

April 2004

Sharing Their Piece of the Real Estate Pie: An Analysis of the Necessity of Lawyers at Residential Real Estate Closings in the Context of the Adoption of Recent Opinions of the North Carolina State Bar

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Recommended Citation

Melissa K. Walker, *Sharing Their Piece of the Real Estate Pie: An Analysis of the Necessity of Lawyers at Residential Real Estate Closings in the Context of the Adoption of Recent Opinions of the North Carolina State Bar*, 26 CAMPBELL L. REV. 59 (2004).

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SHARING THEIR PIECE OF THE REAL ESTATE PIE: AN ANALYSIS OF THE NECESSITY OF LAWYERS AT RESIDENTIAL REAL ESTATE CLOSINGS IN THE CONTEXT OF THE ADOPTION OF RECENT OPINIONS OF THE NORTH CAROLINA STATE BAR

INTRODUCTION

A debate that seems to be as old as “which came first—the chicken or the egg?” has finally been laid to rest in North Carolina.¹ While many states have long since settled this debate,² North Carolina now joins the majority of states who no longer require the physical presence of a licensed attorney at real estate closings.³ With the adoption of opinions by the governing council of the North Carolina State Bar, it is now permissible for non-lawyers to perform certain limited tasks incident to the closing of residential real estate property transactions.⁴ Additionally, these opinions now provide that it is not absolutely necessary for the lawyer who is responsible for the closing to be physically present at the transaction.⁵

With revenues of almost \$6 billion last year, residential real estate is the largest industry in the Triangle region of North Carolina.⁶ The industry continues to thrive and flourish, especially in light of recent low interest rates.⁷ The legal professional has also seen the beneficial side effects of these low rates. The number of real estate closings throughout North Carolina increased twenty five percent between July 2002 and July 2003.⁸ With the potential for economic gain in such a

1. See *State Bar Explains Limited Role of Lay Persons In Real Estate Closings*, at http://www.ncbar.com/home/realestate_ethics.asp (last visited Sept. 18, 2003).

2. See Joyce Palomar, *The War Between Attorney and Lay Conveyancers—Empirical Evidence Says “Cease Fire!”*, 31 CONN. L. REV. 423, 432-37 (1999) (discussing the disputes involving the unauthorized practice of law and lay real estate settlement service providers).

3. *State Bar Explains Limited Role of Lay Persons In Real Estate Closings*, at http://www.ncbar.com/home/realestate_ethics.asp (last visited Sept. 18, 2003).

4. *Id.*

5. *Id.*

6. Steve Cannon, *Home Sales Continue to Rise*, NEWS AND OBSERVER (Raleigh), July 19, 2003, available at <http://newsobserver.com/business/story/2706252p-2509390c.html> (last visited Sept. 18, 2003).

7. *Id.*

8. See North Carolina Association of Realtors, Inc., *Existing Home Sales Statistics for July 2003*, Aug. 20, 2003, at www.ncrealtors.org/searchpubs/stats/july03.htm (last visited Aug. 29, 2003).

lucrative industry, many laypersons have become eager to get their piece of the real estate pie by offering their services as an alternative to the traditional usage of attorneys in the closing of residential real estate transactions.⁹

Prior to the adoption of 2002 Formal Ethics Opinion 9 (02 FEO 9) and Authorized Practice Advisory Opinion 2002-1 (APAO 2002-1) in January 2003, the rules governing the role of laypersons in residential real estate closings in North Carolina mandated that a lawyer be physically present at the closing of a transaction for an initial purchase and a refinancing of residential real estate.¹⁰ Faced with the possibility of an antitrust lawsuit from the federal government, the State Bar was prompted to conduct a year-long study in response to correspondence from the United States Department of Justice (DOJ) and the Federal Trade Commission (FTC).¹¹ This advocacy correspondence, dated December 14, 2001, expressed concerns of these federal agencies that the opinions of the State Bar—requiring the physical presence of an attorney at all real estate closings—constituted a restraint on competition.¹² The State Bar formed a special committee chaired by the State Bar's President-Elect, Dudley Humphrey of Winston Salem, to investigate the matter and receive comments from all interested parties.¹³ The findings of the committee, as well as much debate among the legal community, led to the proposal of two new opinions that authorize non-lawyers to participate in real estate closings in a limited manner.¹⁴ This limited participation includes presiding over the execution of documents and the distribution of funds.¹⁵

This comment will address the necessity of lawyers at real estate closings in light of the recent changes in the Formal Ethics Opinions and Authorized Practice Advisory Opinion issued by the North Caro-

9. See Janet Kennedy Dawson, *Updates on North Carolina Real Estate Law: The Role of Layperson in the Closing of Residential Real Estate Transactions*, 7 N.C. BANKING INST. 277, 277 (2003).

10. See *State Bar Proposal Would Open the Door to Residential Closings by NonLawyers*, NORTH CAROLINA LAWYERS WEEKLY, at <http://nclawyersweekly.com/nclw0627.htm> (last visited Aug. 5, 2003).

11. See *id.*; see also *State Bar Explains Limited Role of Lay Persons in Real Estate Closings*, at http://www.ncbar.com/home/realestate_ethics.asp (last visited Sept. 18, 2003).

12. *State Bar Explains Limited Role of Lay Persons in Real Estate Closings*, at http://www.ncbar.com/home/realestate_ethics.asp (last visited Sept. 18, 2003).

13. *Id.*

14. *Id.*

15. *Id.*

lina State Bar.¹⁶ In order to adequately analyze this issue, it is first necessary to outline the contents of the advocacy letter written to the State Bar by the United States Department of Justice and the Federal Trade Commission (*see* section II). It is also necessary to examine the history of statutes governing this issue and the historical changes to the North Carolina State Bar's Opinions. In section III, the effects of these changes will be addressed. The discussion of these effects will focus on the consequences of the changes in the context of the statutes that govern the unauthorized practice of law in North Carolina.¹⁷ Finally, section IV will outline arguments in support of the necessity of lawyers at real estate closings, as well as possible alternative interpretations of the recent Opinions. Suggestions regarding the future direction of the practice of law in North Carolina as a result of these changes will also be presented.

HISTORY OF REAL ESTATE CLOSINGS IN NORTH CAROLINA

On December 14, 2001, the United States Department of Justice and the Federal Trade Commission (hereafter collectively referred to as the agencies) sent a letter to the Ethics Committee of the North Carolina State Bar regarding the North Carolina State Bar Opinions restricting the involvement of non-lawyers in real estate closings and refinancing transactions.¹⁸ The letter urged the Ethics Committee to reconsider the two opinions, 2001 Formal Ethics Opinion 4 and 2001 Formal Ethics Opinion 8, relating to the involvement of laypersons in real estate refinancing and purchase transactions.¹⁹ Relying on the Sherman Antitrust Act, the agencies pointed out their entrustment with enforcing the nation's antitrust laws through the promotion of free and unfettered competition in all sectors of the American economy, by industry or profession.²⁰ Urging consideration of the public interest in granting North Carolinians the choice to use lay settlement services, the agencies contended that the goal of increasing consumer protection does not warrant the adoption of such limiting opinions. It was concluded that based on the experience of other states, the opin-

16. *Id.*

17. N.C. GEN. STAT. § 84-2.1 (2003); N.C. GEN. STAT. § 84-4 (2003).

18. Letter from Charles A. James, Assistant Attorney General, Jessica N. Butler-Arkow, Attorney, United States Department of Justice, Timothy J. Muris, Chairman, Ted Cruz, Director of the Office of Policy Planning, and Federal Trade Commission, to the Ethics Committee of the North Carolina State Bar (Dec. 14, 2001) at <http://www.ftc.gov/be/V020006.htm> (last visited Aug. 5, 2003).

19. *Id.*

20. *Id.*

ions were likely to increase closing costs and cause additional inconvenience for North Carolina consumers.²¹ The agencies also noted that other less restrictive means may protect consumers more effectively than a total ban on lay closings.²²

The letter from the FTC and the DOJ to the Ethics Committee of the North Carolina State Bar was written in partial response to three Formal Ethics Opinions issued by the Bar. An examination of these Formal Ethics Opinions, specifically 99 Formal Ethics Opinion 13, 2001 Formal Ethics Opinion 8, and 2001 Formal Ethics Opinion 4, is relevant to this discussion. 99 Formal Ethics Opinion 13 (99 FEO 13), issued on July 21, 2000, rules that "competent practice requires the presence of the closing lawyer at a real estate closing conference to explain the documents being executed, answer questions, and advocate for the client or clients."²³ The opinion further states that "[a] non-lawyer may oversee the execution of documents outside the presence of the lawyer provided the closing lawyer provides adequate supervision and is present at the closing conference to complete the transaction."²⁴ 2001 Formal Ethics Opinion 8 (01 FEO 8), issued on October 19, 2001, further clarified the meaning of 99 FEO 13 by stating, "competent practice requires the physical presence of the lawyer at a residential real estate closing conference."²⁵ This opinion was issued to clarify any ambiguity in the requirements of 99 FEO 13, specifically regarding the increasing ability to maintain communication through advanced technology, such as facsimile, telephone, and the internet.²⁶ 2001 Formal Ethics Opinion 4 (01 FEO 4), in conjunction with 99 FEO 13 and 01 FEO 8, "rules that competent legal representation of a borrower requires the presence of a lawyer at the closing of a residential real estate refinancing."²⁷ 01 FEO 4 makes the same provision as 99 FEO 13, allowing for a non-lawyer with adequate supervision to oversee the execution of documents outside the presence of a lawyer in the context of a refinance transaction.²⁸

21. *Id.*

22. *Id.*

23. N.C. State Bar, 99 Formal Ethics Op. 13 (2000).

24. *Id.*

25. N.C. State Bar, 2001 Formal Ethics Op. 8 (2001).

26. *See id.*

27. N.C. State Bar, 2001 Formal Ethics Op. 4 (2001).

28. *Id.*

2002 Formal Ethics Opinion 9 (02 FEO 9), issued on January 24, 2003, was written in response to the agencies' letter. 02 FEO 9 overruled 99 FEO 13, 01 FEO 8, and 01 FEO 4.²⁹ 02 FEO 9 states:

[a] nonlawyer (sic) assistant supervised by a lawyer may identify to the client who is a party to such a transaction the documents to be executed with respect to the transaction, direct the client as to the correct place on each document to sign, and handle the disbursement of proceeds for a residential real estate transaction, even though the supervising lawyer is not physically present.³⁰

02 FEO 9 also allows for the execution of documents and disbursement of funds by mail, e-mail, and other electronic means.³¹

Authorized Practice Advisory Opinion 2002-1 (APAO 2002-1), issued on October 18, 2002, interprets the North Carolina unauthorized practice of law statutes and their application to residential real estate transactions.³² The Opinion addresses two issues.³³ The first issue answers the question of whether a non-lawyer may handle a residential real estate closing for one or more of the parties to the transaction.³⁴ The Opinion answers this question in the negative, asserting the determination by the North Carolina legislature that only persons who are licensed to practice law in the state are authorized to handle the functions collectively termed the "closing" of a real estate transaction.³⁵ The Opinion identifies the several phases of a real estate transaction and what these phases include.³⁶ It then addresses these phases in the context of North Carolina General Statute sections 84-2.1 and 84-4.³⁷ The Opinion identifies eight examples in the context of real estate closings that, if performed by a non-lawyer, would constitute the unauthorized practice of law.³⁸ The examples identified include: (1) performing abstracts or providing opinions on title to real property; (2) explaining the legal status of title, the legal effect of anything within the chain of title, or the legal effect of exceptions in title insurance commitments; (3) explaining or giving advice about the rights and responsibilities of parties concerning the results of land surveys

29. *Id.*; N.C. State Bar, 99 Formal Ethics Op. 13 (2000); N.C. State Bar, 01 Formal Ethics Op. 8 (2001); N.C. State Bar, 02 Formal Ethics Op. 9 (2003).

30. N.C. State Bar, 02 Formal Ethics Op. 9 (2003).

31. *Id.*

32. N.C. State Bar, Authorized Practice Advisory Op. 2002-1 (2003).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

which require the exercise of legal judgment; (4) providing a legal opinion or advice in response to inquiries by parties regarding legal rights or obligations; (5) advising or instructing a party to the transaction with respect to ways to take title and the legal consequences of the decision; (6) drafting or assisting in the completion of legal documents or in the selection of form legal documents for a party to the transaction; (7) explaining or recommending a course of action that has implications on a party's legal rights and obligations or that requires the exercise of legal judgment; and (8) attempting to settle a dispute between parties to the transaction involving implications to their legal rights and obligations.³⁹

The second issue the Opinion addresses is whether a non-lawyer may present and identify documents necessary to close a real estate transaction in North Carolina, show the parties where to sign these documents, and receive and disburse the closing funds.⁴⁰ The Opinion answers this question in the affirmative. It states that so long as a non-lawyer does not engage in any of the activities referenced in the answer to the first issue of the Opinion, or in other activities that likewise constitute the practice of law, a non-lawyer may present and identify documents, show the parties where to sign, and collect and distribute closing funds.⁴¹

In order to fully understand the ramifications of APAO 2002-1, one must look to the North Carolina Statutes governing the unauthorized practice of law. N.C. Gen. Stat. §84-2.1 is the applicable statute governing the practice of law in North Carolina.⁴² This Statute defines the practice of law as:

performing any legal service for any other person, firm or corporation, with or without compensation, specifically including the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or quasi-judicial bodies, or assisting by advice, counsel, or otherwise in any legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation: Provided, that the above reference to particular acts which are specifically included within the definition of the phrase "practice law" shall not be construed to limit the foregoing

39. *Id.*

40. *Id.*

41. *Id.*

42. N.C. GEN. STAT. § 84-2.1 (2003).

general definition of the term, but shall be construed to include the foregoing particular acts, as well as all other acts within the general definition. . . .⁴³

N.C. Gen. Stat. § 84-4 presents the practical effect of N.C. Gen. Stat. §84-2.1 by prohibiting persons other than members of the State Bar from practicing law.⁴⁴ The pertinent part of N.C. Gen. Stat. § 84-4 provides:

[I]t shall be unlawful for any person or association of persons, except active members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys-at-law, to appear as attorney or counselor at law in any proceeding before any judicial body . . . ; to maintain, conduct, or defend the same, except in his own behalf as a party thereto; or by word, sign, letter, or advertisement, to hold out himself, or themselves, as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor-at-law, or in furnishing the services of a lawyer or lawyers; and it shall be unlawful for any person or association of persons except active members of the Bar, for or without a fee or consideration, to give legal advice or counsel, perform or furnish to another legal services, or to prepare directly or through another for another person, firm or corporation, any will or testamentary disposition, or instrument of trust, or to organize corporations or prepare for another person, firm or corporation, any other legal document.⁴⁵

EFFECT OF NORTH CAROLINA STATE BAR OPINIONS, 02 FEO 9 AND APAO 2002-1, ON THE UNAUTHORIZED PRACTICE OF LAW IN NORTH CAROLINA

Adopted in the face of an antitrust lawsuit, the opinions (02 FEO 9 and APAO 2002-1) of the North Carolina State Bar removing the requirement of an attorney's physical presence at residential real estate closing transactions and refinancings can best be analyzed for effectiveness in the context of North Carolina statutes governing the practice of law. The purpose of unauthorized practice of law legislation is for the protection of the general welfare of the public against incompe-

43. *Id.*

44. See generally *North Carolina v. Pledger*, 257 N.C. 634, 127 S.E.2d 337 (1962) (discussing the unauthorized practice of law in North Carolina); see also N.C. GEN. STAT. § 84-4 (2003).

45. N.C. GEN. STAT. § 84-4 (2003).

tence and dishonesty.⁴⁶ These laws help “to protect the public from severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law.”⁴⁷ In North Carolina, the power to police the unauthorized practice of law has been statutorily granted to the judiciary with investigation and inquiry powers granted to the North Carolina State Bar.⁴⁸ However, other states have granted this power to the legislature through legislative supremacy and to the judicial branch by specific Constitutional provisions.⁴⁹

This statutory grant of power in North Carolina is governed by the definition of the practice of law. In defining the practice of law generally as “performing any legal service for any other person, firm or corporation, with or without compensation,”⁵⁰ the North Carolina legislature sets out a broad framework erring on the side of inclusion, as to precisely what this definition encompasses. Although the definition goes on to give specific examples of what is included, it also specifically states that this list is not exhaustive.⁵¹ In the context of real estate conveyances and refinancings, the statutory definition includes “the preparation or aiding in the preparation of deeds [and] mortgages,” and “abstracting or passing upon titles” as examples of practicing law.⁵² The language recently adopted in 02 FEO 9 and APAO 2002-1 is consistent with the definition of the practice of law, effectually allowing no more authority or involvement by laypersons in residential real estate closings than allowed by the statutory law of North Carolina.⁵³ The limitations spelled out in the opinions comply with the specific examples included in the definition of the practice of law, which prohibit non-lawyers from passing upon title or preparing deeds and mortgages.⁵⁴

46. See *Pledger*, 257 N.C. 257 at 636, 127 S.E.2d at 339 (commented on by Bonnie Doglass Menaker, *Attorneys—Unauthorized Practice of Law by Corporations*, 41 N.C. L. REV. 225 (1963)).

47. Palomar, *supra* note 2, at 448.

48. N.C. GEN. STAT. § 84-37 (2003); see also *Gardener v. N.C. State Bar*, 316 N.C. 285, 288, 341 S.E.2d 517, 519 (1986).

49. Palomar, *supra* note 2, at 448-50.

50. N.C. GEN. STAT. § 84-2.1 (2003).

51. See *id.*

52. *Id.*

53. See *id.*; N.C. State Bar, Authorized Practice Advisory Op. 2002-1 (2003); N.C. State Bar, 2002 Formal Ethics Op. 9 (2003).

54. N.C. State Bar, Authorized Practice Advisory Op. 2002-1 (2003); N.C. State Bar, 2002 Formal Ethics Op. 9 (2003).

The statutory definition of the practice of law also includes an example relevant to the discussion of whether lawyers need to be involved at real estate conveyance closings and refinancings. The general provision provides that the practice of law includes: "assisting by advice, counsel, or otherwise in any legal work" and advising or giving opinions concerning the legal rights of "any person, firm, or corporation."⁵⁵ The effect of this language in the statutory definition of the practice of law, when read in conjunction with the newly issued opinions of the State Bar, could cause some concern throughout the legal world. Nevertheless, when read in totality, the opinions of the State Bar are also consistent with these general provision examples.⁵⁶ The removal of the mandate requiring the physical presence of an attorney at closing, and the allowance of laypersons to execute documents and distribute funds, does not violate any of the provisions of the Statute limiting the role of non-lawyers.⁵⁷ Allowing a layperson to show buyers and sellers where to sign in order to execute closing documents, and allowing a layperson to distribute closing funds, does not facially violate the Statute defining the practice of law.⁵⁸ These allowances are not actions that fall within the meaning of the Statute when it defines the practice of law as: "assisting by advice, counsel, or otherwise in any legal work and advising or giving opinions about the legal rights of any person, firm, or corporation."⁵⁹

In practical effect, none of the allowances for layperson participation made by the new opinions are facially inconsistent with the North Carolina statutes governing the practice of law.⁶⁰ As the opinions still mandate oversight by the attorney (without the requirement of physical presence), the effect of the new opinions is to allow the delegation by attorneys of tasks which are merely clerical in nature, and do not require the exercise of legal judgment.⁶¹ The practical effect of these

55. N.C. GEN. STAT. § 84-2.1 (2003).

56. See N.C. State Bar, Authorized Practice Advisory Op. 2002-1 (2003); See N.C. State Bar, 2002 Formal Ethics Op. 9 (2003); See N.C. GEN. STAT. § 84-2.1 (2003).

57. *Id.*

58. See *id.*

59. See N.C. GEN. STAT. § 84-2.1 (2003).

60. See *id.*; N.C. State Bar, Authorized Practice Advisory Op. 2002-1 (2003); See N.C. State Bar, 2002 Formal Ethics Op. 9 (2003).

61. See N.C. State Bar, Authorized Practice Advisory Op. 2002-1 (2003); See N.C. State Bar, 2002 Formal Ethics Op. 9 (2003); See N.C. GEN. STAT. § 84-2.1 (2003); Palomar, *supra* note 2, at 454-55 (discussing the Nevada Supreme Court test used to determine whether a real estate settlement service provider is engaged in practicing law); see also Dawson, *supra* note 9, at 314 (discussing the implications of the adoption of APAO 2002-1 and FEO 9).

allowances, when facially applied to roles of attorneys and laypersons in real estate closings, seems to do little more than save time for attorneys by allowing their assistants to perform the clerical duties of closing outside their presence.⁶² Other than removing the mandate of an attorney's physical presence and allowing laypersons to perform incidental clerical duties, on their face, the practical effect of these opinions is merely the granting of greater participation and authority to laypersons in residential real estate closings. However, the future effect of these opinions could potentially change the structure of the concept of unauthorized practice of law in North Carolina in a more significant manner.⁶³

WHY LAWYERS ARE NEEDED AT REAL ESTATE CLOSINGS

As North Carolina has now taken the first step on a slippery slope possibly ending in carte blanche allowance of layperson closings, the future effect of this step is an important indicator of where North Carolina law is headed and how it will affect the general welfare of the public.⁶⁴ Interpretations of the newly adopted opinions of the North Carolina State Bar (02 FEO 9 and APAO 2002-1) will be discussed in the context of their potential future effect on the concept of the unauthorized practice of law in North Carolina. The future effects of these opinions will be addressed first, as to their potential impact on conflicts of interest and, second, as to their potential economic and time costs.

Conflicts of Interest

The North Carolina Rules of Professional Conduct issued by the North Carolina State Bar provide that no attorney shall represent a client if the representation involves a conflict of interest.⁶⁵ Rule 1.7 of the Rules of Professional Conduct states that a conflict of interest arises when "the representation of one client will be directly adverse to another client . . . or may be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer."⁶⁶ This provision guarding against conflicts of interest in the fiduciary relationship between an attorney and a client is fundamental to the ideals of the profession.⁶⁷ The con-

62. See Dawson, *supra* note 9, at 302.

63. See *id.* at 302 & 310.

64. See *id.* at 295-96.

65. N.C. ADMIN. CODE tit. 27, r. 1.7 (Feb. 2003).

66. *Id.*

67. See *id.*

cept of this fiduciary role plays an important part in the consideration of the future effects that the adoption of the new opinions could potentially have on the unauthorized practice of law in North Carolina.

The inherent debate surrounding conflicts of interest between the proponents for and against the necessity of a lawyer's participation in real estate closings involves the existence of a fiduciary relationship. Attorneys have a duty to act in the best interest of their clients in all circumstances, without influence from economic factors.⁶⁸ By contrast, real estate professionals are not governed by this strict rule and they do not get paid unless the deal is closed.⁶⁹ "[A] real estate agent's legal duty is to the seller, not the buyer, unless the buyer has specifically retained a buyer's broker."⁷⁰ The relationship created between buyers and real estate professionals is the exact type of relationship that provisions governing attorney conflicts of interest are designed to implicate. The absence of these provisions mandating a fiduciary duty between real estate professionals and buyers leaves the door open to possibilities of buyers being disadvantaged by their reliance on experienced real estate professionals motivated by the bottom line.⁷¹

One example of the possibility for such disadvantage exists in the context of title insurance. One commentator noted:

[A] title company often will issue a title insurance policy to a buyer's lender that insures against encroachments and easements, but will except to those same encroachments and easements from the coverage of the buyer's title insurance policy. Neither the title company nor the lender, however, has a duty to explain to the buyer who has paid for both policies . . . that her policy gives her less protection than the lender's policy affords to the lender.⁷²

A reasonable attorney in this type of inequitable transaction could protect the buyers by negotiating with the title company on the buyer's behalf.⁷³

Other possible examples of harm to a buyer who retains a layperson for the closing of a real estate transaction include the lack of or failure to: (1) review the contract of sale to make sure all the terms have been complied with; (2) examine the title insurance costs to ensure the company is not overcharging compared to a rate manual; (3) protect the buyer's interest in the condition of the property, what

68. *See id.*

69. Palomar, *supra* note 2, at 446.

70. *Id.*

71. *See id.*

72. *Id.* at 445.

73. *Id.*

type of deed should be conveyed, and the amount of personal property or total acreage to be conveyed; (4) examine the possibility for saving costs by using a re-issued title insurance policy when the seller has an existing policy; and (5) explain the legal effects of the final closing documents to the buyer.⁷⁴ These possible examples of harm could be avoided if laypersons were governed by the same fiduciary duty and conflict of interest principles that the legal profession is founded upon.⁷⁵

The future effect of the opinions, and the slippery slope their adoption is now resting on, could create facial inconsistencies with the current language of the North Carolina General Statutes governing the practice of law.⁷⁶ The additional examples of possible harm mentioned above are evidence of this possibility. If a layperson were to guard against the possible harms created by conflicting interest as described above, by definition they would be performing some of the actions specifically laid out in the statute as constituting the practice of law.⁷⁷

For instance, if a layperson attempted to guard against potential harm to a buyer that could result when there is a lack of examination as to the type of deed that would be in the buyer's best interest, the layperson closer would be required to exercise legal judgment in making this determination. This exercise of legal judgment would include determining the buyer's best interest and the effects of the conveyance of a particular type of deed on the buyer's legal rights. This would be in direct conflict with the language of the statute, which provides that the practice of law includes abstracting or passing upon title, and advising or giving opinion upon the legal rights of any person.⁷⁸ However, without taking these actions to protect the buyer, real estate professionals would be ignoring the best interest of the client, creating problems which give rise to conflicts of interest between the two parties.

Economic and Time Costs

A second area of concern, which warrants consideration of the future effects of the adoption of APAO 2002-1 and 02 FEO 9 in the context of the unauthorized practice of law, is economic and time costs. The economic and time costs of involving an attorney in the

74. *Id.* at 445-46.

75. N.C. ADMIN. CODE tit. 27, r. 1.7 (Feb. 2003).

76. See N.C. GEN. STAT. § 84-2.1 (2003).

77. See *id.*

78. See *id.*

closing of a residential real estate transaction are significant issues in the eyes of real estate professionals and buyers.⁷⁹ Concerns over additional closing costs and possibilities of losing the deal are two specific issues raised by the proponents for displacement of attorneys by laypersons in residential real estate transactions.⁸⁰ However, it is conceivable that the practical effect of the adoption of APAO 2002-1 and 02 FEO 9 will eradicate the arguments of those opposing the necessity of attorney involvement at real estate closings, including the concerns over economic and time costs associated with attorney involvement. Conversely, in the context of the future effect of the adoption of these opinions, it is also conceivable that the adoption could lend support to those same arguments concerning economic and time costs which were potentially eliminated by the practical effects.

Proponents for the displacement of attorneys in residential real estate closings often express concern over the additional costs attorney involvement adds to a closing.⁸¹ “Actually, using an attorney may add much less . . . to the transaction’s total cost, since the attorney provides some services for which lay real estate professionals otherwise would charge.”⁸² Despite this actuality, the practical effect of the adoption of APAO 2002-1 and 02 FEO 9 also helps to eradicate these concerns. Allowing a layperson to perform the clerical duties incident to a residential real estate closing, and removing the mandate of attorney presence allows the attorney to schedule other income-producing appointments at that time, encouraging cost reduction in attorney’s fees. Since most attorneys charge by the hour, in theory the adoption of these opinions will reduce closing costs incident to an attorney’s involvement, while still affording the same amount of protection to the buyer.⁸³ Therefore, the argument that attorney involvement causes additional costs and time delays has no support in the context of the adoption’s future effect, as it is eliminated by the practical effects of the recent opinion adoption.

Additional arguments are made by the proponents of attorney displacement that allowing laypersons to close residential real estate transactions will encourage competition, thereby reducing costs.⁸⁴ “[T]he counter argument is that competition already exists among North Carolina attorneys conducting closings as North Carolina

79. See Palomar, *supra* note 2, at 438-40.

80. See *id.*

81. See *id.*

82. *Id.* at 439.

83. See Dawson, *supra* note 9, at 300.

84. See Richard A. Posner, *ECONOMIC ANALYSIS OF LAW* 8 (5th ed. 1998).

boasts one of the lowest closing costs in the nation. Thus, . . . could [there] be any benefits in changing a system that already produces such low costs[?]"⁸⁵ For example, legal fees in the Triangle area of North Carolina are roughly equal to the costs for legal fees associated with the closing a residential real estate transaction in southern New Jersey, where laypersons compete with attorneys.⁸⁶ Therefore, it is possible to conceive how the practical effect of the adoption of APAO 2002-1 and 02 FEO 9 will help dispel concerns over additional closing costs due to the involvement of attorneys in real estate closing transactions.

In line with the economic concerns of attorney involvement in closings, proponents for the displacement of attorneys in favor of laypersons also express concern over the time costs. These concerns formulate into worries over losing the deal as a result of time delays experienced by attorney involvement.⁸⁷ The concerns that attorney involvement slows the transaction will also be positively affected by the adoption of the new opinions. Removing the mandate of attorney presence will give flexibility to the scheduling concerns raised by the proponents of layperson closings.⁸⁸ One specific argument put forth by the proponents deals with the frequency of real estate dealings on weekends and weekday evenings, times which, according to proponents, attorneys are normally not in their offices.⁸⁹ The practical effect of the adoption of 02 FEO 9 and APAO 2002-1 is to allow closings to proceed at times when traditionally it would be more difficult to arrange for the physical presence of an attorney. Therefore, as with the eradication of economic arguments in favor of layperson closings, the practical effect of the adoption of these opinions will also dispel any time delay arguments that proponents may make in the context of future effects of these opinions.

However, in contrast to the positive practical effect of the adoption of 02 FEO 9 and APAO 2002-1, the future effect of this adoption could have a negative impact on eradicating the arguments of proponents for layperson closings. Should the slippery slope give way to additional participation of laypersons in real estate closings, the concerns over the time and economic costs associated with attorney involvement could increase. Initially, the adoption of 02 FEO 9 and APAO 2002-1 may not result in additional time delays and economic costs when clos-

85. Dawson, *supra* note 9, at 297-98.

86. *Id.* at 298.

87. See Palomar, *supra* note 2, at 440.

88. Dawson, *supra* note 9, at 302.

89. See Palomar, *supra* note 2, at 440.

ings are done by laypersons.⁹⁰ However, in order to accommodate the abilities of laypersons and their ignorance of the intricacies of the law, closings will need to be standardized.⁹¹ The impact of this standardization on the effects of the adoption of these opinions could ultimately result in the need for attorney involvement to remedy mistakes, which would still end up causing additional costs and time delays.⁹² While one recent empirical study found only a four percent increase in the chance of error in layperson closings,⁹³ this additional margin of error is entirely unnecessary to eradicate economic and time concerns in light of the recent adoption of APAO 2002-1 and 02 FEO 9 and North Carolina's already competitive closing rates. As cliché as it may sound, the old adage "if it ain't broke, don't fix it" seems entirely applicable to the concerns of proponents for layperson closings. In the context of the current unauthorized practice of law statutes and the future effects of the adoption of the recent opinions by the North Carolina State Bar, there seems to be little advantage in taking any further steps towards the total allowance of layperson closings, as this will only create further complications and inconsistencies in the law.

CONCLUSION

The implications of the recently adopted APAO 2002-1 and 02 FEO 9 are significant in scope as applied to attorneys and laypersons. While their practical facial effect does little in the scheme of unauthorized practice of law, their future effect has a much more significant impact. In this context, the practical effect and possible future effects of their adoption support the assertion that attorney involvement in residential real estate closings is necessary. To conclude otherwise would directly conflict the language of the General Statutes of North Carolina. This would necessitate legislative action to reform the law to create consistency between the allowance of layperson closings and the definition of the practice of law in North Carolina. While there are some plausible concerns supporting the displacement of attorneys in these transactions, the overall result would not create any significant advantage to the general public in the way of added competition to lower closing costs or minimize time delays. Additionally, as illustrated by the purposes behind the unauthorized practice of law statutes in North Carolina, there is a significant possibility that the allowance of layperson closings could harm the public by removing

90. See Dawson, *supra* note 9, at 302.

91. See Palomar, *supra* note 2, at 441-42.

92. See Dawson, *supra* note 9, at 305-06.

93. *Id.* at 303-04 (referencing Palomar, *supra* note 2, at 509).

the protections afforded by attorney involvement. Under the current statutory scheme, the recent opinion adoptions by the North Carolina State Bar are sufficient to meet the concerns of the proponents of layperson involvement in real estate closings, while avoiding unnecessary slippage in the direction which would necessitate legislative reform. As the duty to protect the welfare of the public has been fulfilled and the allowance of layperson participation has been sufficiently extended, the North Carolina State Bar has met its burden and should not take any additional steps along the slippery slope to carte blanche allowance of layperson closings.

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