the possession and use of legal knowledge and skill. The prohibition against a non-lawyer preparing such documents applies even where a form of deed or deed of trust prepared by a lawyer may be followed or filled in. In addition, it does not matter whether the instrument is deemed simple or complex. Legal knowledge and skill are required, in any event, in the selection and completion of the proper form to fit the particular real estate transaction. UPC 6-4.

Following these Rules of the Supreme Court of Virginia, this Committee has previously opined that it is the unauthorized practice of law for a title company or real estate settlement service to prepare deeds of bargain and sale, deeds of trust, promissory notes and deeds of release. UPL Ops. 141, 91, 86 and 80. This is true even if the documents are sent to an attorney of either the buyer or seller for review. UPL Ops. 86, 76. Nor can the title or settlement company employ the services of an attorney to perform the services which the lay agency is not authorized to perform. The lawyer may not aid a non-lawyer in the unauthorized practice of law. DR 3-101(A). Thus, it is improper for an attorney employed by a lay corporation to assist the corporation in the unauthorized practice of law. UPL Op. 57. *See also* Richmond Ass'n of Credit Men v. Bar Ass'n of City of Richmond, 167 Va. 327, 189 S.E. 153 (1937)(lay corporation may not ordinarily employ an attorney to provide legal services to customers or clients of the corporation). Further, UPC 6-1 provides that "[a] lawyer employed by a lay agency to render services for others is restricted to the doing of acts in the course of his employment that a non-lawyer can lawfully do." Hence, a Virginia attorney employed by a title agency may not perform any of the tasks, incident to a real estate closing, that a non-lawyer may not perform.

Aside from the preparation of legal instruments, the Committee believes that, by necessity, the settlement agent is not merely a scrivener for the parties to a real estate closing. He or she

must also pass upon the legal sufficiency of the prepared documents, whether complex, simple or pre-printed, to accomplish the contractual agreement of the parties. State v. Buyer's Service Co., 292 S.C. 426, 429, 357 S.E.2d 15, 17 (1987). Whether stated or not, the person conducting the closing vouches for the legal sufficiency of the documents executed by the parties. Id.

The Committee is informed that, particularly in the Northern Virginia area, over the past 15 years title and escrow companies and other laypersons have conducted real estate closings. The Committee has never condoned such activity and, prior to your inquiry, has not had an occasion to render an advisory opinion as to whether a closing conducted by a non-lawyer is the unauthorized practice of law. *See*, pp. 1-3, nn. 2 and 3, *supra*. In addition, the Committee's review of pertinent statutory authority does not find that authority dispositive of the question raised in your inquiry. Those who favor title companies and other non-lawyers conducting closings point out that the typical residential closing has become so standardized that the specific legal instruments selected and filled out are fixed by custom. Notwithstanding the standardization of procedures and forms, in a transaction of such importance as the acquisition of a home, the Committee is concerned with situations where an attorney-client relationship in connection with the legal rights of the parties is completely lacking. The non-lawyer settlement agent, independently or as an employee of the title company, does not conduct the closing nor examine the required documents with an eye toward protecting the independent legal rights of the buyer and/or seller. Only an attorney can perform that function with the degree of undivided loyalty and accountability required of a member of the bar.

The Committee is aware that other states have granted authority to real estate brokers, title agents and other laypersons to conduct real estate closings.[5] Nevertheless, many legal authorities agree that much of the activity undertaken by such laypersons, in conducting real estate closings, involves the practice of law which can only be performed by a licensed attorney. In re First Escrow, Inc., 840 S.W.2d 839 (Mo. 1992)(escrow companies may not

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[5] The Committee studied with curiosity the most recent reported decision on the subject, In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 139 N.J. 323, 654 A.2d 1344 (1995). The New Jersey Supreme Court noted that:

> . . . this transaction in its entirety, the sale of real estate, especially with a home on it, is one that cannot be handled competently except by those trained in the law. The most important parts of it, without which it could not be accomplished, are quintessentially the practice of law. The contract of sale, the obligations of the contract, the ordering of a title search, the analysis of the search, the significance of the title search, the quality of title, the risks that surround both the contract and the title, the extent of those risks, the probability of damage, the obligation to close or not to close, the closing itself, the settlement, the documents there exchanged, each and every one of these, to be properly understood must be explained by an attorney.

139 N.J. at 339, 654 A.2d at 1351. Given the Court's analysis above, the Committee is perplexed at the Court's conclusion that real estate brokers may close residential transactions without an attorney to represent the buyer and seller.

draft legal documents, select form of documents to be used, or give advice or opinions as to the legal rights of their customers, legal effect of instruments, or validity of titles to real estate); Bowers v. Transamerica Title Ins. Co., 100 Wash.2d 581, 585, 675 P.2d 193, 197 (1983)(selection and completion of form legal documents, or drafting of such documents, including deeds, mortgages, deeds of trust, promissory notes and agreements modifying these documents constitutes practice of law); Coffee County Abstract & Title Co. v. State of Alabama, 445 So.2d 852 (Ala. 1983)(filling out or completion of blanks of deed is practice of law despite claim that task is clerical in nature and title company employee giving opinion regarding the effect or manner of purchasers taking title is unauthorized practice of law); and State v. Buyer's Service Co., Inc., *supra* (title company's handling of real estate closings and mortgage loan closings constituted unauthorized practice of law; attorney must be present during closing); Georgia Bar Ass'n v. Lawyers Title Ins. Corp., 222 Ga. 657, 151 S.E.2d 657 (1966)(title company enjoined from advertising legal services and giving advice in the handling and closing of real estate transactions); State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962)(mere completion of deeds of trusts by filling in blanks is unauthorized practice of law by employee of new construction builder); Pioneer Title v. State of Nevada, 74 Nev. 186, 326 P.2d 408 (1958)(prohibiting title companies from drafting any document that involves a judgment of legal sufficiency).

This Committee must apply and interpret the law as it exists in Virginia. The Committee adopts the reasoning embraced in some of the authorities cited above that the real estate closing should be viewed in its entirety. A closing in the context in which the question is presented is the culmination of a real estate contract involving the transfer of real property and typically the establishing of liens in favor of others against the property. While a closing is the sum of many different and varied activities, some of which non-lawyers are authorized to perform, the closing takes place when appropriate parties meet together to execute the required legal documents. The explanation, execution and delivery of the necessary documents inherently involves legal advice and therefore must be done by an attorney. Some individual components leading up to the closing could be appropriately handled by laypersons under certain circumstances, but the closing itself must be done by an attorney. The Committee is also mindful of the inherently coercive nature of a real estate settlement. Prior to closing, with the expectation that all is in order, both the buyer and seller have typically made commitments with other parties and have invested significant time and money in reliance on the closing of the transaction. The title company's interest is to conclude the transaction. If a problem arises during closing, and there is no attorney-client relationship, the parties are without the benefit of independent counsel and may lack the leverage or will to halt a transaction that is not in their best interest.

In addition, the significance of the closing to the parties cannot be overlooked. For most individuals, the purchase of a home represents the most important financial investment or transaction of their lives. Extreme care needs to be taken that legal issues or questions that the parties may have are competently answered or addressed by a professional having the requisite legal knowledge and skill. Such questions may include, for example:

Exactly what real and personal property conveys with the transaction?
How should title be taken and why?
Do any easements or covenants restrict the use of the property and in what manner?
What local land use regulations affect the property?
What happens if a builder fails to deliver as/when promised?
What are the rights and responsibilities of the parties under the contract? Deed of Trust? Deed of Trust Note?

Other issues or problems may include walk-through disputes, disagreement over an obligation in the contract, problems with the legal description as revealed by a survey, defects in the title not insured over by the title insurance. Potential disputes or conflicts may and do arise under circumstances that frequently involve duress. Either the buyer or seller, or both, may be under pressure to close, having already expended substantial time and resources, when to do so may not be in their best interest.

The Supreme Court of South Carolina, in State v. Buyers Service Co., Inc., *supra*, ruled that real estate and mortgage loan closings should be conducted only under the supervision of an attorney for the reason that the parties to the transaction may raise a legal question, and there is no way of assuring that non-lawyers would not attempt to offer an explanation. Based on this sound reasoning, and our Supreme Court's definition of the practice of law which includes "advising another in any matter involving the application of legal principles to facts or purposes or desires," it follows that a non-lawyer may not advise a party that the conditions of a closing have or have not been met. Therefore, if a non-lawyer is to conduct a closing without an attorney present, the non-lawyer closing agent would have to advise the seller and/or buyer that they would have to determine for themselves whether the documents and conditions are in order to go forward with the closing, even when the non-lawyer closing agent has obviously concluded that all conditions precedent to closing have been met. If this is the case, then the lay settlement company is providing no service to the parties, other than marshalling the required documents to close, an activity which the parties might perform themselves.

The Committee also believes that it is unrealistic and naive to assume that, in all instances, the lay settlement agent can present important legal documents to buyer and seller at a real estate closing without legal questions being asked and without the giving of legal advice. Even if this were a realistic assumption to make, the Committee believes that the preparation and presentation of a package of documents necessary to close a transaction is an implied representation that the documents fulfill the requirements of the contract and the law, and that the non-lawyer closing the transaction has reviewed them and found them legally sufficient.

Notwithstanding the standardization of residential real estate closings, we have concluded that the conduct of settlement activities inevitably involves legal judgments which constitute the practice of law. As long as a lawyer is involved in the representation of a party to the transaction, however, a non-lawyer might conduct certain activities.

We believe, for example, the contract of sale must be reviewed and interpreted to determine whether all the conditions expressed therein have been met.[6] Where a survey has been ordered, a determination must be made of whether the legal description and the plat are compatible; and the plat must be reviewed and interpreted to determine whether encumbrances not allowed by the terms of the contract, or by covenants or restrictions, are disclosed by the plat. A title opinion or title insurance policy must be reviewed and interpreted in order to inform the purchaser of its meaning and potential risks, as well as the effect of covenants, conditions, restrictions, encumbrances and other matters set forth in the opinion or policy. A person responsible for a closing must be able to interpret and evaluate the terms of a loan commitment and accompanying documents to determine whether they conform to the contract and whether they comply with applicable federal and state laws or regulations. Inquiries should be made regarding whether special legal requirements apply and whether they have been fulfilled, i.e., execution of certain documents by a spouse or an executor. Also, inquiries concerning the rights of mechanics and materialmen to liens must be made and decisions should be made as to the advisability of waivers by such potential claimants.

In any case, the typical real estate closing, in our judgment, cannot proceed from start to finish without legal judgments and conclusions being made. Thus, while it is true that certain activities incident to a real estate closing can, in isolation, be performed by a non-lawyer, the closing as a whole is a legal service which must be done by or under the supervision of an attorney with whom the parties have an attorney-client relationship. This means that an attorney must attend the closing at which the parties execute the documents required to close the transaction or be readily available to respond to any inquiries or issues that may arise.[7] In either event, whether physically present at the closing or readily available for when problems or questions arise, the *attorney* remains accountable and bears ultimate responsibility.

The degree of accountability and ultimate responsibility that an attorney brings to the real estate closing far exceeds that of a non-lawyer settlement company. First, to the extent that the attorney properly delegates and supervises closing related tasks to non-lawyer staff, the attorney is nonetheless personally responsible for their work. DR 3-104(C). Moreover, the delegated work of non-lawyer personnel merges into the lawyer's completed work product.

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[6] The Committee observes that Va. Code § 6.1-2.10 (the "Wet Settlement Act") defines the closing as "the time when the settlement agent has received the duly executed deed, loan funds, loan documents and other documents and funds required to carry out the terms of the contract between the parties and **the settlement agent reasonably determines that prerecordation conditions of such contracts have been satisfied.**" (emphasis added).

[7] The Committee struggled with imposing a requirement that the attorney be physically present during the closing. The Committee concluded that a "physical presence" requirement was unnecessary given that an attorney, with whom there exists an attorney-client relationship, bears the ultimate responsibility for the work delegated to and performed by non-lawyer staff, both in terms of malpractice and disciplinary rules. *See, e.g.,* DR 3-104(C) & (D). In addition, a requirement that the attorney always be present at every closing presents logistical problems and practical difficulties, for example, where the buyer and/or seller are out of state.

DR 3-104(D). A lawyer is required to exercise a high standard of care to insure that non-lawyer staff comply with applicable provisions of the Code of Professional Responsibility. Lawyers are subject to discipline for acts or omissions by non-lawyer staff. No such standards apply to lay settlement agencies.

In the event a lawyer's secretary or paralegal commits an act or omission which would otherwise be misconduct under the Code of Professional Responsibility, the lawyer is subject to discipline even though he or she did not engage in the misconduct personally. If a lawyer engages in dishonest conduct resulting in a loss to a real estate client, the client may petition the Virginia State Bar's Client Protection Fund and seek reimbursement for their loss up to $25,000.00.[8] In addition, if the lawyer is suspended or disbarred as a result of mishandling client funds, the Disciplinary Board may require restitution before the lawyer is reinstated to practice law.[9] A lawyer in his capacity as settlement agent is required to place all funds in and disburse funds from his attorney trust account. DR 9-102(A). In the event the trust account is overdrawn, the bank is required to report the overdraft to the Virginia State Bar. and an immediate investigation will ensue. DR 9-103(B)(1)(b). A client, before engaging the services of an attorney, can contact the Virginia State Bar and learn whether an attorney has professional liability insurance, unsatisfied judgments (for acts or errors arising out of the rendering of legal services) or has been publicly disciplined. Va. S. Ct. R., Pt. 6: § IV, ¶ 18; ¶ 13(K)(5)(e). The Committee also observes that ninety-two percent (92%) of all Virginia attorneys in private practice reported for fiscal year 1996 that they voluntarily carry professional liability insurance.

On the other hand, lay settlement companies are not subject to any regulations and owe no legal duties other than those imposed by agency or tort law.[10] We believe that both the potential and actual harm to the consumer is very significant when lay settlement companies are permitted to close real estate transactions when the buyer and/or seller are unrepresented by counsel. This Committee has received many reports of specific instances of harm caused by lay settlement agents, including increased costs, delay, out-of-pocket expenses, lawsuits, title

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[8] There are admittedly restrictions and qualifications to the payment of claims by the Client Protection Board, not the least of which is that payments are deemed a matter of grace and are totally discretionary. However, the Committee is informed that the Board has never exercised its discretion to deny an otherwise eligible claim. The only time the Board has used its discretion is to pay a claim which did not meet all of the requirements under the rules.

[9] In the case of a disbarred attorney seeking reinstatement, the Virginia Supreme Court refers the petition to the Disciplinary Board for a recommendation following hearing on the matter. The Board, in determining whether to recommend reinstatement, applies ten factors enunciated in an earlier case In the Matter of Alfred L. Hiss, VSB Docket No. 83-26 (1984). One of the ten Hiss factors requires restitution to clients.

[10] Since non-lawyer settlement companies are an unregulated industry, neither the Committee nor Council can evaluate the adequacy of any existing regulation other than our own unauthorized practice rules. Proposals to require licensing, financial responsibility, escrow account procedures, certification, grievance procedures, etc., are measures beyond the purview of this Committee and the Virginia State Bar.

defects and monetary loss. These reports are too numerous and detailed to set out in this opinion. As a result, examples of these matters are set out in a report to accompany this opinion.

II. Pro Se Closings: Real Estate Closings Performed by Persons Who are Parties to the Transaction

The unauthorized practice rules do not apply when a natural person chooses to act *pro se* (without an attorney) in a particular matter. Thus, either the buyer or seller, or both, may choose to forego the engagement of an attorney and proceed with a real estate transaction at his or her peril. However, it is the unauthorized practice of law for a third party[11] (i.e., settlement agent) to perform a real estate closing on behalf of the buyer and/or seller and obtain compensation, direct or indirect, for that service.

Thus, for example, the prohibition against the unauthorized practice of law does not apply when a bank, through its regular employee closes its own loan with an unrepresented customer. A regular employee acting for his employer is authorized to prepare certain legal documents necessary and incident to the regular course of conducting a licensed business. Va. S. Ct. R., Pt. 6: § I(B). The Committee is of the opinion that lending institutions are to be regarded as "licensed" businesses.[12] Indeed, this Committee has previously opined that a mortgage company may lawfully prepare instruments used in first and second trust lending. However, it is the unauthorized practice of law for the mortgage company to make a separate charge for the preparation of instruments affecting title to real estate in connection with a real estate mortgage closing. UPL Opinion No. 112 (app'd by Supreme Court of Virginia, September 21, 1989); UPR 6-103(A)(4).

Therefore, this opinion should not be construed as prohibiting a lender from closing its own

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[11] An unauthorized third party would also include banks attempting to close a loan made to a borrower to purchase real estate from a seller (other than the bank). While the Committee states herein that a bank may close its own loan without violating the unauthorized practice rules, this is limited to situations in which the bank and its customer are the only parties to the transaction (i.e., equity loans, refinance loans). If the bank is the lender in a transaction in which the borrower is purchasing real estate from a third party, the bank may not conduct, nor appoint an agent to conduct, the settlement who is not an attorney for one of the parties to the sales contract.

[12] Mortgage lenders or brokers must apply for a license with the State Corporation, before beginning business and meet certain criteria under Va. Code § 6.1-416. Other lending institutions, before beginning business, must apply to the SCC for a "Certificate of Authority." Banks, for example, must meet certain criteria as determined by the SCC before receiving a certificate including: adequate capitalization, public interest, oaths of directors, qualifications of officers (i.e., moral fitness, financial responsibility, business qualifications), insured deposits, etc. Other financial institutions face similar requirements before receiving their Certificate of Authority. *See, e.g.*, §§ 6.1-194.12 (state savings and loan associations); 6.1-194.14 (state savings banks) and 6.1-225.14 (credit unions).

In addition, federal law imposes on lending institutions significant regulation of loan settlement practices and disclosure requirements. *See* 12 U.S.C. §§ 2601-2617, Real Estate Settlement Procedures Act (RESPA).

loans (i.e., equity loans, refinancings) with its customer, provided no separate fee is charged for the preparation of any legal instruments. The Committee warns, however, that the lender's employee may not undertake to give legal advice to the borrower or answer any questions posed by the borrower that would require the lender's employee to apply legal knowledge or skill.

Likewise, subject to the foregoing restrictions, a builder or other corporate entity may close on the sale of its own property to an unrepresented purchaser through the services of its own regular employee. First, consistent with the right of *pro se* representation set out above, a non-lawyer may prepare a deed with respect to, or deed of trust secured by real estate owned by him. UPR 6-103(A)(1). An individual, if he chooses to do so, may draw or attempt to draw legal instruments for himself or affecting his property. A corporation acting through its employees may do the same with respect to its own property. UPC 6-5. Thus, for example, this Committee has opined that it is not the unauthorized practice for non-lawyer employees of the Virginia Department of Transportation to prepare deeds, option agreements and Certificates of Take/Deposit, using forms prepared by the Office of the Attorney General, to acquire title of, or right of way to real estate owned by a private landowner. Citing Part 6, Section I(B)(2) of the Rules of the Supreme Court of Virginia, the Committee concluded that the Department employees would be allowed to prepare these documents, some of which were to be executed by the property owner following negotiations and offer for the privately owned property. UPL Op. 125.

Common to all these permitted activities is the fact that the non-lawyer, or his employer is a party to the real estate transaction. On the other hand, a lay settlement agency is not a party to the real estate transaction it closes and has no direct interest in the transaction other than the payment of its settlement fee. Therefore, the lay settlement agent does not qualify for the "*pro se*" or "employee" exceptions to the unauthorized practice rules. The lay settlement agency, in performing a loan closing, undertakes to represent others by providing advice or services under circumstances which imply the use or possession of legal knowledge or skill.

III. Tasks Which a Non-lawyer May Perform Incident To a Real Estate Closing

The foregoing does not mean that a lay settlement agency cannot perform many tasks associated with a real estate closing. UPR 6-104(A) provides that a non-lawyer may: (1) Make abstracts of title (i.e., copy salient portions of what the public record shows as distinguished from expressing an opinion on the legal consequences of what the records show); (2) Act as an agent or broker in connection with the issuance of title insurance commitments, binders and policies; and (3) Provide such other services of a clerical nature as may assist the parties in the settlement of a contract, commitment or other agreement with respect to the sale or encumbrance of property.

Thus, for example, a non-lawyer may compile and report factual information as disclosed by the public records (i.e., make an abstract of title); but he may not express an opinion or issue

a certificate as to the legal consequences of what his investigation of the public records may show. Incident to his investigation of the facts, an abstracter may give to his regular employer or, upon request, to a lawyer his opinion as to the status of legal title as disclosed by his investigation. However, neither the abstracter nor his employer may give a certificate or title or opinion to a third party, or otherwise hold themselves out as possessing legal knowledge or skill unless that individual is a lawyer or entity registered and authorized to practice law. UPC 6-3.

A title insurance company may issue its title insurance commitment, binder or policy; but these Documents, or the provisions thereof, cannot be held out as a legal opinion based on the examination of title. UPR 7-101(B),(C). Nor may a title insurance company through its agents or employees give legal advice or express an opinion to any person other than, upon request, to a lawyer, as to the status or marketability of title to real property in Virginia, or as to the legal effect of documents comprising the chain of title. UPR 7-101(A).

A real estate agent may prepare a contract for the sale of real estate incident to a transaction in which he or she negotiated in the ordinary course of conducting his or her licensed business. UPR 6-103(A)(3); UPC 6-6; UPL Ops. 63, 96. However, the agent may not do so if he or she was not involved in the negotiation of the transaction, as this constitutes the unauthorized practice of law. UPL Op. 75.

UPC 6-7 states that non-lawyers may perform the following tasks in connection with a real estate closing:

> A. Order a survey, but not give an opinion as to the adequacy of such survey or with respect to matters reflected therein.
>
> B. Obtain copies of leases, easements, restrictions, building codes, zoning ordinances and the like, but not give an opinion as to the legal effects thereof or any party's legal obligation to comply therewith.
>
> C. Order termite or other inspections, but not give an opinion as to whether the results thereof comply with the terms of the contract.
>
> D. Ascertain the status of utility services and assist in their transfer, but not give legal advice as to a party's legal obligation with respect thereto.
>
> E. Arrange for the issuance of casualty insurance coverage, as requested by a party in interest.
>
> F. Provide lien payoff figures as asserted by the lienholder, but not give advice as to a party's obligation to pay the amount claimed.

G. Make mathematical computations involving the proration of taxes, insurance, rents, interest and the like in accordance with the terms of the contract or local custom.

H. Obtain lien waivers from mechanic or materialmen in a form acceptable to the party in interest, but not prepare such waiver or give advice as to the legal sufficiency thereof.

I. Prepare settlement statements.

J. Receive and disburse settlement funds, and serve as escrow agent, to the extent licensed to do so.

K. Prepare receipts and certificates of release, but not deeds, deeds of trust, deed of trust notes, or deeds of release.

In UPL Op. 147, the Committee distinguished those activities which may properly be done by an independent real estate paralegal company and those which must be performed by the closing attorney. The closing attorney reviews the real estate contract to determine its requirements and what tasks can be delegated to non-lawyers. The settlement company requests title search, orders survey, notifies lender, receives lender's package and completes non-legal documents, i.e., tax information, name affidavit, W-9 forms, commitment letter, HUD-1 statement and forwards any legal instruments prepared by the lender to the closing attorney for review prior to closing. Thus, the closing attorney may delegate to laypersons those tasks which do not require legal skill or knowledge, but the closing attorney must actively oversee all aspects of the closing.

It is also permissible for a non-lawyer to prepare certificates of satisfaction to be executed by a mortgage company. UPL Op. 80, UPC 6-7(K).

This Committee has also opined that an escrow and title company or real estate settlement service may charge a release fee or closing fee for its services. UPL Ops. 141, 91, 80. The fee, however, may not be charged for the preparation of legal instruments or the provision of legal services. *Id.*, Legal Ethics Op. 1329. The title agency may not mask attorneys legal fees under the guise of a "settlement fee" or "document preparation fee." LEO 1329.

III. Conclusion

The real estate closing, as addressed herein, when viewed in its entirety, is an undertaking which requires the application of legal skill, knowledge, and principles to a particular situation. The determination that all the requirements to close a real estate transaction have or have not been met is a legal judgment or conclusion which a non-lawyer is not authorized to make. Handling and conducting a real estate closing is the practice of law even though some of its

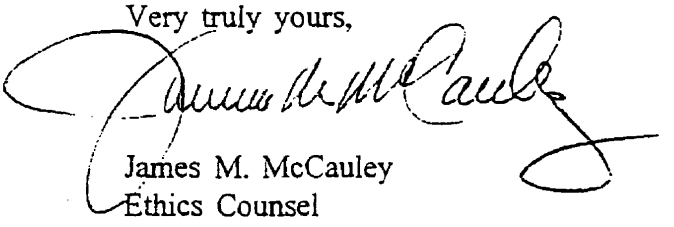
component tasks may be performed by non-lawyers.

Nevertheless, the parties to the transaction (i.e., buyer/seller or borrower/lender) may close a loan without a lawyer and this is not unauthorized practice. However, no party may retain the services of a third party, not his or her employee, to close the real estate transaction. Such a third party would be engaging in the unauthorized practice of law.

Although this opinion frequently addresses matters relating to residential real estate closings, the analysis would be essentially the same if the transaction were commercial. Therefore, this opinion applies with equal force to commercial real estate closings.

This opinion was approved by Bar Council on October 17, 1996. However, this opinion is not final and must be reviewed by the Virginia Supreme Court after a public comment period pursuant to Pt. 6: § IV: ¶ 10(f)(iii). The Virginia Supreme Court has the authority to approve, disapprove or modify the opinion. If the opinion is approved, with or without modification, it shall become a decision of the Court. Pt. 6: § IV: ¶ 10(g)(v).

Very truly yours,



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UNAUTHORIZED PRACTICE OF LAW

November 15, 1996

The Honorable William K. Barlow
353 Main Street
Smithfield, VA 23430

Re: Joint Legislative Study Committee
Request Concerning States Forbidding
Non-Lawyer Real Estate Closings

Dear Delegate Barlow:

This letter and enclosures will hopefully respond to your subcommittee's request for an accurate report of the law in other states concerning whether nonlawyers are permitted to close real estate transactions. In our research, we refer often to "title companies" which also includes, unless specifically noted otherwise, any other type of lay settlement agent (i.e., real estate agent, lender's agent, escrow agent, etc.). Our office has thoroughly researched the pertinent legal authorities in every state by statute, case law, rule of court or advisory opinion. In some cases, we have contacted officials in other states by telephone. Unfortunately, we did not have enough time since the October 31 meeting and the November 15 deadline to conduct more telephone inquires of those states where the law seems unclear.

We do not agree with the representations that have been made by the Coalition to the your Subcommittee at the last two hearings regarding the status of the law in other states. South Carolina is not the only state that prohibits non-lawyers from conducting real estate settlements. Clearly there are other states that prohibit or significantly restrict activities by nonlawyers in connection with real estate closings.

While the results of our research in all other states is provided, I make the following observations:

In Coffee County Abstract & Title Co. v. Norwood, 445 So.2d 852 (Ala. 1983), the court held that ALA. CODE §34-3-6 specifically prohibits certain closing activities conducted by those other than licensed attorneys. A lay settlement service could not complete nor fill in blank legal instruments nor give legal advice to the parties at closing. In this case the lay settlement agent gave his opinion regarding the effect of the manner of taking title. While this case can be argued as saying that non-lawyers can do a real estate closing so long as no legal advice is given and no legal instruments

are prepared (see concurring opinion), the reality is that few, if any real estate closings can be performed without legal advice being given somewhere during the closing process.

In Connecticut, according to the Connecticut Bar Association, attorneys must close real estate transactions. In fact, the Connecticut Bar Association has recently issued an advisory opinion stating that a paralegal's role in a real estate closing is essentially limited to that of a messenger and to deliver and pick up the documentation needed for the closing. While the paralegal may have the parties execute the documents, it is expected that the paralegal will contact an attorney in his or her law firm during the closing for instructions, if any questions are raised about the documents, changes in adjustment or price, or any other matters involving documents or funds. In addition, a lay employee of a law firm, such as a paralegal cannot supervise the closing where there is no attorney at the closing to perform this function. Conn. Bar Assoc. Informal Op. 96-16 (July 3, 1996). A copy of the advisory opinion in enclosed.

The State Bar of Georgia in Adv. Op. No. 86-5 (May 12, 1989), states that the closing of a real estate transaction constitutes the practice of law as defined by GA. CODE ANN. § 15-19-50. Accordingly, it is ethically improper for lawyers to permit nonlawyers to close real estate transactions. Certain tasks may be delegated to nonlawyers, subject to the control and supervision of an attorney. However, the lawyer cannot delegate to the nonlawyer the responsibility to "close" the real estate transaction without the participation of an attorney.

In Iowa, title companies do not perform closings because they are prohibited, by statute, from selling title insurance on real estate transactions in that state. My source of information is the current Chair of the Iowa Standing Committee on the Unauthorized Practice of Law, Joseph Lauterbach, (712) 755-3141. Real estate agents, on the other hand, may perform closings and prepare "simple documents."

In North Carolina, no one but a licensed attorney may prepare deeds or mortgages. N.C. GEN. STAT. § 84-2.1. The preparation of legal documents for a third party is the practice of law. However, case law permits someone with a "primary interest" in a transaction to prepare legal documents for that transaction. The cited statute also prohibits nonattorneys from rendering opinions as to the legal rights of any party. The filling in of blanks on deeds of trust is also the unauthorized practice of law. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962). In addition, Chapter 58 of the North Carolina General Statutes requires that an *independent* attorney certify the title in order to obtain the title insurance. Relying primarily on the Pledger case, lenders close loans in North Carolina because the lender has a "primary interest" in the transaction as explained in that decision. However, it is the opinion of the Consumer Protection Committee of the North Carolina State Bar that a title company does not have a primary interest in a real estate closing that would enable it to prepare documents for or close a real estate transaction for others. I have a letter from the North Carolina Bar confirming their position and enclose a copy for your review.

South Carolina, as you know prohibits the unauthorized practice of law by statute, and by case law, the conduct of a real estate is the practice of law which only lawyers may perform. South Carolina v. Buyers Service Co., Inc., 357 S.E.2d 15 (S.C. 1987).

According to the Massachusetts Lawyers Weekly (April 18, 1994) at p.1, in 1993 a state Superior Court judge permanently restrained a settlement company from performing real estate closings because it

constituted the unauthorized practice of law. The style of the case in Massachusetts Convevancers Association, Inc. v. Closings, Ltd. I have only the Lawyers Weekly article, but not any order or opinion. I enclose a copy of the article.

I am enclosing a revised and updated summary of the results of our research of the law in the other 49 states regarding real estate closings and the unauthorized practice of law. This material was previously supplied to Legislative Services well before the October 31, 1996 meeting. By copy of this letter to each of the Subcommittee members, I am providing the enclosed summary to each of them. I believe it may be wise for Legislative Services to consider a followup with a survey to the appropriate regulatory bar or agency that enforces UPL to determine what their specific enforcement policies may be. We have found ten (10) states which have nothing on the books other than a general statute prohibiting the unauthorized practice of law. In regard to those states, our research did not reveal, however, any statute, case, court rule or advisory opinion that specifically addresses the issue of whether lay persons may close a real estate transaction. Also please note that in some jurisdictions where title companies or lenders are permitted to close real estate transactions, they may not charge a separate fee for that service.

I would also like to address the conflict of interest issue raised by Senator Saslow, where an attorney represents the buyer, seller and lender at closing. While it is true that the settlement attorney cannot ethically represent the buyer against the seller if an actual conflict should arise during the course of a real estate settlement, at least the settlement attorney has an ethical and fiduciary duty to abate the settlement, advise the parties of the conflict and their need to secure independent counsel. The Bar seriously questions whether a nonlawyer settlement agent would recognize these obligations and advise the parties not to go forward with an ill-advised settlement and secure legal counsel. I would also turn your attention to Pickus v. Virginia State Bar, 232 Va. 5 (1986) which found in pertinent part that a closing attorney may represent both the buyer and seller in a real estate transaction. The Supreme Court stated that, in that situation, the settlement attorney assumes the duties of a fiduciary and is obligated to handle properly the preparation of documents, settlement of the real estate transaction and disbursement of funds. As stated before, lawyers are subject to ethical and legal standards to which nonlawyers are not.

Nor should the fact that the settlement attorney's fee is paid out of the loan proceeds provided by the lender on behalf of the purchaser compromise or weaken the lawyer's ability to discharge his fiduciary obligations. Lawyers are paid routinely by insurance companies to defend their insureds, and if a conflict arises, the lawyer owes his primary duty to the insured, not the carrier which pays the lawyer's fee. Rarely does the Virginia State Bar receive even a complaint or allegation that an insurance defense lawyer failed to adequately represent the insured because of a conflict of interest. Moreover, particularly in residential real estate transactions, the lawyer's fee is so modest that it would be foolish to risk liability or disciplinary action by closing a transaction which the lawyer knows has problems.

It was explained to your subcommittee on October 31, 1996, that the UPL Committee's vote was 7-2, with the two lay members voting against. In fact, the vote at the May 24, 1996 meeting was 6-2-1. Six members, all attorneys, voted in favor, with two members voting against and one person absent. An attorney who works for a title company along with one of the lay members, voted against the opinion. The other lay member was not present and attended only one meeting during his appointment

as a member of the committee. At our September, 1996 meeting the vote was 6-3. The three in opposition included the title company attorney and two lay members. Please allow this letter to correct the record accordingly.

I hope that this information proves to be of value to you and your committee in considering these matters. If I can be of further assistance, please advise.

Very truly yours,

James M. McCauley
Ethics Counsel

Enclosures

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The Hon. William S. Moore, Jr.
The Hon. Joseph B. Benedetti
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IS THE PREPARATION OF REAL ESTATE CLOSING DOCUMENTS BY NON-ATTORNEYS THE UNAUTHORIZED PRACTICE OF LAW?
UPL 183 AND THE BODY OF LAW WITHIN THE UNITED STATES[1]

Earlier this year, the Virginia State Bar issued Unauthorized Practice of Law Opinion Number 183. This opinion has stimulated renewed fervor about whether non-attorneys may prepare legal documents and conduct real estate closing transactions. In November, 1996, the Virginia General Assembly will hear further argument for and against legislation intended to authorize the preparation of certain documents and actual closing activities for non-attorneys.

The following is a summary of the current state of the law in the rest of the United States pertaining to real estate document preparation and closing activities:

Alabama
Statute specifically prohibits closing activities conducted by those other than licensed attorneys. ALA. CODE § 34-3-6. The act of " 'filling out blanks of deeds' " is the unauthorized practice of law as legal decisions must frequently be made about the information that must go into the blanks. Coffee County Abstract and Title Co. v. Norwood, 445 So.2d 852 (Ala. 1983).

Alaska
Rule pending before Alaska Supreme Court declaring closing activities the practice of law.

Arizona
Any person holding a valid real estate salesman or broker's license who is a broker or agent for a party to a real estate transaction may draft or fill out, without charge, any and all instruments relating thereto, including mortgages, deeds and contracts for sale. ARIZ REV. STAT. ANN. 26 § 1.

Arkansas
. Real estate brokers are authorized to fill in the blanks of pre-printed, standardized forms concerning mortgages, deeds, and other documents relating to the transaction being handled by the broker. Pope County Bar Ass'n, Inc. v. Suggs, 624 S.W.2d 828. (Ark. 1981).

California
WEST'S ANN. CAL. INS. CODE §12340.3 permits closing activities in connection with title insurance policies.

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[1] This summary also includes state authorities pertaining to the preparation of documents relating to real estate transactions including deeds, deeds of trust, notes and other legal papers. The sources for the conclusions drawn include case and statutory law from the various jurisdictions and telephone interviews with title companies or state bar counsel from the various jurisdictions.

Colorado
Real estate brokers may prepare deeds and other related instruments at the request of their customers in connection with the transactions where done without charge for these services. Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 312 P.2d 998 (Colo. 1957). Title companies are restricted as to the documents which they may prepare by the admonition that they may not do any act nor perform any service within special field restricted to attorneys. See Title Guaranty Co. v. Denver Bar Ass'n, 312 P.2d 1011 (Colo. 1957).

Connecticut
Attorneys must close real estate transactions. Additionally, the Connecticut Supreme Court has ruled that a town clerk, who was not an attorney , was engaged in the unauthorized practice of law by preparing, issuing and rendering opinions of title for a fee. Grievance Committee of New Haven County v. Payne, 22 A.2d 623 (Conn. 1941).

Delaware
Delaware has not been faced with this issue, however, the position of the State Bar is that non-lawyers may not handle real estate closings.

District of Columbia
Title Companies do not close real estate in the District of Columbia.

Florida
F.S.A. §627.7711 permits closing activities by title companies as part of the business of title insurance.

Georgia
Real estate brokers and salespersons may complete listing or sales contracts and leases whose form was drafted by an attorney. GA. CODE ANN. § 43-40-25.1 (1995). However, closing of real estate transactions is the practice of law and cannot be undertaken without the participation of an attorney. Adv. Op. No. 86-5 (May 12, 1989).

Hawaii
General statutory prohibition against unauthorized practice of law.

Idaho
General statutory prohibition against unauthorized practice of law.

Illinois
215 ILL. COMP. STAT. § 155/3 permits closing activities in conjunction with the issuance of title insurance policies.

Indiana
Filling in blanks on legal documents drafted by attorneys which requires only use of common

knowledge of the information to be inserted in the blanks and the legal consequences involved does not constitute the unauthorized practice of law. However, if the filling in of the blanks involves significant legal consequences, the act of completing the forms may be the unauthorized practice of law. Indiana State Bar Ass'n v. Indiana Real Estate Ass'n, 191 N.E.2d 711 (Ind. 1963). A real estate salesperson may not make separate charge for completion of standardized forms and may not prepare these forms for any party for whom he is not the agent, unless he is one of the parties to the contract or instrument. Id.

Iowa
Title insurance is not sold in Iowa, therefore title companies do not conduct real estate closings.

Kansas
Title Companies close real estate transactions.

Kentucky
A real estate mortgage lender, or a title insurance company, on behalf of a real estate mortgage lender may perform the ministerial acts necessary to close a real estate loan. KBA U-31 (Mar. 1981).

Louisiana
The practice of law "means and includes: . . . [c]ertifying or giving opinions as to title to immovable property or any interest therein or as to rank or priority or validity of a lein, privilege or mortgage, as well as the preparation of acts of sale, mortgages, credit sales or any acts or other documents passing title to or encumbering immovable property." LA. REV. STAT. ANN. § 37:212 A(d) (1995).

Maine
Title companies close real estate transactions.

Maryland
Title companies close real estate transactions.

Massachusetts
Title companies conduct some closings on commercial properties and attorneys close residential transactions. The drafting of documents incidental to work of a distinct occupation is not the practice of law, though those documents may have legal consequences. Lowell Bar Ass'n v. Loeb, 52 N.E.2d 27 (Mass. 1943).

Michigan
Title companies may conduct real estate closings. Licensed real estate brokers may, without compensation, complete printed forms of offers to purchase realty, warranty deeds, quit claim deeds, land contracts, assignments, leases and other documents incidental to the consummation of realty transactions in which they act as brokers. In re Petitions of Ingham County Bar Ass'n.,

69 N.W.2d 713 (Mich. 1955).

Minnesota
Residential real estate closing services may be provided and a fee charged by a licensed attorney, real estate broker, real estate salesperson, and real estate closing agent. MINN. STAT. ANN. § 507.45 (1995). Real estate brokerage did not engage in the unauthorized practice of law when it charged a separate fee for preparing the documentation and closing of an ordinary real estate transaction which presented no difficult or doubtful questions requiring the analysis of a trained legal mind. Cardinal v. Merrill Lynch Realty/Burnet, Inc., 433 N.W.2d 864 (Minn. 1989).

Mississippi
No one but licensed attorney may directly or indirectly write deeds of conveyance, deeds of trust, mortgages, contracts or other legal documents. MISS. STAT. ANN. §73-3-55 (1995). The Mississippi Supreme Court has held that the practice of law includes selecting or drafting documents and rendering any advice pertaining to the legal rights of another. Darby v. Mississippi State Bar Board of Admissions, 185 So.2d 684 (Miss. 1966).

Missouri
Title companies handle real estate closings.

Montana
Title companies close real estate transactions.

Nebraska
Title companies close real estate transactions.

Nevada
Title companies close real estate transactions.

New Hampshire
Title companies perform real estate closings.

New Jersey
Title companies perform real estate closings. The practice of conducting residential real estate closings without the presence of attorneys representing the vendor and purchaser is not the unauthorized practice of law, as long as the broker notifies the vendor and purchaser of the conflicting interests of the broker and title company, and of the general risk involved in not being represented by an attorney. In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 654 A.2d 1344 (N.J. 1995).

New Mexico
Filling in blanks on legal documents where only general knowledge is required and where the forms have been prepared by attorneys is not the unauthorized practice of law. However, if the

completion of the forms affects substantial legal rights, then the services of an attorney are required. Further, the making of a separate additional charge for the completion of the forms is the practice of law because it emphasizes conveyancing and legal drafting, rather than the business of the title company. State Bar v. Guardian Abstract & Title Co., 575 P.2d 943 (N.M. 1978).

New York
Title companies do not close real estate transactions.

North Carolina
N.C. GEN. STAT. §84-2.1 prohibits anyone other than a licensed attorney from preparing deeds or mortgages. That statute also prohibits non-attorneys from rendering opinions as to the legal rights of any party. The North Carolina Supreme Court has held the filling in of blanks on deeds of trust was the unauthorized practice of law. State v. Pledger, 127 S.E.2d 337 (N.C. 1962).

North Dakota
General statutory prohibition against unauthorized practice of law.

Ohio
General statutory prohibition against unauthorized practice of law. A real estate broker's drafting of a real estate sales contract was the unauthorized practice of law. Foss v. Berlin, 443 N.E.2d 197 (Ohio Ct. App. 1981).

Oklahoma
General statutory prohibition against unauthorized practice of law.

Oregon
General statutory prohibition against unauthorized practice of law. A real estate broker is not engaged in the unauthorized practice of law where his acts were as a "mere scrivener" in the preparation of deeds and contracts. Oregon State Bar v. Fowler, 573 P.2d 674 (Or. 1977). Also, whether the broker received compensation for his services as a scrivener is not controlling upon whether his acts constitute the unauthorized practice of law. Oregon State Bar v. Wright, 573 P.2d 283 (Or. 1977).

Pennsylvania
General statutory prohibition against unauthorized practice of law. A title insurance company which did not hold itself out to the public as authorized to conduct any business except title insurance, but which, incidental to issuance of title insurance, prepared deeds, mortgages, assignments of mortgages and agreements, and informed applicants of conditions under which title insurance would be issued, did not engage in the unauthorized practice of law. La Brum v. Com. Title Co. of Philadelphia, 56 A.2d 246 (Pa. 1948).

Title companies in twenty states conduct real estate closings in the absence of any clear prohibition upon the practice. These states include: Arkansas, Colorado, Indiana, Kansas, Kentucky, Maine, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, Pennsylvania, South Dakota, Texas, Utah, Wisconsin, Wyoming.

In Massachusetts, title companies conduct closings on commercial property; attorneys conduct closings on residential property.

Title companies do not conduct closings in the following states, despite no clear prohibition on the practice: Connecticut, District of Columbia, and New York.

Sherrill A. Oates
Virginia State Bar Intern
November, 1996

The

Coalition

For Choice In Real Estate Closings

Virginia Bankers Association
Virginia Association of Community Banks
Virginia Mortgage Bankers Association
Virginia Association of Mortgage Brokers
Virginia Financial Services Association
Virginia Association of Realtors
Home Builders Association of Virginia
Virginia Land Title Association
Virginia Association of Land Title & Escrow Agents
Virginia Credit Union League

November 27, 1996

The Hon. William K. Barlow
P. O. Box 190
Smithfield, Virginia 23430

Re: House Joint Resolution 210

Dear Chairman Barlow:

At the last session of the HJR210 Study Committee, the Committee asked the State Bar and the Coalition for Choice in Real Estate Closings to identify those states which forbid non-lawyer real estate settlements by statute or case law. With the consent of the Coalition, Lawyers Title Insurance Corporation contacted the State Bar to work together on gathering this information. The State Bar chose to prepare its own report which it submitted on November 15, 1996.

As the chart attached as Exhibit A reveals, the State Bar's analysis and conclusions are, in many respects, misleading or wrong. Please, consider the following:

	States with no prohibition on non-lawyer settlements
1. On page 8, the last page of its report, the State Bar concludes that in twenty states title companies conduct closings in the absence of any clear prohibition on the practice. These states include Arkansas, Colorado, Indiana, Kansas, Kentucky, Maine, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, Pennsylvania, South Dakota, Texas, Utah, Wisconsin and Wyoming.	20
2. The State Bar concludes six states have enacted legislation authorizing non-attorneys to conduct real estate settlements. These are Arizona, California, Florida, Illinois, Minnesota and Rhode Island.	6

	States with no prohibition on non-lawyer settlements
3. On page 7, the State Bar says ten states have enacted a "general prohibition" against the unauthorized practice of law. The states are Hawaii, Idaho, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Tennessee, Vermont and Washington. What the State Bar declined to tell you is that in nine of the ten states the predominant practice is for non-attorneys to conduct real estate settlements. In only one of these states, Vermont, do attorneys handle most (but not all) closings.	10
Subtotal	36

That brings us to **36 states** that do not have statutory or case law prohibitions on non-lawyer settlements. Let us consider the remaining dozen states outside Virginia (excluding South Carolina which everyone concedes by judicial decision prohibits non-lawyers from conducting settlements) plus the District of Columbia to see whether statute or case law prohibits non-lawyer closings.

4. On page 7, the State Bar says four states, Alabama, Louisiana, Mississippi and North Carolina, prohibit anyone except attorneys from "conducting real estate activities or preparing documents having legal effect." Although these states have certain prohibitions on non-lawyers drafting legal documents (not unlike Virginia), it is not true that these states have statutes or case law prohibitions on non-lawyers handling settlements. Indeed, in Louisiana, notaries can close real estate transactions; in Alabama, a state Supreme Court decision permits non-lawyer closings (see McCauley cover letter dated November 15); and non-lawyers conduct closings in Mississippi and in North Carolina (a point conceded by Mr. McCauley

	States with no prohibition on non-lawyer settlements
in his cover letter but not mentioned in the Virginia State Bar summary).[1]	4
5. As to the remaining states:	
o Alaska--the State Bar is wrong--an Alaska statute expressly permits title insurance companies to close real estate transactions and the unauthorized practice rule pending before the Alaska Supreme Court that the Virginia State Bar cites excludes document preparation and legal advice by non-lawyers in the regular course of their primary business.	1
o District of Columbia and New York--despite the Virginia State Bar's conclusions, title companies do close real estate transactions regularly in both jurisdictions.	2
o Iowa and West Virginia--in Iowa, the Virginia State Bar concludes no title companies handle settlements because there is no title insurance. What is not said is that non-attorneys handle most closings. Likewise, in West Virginia, banks also close real estate transactions.	2
o Massachusetts--Although the State Bar concedes title companies close commercial real estate transactions, a "lawyers only" dispute similar to Virginia's is brewing.	1

[1] A committee of the North Carolina State Bar advised VaREAL representative, Charles Lollar, by letter dated August 28, 1996, that the preparation of legal documents is considered to be the practice of law. Although that letter was attached to the State Bar report, it did not address closings.

	States with no prohibition on non-lawyer settlements
o Connecticut--All current case law involves document preparation. Although attorneys are the dominant form of closing entity, non-attorneys do close transactions there (see attached advertisement).	1
o Georgia--Although attorneys are the dominant form of closing entity, banks frequently close real estate transactions.	1
o Delaware--Issue unaddressed.	1
GRAND TOTAL	49 (including D.C.)

Even the State Bar's own research efforts confirm that non-lawyers close real estate transactions in the vast majority of the states. Given the Virginia State Bar's conclusions in its UPL Opinion No. 183, they undoubtedly have reason to wish that "lawyers only" prohibitions exist in more states than South Carolina. Regardless of the quality of the State Bar's work, the Bar's erroneous conclusions on states like Alaska pale in significance to the larger question posed by the Joint Legislative Study Committee at its last meeting. Whether it is 49 states or just 48 states that permit non-lawyer closings, the ultimate question both the Virginia State Bar and VaREAL failed to address is why all of these states are wrong.

Sincerely yours,

R. Brian Ball

RBB/cls
Enclosure
cc: *The Hon. Gladys B. Keating*
The Hon. Mitchell Van Yahres
The Hon. William S. Moore, Jr.
The Hon. Joseph B. Benedetti
The Hon. Richard L. Saslaw
The Hon. Warren E. Barry
Charles M. Lollar, Esq.
James M. McCauley, Esq.
W. Chadwick Perrine, Esq.
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EXHIBIT A

ISSUE: What states forbid non-lawyer closings by statute or by case law?					
STATE	BAR RESEARCH	BAR CONCLUSION	CONTRA ALTA RESEARCH	PRACTICE	CONCLUSION
Alabama	Alabama Code Section 34-3-6 (Comment: doc prep. statute)	Statute prohibits non- attorneys from conducting real estate closing activities or preparing documents (Comment: statute addresses doc prep.)	Coffee County Abstract & Title Co. v. Norwood, 445 445 So. 2d 852 (Ala. 1983)	Non-lawyer closings by banks and title companies occur in accord with Norwood. Comment: "Under Norwood non-lawyers can conduct the actual closings." Alabama Ethics Opinion RO-94-01	Non-attorneys close real estate transactions
Alaska	Rule Pending (?) (See Proposed Rule 33.3) Comment: see also A.S.08-88-40S effective 6/26/96 concerning doc. prep.	Alaska has a rule pending before its Supreme Court that closing activities are the practice of law. Comment: Draft Proposed Rule 33.3 specifically exempts from the practice of law "advice, for compensation, as to the legal rights and duties applicable to the specific circumstances of any person" as well as "preparation of documents and contracts, for compensation, by which legal rights are affected" when performed in the regular course of a business having a primary purpose other than performance of those acts.	A.S. 08.08.210 (who may practice law). Alaska Rules of Court - Rule 63. Comment: A.S. 21.66.180(2) a title insurance company may do any act incidental to a policy of title insurance: "including but not limited to, conducting or holding an escrow, settlement, or closing of a transaction."	Non-lawyer closings routine	Non-attorneys close real estate transactions
Arizona	ARIZ REV. STAT ANN 26 Section 1. (Comment: doc prep statute)	Legislation authorizes closings by non-attorneys		Non-lawyer closings routine	Non-attorneys close real estate transactions
Arkansas	Brokers fill in documents Pope County Bar Ass'n v. Suggs 624 S.W..2d 828 (Ark 1981)	Title companies close in absence of clear prohibition		Non-lawyer closings routine	Non-attorneys close real estate transactions
California	WEST'S ANN. CAL INS. CODE Section 12340.3 permits closing activities in connection with title insurance	Legislation authorizes closings by non-attorneys		Non-lawyer closings routine	Non-attorneys close real estate transactions

ISSUE: What states forbid non-lawyer closings by statute or by case law?

STATE	BAR RESEARCH	BAR CONCLUSION	CONTRA ALTA RESEARCH	PRACTICE	CONCLUSION
Colorado	Real estate brokers may prepare documents upon request, but not title companies. Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 312 p.2d 998 (Colo. 1957), Title Guaranty Co. v. Denver Bar Ass'n, 312 p.2d 1011 (Colo. 1957)	Title companies close in absence of clear prohibition	Colo. Rev. Stat. Ann. Section 10-11-101 et seq. Comment: See Section 10-11-1 (3) The business of title insurance includes "the performance of closing and settlement services by a title insurance company." Sub-Section 3.5 defines closing and settlement services as "providing services for the benefit of all necessary parties in connection with the sale, leasing, encumbrancing, mortgaging, creating a secured interest in and to real property, and the receipt and disbursement of money in connection with the sale, lease, encumbrance, exchange or deed of trust."	Non-lawyer closings routine	Non-attorneys close real estate transactions
Connecticut	Attorney must close real estate transactions. Conn. Bar Ass'n takes position that closings are practice of law. See also Grievance Committee of New Haven County v. Payne 22 A.2d 623 (Conn. 1941) (Comment: doc prep.).	Title companies do not conduct closings despite no clear prohibition	All identified cases concern document preparation	By custom, attorneys close real estate transactions, except for equity lines. Some non-lawyer closing entities openly advertise (see attached). Comment: Unlike the Virginia State Bar, the Conn. Bar Ass'n is voluntary Bar, not a state agency, and is entitled to articulate whatever opinion it wishes.	Non-attorneys close real estate transactions
Delaware	State Bar takes position that non-lawyer may not handle real estate closings (?)	State Bar takes position that title companies would not be permitted to conduct closings	No case law	Attorneys dominant form of settlement entity	Attorneys dominant form of settlement entity.
District of Columbia	Title companies do not close real estate in DC (?)	Title companies do not conduct closings despite no clear prohibition	Burleson v. United Title and Escrow Co., 484 A.2d 535 (D.C. 1983) (Commonwealth Title by settlement of individual real estate transactions was engaged in authorized business.)	Title companies close real estate by longstanding custom and practice	Non-attorneys close real estate transactions

ISSUE: What states forbid non-lawyer closings by statute or by case law?

STATE	BAR RESEARCH	BAR CONCLUSION	CONTRA ALTA RESEARCH	PRACTICE	CONCLUSION
Florida	F.S.A. Section 627.771 permits closing activities by title companies as part of business of title insurance	Legislation authorizes closings by non-attorneys			Non-attorneys close real estate transactions
Georgia	GA CODE ANN SECTION 43-40-25.1 (1995) (men Comment: doc prep statute), closing real estate transactions is practice of law, Adv. Op. No. 86-5 (May 12, 1989)	Georgia prohibits closing transactions performed by non-attorneys.	Georgia Bar Ass'n v. Lawyers Title Insurance Corporation, 151 S.E. 2d 718 (Ga. 1966). See also GA. CODE Sections 15-19-52 (nothing contained in UPL statute shall prevent any corp..... from doing any act or acts set out in Code Section 15-19-50 to which the persons are a party. "Furthermore, a title insurance company may prepare such papers as it thinks proper or necessary in connection with a title which it proposes to insure, in order, in its opinion, for it to be willing to insure the title, where no charge is made for it by the papers.") and 15-19-53. GA CODE ANN. Section 43-40-25(a)29 unfair trade practice to conduct "the closing of any real estate transaction by any licensee except a broker unless the licensee acts under the supervision of the broker under whom such licensee is licensed..." (Emphasis added)	Attorneys currently dominant form of settlement entity. Title companies closed real estate transactions for years after the 1966 Georgia Bar case cited. Banks continue to conduct closings.	Non-attorneys close real estate transactions
Hawaii	Has UPL statute	No information authorizing non-lawyers to conduct closings		Title companies routinely close residential and commercial transactions.	Non-attorneys close real estate transactions

ISSUE: What states forbid non-lawyer closings by statute or by case law?

STATE	BAR RESEARCH	BAR CONCLUSION	CONTRA ALTA RESEARCH	PRACTICE	CONCLUSION
Idaho	Has UPL statute	No information authorizing non-lawyers to conduct closings	In re Mathews, 79 P. 2d 536 (Idaho 1938) (doc. prep) NOTE: The Idaho Supreme Court has historically declined to implement rules proposed by the Idaho Bar Ass'n to restrict non-lawyer doc prep.	Non-attorney closings common	Non-attorneys close real estate transactions
Illinois	215 ILL COMP STAT. Section 155/3 permits closing activities in conjunction with issuance of title policy	Legislation authorizes closings by non-attorneys			Non-attorneys close real estate transactions
Indiana	Indiana State Bar Ass'n v. Indiana Real Estate Ass'n, 191 N.E. 2d 711 (Ind. 1963) (doc prep)	Title companies close in absence of clear prohibition		Non-attorney closings customary	Non-attorneys close real estate transactions
Iowa	Title insurance not sold in Iowa; therefore, title companies do not conduct real estate closings	No title insurance by statute Real estate agents may perform closings and prepare "simple documents."		Non-attorneys close by custom and practice	Non-attorneys close real estate transactions
Kansas	Title companies close real estate transactions	Title companies close in absence of clear prohibition			Non-attorneys close real estate transactions
Kentucky	A real estate lender, or a title insurance company on behalf of a real estate mortgage lender may perform the ministerial acts necessary to close a real estate loan. KBA U-31 (Mar. 1931)	Title companies close in absence of clear prohibition (?)			Non-lawyers close real estate transactions

ISSUE: What states forbid non-lawyer closings by statute or by case law?

STATE	BAR RESEARCH	BAR CONCLUSION	CONTRA ALTA RESEARCH	PRACTICE	CONCLUSION
Louisiana	LA REV. STAT. ANN. Section 37:212 A(a)(d)(1995) (practice of law statute) Comment: "Nothing in this section prohibits any person from performing, as a notary public, any act necessary or incidental to the exercise of the powers and functions of the office of notary public, as those powers are delineated in LA REV. STAT. Title 35."	Statute prohibits non-attorneys from conducting real estate activities or preparing documents	Only notaries can close real estate transactions. Comment: LA REV. STAT. ANN 35:2A1(a) (Notaries shall have the power to make conveyances)	Notaries close real estate transactions as employees of title companies. Many notaries are attorneys.	Non-lawyers close real estate transactions
Maine	Title companies close real estate transactions	Title companies close in absence of clear prohibition			Non-lawyers close real estate transactions
Maryland	Title companies close real estate transactions	Title companies close in absence of clear prohibition			Non-attorneys close real estate transactions
Massachusetts	Title Companies conduct some commercial closings, attorneys close residential transactions. Lowell Bar Ass'n v. Loeb, 52 N.E. 2nd 27 (Mass 1943) (doc prep case). See also Massachusens Conveyances Association, Inc. v. Closings, Ltd. reported in Lawyers Weekly.	Title companies conduct closings on commercial property, attorneys conduct closings on residential property.	Massachusetts Ass'n of Bank Counsel, Inc. v. Closings Ltd., 1993 WL 818916 (Mass Super. 1993) (default judgment case) Comment: See pending Massachusetts Conveyancers Association v. Colonial Title & Escrow, Inc., Superior Court Dept. of the Trial Court CA #96-2746C	Attorneys dominant form of closing entity. Banks close equity lines. Note current challenge in Colonial Title case.	Non-attorneys close real estate transactions
Michigan	Title companies may conduct real estate transactions	Title companies close in absence of clear prohibition			Non-attorneys close real estate transactions
Minnesota	MINN. STAT. ANN Section 507.45 (1995) residential real estate closing service may be provided and a fee charged by a licensed attorney, real estate broker, real estate sales person, real estate closing agent.	Legislation authorizes closings by non-attorneys			Non-attorneys close real estate transactions

ISSUE: What states forbid non-lawyer closings by statute or by case law?

STATE	BAR RESEARCH	BAR CONCLUSION	CONTRA ALTA RESEARCH	PRACTICE	CONCLUSION
Mississippi	MISS. STAT. ANN Section 73-3-55 (1995) (document drafting) Darby v. Mississippi State Bar Board of Admissions, 185 So. 2d 684 (Miss. 1966) (Selection of documents and rendering any legal advice)	Statute prohibits non-attorneys from conducting real estate closing activities or preparing documents		Non-attorney closings generally restricted to urban areas	Non-attorneys close real estate transactions
Missouri	Title companies handle real estate closings	Title companies close in absence of clear prohibition			Non-attorneys close real estate transactions
Montana	Title companies close real estate transactions	Title companies close in absence of clear prohibition			Non-attorneys close real estate transactions
Nebraska	Title companies close real estate transactions	Title companies close in absence of clear prohibition			Non-attorneys close real estate transactions
Nevada	Title companies close real estate transactions	Title companies close in absence of clear prohibition			Non-attorneys close real estate transactions
New Hampshire	Title companies close real estate transactions	Title companies close in absence of clear prohibition			Non-attorneys close real estate transactions
New Jersey	Title companies close real estate transactions	Title companies close in absence of clear prohibition			Non-attorneys close real estate transactions
New Mexico	State Bar v. Guardian Abstract Title Co., 575 P. 2d 943 (N.M. 1978)	No information authorizing non-lawyers to conduct closings. Comment: but see Guardian case cited by the Bar.	State Bar v. Guardian Abstract Title Co., 575 P.2d 943 (N.M.1978) (judicial notice of widespread title company closings without harm to public)	Title companies close virtually all real estate transactions.	Non-attorneys close real estate transactions
New York	Title companies do not close real estate transactions	Title companies do not conduct closings despite no clear prohibition on the practice.		Non-attorney real estate closings routine. Buyers and sellers often represented by separate counsel on buy/sell transactions.	Non-attorneys close real estate transactions

ISSUE: What states forbid non-lawyer closings by statute or by case law?					
STATE	BAR RESEARCH	BAR CONCLUSION	CONTRA ALTA RESEARCH	PRACTICE	CONCLUSION
North Carolina	N.C. GEN. STAT. Section 84-2.1 (define practice of law) but see "primary interest" exception. State v. Pledger 127 S.E. 2d 337 (1962) NOTE: A N.C. Statute requires an independent attorney to certify title for title insurance	Statute prohibits non-attorneys from conducting real estate closings activities or preparing documents. "It is the opinion of the Consumer Protection Committee of the North Carolina State Bar that a title company does not have a primary interest in a real estate closing that would enable it to prepare documents or close a real estate transaction for others". (Highlighted portion appeared in Virginia State Bar conclusion, but not in North Carolina State Bar letter.)		Attorneys dominant form of closings except with certain lenders. Previously, lender closings were the norm. Comment: Scope of the Pledger "primary interest" exception untested.	Non-lawyers close real estate transactions.
North Dakota	Statutory prohibition against UPL	No information authorizing non-lawyers to conduct closings.		Non-attorney real estate closings routine	Non-attorneys close real estate transactions
Ohio	Statutory prohibition against UPL	No information authorizing non-attorneys to conduct closings.		Generally, in South Ohio, no attorneys are used, while in North Ohio, attorneys represent buyers and sellers	Non-attorneys close real estate transactions
Oklahoma	Statutory prohibition against UPL	No information authorizing non-attorneys to conduct closings.		Non-attorneys close by custom and practice	Non-attorneys close real estate transactions
Oregon	Statutory prohibition against UPL. Oregon State Bar v. Fowler, 573 P. 2d 674 (Or. 1977) (doc prep case with scrivener exception) See also Oregon State Bar v. Wright, 573 P.2d 283 (Or. 1977)	No information authorizing non-attorneys to conduct closings.		Non-attorneys close by custom and practice	Non-attorneys close real estate transactions

ISSUE: What states forbid non-lawyer closings by statute or by case law?

STATE	BAR RESEARCH	BAR CONCLUSION	CONTRA ALTA RESEARCH	PRACTICE	CONCLUSION
Pennsylvania	A title insurance company did not engage in the unauthorized practice of law when it did not hold itself out to the public as authorized to conduct any business except title insurance, but which, incidental to issuance of title insurance, prepared deeds, mortgages, assignments of mortgages, and agreements, and informed applicants of conditions under which title insurance would be issued. LaBrum v. Commonwealth Title of Philadelphia, 56 A.2d 246 (Pa. 1948), Statutory prohibition against UPL	Title companies close in absence of clear prohibition		Non-attorneys close by custom and practice	Non-attorneys close real estate transactions
Rhode Island	R.I. Gen. Laws Section 11-27-16	Legislation authorizes closings by non-attorneys		Non-attorneys close by custom and practice.	Non-attorneys close real estate transactions.
South Carolina	Title companies do not close real estate transactions South Carolina v. Buyers Service Co., Inc. 357 S.E. 2d 15 (S.C. 1987)			Attorneys close real estate transactions	Only attorneys close real estate transactions
South Dakota	Title companies perform real estate closings	Title companies close in absence of clear prohibition			Non-attorneys close real estate transactions
Tennessee	Title companies close real estate transactions	No information authorizing non-attorneys to conduct closings	Bar Ass'n of Tennessee, Inc. v. Union Planters Title Guaranty Co., 326 S.W. 2d 767 (Tenn. Ct. App. 1959) (Conduct of closings not the practice of law)	Non-lawyers routinely close real estate transactions	Non-attorneys close real estate transactions
Texas	General statutory prohibition against UPL	Title companies close in absence of clear prohibition			Non-attorneys close real estate transactions
Utah	Title companies perform real estate closings	Title companies close in absence of clear prohibition			Non-attorneys close real estate transactions

ISSUE: What states forbid non-lawyer closings by statute or by case law?					
STATE	BAR RESEARCH	BAR CONCLUSION	CONTRA ALTA RESEARCH	PRACTICE	CONCLUSION
Vermont	Statutory prohibition against UPL	No information authorizing non-attorneys to conduct closings.		Attorneys and banks dominant form of closing entity	Non-attorneys close real estate transactions
Washington	Bowers v. Transamerica Title Insurance Co., 675 P. 2d 193 (Washington 1983) (doc drafting) Cultum v. Heritage House Realtors, Inc., 694 P 2d 630 (Wash. 1985) (doc drafting)	No information authorizing non-attorneys to conduct closings		Non-attorneys routinely close real estate transactions NOTE: Washington has limited practice officers (non-attorneys) who draft certain documents.	Non-attorneys close real estate transactions
West Virginia	Title agents, who are required to be attorneys(?) close real estate transactions Title companies do not exist in West Virginia. (?)	No title insurance by statute (?)		Attorneys dominant form of closing entity, although banks also close real estate transactions	Non-attorneys close real estate transactions
Wisconsin	Title companies perform real estate transactions	Title companies close in absence of clear prohibition			Non-attorneys close real estate transactions
Wyoming	Title companies close real estate transactions	Title companies close in absence of clear prohibition			Non-attorneys close real estate transactions

Comments added for compilation.

Model Regulation Service—October 1995

TITLE INSURANCE AGENT MODEL ACT

Drafting Note: This model Act should be adopted concurrently with the Title Insurers Model Act because the Acts contain many complementary provisions and both Acts are required to provide sufficient regulation of title insurance.

Table of Contents

(Note: All sections omitted except Section 10)

Section 10. Conditions for Providing Escrow, Closing, or Settlement Services, and Maintaining Escrow and Security Deposit Accounts

A title insurance agent may operate as an escrow, security, settlement or closing agent, provided that:

A. All funds deposited with the title insurance agent in connection with an escrow, settlement, closing or security deposit shall be submitted for collection to or deposited in a separate fiduciary trust account or accounts in a qualified financial institution no later than the close of the next business day, in accordance with the following requirements:

(1) The funds shall be the property of the person or persons entitled to them under the provisions of the escrow, settlement, security deposit or closing agreement and shall be segregated for each depository by escrow, settlement, security deposit or closing in the records of the title insurance agent in a manner that permits the funds to be identified on an individual basis; and

(2) The funds shall be applied only in accordance with the terms of the individual instructions or agreements under which the funds were accepted.

B. Funds held in an escrow account shall be disbursed only pursuant to a written instruction or agreement specifying how and to whom such funds may be disbursed.

C. Funds held in a security deposit account shall be disbursed only pursuant to a written agreement specifying:

(1) What actions the indemnitor shall take to satisfy his or her obligation under the agreement;

(2) The duties of the title insurance agent with respect to disposition of the funds held, including a requirement to maintain evidence of the disposition of the title exception before any balance may be paid over to the depositing party or his or her designee; and

(3) Any other provisions the commissioner may require.

D. Any interest received on funds deposited in connection with any escrow, settlement, security deposit or closing shall be paid, net of administrative costs, to the depositing party, unless the instructions for the funds or a governing statute provides otherwise.

E. Disbursements may be made out of an escrow, settlement or closing account only if deposits in amounts at least equal to the disbursement have first been made directly relating to the transaction disbursed against and if the deposits are in one of the following forms:

(1) Cash;

(2) Wire transfers such that the funds are unconditionally received by the title insurance agent or the agent's depository;

(3) Checks, drafts, negotiable orders of withdrawal, money orders and any other item that has been finally paid before any disbursements;

(4) A depository check, including a certified check, governed by the provisions of the Federal Expedited Funds Availability Act, 12 U.S.C. § 4001, et seq.; or

(5) Credit transfers through the Automated Clearing House (ACH) which have been deemed available by the depository institution receiving the credits. The credits must conform to the operating rules set forth by the National Automated Clearing House Association (NACHA).

F. The title insurance agent shall have an annual audit made of its escrow, settlement, closing and security deposit accounts, conducted by a certified public accountant on a calendar year basis at its expense within ninety (90) days after the close of the previous calendar year. The title insurance agent shall provide a copy of the audit report to each title insurance company which it represents. The commissioner may promulgate regulations setting forth the minimum threshold level at which an audit would be required, the standards of audit and the form of audit report required. Title insurance agents who are attorneys and who issue title insurance policies as part of their legal representation of clients are exempt from the requirements of this paragraph. However, the title insurer may, at its expense, conduct or cause to be conducted an annual audit of the escrow, settlement, closing and security deposit accounts of the attorney. Attorneys who are exclusively in the business of title insurance are not exempt from the requirements of this paragraph. The commissioner may also require the title insurance agent to provide a copy of its audit report to the commissioner.

G. If the title insurance agent is appointed by two (2) or more title insurers and maintains fiduciary trust accounts in connection with providing escrow, closing settlement services, the title insurance agent shall allow each title insurer reasonable access to the accounts and any or all of the supporting account information in order to ascertain the safety and security of the funds held by the title insurance agent.

H. Nothing in this Act shall be deemed to prohibit the recording of documents prior to the time funds are available for disbursement with respect to a transaction, provided all parties consent to the transaction in writing.

I. Nothing in this section is intended to amend, alter, or supersede other sections of this Act, or the laws of this state or the United States, regarding an escrow holder's duties and obligations.

J. The commissioner may prescribe a standard agreement for escrow, settlement, closing or security deposit funds.

Model Regulation Service—April 1996

TITLE INSURERS MODEL ACT

Drafting Note: This model Act should be adopted concurrently with the Title Insurance Agent Model Act because the Acts contain many complementary provisions and both Acts are required to provide sufficient regulation of title insurance.

Table of Contents

(Note: All sections omitted except Section 16)

Section 16. Conditions for Maintaining Escrow and Security Deposit Accounts

A title insurer may operate as an escrow, security, settlement or closing agent, provided that:

A. All funds deposited with the title insurer in connection with any escrow, settlement, closing or security deposit shall be submitted for collection to or deposited in a separate fiduciary trust account or accounts in a qualified financial institution no later than the close of the next business day, in accordance with the following requirements:

(1) The funds shall be the property of the person or persons entitled to them under the provisions of the escrow, settlement, security deposit or closing agreement and shall be segregated for each depository by escrow, settlement, security deposit or closing in the records of the title insurer in a manner that permits the funds to be identified on an individual basis; and

(2) The funds shall be applied only in accordance with the terms of the individual instructions or agreements under which the funds were accepted.

B. Funds held in an escrow account shall be disbursed only pursuant to a written instruction or agreement specifying how and to whom such funds may be disbursed.

C. Funds held in a security deposit account shall be disbursed only pursuant to a written agreement specifying:

(1) What actions the indemnitor shall take to satisfy his or her obligation under the agreement;

(2) The duties of the title insurer with respect to disposition of the funds held, including a requirement to maintain evidence of the disposition of the title exception before any balance may be paid over to the depositing party or his or her designee; and

(3) Any other provisions the commissioner may require.

D. Any interest received on funds deposited in connection with any escrow, settlement, security deposit or closing shall be paid, net of administrative costs, to the depositing party, unless the instructions for the funds or a governing statute provides otherwise.

E. Disbursements may be made out of an escrow, settlement or closing account only if deposits in amounts at least equal to the disbursement have first been made directly relating to the transaction disbursed against and if the deposits are in one of the following forms:

(1) Cash;

(2) Wire transfers such that the funds are unconditionally received by the title insurer or the insurer's depository;

(3) Checks, drafts, negotiable orders of withdrawal, money orders and any other item that has been finally paid before any disbursements;

(4) A depository check, including a certified check, governed by the provisions of the Federal Expedited Funds Availability Act, 12 U.S.C. § 4001, et seq.; or

(5) Credit transfers through the Automated Clearing House (ACH) which have been deemed available by the depository institution receiving the credits. The credits must conform to the operating rules set forth by the National Automated Clearing House Association (NACHA).

F. Nothing in this Act shall be deemed to prohibit the recording of documents prior to the time funds are available for disbursement with respect to a transaction, provided all parties consent to the transaction in writing.

G. Nothing in this Act is intended to amend, alter or supersede other sections of this Act, or the laws of this state or the United States, regarding an escrow holder's duties and obligations.

H. The commissioner may prescribe a standard agreement for escrow, settlement, closing or security deposit funds.

Real World Impact of Controlled Business

-- Goal to Increase Sources of Revenue Through Settlement Services and Control Entire Process.

-- Lenders through affiliated title/settlement companies

-- Real estate companies through affiliated lending, title/settlement companies

-- Payment of Incentive Fees to Employees & Managers to Encourage Business to be steered to affiliates under 1992 regulations

-- Loan Officers as employees are paid referral fees to steer title/settlement business to affiliated companies

-- Real estate managers are paid referral fees to promote agents to steer lender business to in-house lender affiliates and title/settlement affiliates

-- "In-House" Settlement Service Providers

-- Types of "in-house" lenders

-- Real estate company's wholly owned mortgage affiliate

-- Joint venture with mortgage originator, where fee is paid to real estate office for taking of application, or stock

-- Lender paying a high desk fee to rent space to the exclusion of other lenders from the real estate office, and a commitment from the broker to encourage the use of that lender.

-- Types of "in-house" title/settlement providers

-- Real estate company's wholly owned settlement affiliates

-- Joint venture between real estate broker or lender having stock ownership with title underwriter, and receiving dividends for merely referring consumer business.

-- Lender's title/settlement company.

Where Does the Consumer Fit In to Controlled Business?

-- Consumers, who buy a home only once or twice, establish a trust with their real estate professional

-- Real Estate Agent

-- Loan Officer

-- Consumer relies upon these professionals to make referrals to the lender providing the best rate and service, and the settlement agent with the expertise and ability who will look out for his interest.

-- RESPA Disclosures of Controlled Business self interest referrals are clearly lost in the multitude of forms and disclosures

-- Lenders present a multitude of "disclosures" at loan application

-- Real estate agents present a multitude of forms and disclosures upon establishing their relation with the consumer

-- Consumer referrals by real estate agents and based on price and quality of service used to be the norm; steering for settlement services used to be unethical.

-- Fast emerging controlled business arrangements are subject to steering:

-- If the referring party has a self interest, which can be from a simple company pressure (by a sales manager receiving a referral fee), to the payment of a referral fee or a dividend, that interest will direct the referral of the consumer to the lender's or real estate company's affiliates.

-- No matter how well the controlled referral may turn out, the opportunities for the consumer to shop for the best provider, and for the referring person to disinterestedly direct the consumer to the best provider have been lost when the person making the referral has a self interest as the basis for his or her referral.

Anti-Competitive Controlled Business; Steering in Real Estate Closings

Lenders

-- Lenders at loan application will try to steer the consumer on their own title agency affiliate

-- Lender then refers settlement to an in-house provider, or an affiliate which will do the settlement for lender's title agency

-- Lender reaches the consumer early in the process and is free to market its title insurance product at loan application; does the consumer know better?

CAVEAT

BUT OUR UNFAIR TRADE PRACTICES STATUTES PROVIDE:

Virginia Code Section 38.2-513: **Favored Agent or Insurer; coercion of debtors.....** –C. No person who lends money or extends credit shall solicit insurance on real or personal property after a person indicates his interest in securing a first mortgage credit extension, until the person has received a commitment in writing from the lender as to a loan or credit extension.

Employees of some lenders are paid commissions to capture the title insurance business. If a separate settlement agent is designated, as in a real estate contract, the settlement fees of the consumer's selected settlement agent who takes the liability and does the work for the settlement are increased when the title insurance has already been diverted.

Real Estate Companies

-- Broker owned lender and/or title company

-- May be wholly owned, or a joint venture with the broker having a stock ownership interest.

-- Independent lenders and settlement agents are often LOCKED OUT, not being able to meet with the agents in their own sales offices to present their competitive products.

-- Broker "encourages" the agents to refer their business to its lender and title insurance affiliate.

-- In some current joint venture arrangements, the broker provides list of "selected attorneys" who will take captive referrals from the broker's title agency to do the settlement if the consumer wants an attorney

-- Agents are often rewarded for cooperating or penalized indirectly for not going with the company plan

-- Joint Ventures, a described in Michael Smith's article in the Virginia Land Title Association Examiner newsletter, describes such arrangements as happening now.

-- The referring broker and the title agent or lender, who both have their hands in the profits of the title company's work, result in higher costs for the consumer when the business is controlled.

-- Individual Agent owns part of title/settlement agency

-- Settlement agent sells shares of a title insurance agency to individual high producing agents; agents steer their consumers to their title agency, and receive large dividends, often in competition with their broker's competing agency.

-- Quality and price become secondary when self referrals become the norm.

-- Real estate agent steering of the consumer, which used to be unethical, now is encouraged because the self-referrals pay off.

Builder Steering

-- The almost universal practice for builders is to require the builder's designated lender to supply the loan and require the builder's designated title/settlement agent to do the settlement.

-- The homebuyer is faced with a one-sided contract. The buyer doesn't want the builder to be upset in building the new house, so he or she complies in most cases if he or she wants the home.

-- Often the coercion is economic, in that the builder will offer the purchaser a large closing cost credit only if the buyer uses the builder's affiliate lending and title services.

-- The industry express purpose is to control the transaction since the builder is often building a house for a particular buyer and wants to know that buyer will qualify and purchase the house, and that the builder will get its money promptly from closing.

CAVEAT:

BUT:

RESPA Section 9: (a) No seller of property that will be purchased with the assistance of a federally related mortgage loan shall require, directly or indirectly, as a condition to selling the property, that title insurance covering the property be purchased from any particular title company.

Once again, laws are disregarded in the pursuit of title insurance profits; rewards for violating the law have become profitable.

-- Controlled business has naturally caught on for builders as well.

-- Large national builders doing the entire transaction and wrapping up the consumer transaction in-house can keep up to 85% of the title insurance premium; can the title underwriter stay solvent with such a giveaway?

-- Other settlement agents have gone to small to mid-size builders with joint ventures opportunities; from a Fairfax County title and escrow company to a local builder:

-- "I can make you $40,000.00 in title insurance dividends per year in a joint venture based on your volume of closings, if you change over from the settlement agent [who has done your closings for the last 13 years]." You don't have to do anything but refer the business; you can use that money to pay salaries of your employees.

-- In such directed business, the consumer's interest is again left out of the transaction, and closing the transaction becomes primary.

APPENDIX OF MATERIALS FOR THE COMMITTEE

-- Statement of Daniel Borinsky before HUD, 8/6/93, which indicates the mentality of controlled business. Lock outs of competition and denials to agents for non-referrals are suggested.

> -- Illustrates management suggestions of penalizing agents who do not refer to the controlled business affiliate

-- Consumer Federation of America statement to HUD, 8/5/93, indicating that referral incentives and controlled business take away the consumer's right to shop.

> -- "CFA recommends that the Department rescind the November 2, 1992 rule (permitting employee referral fees) and take appropriate steps to publish a subsequent rule that is in accord with the statutes and the overriding purpose of the provisions to protect consumers -- over and above that of any other participant in the settlement service marketplace -- from abusive, price-inflating kickback schemes" p.2

> -- "it is a rising tide of consumer rip-offs egged on by deliberate restraint of competitive market forces -- forces that reward consumers with the benefit of better prices, quality and service. And, this is not one-stop shopping. But, rather, an open invitation for some of the largest financial service companies in our nation to engage in one-stop rip offs of consumers" p.5

-- Declaration of Professor William Eskridge, Jr., a recognized expert on these issues who studied and wrote on controlled business in this nation while at the University of Virginia.

> -- "To my thinking, there is no consumer protective reason for allowing employee bonuses, but there is an obvious interest group reason -- to make sure that employees or sales managers or real estate agents or loan officers steer consumers to the affiliated company, whether they offer consumers any benefit or not.... there is substantial reason to expect the affiliated companies to charge higher-than-market prices..."

> -- "Because the focus of the process is choosing a particular house, homebuyers are particularly likely to be lazy shoppers for financial services, including the home loan itself; because title insurance and other settlement services represent a small portion of the overall price and become most relevant only at the end of the homebuying process (when most consumers just want to get it over with and feel time pressured), homebuyers are most likely to avoid any king of shopping for these services." p. 11

– "And Peat Marwick found that only 11% of the interviewed homebuyers spoke to more than one title company... and further reported that most homeowners believe that title insurance services and prices are pretty much uniform, a belief that is incorrect for most markets." p. 12.

-- "Study after study has shown that when real estate professionals have incentives to refer settlement businesses to companies controlled by their employers, they will do so, and consumers will pay higher prices". p 13.

-- "In the mid 1970's, the Department of Justice's Antitrust Division conducted a study of title companies affiliated with realty companies and conluded that controlled companies charged higher prices than other companies." p. 14.

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— 1993 Statement of Howard A. Birmiel in CRISIS v Cisneros, as to predictions of effects of referral fees and controlled business on the marketplace.

— Diminished competition through forcing out of small, independent providers.

— Steered business to controlled entities raises prices, as there is no reason to discount.

— New, controlled entities forcing independent competitors out of the marketplace have little sense of what independent competitiveness means.

— Joint statement from 17 attorneys general opposing controlled business and referral fees in the settlement services industries.

— Statement of American Land Title Association opposing controlled business and regulations

— Makes the point that RESPA Sec. 8(d)(6) allows for states to make more stringent legislation regarding controlled business.

SUMMARY

Attorneys; Virginia Supreme Court rules regarding real estate settlements. Prohibits the Virginia Supreme Court from promulgating rules or regulation limiting to attorneys, or having the effect of limiting to attorneys, the closing of the sale of real estate or of loans secured by real estate. The bill further declares void any previously issued rule or regulation inconsistent with the bill's provisions.

SENATE BILL NO. _____ HOUSE BILL NO. _____

A BILL to amend the Code of Virginia by adding a section numbered 54.1-3915.2, relating to attorneys at law; real estate settlements; Supreme Court rule or regulation prohibited.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 54.1-3915.2 as follows:

§ 54.1-3915.2. Rules regarding real estate settlements.

The Supreme Court shall not promulgate any rule or regulation limiting to attorneys, or having the effect of limiting to attorneys, the closing of the sale of real estate or of loans secured by real estate. Any previously promulgated rule or regulation which is inconsistent with this section is void.

#

The

Coalition

For Choice In Real Estate Closings

Virginia Bankers Association
Virginia Association of Community Banks
Virginia Mortgage Bankers Association
Virginia Association of Mortgage Brokers
Virginia Financial Services Association
Virginia Association of Realtors
Home Builders Association of Virginia
Virginia Land Title Association
Virginia Association of Land Title & Escrow Agents
Virginia Credit Union League

November 27, 1996

The Hon. William K. Barlow
P. O. Box 190
Smithfield, Virginia 23430

Re: House Joint Resolution 210

Dear Chairman Barlow:

As promised, I enclose, on behalf of the Coalition for Choice in Real Estate Closings, a draft of the Consumer Real Estate Settlement Protection Act. We believe the Act is a reasonable solution to this controversial issue. While short and straightforward, this Act regulates settlement agents--non-lawyers and lawyers alike--in several important respects for the benefit of consumers.

First, the Act confirms once and for all that non-lawyer settlement agents may provide escrow, closing and settlement services for residential real estate transactions. Such services are spelled out in detail in the Act. The Act does not authorize lay settlement agents to provide legal advice.

Second, the Act requires that all settlement funds be deposited in escrow accounts at financial institutions authorized to do business in Virginia.

Third, the Act requires settlement agents to provide an independent annual audit of its escrow accounts. While title insurance underwriters typically audit title insurance agent escrow accounts annually, the State Bar imposes no such requirement on attorneys. The State Bar only audits after a problem surfaces. The Act will require all settlement agents, including attorneys, to provide annual audits of escrow accounts.

Fourth, under the Act, settlement agents will be required to carry errors and omissions or malpractice insurance policies and fidelity bonds or employee dishonesty coverage, each in the amount of $100,000. While title insurance underwriters typically require these coverages of title insurance agents, the State Bar imposes no similar requirement on attorneys. In fact, attorneys

are not required by the State Bar to carry any form of malpractice insurance.

Fifth, to conduct business, a settlement agent must be (i) licensed in Virginia as an attorney, title insurance underwriter or title insurance agent, a real estate broker or a financial institution, (ii) exercise reasonable care in providing settlement services and, (iii) comply with all applicable regulations of his, her or its regulatory licensing authority. It is important to note that no new regulatory entity or body is created by the Act. While all settlement agents will continue to be regulated by their current regulators, i.e. attorneys--State Bar, financial institutions--Bureau of Financial Institutions, title insurance companies and agents--Bureau of Insurance, and real estate brokers--Board of Realtors, these regulators will have specific authority to enforce the provisions of this Act.

Sixth, The Act requires advance written disclosure that non-lawyer settlement agents cannot provide legal advice to the parties to a settlement.

Seventh, the Act contains substantial penalties for non-compliance with its provisions, applicable to lawyers and non-lawyers alike.

We look forward to working with the Study Committee on this Act and hope it will be the pleasure of the Committee to recommend the Act to the 1997 Session of the General Assembly at the meeting on December 4, 1996.

Sincerely yours,

R. Brian Ball

RBB/cls
Enclosure
cc: Arlen Bolstad, Esq.
Charles M. Lollar, Esq.
Robert C. Barclay, IV, Esq.
Coalition Members
0299339.01

P.P.S. to Arlen Bolstad

Arlen: I have sent this same letter with draft legislation attached to all other Committee members and to representatives of VaREAL.

RBB

_____ Bill No. _____

A BILL to amend the Code of Virginia by adding in Title 6.1 a Chapter numbered 1.3 consisting of sections numbered 6.1-2.19 through 6.1-2.28 as follows Chapter 1.3

CONSUMER REAL ESTATE SETTLEMENT PROTECTION ACT

§ 6.1-2.19. Title and Purpose - A. This Act shall be known as the Consumer Real Estate Settlement Protection Act.

B. The purpose of this Act is to provide a comprehensive body of law for the effective regulation and supervision of all persons performing escrow, closing or settlement services in connection with real estate transactions in this Commonwealth.

C. This Chapter applies only to transactions involving the purchase or financing of real estate containing not more than four residential dwelling units.

§ 6.1-2.20. Definitions - A. "Appropriate licensing authority" shall mean the Virginia State Bar, the Virginia Real Estate Board, or the Virginia State Corporation Commission.

B. "Escrow" means written instruments, money or other items deposited by one party with a settlement agent for delivery to another party upon the performance of a specified condition or the happening of a certain event.

C. "Party to the real estate transaction" means a lender, seller, purchaser or borrower with respect to that real estate transaction.

D. "Person" means a natural person, partnership, association, cooperative, corporation, limited liability company, trust or other legal entity.

E. "Escrow, closing or settlement services" means the administrative and clerical services required to carry out the terms of contracts affecting real estate. These services include, but are not limited to, placing orders for title insurance, receiving and issuing receipts for money received from the parties, ordering loan checks and payoffs, ordering surveys and inspections, preparing settlement statements, determining that all closing documents conform to the parties' contract requirements, setting the closing appointment, following up with the parties to ensure that the transaction progresses to closing, ascertaining that the lenders' instructions have been satisfied, conducting a closing conference at which the

documents are executed, receiving and disbursing funds, completing form documents and instruments selected by and in accordance with instructions of the parties to the transaction, handling or arranging for the recording of documents, sending recorded documents to the lender, sending the recorded deed and the title policy to the buyer, and reporting federal income tax information for the real estate sale to the Internal Revenue Service.

F. "Settlement agent" means a person other than a party to the real estate transaction who provides any escrow, closing or settlement service in connection with a transaction related to real estate in this Commonwealth.

§ 6.1-2.21. Licensing Requirements, Standards and Financial Responsibility - A. A person shall not act in the capacity of a settlement agent, and a lender, seller, purchaser or borrower may not contract with any person to act in the capacity of a settlement agent with respect to real estate settlements in this Commonwealth unless the person is licensed as an attorney under Chapter 39 of Title 54.1, a title insurance company or title insurance agent under Chapter 46 of Title 38.2, a real estate broker under Chapter 21 of Title 54.1, or unless the person is a financial institution authorized to do business in this Commonwealth under any of the provisions of Title 6.1 or under federal law, or is a subsidiary or affiliate of such financial institution.

B. Notwithstanding any rule of court to the contrary, a settlement agent operating in compliance with the requirements of this Act or a party to the real estate transaction may provide escrow, closing or settlement services and receive compensation for such services.

C. A settlement agent shall exercise reasonable care and comply with all applicable requirements of this Act and all applicable statutes and regulations, including the laws and regulations pursuant to which the settlement agent is licensed by the appropriate licensing authority.

D. A settlement agent other than a financial institution described in subsection A of this § 6.1-2.21 or title insurance company as defined in § 38.2-4601, shall maintain the following to the satisfaction of the appropriate licensing authority:

1. An errors and omissions or malpractice insurance policy providing a minimum of $100,000 in coverage;

2. A fidelity bond or employee dishonesty insurance covering persons employed by the settlement agent providing a minimum of $100,000 in coverage.

E. 1. A settlement agent other than a financial institution described in subsection A of this § 6.1-2.21 or title insurance company as defined in § 38.2-4601, shall have an annual audit made of its escrow and trust bank accounts, conducted by an independent certified public accountant on a calendar year basis at its expense by not later than six months after the close of the previous calendar year. The appropriate licensing authority shall require the settlement agent to provide a copy of its audit report to the licensing authority. A settlement agent that is a licensed title insurance agent under Chapter 46 of Title 38.2 shall also provide a copy of the audit report to each title insurance company which it represents.

2. In lieu of such annual audit, a settlement agent that is licensed as a title insurance agent under Chapter 46 of Title 38.2 shall allow each title insurance company for which it has an appointment to conduct an audit of its escrow accounts on a calendar year basis by no later than six months after the close of the previous calendar year. The title insurance company shall submit a copy of its audit report to the appropriate licensing authority. With the consent of the title insurance agent, a title insurance company may share the results of its audit with other title insurance companies that will accept the same in lieu of conducting a separate audit.

3. A title insurance company shall retain a copy of the audit report for each title insurance agent it has appointed and all such reports shall be subject to financial examination under Chapter 13, Article 4 of Title 38.2 (Sections 38.2-1317 through 38.2-1321.1).

§ 6.1-2.22. Disclosure - All contracts involving the purchase of real estate containing not more than four residential dwelling units shall include the following language:

Choice of Settlement Agent: You have the right to select a settlement agent to handle the closing of this transaction. The settlement agent's role in closing your transaction involves the coordination of numerous administrative and clerical functions relating to the collection of documents and the collection and disbursement of funds required to carry out the terms of the contract between the parties. If part of the purchase price is financed, your lender will instruct the settlement agent as to the signing and recording of loan documents and the disbursement of loan proceeds. No settlement agent can provide legal advice to any party to the transaction except a settlement agent who is engaged in the private practice of law and who has been retained or engaged by a party to the transaction for the purpose of providing legal services to that party.

§ 6.1-2.23. Conditions for providing escrow, closing, or settlement services, and maintaining escrow accounts - A. All funds deposited with the settlement agent in

connection with an escrow, settlement or closing shall be submitted for collection to or deposited in a separate fiduciary trust account or accounts in a financial institution licensed to do business in this Commonwealth no later than the close of the next business day, in accordance with the following requirements:

1. The funds shall be the property of the person or persons entitled to them under the provisions of the escrow, settlement, or closing agreement and shall be segregated for each depository by escrow, settlement, or closing in the records of the settlement agent in a manner that permits the funds to be identified on an individual basis; and

2. The funds shall be applied only in accordance with the terms of the individual instructions or agreements under which the funds were accepted.

B. Funds held in an escrow account shall be disbursed only pursuant to a written instruction or agreement specifying how and to whom such funds may be disbursed. A settlement statement in the form prescribed under the federal Real Estate Settlement Procedures Act which has been signed by the seller and the purchaser or borrower shall be deemed sufficient to satisfy the requirement of this subsection.

C. A settlement agent may retain interest received on funds deposited in connection with any escrow, settlement, or closing provided written disclosure is given to, and consent is obtained from, the purchaser or borrower.

D. Nothing in this Act shall be deemed to prohibit the recording of documents prior to the time funds are available for disbursement with respect to a transaction, provided all parties consent to such recordation.

E. Nothing in this Section is intended to amend, alter or supersede other sections of this Act, or the laws of this Commonwealth or the United States, regarding the duties and obligations of the settlement agent in maintaining escrow accounts.

§ 6.1-2.24. Record Retention Requirements - The settlement agent shall maintain sufficient records of its affairs so that the appropriate licensing authority may adequately ensure that the settlement agent is in compliance with all provisions of this Act. The settlement agent shall retain records pertaining to each settlement handled for a minimum of five years after the settlement is completed. The appropriate licensing authority may prescribe the specific record entries and documents to be kept.

§ 6.1-2.25. Rules and Regulations - The appropriate licensing authority may issue rules, regulations and orders consistent with and necessary to carry out the provisions of this Act.

§ 6.1-2.26. Penalties and Liabilities - A. If the appropriate licensing authority determines that the settlement agent or any other person has violated this Act, or any regulation or order promulgated thereunder, after notice and opportunity to be heard, the appropriate licensing authority may order:

1. A penalty not exceeding $5,000 for each violation; and

2. Revocation or suspension of the applicable licenses.

B. Nothing in this Section shall affect the right of the appropriate licensing authority to impose any other penalties provided by law or regulation.

§ 6.1-2.27. Severability - If any provision of this Act, or the application of the provision to any person or circumstance shall be held invalid, the remainder of the Act, and the application of the provision to persons or circumstances other than those to which it is invalid, shall not be affected.

§ 6.1-2.28. Compliance - A settlement agent operating in this Commonwealth prior to the effective date of this Act shall have ninety (90) days after the effective date of this Act to comply with requirements of §§ 6.1-2.21 and 6.1-2.23.

970592126

HOUSE JOINT RESOLUTION NO. 584

Offered January 20, 1997

Continuing the joint subcommittee examining real estate settlement practices in the Commonwealth.

Patrons—Barlow, Davies, Keating, Moore and Van Yahres

Referred to Committee on Rules

970592126

HJ584

WHEREAS, House Joint Resolution 210 (1996) established a joint subcommittee to study real estate settlement practices within the Commonwealth, with particular emphasis on (i) the types of entities furnishing such services and their practices, (ii) the extent of state regulation of these entities, and (iii) any potential risk to the public or any possible illegalities associated with such entities or practices; and

WHEREAS, in 1996, the joint subcommittee convened several meetings, conducted a public hearing, and received extensive information from a broad range of groups and individuals having an interest in this issue, including Realtors, bankers, real estate attorneys, lay settlement agents, title insurance companies, and citizens of the Commonwealth; and

WHEREAS, there is currently before the Virginia Supreme Court an opinion of the Virginia State Bar Council that conducting a real estate closing constitutes the practice of law, and such opinion could result in the Supreme Court adopting a rule to that effect; and

WHEREAS, the joint subcommittee received at its final 1996 meeting a briefing concerning controlled business relationships between title insurers, lenders, settlement agents and Realtors, an emerging trend in the real estate settlement industry said to influence consumer costs, choices and flexibility; and

WHEREAS, at its final 1996 meeting, the joint subcommittee also reviewed but did not adopt legislative proposals directed at the real estate settlement industry including (i) prohibiting the Supreme Court from adopting a rule restricting real estate settlements to licensed attorneys, and (ii) requiring all persons engaged in conducting real estate settlements as settlement agents to be licensed as attorneys, title insurance companies, title insurance agents, or real estate brokers, and to meet certain standards for insurance, bonding, and auditing; and

WHEREAS, members of the joint subcommittee formally recommended that their work continue in 1997 to permit (i) additional examination of the issues presented by HJR 210 (1996), (ii) monitoring of Virginia Supreme Court activities regarding any proposed unauthorized practice rule affecting real estate settlements, (iii) thorough analyses of legislative proposals before the joint subcommittee in 1996, and (iv) investigation of issues associated with controlled business relationships in the real estate settlement industry; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the study of real estate settlement practices in the Commonwealth be continued. The members duly appointed pursuant to HJR 210 (1996) shall continue to serve; any vacancies shall be filled as provided in such resolution. Staffing shall continue to be provided by the Division of Legislative Services.

All agencies of the Commonwealth shall provide assistance to the joint subcommittee, upon request.

The direct costs of this study shall not exceed $5, 250.

The joint subcommittee shall complete its work in time to submit its findings and recommendations to the Governor and the 1998 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

Implementation of this resolution is subject to subsequent approval and certification by the Joint Rules Committee. The Committee may withhold expenditures or delay the period for the conduct of the study.

1/21/97 17:5

VIRGINIA ACTS OF ASSEMBLY -- CHAPTER

An Act to amend the Code of Virginia by adding in Title 6.1 a chapter numbered 1.3, consisting of sections numbered 6.1-2.19 through 6.1-2.29, relating to the Consumer Real Estate Settlement Protection Act; penalty.

[S 1104]
Approved

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 6.1 a chapter numbered 1.3, consisting of sections numbered 6.1-2.19 through 6.1-2.29, as follows:

CHAPTER 1.3.
CONSUMER REAL ESTATE SETTLEMENT PROTECTION ACT.

§6.1-2.19. Title, purpose and applicability.

A. This Act shall be known as the Consumer Real Estate Settlement Protection Act.

B. The purpose of this Act is to authorize existing licensing authorities in the Commonwealth of Virginia to require persons performing escrow, closing or settlement services to comply with certain consumer protection safeguards relating to licensing, financial responsibility and the handling of settlement funds.

C. This chapter applies only to transactions involving the purchase or financing of real estate containing not more than four residential dwelling units.

§6.1-2.20. Definitions.

"Escrow" means written instruments, money or other items deposited by one party with a settlement agent for delivery to another party upon the performance of a specified condition or the happening of a certain event.

"Escrow, closing or settlement services" means the administrative and clerical services required to carry out the terms of contracts affecting real estate. These services include, but are not limited to, placing orders for title insurance, receiving and issuing receipts for money received from the parties, ordering loan checks and payoffs, ordering surveys and inspections, preparing settlement statements, determining that all closing documents conform to the parties' contract requirements, setting the closing appointment, following up with the parties to ensure that the transaction progresses to closing, ascertaining that the lenders' instructions have been satisfied, conducting a closing conference at which the documents are executed, receiving and disbursing funds, completing form documents and instruments selected by and in accordance with instructions of the parties to the transaction, handling or arranging for the recording of documents, sending recorded documents to the lender, sending the recorded deed and the title policy to the buyer, and reporting federal income tax information for the real estate sale to the Internal Revenue Service.

"Licensing authority" shall mean the (i) State Corporation Commission acting pursuant to this Act, Title 6.1 or Title 38.2; (ii) the Virginia State Bar acting pursuant to this Act or Chapter 39 (§ 54.1-3900 et seq.) of Title 54.1; or (iii) The Virginia Real Estate Board acting pursuant to this Act or Chapter 21 (§ 54.1-2100 et seq.) of Title 54.1.

"Party to the real estate transaction" means a lender, seller, purchaser or borrower with respect to that real estate transaction.

"Person" means a natural person, partnership, association, cooperative, corporation, limited liability company, trust or other legal entity.

"Settlement agent" means a person other than a party to the real estate transaction who provides any escrow, closing or settlement service in connection with a transaction related to real estate in this Commonwealth.

§6.1-2.21. Licensing requirements, standards and financial responsibility.

A. A person shall not act in the capacity of a settlement agent, and a lender, seller, purchaser or borrower may not contract with any person to act in the capacity of a settlement agent with respect to real estate settlements in this Commonwealth unless the person is licensed as an attorney under Chapter 39 (§54.1-3900 et seq.) of Title 54.1, a title insurance company or title insurance agent under Title 38.2, a real estate broker under Chapter 21 (§ 54.1-2100 et seq.) of Title 54.1, or unless the person is a financial institution authorized to do business in this Commonwealth under any of the provisions of Title 6.1 or under federal law, or is a subsidiary or affiliate of such financial institution. Any such person, not acting in the capacity of a settlement agent, shall not be subject to the provisions of this chapter.

B. Notwithstanding any rule of court to the contrary, a settlement agent operating in compliance with the requirements of this Act or a party to the real estate transaction may provide escrow, closing or settlement services and receive compensation for such services.

C. A settlement agent shall exercise reasonable care and comply with all applicable requirements of this Act and its licensing authority regarding licensing, financial responsibility, errors and omissions or malpractice insurance policies, fidelity bonds, employee dishonesty insurance policies, audits and record retention.

D. A settlement agent other than a financial institution described in subsection A or title insurance company as defined in § 38.2-4601, shall maintain the following to the satisfaction of the appropriate licensing authority:

1. An errors and omissions or malpractice insurance policy providing a minimum of $250,000 in coverage;

2. A blanket fidelity bond or employee dishonesty insurance policy covering persons employed by the settlement agent providing a minimum of $100,000 in coverage. When the settlement agent has no employees except the owners, partners, shareholders or members, the settlement agent may apply to the appropriate licensing authority for a waiver of this fidelity bond or employee dishonesty requirement; and

3. A surety bond of not less than $100,000.

E. 1. A settlement agent, other than an attorney, shall, at its expense, have an annual audit of its escrow accounts conducted by an independent certified public accountant on a calendar year basis by not later than six months after the close of the previous calendar year. The appropriate licensing authority shall require the settlement agent to provide a copy of its audit report to the licensing authority. A settlement

agent that is a licensed title insurance agent under Title 38.2 shall also provide a copy of the audit report to each title insurance company which it represents.

2. In lieu of such annual audit, a settlement agent that is licensed as a title insurance agent under Title 38.2 shall allow each title insurance company for which it has an appointment to conduct an annual audit of its escrow accounts on a calendar year basis by not later than six months after the close of the previous calendar year. The title insurance company shall submit a copy of its audit report to the appropriate licensing authority. With the consent of the title insurance agent, a title insurance company may share the results of its audit with other title insurance companies that will accept the same in lieu of conducting a separate audit.

3. A title insurance company shall retain a copy of the audit report for each title insurance agent it has appointed and such reports and other records of the insurance company's activities as a settlement agent shall be made available to the appropriate licensing authority when examinations are conducted pursuant to provisions in Title 38.2.

§6.1-2.22. Disclosure.

All contracts involving the purchase of real estate containing not more than four residential dwelling units shall include in bold face, 10 point type the following language:

Choice of Settlement Agent: You have the right to select a settlement agent to handle the closing of this transaction. The settlement agent's role in closing your transaction involves the coordination of numerous administrative and clerical functions relating to the collection of documents and the collection and disbursement of funds required to carry out the terms of the contract between the parties. If part of the purchase price is financed, your lender will instruct the settlement agent as to the signing and recording of loan documents and the disbursement of loan proceeds. No settlement agent can provide legal advice to any party to the transaction except a settlement agent who is engaged in the private practice of law in Virginia and who has been retained or engaged by a party to the transaction for the purpose of providing legal services to that party.

Escrow, closing and settlement service guidelines: The Virginia State Bar issues guidelines to help settlement agents avoid and prevent the unauthorized practice of law in connection with furnishing escrow, settlement or closing services. As a party to a real estate transaction, you are entitled to receive a copy of these guidelines from your settlement agent, upon request, in accordance with the provisions of the Consumer Real Estate Settlement Protection Act.

§6.1-2.23. Conditions for providing escrow, closing, or settlement services and for maintaining escrow accounts.

A. All funds deposited with the settlement agent in connection with an escrow, settlement or closing shall be handled in a fiduciary capacity and submitted for collection to or deposited in a separate fiduciary trust account or accounts in a financial institution licensed to do business in this Commonwealth no later than the close of the next business day, in accordance with the following requirements:

1. The funds shall be the property of the person or persons entitled to them under the provisions of the escrow, settlement, or closing agreement and shall be segregated for each depository by escrow, settlement, or closing in the records of the settlement agent in a manner that permits the funds to be identified on an individual basis; and

2. The funds shall be applied only in accordance with the terms of the individual instructions or agreements under which the funds were accepted.

B. Funds held in an escrow account shall be disbursed only pursuant to a written instruction or agreement specifying how and to whom such funds may be disbursed. A settlement statement in the form prescribed under the federal Real Estate Settlement Procedures Act (12 U.S.C. § 2601 et seq.) which has been signed by the seller and the purchaser or borrower shall be deemed sufficient to satisfy the requirement of this subsection.

C. A settlement agent may not retain any interest received on funds deposited in connection with any escrow, settlement, or closing; provided, however, that an attorney settlement agent shall maintain escrow accounts in accordance with applicable rules of the Virginia State Bar and the Supreme Court of Virginia.

D. Nothing in this Act shall be deemed to prohibit the recording of documents prior to the time funds are available for disbursement with respect to a transaction, provided all parties consent to such recordation.

E. Nothing in this section is intended to amend, alter or supersede other sections of this Act, or the laws of this Commonwealth or the United States, regarding the duties and obligations of the settlement agent in maintaining escrow accounts.

§6.1-2.24. Record retention requirements.

The settlement agent shall maintain sufficient records of its affairs so that the appropriate licensing authority may adequately ensure that the settlement agent is in compliance with all provisions of this Act. The settlement agent shall retain records pertaining to each settlement handled for a minimum of five years after the settlement is completed. The appropriate licensing authority may prescribe the specific record entries and documents to be kept.

§ 6.1-2.25. Rules and regulations.

Except as provided in §6.1-2.26, the appropriate licensing authority may issue rules, regulations and orders, including educational requirements, consistent with and necessary to carry out the provisions of this Act. A title insurance company domiciled in this Commonwealth or acting in the capacity of a settlement agent pursuant to this Act shall account for funds held and income derived from escrow, closing or settlement services in accordance with the applicable instructions of, and the accounting practices and procedures manuals adopted by, the National Association of Insurance Commissioners when filing the annual statements and reports required under Chapter 13 (§38.2-1300, et seq.) of Title 38.2.

§6.1-2.26. Settlement agent and financial institution compliance with unauthorized practice of law guidelines.

A. Every settlement agent subject to the provisions of this Act shall be registered as such with the Virginia State Bar within 90 days of the effective date of this Act. In conjunction therewith, settlement agents shall furnish (i) their names, business addresses and telephone numbers, (ii) information pertaining to licenses issued them by any licensing authority, and (iii) such other information as may be required by the Virginia State Bar. The Virginia State Bar shall accept in satisfaction of the requirements of this subsection, settlement agents' licensing forms submitted to any licensing authority,

as defined in this Act, if such forms contain substantially the same information required hereby. Each such registration (i) shall be accompanied by a fee not to exceed $100, and (ii) shall be renewed at least biennially thereafter.

B. The Virginia State Bar, in consultation with the Virginia State Corporation Commission and the Virginia Real Estate Board, shall promulgate regulations establishing guidelines for settlement agents designed to assist them in avoiding and preventing the unauthorized practice of law in conjunction with providing escrow, closing and settlement services. Such guidelines shall be furnished by the Virginia State Bar to (i) each settlement agent at the time of registration and any renewal thereof, (ii) state and federal agencies that regulate financial institutions, and (iii) members of the general public upon request. Such guidelines shall also be furnished by settlement agents to any party to a real estate transaction in which such agents are providing escrow, closing or settlement services, upon request.

C. The Virginia State Bar shall receive complaints concerning settlement agent or financial institution noncompliance with the guidelines established pursuant to subsection B and shall (i) investigate the same to the extent they concern the unauthorized practice of law or any other matter within its jurisdiction, and (ii) refer all other matters or allegations to the appropriate licensing authority.

D. The willful failure of any settlement agent or financial institution to comply with the provisions of this section shall be a violation of this Act, and such agent shall be subject to a penalty of up to $5,000 for each such failure as the Virginia State Bar may determine.

§6.1-2.27. Penalties and liabilities.

A. If the appropriate licensing authority determines that the settlement agent or any other person has violated this Act, or any regulation or order promulgated thereunder, after notice and opportunity to be heard, the appropriate licensing authority may order:

1. A penalty not exceeding $5,000 for each violation; and

2. Revocation or suspension of the applicable licenses.

B. Nothing in this section shall affect the right of the appropriate licensing authority to impose any other penalties provided by law or regulation.

§6.1-2.28. Severability.

If any provision of this Act, or the application of the provision to any person or circumstance, shall be held invalid, the remainder of the Act, and the application of the provision to persons or circumstances other than those to which it is invalid, shall not be affected.

§6.1-2.29. Compliance.

A settlement agent operating in this Commonwealth prior to the effective date of this Act shall have ninety days after the effective date of this Act to comply with requirements of §§6.1-2.21 and 6.1-2.23.

Go to (General Assembly Home)