APPENDIX B

5. **Does a Lay Person Who Conducts a Real Estate Closing Engage in the Unlawful Practice of Law?**

I. Introduction

The issue before this Committee is whether real estate closings conducted by lay persons constitute the unauthorized practice of law. In proposed Advisory Opinion No. 2000-01, it is stated that the conducting of real estate closings is the practice of law. However, this language relies on a former Advisory Opinion, No. 93-003 for this conclusion, when in fact, Advisory Opinion No. 93-003 did not specifically conclude this.

Nevertheless, as set forth below, it is clear that, generally, real estate closing practices and activities are the practice of law. This does not, however, end the inquiry. The Committee must also address whether the public interest demands that lay persons be prohibited from performing such activities and, hence, such activities are the unauthorized practice of law.

Neither the West Virginia Supreme Court nor prior Advisory Opinions of this Committee have specifically addressed the element of public interest and how it weighs in determining whether the practice of certain activities of law by lay persons is unauthorized. It is time for the Committee to specifically address this element and formulate a policy in this matter and for future issues. That is, the Committee should determine whether the harm to the public is presumed simply by the practice of law by lay persons and, therefore, unauthorized, or whether, in certain instances, the harm or risk of harm is minimal compared to the cost of requiring the public to hire an attorney.

As explained in more detail below, it is recommended the Committee specifically recognize that if it is going to proscribe lay persons from providing real estate closing services to the public for its own good, then the harm must be known and the significance of the harm weighed in the balance of determining what the public interest requires. The Committee must also look at closings by lenders who are a party to the transaction and perhaps distinguish between closings conducted by lenders as opposed to closings conducted by third parties who are not a party to the transaction.

II. Real Estate Closings are the Practice of Law

From documents submitted to the Committee, the following activities apparently occur at real estate closings in connection with the purchase and

financing of the purchase of residential real estate or the refinancing of prior existing secured loans:[1]

1. Reviewing of final terms of transaction in connection with the sales contract;
2. Completing legal documents, including deeds of trust or other security instruments, notes, riders, and rights of recission;
3. Making certain that lenders will have valid first liens upon property conveyed as security;
4. Reviewing title insurance binders or opinions to determine what is included or excluded and that title policy requirements can be met;
5. Determining that the legal description of the land conforms with a survey;
6. Determining that easements and/or other restrictions have been identified and have not been violated or encroached upon;
7. Determining if there is sufficient evidence of hazard insurance;
8. Determining the amount of taxes owed and providing for payment of taxes at closing;
9. Preparing HUD form 1, settlement statement;
10. Addressing contingencies specific to the transaction;
11. Attending the closing and obtaining appropriate signatures on documents;
12. Attending the closing and answering buyer and/or seller questions about documents and/or the transaction;
13. Recording documents and seeing that releases for payoffs are recorded and security instruments constitute valid liens; and
14. Disbursing proceeds.

The practice of law, as described by the West Virginia Supreme Court by Rule on March 28, 1947 and amended July 1, 1961 states in relevant part:

> In general, one is deemed to be practicing law whenever he or it furnishes to another advice or service under circumstances which imply the possession or use of legal knowledge or skill.
>
> More specifically, but without purporting to formulate a precise and completely comprehensive definition of the practice of law or to prescribe limits to the scope of that activity, one is deemed to be practicing law whenever (1) one undertakes, with or without compensation and whether or not in connection with another activity, to advise another in any matter involving the application of legal principles to facts, purposes or desires; (2) one undertakes, with or without compensation and whether or not in connection with another activity, to prepare for another legal instruments of any character; or (3) one undertakes, with or without compensation and whether or not in connection with another activity, to represent the interest of another

[1] See Appendix to Memorandum, Exhibit #1, which is a letter from Dan Guida with an attached listing of "matters that arise during closing," and Exhibit #2, which are closing instructions from various financial institutions submitted by Committee member, Rob Tebay. The list of activities set forth above is not intended to be an exhaustive or detailed accounting.

> before any judicial tribunal or officer, or to represent the interest of another before any executive or administrative tribunal, agency or officer otherwise than in the presentation of facts, figures or factual conclusions as distinguished from legal conclusions in respect to such facts and figures. Nothing in this paragraph shall be deemed to prohibit a lay person from appearing as agent before a justice of the peace or to prohibit a bona fide full-time lay employee from performing legal services for his regular employer (other than in connection with representation of his employer before any judicial, executive or administrative tribunal agency or officer) in matters relating solely to the internal affairs of such employer, as distinguished from such services rendered to or for others.

While some ministerial and clerical functions occur as part of a real estate closing, i. e., preparation of the HUD settlement statements, simple execution of documents, and disbursement of proceeds, [2] in general, legal principles are applied to the factual situation to determine if and how the transaction should be concluded. For example, there is a determination that the lender can obtain a valid first lien; that the legal description of the land conforms to the survey; that the title insurance requirements have been met; that evidence of hazard insurance is sufficient; that easements and other restrictions have been noted and have not been violated or encroached upon; and that legal instruments have been properly signed to constitute binding documents to achieve their legal purposes. Most importantly, however, it is inherent at the closing itself that buyers and sellers will have questions about the transaction and the documents, which answers necessarily go to their respective legal rights and obligations. Such answers are advising on legal matters. Thus, in West Virginia, generally, real estate closings constitute the practice of law.

In Advisory Opinions 93-002 and 93-003, this Committee held the filling in of blanks in pre-printed forms for deeds of trust, deeds or other loan documents which does not require knowledge and skill beyond that possessed by the ordinarily experienced and intelligent layman is not the unauthorized practice of law.

Moreover, virtually every state that has specifically considered the issue of real estate closings has determined that such activities are the practice of law. See e. g., Massachusetts Conveyancers Ass'n, Inc. v. Colonial Title and Escrow Inc., 2001 Mass. Super. Lexis 431 (Superior Ct. Mass., 2001); In Re Mid-Atlantic Settlement Services, Inc., 755 A.2d 389 (Del. 2000); In Re Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 654 A.2d 1344 (N. J. 1995); Cardinal v. Merrill Lynch Realty/Burnet, Inc., 433 N. W.2d 864 (Minn. 1988); Coffee County Abstract and Title Co. v. State of Alabama, 445 So.2d 852 (Ala. 1983); State of South Carolina v. Buyers Service Co., Inc., 357 S.E.2d 15 (S. Car. 1987); The Florida Bar v. Columbia Title of Florida, 197 So.2d 3 (Fla. 1967); and Title Guarantee Co. v. Denver Bar Ass'n, 312 P.2d 1011 (Col. 1957).

III. Whether Real Closings Conducted by Lay Persons are the Unauthorized Practice of Law and the Public Interest

Although it is clear under the West Virginia Supreme Court definition of the practice of law and in other jurisdictions that real estate closing activities are the practice of law, states differ on whether such practice is "unauthorized" when performed by lay persons. The difference stems from the analysis of the harm to the public. West Virginia has not specifically decided this issue.

In In Re Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 654 A.2d 1344 (N. J. 1995), the Supreme Court of New Jersey reviewed the opinion of its Unauthorized Practice of Law Committee that real estate closings conducted by non-attorneys were the unauthorized practice of law. The New Jersey Court remanded the matter for specific fact finding regarding the actual practices and activities and the harm to the public if lawyers are not involved. The Court reviewed prior decisions on issues of the unauthorized practice of law and concluded:

> Having answered the question whether the practice of law is involved, we must decide whether the public interest is served by such prohibition. Not every such intrusion by laymen into legal matters disserves the public; this Court does not wear public interest blinders when passing on unauthorized practice of law questions. We have often found, despite the clear involvement of the practice of law, that non-lawyers may participate in these activities, basing our decisions on the public interest in those cases in allowing parties to proceed without counsel.

Id. at 1352.

The New Jersey Court then reviewed the factual record made on remand and found southern New Jersey had a long tradition of closing real estate transactions without lawyers; there was a lack of demonstrable harm to sellers and buyers in closings conducted by non-lawyers; the non-lawyer practice cost less; that persons participating without lawyers are informed of the risks; and, that parties are not discouraged from retaining attorneys. Id. at 1359. On this factual finding, the Court held "the public interest does not require that the protection of counsel be forced upon parties against their will." Id. at 1360. Rather, the Court held as long as parties are provided specific written notice at the time of delivery of the sales contract advising of the risks of proceeding without an attorney and their right to retain counsel, a closing conducted without an attorney is not the unauthorized practice of law. Id. at 1360-1361. See also Cardinal v. Merrill Lynch Realty/Burnet, Inc., 433 N.W.2d 864, 868 (Minn. 1988) (holding the closing of simple real estate transactions is not the unauthorized practice of law: "[t]he overriding consideration in the case before us,...is the public welfare rather than the advantage that might accrue to lawyer or non-lawyer").

On the other hand, the Delaware Board on the Unauthorized Practice of Law, after holding factual hearings on the issue, reached the opposite conclusion. In In Re: Mid-Atlantic Settlement Services, Inc., 755 A.2d 389 (Del. 2000), the Delaware Supreme Court reviewed a decision of its Board on the Unauthorized Practice of Law which was based on evidence adduced before the Board. The Supreme Court adopted the decision of the Board which found lawyers are better qualified than lay persons to handle closings and spot problems at closings; that real estate law in Delaware is complicated and differs in complexity from one transaction to another; that the execution of a waiver to counsel in connection with a real estate closing is not an effective, knowing and voluntary waiver; and that settlement services by third parties cost more than attorney services. Based upon this record, the Board stated:

> [T]he evidence in the case before the panel suggests requiring attorneys to conduct real estate settlements for purchase and refinancing of Delaware real estate loans is the simplest and most direct way to assure the integrity of the process and the public good. Indeed, the evidence in this case demonstrates that financial savings, together with the legal protections inherently available through both expertise and accountability of members of the Delaware Bar, would be visited upon borrowers as members of the public conducting, in many instances, the largest single transaction of their lives.

Id. at p. 34 of Attachment. See also Massachusetts Conveyancers Ass'n., Inc. v. Colonial Title and Escrow, Inc., 2001 Mass. Super. Lexis 431 (Mass. 2001) ("the public interest demands that legal interpretation and advice be given by attorneys who are trained to do so...").

Finally, some states simply hold that if the real estate closing activity is the practice of law, then it is the unauthorized practice of law for laymen to perform these activities. Apparently the harm to the public is presumed from the unauthorized practice. See Coffee County Abstract and Title Co. v. State of Alabama, 445 So.2d 852 (Ala. 1983); State of South Carolina v. Buyers Service Co., Inc., 357 S.E.2d 15 (S. Car. 1987).

In West Virginia, the definition of the practice of law promulgated by our Supreme Court recognizes the public interest as a factor to be considered. The Court states that "[i]t is essential to the administration of justice and the proper protection of society that only qualified persons duly licensed be permitted to engage in the practice of law;" and "[t]he principles underlying a definition of the practice of law have been developed through the years in social needs and have received recognition by the courts." Further, the Supreme Court expressly recognized in its definition that even though it is the practice of law to represent another before a tribunal, "[n]othing in this paragraph shall be deemed to prohibit a lay person from appearing as an agent before a justice of the peace...." Thus, the Court implies that in this circumstance the harm to the public that may result from lay representation before a justice of the peace is not significant or substantial enough to require individuals to hire attorneys.

Likewise, in State ex rel. Frieson v. Isner, 285 S.E.2d 641 (W. Va. 1981), the Court appeared to engage in the same type of analysis. In Isner, one issue before the Court was whether W. Va. Code § 50-4-4a, which allows persons to appear in magistrate court by lay representatives, is an unconstitutional usurpation of the Court's power to define and regulate the practice of law. The Supreme Court recognized that magistrate courts were designed to be " ' people's courts' the purpose of which was to provide the ordinary person involved in small claims litigation with an accessible forum for resolution of disputes, unburdened by the expense and delay usually associated with litigation.... It was anticipated that the informal nature of the proceedings in magistrate court would encourage individuals to prosecute their own claims and, thus, avoid the necessity and expense of hiring a lawyer." Id. at 654. The Court then held that lay persons may represent others in magistrate court as long as it is not a regular activity or for a fee. Id. at 654-655. Implicit in the Isner Court's analysis is a determination that in magistrate court, the interests at stake are not so significant that the protection of the public requires that representation of others only be provided by attorneys.

Thus, our Supreme Court has recognized there may be circumstances when the public interest does not demand that certain legal practices always be provided by a licensed attorney. Therefore, this Committee should determine exactly what harm to the public and to what risks individuals are exposed when attorneys do not conduct real estate closings. So far the Committee has heard only anecdotes. Conversely, the Committee should determine whether there are any benefits to non-attorney closings and whether the benefits outweigh any harm.

Notably, at least one author has attempted an empirical study to determine whether persons are harmed more often in non-attorney closings or attorney closings. The results in this study suggest the public does not suffer sufficient risk in non-attorney closings. At any rate, the author concludes "if attorneys want to persuade the public, federal agencies, and courts that the public is better protected when attorneys supervise residential real estate transactions than when lay providers do, then they must make an effort to generate and provide data to prove their argument." Palomar, Joyce, "The War Between Attorneys and Lay Conveyancers – Empirical Evidence Says 'Cease-Fire!,'" 31 Conn. L. Rev. 423, 520 (Winter 1999).

IV. Anti-Trust Liability

The spectre has been raised that if the Committee should determine all real estate closings must be conducted by attorneys, then the Federal Department of Justice or the Federal Trade Commission may attempt to enjoin the Committee as violating the federal Sherman Anti-Trust Act. This threat should not factor into the Committee's decision.

The United States Supreme Court held the Sherman Anti-Trust Act is not applicable to state action or to official action directed by the state. Parker v. Brown,

317 U.S. 341 (1943). With respect to state bar action, the state action doctrine was later applied in Bates v. State Bar of Arizona, 433 U.S. 350 (1977). In Bates, the Supreme Court held that a disciplinary rule of the Arizona State Bar prohibiting lawyer advertising was not affected by the Sherman Anti-Trust Act. The Court found the Arizona Supreme Court is the state's ultimate authority in the regulation of the practice of law and the state bar is its agent. Therefore, the disciplinary rule is the product of the state acting as a sovereign and thus exempt from Sherman Anti-Trust claims. See also Lender's Service, Inc. v. Dayton Bar Ass'n, 758 F. Supp. 429 (S.D. Ohio 1991) (holding that a state bar legal action to enjoin a lay closing service from engaging in the unlawful practice of law was immune from anti-trust liability as state action.)

Although the Federal Trade Commission has sent letters to the Kentucky, North Carolina and Virginia State Bars concerning the anti-competitive effect of advisory opinions holding that only attorneys may conduct closings, the FTC recognizes that if the state supreme courts adopt the opinions, then this state action would likely bar federal anti-trust liability. See Palomar, supra 472 and n. 185.

In West Virginia, our Supreme Court is the ultimate authority on the definition and regulation of the practice of law. State ex rel. Frieson v. Isner, 285 S.E.2d 641, 647-648 (W. Va. 1981). Further, the West Virginia State Bar and its Committees are agents of the Court. Thus, actions of this Committee can fairly be construed to be an action of the Supreme Court, especially if any act or opinion of this Committee is specifically adopted or approved by the Supreme Court.

V. Conclusion and Solicitations

In conclusion, it is clear that as a whole, real estate closings are the practice of law. The Committee presumes that significant harm to the public occurs just by the practice of law by lay persons and holds such practice to be the unauthorized practice of law.