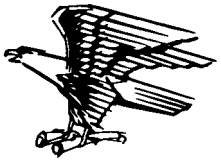
AMERICAN
LAND TITLE
ASSOCIATION



December 20, 2002

Arthur Garwin, Esq.
Center for Professional Responsibility
American Bar Association
541 N. Fairbanks Court
Chicago, IL 60611

Dear Mr. Garwin:

The American Land Title Association wishes to take this opportunity to provide comments to the American Bar Association's Task Force on the Model Definition of the Practice of Law concerning its latest draft of that definition.

As the drafters are most likely aware, one of the perennially most active areas of UPL debate within the organized bar of many eastern states is the issue of the application of individual state UPL restrictions to the lay closing of a real estate transaction and the issuance of a policy of title insurance. While these questions have been resolved in the great majority of states in a manner which allows such activities to be performed by lay people, areas of the country (most notably many of the original thirteen states and others east of the Mississippi) continue to wrestle with this question. Despite the fact that the great majority of such transactions are overseen by lay people throughout most of the country, these other states continue to believe their legal systems are somehow unique and that their state population requires the protection of the courts against such "unauthorized practice of law" activities. Obviously, we–and the Federal Trade Commission and the Department of Justice–disagree.

Let me state for the record that our membership includes bar-related title insurers and individual attorney practitioners and we consider attorneys to be capable of great service to the public in this area. Attorneys perform real estate transactions in many states and assist borrower/buyers as well as sellers with this important financial undertaking. Those attorneys who are truly engaged in an active real estate practice can add great value to that process. However, it has long been the official position of

this Association and the industry it represents that it is inappropriate for the state–rather than the marketplace–to be the final arbiter of whether the individual parties in the transaction should seek legal or lay closing assistance.

The ALTA considers this a tremendous opportunity for the ABA to speak up on this important question and establish the standard certain jurisdictions can refer to in responding to these periodic challenges. Subsection (d) already provides exceptions to the enumerated definition. We note that the committee (with Washington state representatives) has already acknowledged at least one state's rather formal reconciliation of this debate by exempting those granted "limited license" to practice–most notably in the real estate closing and title search arenas as it turns out. We would propose an additional, more general exemption:

> (5) The conduct of a real estate closing or escrow, including the preparation and issuance of a policy of title insurance.

As the ALTA has pointed out in numerous filings (Virginia, Kentucky, Rhode Island, New Jersey, etc.), the ministerial acts associated with the conduct of a real estate closing are such that they do not require the participation of an attorney–although we continue to acknowledge the benefits of such participation. The residential sales contract, the blue-print for the closing of the transaction between seller and buyer and the embodiment of the legal rights of both parties, is negotiated, modified, and executed under the auspices of a lay real estate sales agent. While the standard sales contract may have been reviewed, approved, or even drafted by the state bar, the all-powerful real estate sales industry isn't challenged by the organized bar for UPL infractions when they extensively modify every such document with interminable addenda, cross-outs, and other additions and changes.

For many years now, the mortgage or deed of trust and note have been standardized by Fannie Mae and Freddie Mac. These form documents may not be altered in any way and are, more often than not, prepared by the lender (along with most other documents association with closing) and must be executed by the borrower or the transaction will not close. This is perhaps the most significant financial and legal aspect of the transaction as between the borrower and lender, and the closing agent–legal or lay–is powerless to change a word. To provide neutral explanations of its immutable provisions doesn't require a law degree–a weekend training session is sufficient for that! Of course, it is universally understood that any lay closer must refrain from providing actual legal advice at the closing and would be liable for any such advice if given and adverse consequences arose.

The settlement statement was standardized over a quarter century ago by the Real Estate Settlement Procedures Act. The ubiquitous HUD-1 Form presents the financial details of the transaction and discloses how the settlement agent, lay or legal, will disburse funds, in what amount and to whom. Software prepares these statements and lay para-professionals invariably enter the data. As with most other aspects of the closing of a real estate transaction, the economics of the practice of law in this area simply doesn't allow for the intimate involvement of attorneys in such detailed activities.

And the future holds even greater standardization–not to mention automation–for the closing process. As we move into the realm of e-mortgage transactions, question certainly has to be raised whether the training and investment necessary to electronically interface efficiently and cost-effectively with other parties to the transaction will be something all but the dedicated attorney practitioner will want to make.

There certainly is specialized knowledge and expertise required to search and examine real estate titles. However, as has been demonstrated throughout history, lay people have consistently demonstrated their ability to perform this function at least as well as attorneys. "Conveyancers" (now perhaps best characterized as modern-day abstracters) were common throughout the nineteenth and well into the twentieth century, even in many states where these UPL controversies rage today. Currently, the chief title officer for the second largest title insurer in the country is a non-lawyer. He also chairs my Title Insurance Forms Committee, responsible for drafting all ALTA standard title insurance policy forms and endorsements. Moreover, it is the practice of many if not most attorneys to contract out–generally to lay parties–the actual search function. And the great majority of title insurance policies are issued without any involvement of an attorney and with no demonstrable difference in claims experience over those produced by attorney-agents.

In conclusion, we find it difficult to believe that the ABA can fail to include in its model definition some statement akin to our suggested language if only to acknowledge the established fact of the role of the lay person in real estate transactions. In the great majority of states, no attorney is involved in any aspect of closing real estate transactions. This occurs with a maximum of efficiency and a minimum of negative social impact. There is no documented evidence that the public is less well served by a lay closer over a legal one. In the final analysis, that should be the task force's standard.

Thank you for this opportunity to submit comments on your important undertaking.

Sincerely,

James R. Maher