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The Role of Laypersons in the Closing of Residential Real Estate Transactions: North Carolina's New Approach

I. INTRODUCTION

In North Carolina in 2001, more than twelve billion dollars worth of residential real estate transactions occurred.¹ Over the last several years, profitability within this industry has increased as evidenced by a growth of four percent in both the number of units sold and the price of such units in 2001.² As the industry grows in profitability, the competition for conducting real estate closings has also increased.³ Many laypersons in North Carolina clamor to offer closing services traditionally defined within the scope of the practice of law.⁴ Indeed, there has been great debate not only within North Carolina but also across the nation over what role brokers, lenders, paralegals, notaries public, and other real estate laypersons may take in the closing process.⁵ The trend is towards less lawyer involvement in real estate closings, with only forty percent of all residential real estate closings nationwide involving an attorney.⁶ Uncertainty continues to exist, however, as “[m]ore unauthorized practice proceedings have been brought to restrain laypersons from providing real estate settlement services than any

1. N. C. ASSOCIATION OF REALTORS, INC., MULTIPLE LISTING STATISTICS FOR 2001, at http://nc.living.net/consumer_information/mls2001.htm (last visited Feb. 15, 2003).

2. *Id.*

3. *See id.*; see also Leigh Somerville, *State Bar Association Mulls Allowing Laymen to be Responsible for Real Estate Closings*, BUS. J., Sept. 20-26, 2002, at 14.

4. Somerville, *supra* note 3, at 14-15; see generally Joyce Palomar, *The War Between Attorneys and Lay Conveyances—Empirical Evidence Says “Cease Fire!”*, 31 CONN. L. REV. 423, 429 (1999) (discussing the fight in defining what constitutes the practice of law among laypersons and attorneys). North Carolina's statutes concerning the “practice of law” may be found in N.C. Gen. Stat. §§ 84-2.1 to 84-5. N.C. GEN. STAT. §§ 84-2.1 to 84-5 (2001).

5. *See* Somerville, *supra* note 3, at 14.

6. Michael Braunstein, *Structural Change and Inter-Professional Competitive Advantage: An Example Drawn From Residential Real Estate Conveyancing*, 62 MO. L. REV. 241, 241 (1997).

other single type of service.”⁷ Consequently, not just brokers took notice when the North Carolina State Bar issued 2001 Formal Ethics Opinion 4 and 2001 Formal Ethics Opinion 8 in October 2001.⁸ These Opinions, stating that attorneys must not only oversee the creation of real estate closing documents but must also be physically present at the closing or refinancing,⁹ led the Federal Trade Commission (FTC) and the United States Department of Justice (DOJ) to issue a joint letter detailing the potential violations in restraint of trade resulting from such requirements.¹⁰

The joint letter from the FTC and DOJ sparked immediate concern over a federal lawsuit against the North Carolina State Bar.¹¹ Consequently, the State Bar mobilized to reconsider its former opinions and ward off a potential lawsuit.¹² In re-examining the two Formal Ethics Opinions challenged in the FTC/DOJ letter, the debate over the role of attorney involvement in the residential real estate closing process came to the forefront of the realty community.¹³ Some argued that the system needed no change, pointing to the fact that the total closing costs in North Carolina rank among the lowest in the nation.¹⁴ Others argued that allowing non-attorneys to compete in the real estate closing market would decrease costs and increase the number of choices available to consumers.¹⁵ The arguments on both sides of this issue must be weighed in terms of economics, competition,

7. Palomar, *supra* note 4, at 429.

8. N.C. STATE BAR, 2001 FORMAL ETHICS OPINION 8, 2002 LAWYER'S HANDBOOK 265 (Oct. 19, 2001), *available at* http://www.ncbar.com/eth_op/ethics_sel.asp?ID=634&LIST=number&BACK='ethics_o.asp' (last visited Feb. 15, 2003) [hereinafter FORMAL OP. 8]; N.C. STATE BAR, 2001 FORMAL ETHICS OPINION 4, 2002 LAWYER'S HANDBOOK 263-64 (Oct. 19, 2001), *available at* http://www.ncbar.com/eth_op/ethics_sel.asp?ID=632&LIST=number&BACK='ethics_o.asp' (last visited Feb. 15, 2003) [hereinafter FORMAL OP. 4].

9. FORMAL OP. 8, *supra* note 8; FORMAL OP. 4, *supra* note 8.

10. Russell Rawlings, *Real Property Section Unites in 'Constructive Force,'* N.C. LAW., Nov.-Dec. 2002, at 1, 13; *see also* Letter from the Federal Trade Commission and Department of Justice to the Ethics Committee, North Carolina State Bar (Dec. 14, 2001), *available at* <http://news.findlaw.com/hdocs/docs/doj/usdojncbar121401ltr.pdf> (last visited Feb. 15, 2003) [hereinafter North Carolina Letter].

11. Rawlings, *supra* note 10, at 1.

12. *Id.*

13. Somerville, *supra* note 3, at 14; *see* Rawlings, *supra* note 10, at 1.

14. Somerville, *supra* note 3, at 14.

15. *Id.*

efficiency, and consumer benefit.¹⁶ An analysis of these factors serves as a helpful tool in understanding the North Carolina State Bar's most recently adopted ethics Opinions, the Authorized Practice Advisory Opinion 2002-1¹⁷ and 2002 Formal Ethics Opinion 9,¹⁸ adopted on January 24, 2003,¹⁹ as well as the potential impact of these Opinions on the lending community.

This note will delve into the debate surrounding whether to mandate attorney presence at residential real estate closings and refinancings in the state of North Carolina. It will first delineate the relevant players and procedures.²⁰ It will then analyze the history leading to the adoption of the Authorized Practice Advisory Opinion (Advisory Opinion) and 2002 Formal Ethics Opinion 9,²¹ exploring the concept of the unauthorized practice of law in relation to these Opinions.²² Next, it will present the arguments for and against allowing laypersons to conduct real estate closings and examine the potential effects of the recent Opinions for both laypersons and attorneys.²³ Finally, it will conclude with an examination of the posture of lending institutions in this debate and an analysis of the effects of the most recent Opinions on lenders.²⁴

16. See *infra* notes 130 to 241 and accompanying text.

17. See N.C. STATE BAR, AUTHORIZED PRACTICE ADVISORY OPINION 2002-1 (2002), at http://www.ncbar.com/home/realestate_ethics.asp (last visited Feb. 15, 2003) [hereinafter ADVISORY OP.].

18. N.C. STATE BAR, 2002 FORMAL ETHICS OPINION 9 (2002), at http://www.ncbar.com/home/realestate_ethics.asp (last visited Feb. 15, 2003) [hereinafter FORMAL OP. 9].

19. N.C. STATE BAR, State Bar Explains Limited Role of Lay Persons in Real Estate Closings, at http://www.ncbar.com/home/realestate_ethics.asp (last visited Feb. 15, 2003) [hereinafter Limited Role].

20. See *infra* notes 25-58 and accompanying text.

21. See *infra* notes 59-107 and accompanying text.

22. See *infra* notes 108-121 and accompanying text.

23. See *infra* notes 122-241 and accompanying text.

24. See *infra* notes 242-273 and accompanying text.

II. BACKGROUND—PLAYERS AND PROCEDURES

A. *The Players*

The major players involved in any real estate transaction are: the buyer and seller, real estate broker, attorney, lender, and title insurance company.²⁵ Buyers and sellers stand at the center of any real estate transaction. While these two need be the only parties to the transaction, in practice, most real estate sales involve the aid of a broker.²⁶ All brokers within North Carolina are required to hold a valid license issued by the North Carolina Real Estate Commission.²⁷ Brokers typically represent sellers²⁸ and serve as the deal-maker.²⁹ In recent years, however, real estate brokers across the nation have broadened the scope of the services they provide to include activities such as executing standardized conveyance instruments, “advising clients on the legal ramifications of provisions in such instruments, and even

25. See generally GEORGE J. SIEDEL & JANIS K. CHEEZEM, *REAL ESTATE LAW* (4th ed. 1999) (describing the relationships found among the players in a real estate transaction).

26. LUCY A. MARSH, *REAL PROPERTY TRANSACTIONS* 124 (1992). North Carolina law defines a real estate broker as:

any person, partnership, corporation, limited liability company, association or other business entity who for a compensation or valuable consideration or promise thereof lists or offers to list, sells or offers to sell, buys or offers to buy, auctions or offers to auction . . . , or negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, or who sells or offers to sell leases of whatever character, or rents or offers to rent any real estate or the improvement thereon, for others.

N.C. GEN. STAT. § 93A-2(a) (2001).

27. N.C. GEN. STAT. § 93A-1 (2001). To obtain a license, a real estate broker must submit a written application and be at least eighteen years old. *Id.* at § 93A-4(a). The applicant must have also satisfactorily completed, within three years prior to the application submission, a Commission approved real estate school course load consisting of sixty hours of classroom instruction or possess the real estate experience deemed equivalent by the Commission. *Id.* All real estate broker licenses must be renewed annually. *Id.* at § 93A-4(c).

28. SIEDEL & CHEEZEM, *supra* note 25, at 178.

29. MARGARET C. JASPER, *REAL ESTATE LAW FOR THE HOMEOWNER & BROKER* 9 (4th ed. 2000). Brokers frequently bring together the buyer and seller as well as hammer out the differences between the two parties which might otherwise impede the sale. *Id.*

representing clients before various judicial and administrative hearings.”³⁰

Attorneys³¹ are also frequently involved.³² Many states, such as North Carolina, mandate that attorneys oversee large portions of the transaction.³³ Attorney duties within the transaction may include: examination of title records, preparation of legal documents, representation of parties at the closing, fund disbursement, and dissemination of client advice.³⁴ Any attorney involved generally represents the buyer and lender, performing only limited functions for the seller.³⁵ In North Carolina, an attorney “may, with proper notice to the borrower, represent only the lender,”³⁶ or may, in acceptable circumstances, “represent the buyer, the seller and the lender in the closing of a residential real

30. Shane L. Goudey, *Too Many Hands in the Cookie Jar: The Unauthorized Practice of Law by Real Estate Brokers*, 75 OR. L. REV. 889, 889-90 (1996). It should be noted that while many real estate agents across the nation have broadened the scope of their services, North Carolina law, unlike several other states, places fairly strict limits on the services a broker may provide when such services border on or involve the practice of law. See *infra* notes 80-107 and accompanying text. For a discussion of what constitutes the practice of law in North Carolina, see *infra* notes 108-121 and accompanying text. For a discussion of the arguments for and against expanding this definition to allow laypersons to conduct closings within North Carolina, see *infra* notes 122-241 and accompanying text.

31. Attorneys may choose to employ paralegals in performing some of the functions relating to the residential real estate closing. For a general discussion of the role of the paralegal, see Julie A. Flaming, *Avoiding the Unauthorized Practice of Law: Proposed Regulations for Paralegals in South Carolina*, 53 S.C. L. REV. 487 (2002). In North Carolina, attorneys may seek the aid of paralegals in performing title searches if the paralegals are attorney supervised but may not rely upon an unsupervised non-lawyer's title information prepared from an abstract. N.C. STATE BAR, RULE OF PROF. CONDUCT 216, 2001 LAWYER'S HANDBOOK 210 (July 18, 1997) [hereinafter RPC 216]; N.C. STATE BAR, RULE OF PROF. CONDUCT 29, 2001 LAWYER'S HANDBOOK 141 (Oct. 23, 1987) [hereinafter RPC 29].

32. See JASPER, *supra* note 29, at 27; PATRICK K. HETRICK & LARRY A. OUTLAW, NORTH CAROLINA REAL ESTATE FOR BROKERS AND SALESMEN 566 (4th ed. 1994).

33. JASPER, *supra* note 29; see ADVISORY OP., *supra* note 17. South Carolina, Massachusetts, Delaware, Connecticut, and Georgia have similar rules to North Carolina regarding the role of an attorney in the closing process. Eric Frazier, *Lawyers Fight for Real-Estate Niche*, THE CHARLOTTE OBSERVER, July 23, 2002, at D1.

34. See generally Somerville, *supra* note 3 (discussing the attorneys role in the real estate transaction).

35. HETRICK & OUTLAW, *supra* note 32, at 566. In complex transactions, however, both buyer and seller may seek legal representation. *Id.*

36. N.C. STATE BAR, RULE OF PROF. CONDUCT 41, 2001 LAWYER'S HANDBOOK 145 (Jan. 13, 1989) [hereinafter RPC 41].

estate transaction.”³⁷ The attorney may represent all of the parties involved in the transaction “where the clients are generally aligned in interests even though there is some difference of interests among them,” as when the buyer and seller come together, with the aid of the lender, desiring to close a real estate deal.³⁸

Lenders play a critical role in the real estate process as many buyers require additional financial resources.³⁹ To receive such funds, buyers typically must provide the lender with security in the form of personal or real property or a guarantee by a third party.⁴⁰ Lenders frequently encroach upon the traditional practice of law definition.⁴¹ For instance, many lenders across the nation have begun to prepare documents to meet the particular and stringent standards often found in the secondary mortgage markets.⁴² In North Carolina, it is common practice for lenders to provide attorneys with a closing letter detailing the documentation required by the lender.⁴³

Before loaning money, lenders usually require the buyer to purchase a mortgagee title insurance policy.⁴⁴ This form of title insurance protects the lender from defects of title and also insures the lender for the amount of the mortgage.⁴⁵ The owner’s interest in the real property, however, is not protected.⁴⁶ The services provided by a title insurer may include: chain of title examination, certification and opinion formation regarding a title, writing a title

37. N.C. STATE BAR, RULE OF PROF. CONDUCT 210, 2001 LAWYER’S HANDBOOK 208 (Apr. 4, 1997) [hereinafter RPC 210].

38. *Id.* at Op. #1.

39. SIEDEL & CHEEZEM, *supra* note 25, at 308.

40. *Id.* at 308-09. Security is usually in the form of a mortgage on the real property to be purchased. See JASPER, *supra* note 29, at 29-30.

41. Gary S. Moore, *Lawyers and the Residential Real Estate Transaction*, 26 REAL EST. L. J. 351, 354-55 (1998).

42. *Id.*

43. E-mail from Paul Stock, Executive Vice-President, N.C. Banker’s Association to Janet K. Dawson (Jan. 6, 2003 16:15 EST) (on file with the N.C. Banking Inst.).

44. SIEDEL & CHEEZEM, *supra* note 25, at 272.

45. *Id.* at 271-72. Defects of title may arise from forged signatures, minor grantors, or undelivered instruments. *Id.*

46. *Id.* If the situation arises so that the title company must pay out on the policy, it then takes the lender’s right to collect from the owner. *Id.* at 272. Thus, owners may seek title insurance called an owner’s title insurance policy. *Id.* The owner’s title insurance policy usually consists of a one time payout premium based upon the location of the real estate in question. *Id.* at 271.

insurance policy, attending closings, as well as receiving, reviewing, and recording title instruments.⁴⁷ In North Carolina, title insurance companies may not furnish information regarding real estate titles “unless and until the title insurance company has obtained the opinion of an attorney, licensed to practice law in North Carolina and not an employee or agent of the company, who has conducted or caused to be conducted under the attorney’s direct supervision a reasonable examination of the title.”⁴⁸

B. *The Procedure*

While residential real estate transactions vary slightly across the nation according to state law and local practice, most transactions share the same basic framework. The first step generally involves the consultation of a real estate broker.⁴⁹ Once a real estate broker brings together the buyer and seller, the buyer may desire to employ an attorney to prepare a contract.⁵⁰ Many buyers, however, forego this stage and use standardized forms supplied by the broker.⁵¹ Next, the buyer and seller reach an agreement on the purchase price.⁵² The buyer finds a lender, if needed, assuming that the seller provides assurance of good title to the property in question.⁵³ The final step, execution of documents, occurs at the closing after which the transfer is recorded in the local courthouse.⁵⁴ In this entire process, the closing serves as the deal-maker or breaker, as it is the final and most important step in ensuring that the transaction occurs.⁵⁵

47. Moore, *supra* note 41, at 354.

48. N.C. GEN. STAT. § 58-26-1 (2001).

49. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 549 (4th ed. 1998) (quoting John C. Payne, *A Typical House Purchase Transaction in the United States*, 30 CONV. (N.S.) 194, 194-211 (1966)).

50. *Id.*

51. *Id.* at 549-50. For an example of a standardized real estate form in North Carolina see KENNETH A. MOSER, HARDIN G. HALSEY, & CHRISTOPHER E. LEON, 1 NORTH CAROLINA REAL ESTATE FORMS 1-8 (1994).

52. DUKEMINIER & KRIER, *supra* note 49, at 550.

53. *Id.* at 550-51. Title may be assured by a “certificate of title” and title insurance. *Id.* at 550-52.

54. *See id.* at 553.

55. *See* HETRICK & OUTLAW, *supra* note 32, at 563. Indeed, the closing serves to transfer title to the real estate from seller to buyer, disburse funds

Closing meetings and escrow closings serve as the two primary closing methods.⁵⁶ In North Carolina, the most common form of closing is the closing meeting, but escrow closings may occur in certain, limited situations.⁵⁷ Closing meetings involve a formal meeting between the buyer and seller where all legal documents and funds related to the sale are executed and delivered.⁵⁸

III. THE ISSUE

The critical issue facing North Carolina's legal, real estate, and lending communities surrounds which acts, if any, non-attorneys may perform within the residential real estate closing.⁵⁹ A series of Formal Ethics Opinions issued by the North Carolina State Bar fueled this controversy,⁶⁰ which ended with the formal adoption of the Advisory Opinion⁶¹ and 2002 Formal Ethics Opinion 9⁶² at the January 24, 2003 meeting of the North Carolina State Bar.⁶³ To understand the implications of these most recent Opinions as well as the preceding two-year controversy one must

necessary to clear title and pay persons who have rendered services in connection with the closing, transfer the funds owed by the buyer to the seller, complete all legal and related documents required in connection with the buyer's loan to finance the purchase, and complete all legal and technical steps necessary to transfer the title.

Id.

56. *See id.*

57. *Id.* An escrow closing involves the deposit of all legal documents and funds related to the closing with an escrow agent, occasionally an attorney in North Carolina. *Id.* at 564. These agents follow instructions agreed upon by the buyer and seller at the time of contracting, executing the closing without the presence of either party. *Id.*

58. *Id.* at 565-66.

59. *See, e.g.,* Somerville, *supra* note 3.

60. *See* ADVISORY OP., *supra* note 17; FORMAL OP. 8, *supra* note 8; FORMAL OP. 4, *supra* note 8; N.C. STATE BAR, 99 FORMAL ETHICS OPINION 13, 2001 LAWYER'S HANDBOOK 249 (July 21, 2000) [hereinafter FORMAL OP. 13].

61. *See* ADVISORY OP., *supra* note 17.

62. FORMAL OP. 9, *supra* note 18.

63. Limited Role, *supra* note 19.

analyze 99 Formal Ethics Opinion 13,⁶⁴ 2001 Formal Ethics Opinion 8,⁶⁵ and 2001 Formal Ethics Opinion 4.⁶⁶

A. *99 Formal Ethics Opinion 13*

Issued on July 31, 2000, 99 Formal Ethics Opinion 13 (Opinion 13) mandated attorney presence at residential real estate closings.⁶⁷ While permitting supervised non-attorneys to oversee the execution of the closing documents outside the attorney's presence, the Opinion stated that an attorney must be present at the closing conference and readily available to answer any questions which may arise.⁶⁸ The Opinion justified such a requirement on the basis that the closing serves as the primary point of attorney-closing party contact, non-attorneys do not possess adequate skill to represent the parties, and non-attorneys lack the legal authority to issue legal advice if needed.⁶⁹

B. *2001 Formal Ethics Opinion 8*

Attorney "presence," as required in Opinion 13, was defined in 2001 Formal Ethics Opinion 8 (Opinion 8).⁷⁰ As Opinion 8 indicated, confusion had arisen over the exact meaning of attorney "presence."⁷¹ Did this language refer to physical presence, or would the availability of an attorney via phone, Internet, or other means suffice?⁷² Opinion 8 defined attorney "presence" to mean "physical presence," requiring the attorney to be actually present in the room at the moment of the closing.⁷³ Surrogate presence through a paralegal or communication via

64. See FORMAL OP. 13, *supra* note 60.

65. See FORMAL OP. 8, *supra* note 8.

66. See FORMAL OP. 4, *supra* note 8.

67. See FORMAL OP. 13, *supra* note 60.

68. *Id.*

69. See *id.*

70. See FORMAL OP. 8, *supra* note 8.

71. See *id.*

72. See *id.*

73. *Id.* The Opinion indicates that an attorney's presence down the hall or around the corner will not suffice for "physical presence" by mandating that the attorney be "physically present at the closing conference." *Id.*

phone did not constitute the presence required in the former Opinion 13.⁷⁴

C. *2001 Formal Ethics Opinion 4*

2001 Formal Ethics Opinion 4 (Opinion 4), issued on October 19, 2001, discussed the role of “attorney presence” in residential real estate refinancing transactions.⁷⁵ This Opinion asserted that a non-lawyer may not conduct the closing for a residential real estate refinancing transaction, stating

the closing of a refinancing of residential property is the primary opportunity that a lawyer has to meet with the borrower, explain the refinancing documents, define the borrower’s rights and obligations, and answer questions. These activities are the practice of law because the lawyer gives legal advice and opinion on the rights of the borrower.⁷⁶

While Opinion 4 conceded that non-lawyers may “oversee the execution of documents outside the presence of the lawyer,” provided the lawyer adequately supervises the non-lawyer, it mandated that the closing attorney must be present at some point during the closing conference to “complete the transaction.”⁷⁷ In effect, it would appear that Opinion 4 mandated an attorney’s presence and severely restricted the role of a layperson at the refinancing closing since an attorney, in the end, had to be present.⁷⁸ While the Opinion did not expressly define “attorney presence” as physical presence, this conclusion may have been reached when viewed in light of Opinion 8, which defined

74. *Id.*

75. *See* FORMAL OP. 4, *supra* note 8.

76. *Id.*

77. *Id.*

78. *See id.*

“attorney presence” as the attorney’s physical presence in the closing conference room.⁷⁹

D. Adoption of the Authorized Practice Advisory Opinion and 2002 Formal Ethics Opinion 9

Opinions 8 and 4, mandating physical attorney presence at residential real estate closings within North Carolina, sparked the great debate over the appropriate role of attorneys and non-attorneys within this transaction.⁸⁰ In particular, the debate was brought to a head as a result of pressure from the Department of Justice (DOJ) and the Federal Trade Commission (FTC) on the North Carolina State Bar to reexamine these Opinions.⁸¹ In a jointly issued letter, the DOJ and FTC warned the North Carolina State Bar that prohibiting laypersons from conducting residential real estate closings under the guise of constituting the unauthorized practice of law may create monopoly conditions and therefore violate federal antitrust laws.⁸² Stating that an attorney’s physical presence should not be mandated at a closing or refinancing conference, the FTC and DOJ opposed Opinion 4 and Opinion 8.⁸³ The FTC and DOJ objected to this practice on the grounds that mandating attorney presence at residential real estate closings and refinancings would: 1) force consumers preferring to forego attorney presence at the closing to hire an attorney, 2) raise the cost of closings and refinancings as lower-cost alternatives would be effectively eliminated, 3) reduce competition from out of state lending companies who would need to seek a North Carolina

79. *See id.*; FORMAL OP. 8, *supra* note 8.

80. *See generally* Letter from Dudley Humphrey, Chair of The Special Committee on Real Estate Closings, to the Executive Committee and the Council of the North Carolina State Bar (June 24, 2002), INFOBYTES (Goodwin Procter, Boston, MA), at 10-12 (June 28, 2002) (discussing the steps taken by the North Carolina State Bar as a result of receiving the Dec. 14, 2001 joint advocacy letter from the FTC/DOJ), *at* http://www.goodwinprocter.com/publications/IB_6_28_02.pdf [hereinafter Letter from Dudley Humphrey]; Frazier, *supra* note 33, at D1; Matt Harrington, *Federal Organizations, State Bar at Odds Over Opinions*, BUS. J., Dec. 19, 2001, at <http://triad.bizjournals.com/triad/stories/2001/12/17/daily28.html>.

81. Rawlings, *supra* note 10, at 1.

82. *See* North Carolina Letter, *supra* note 10.

83. *See id.*

attorney to conduct the closing, and 4) result in harmful delays in the closing process as interest rates fluctuate.⁸⁴

Upon receiving this letter with the aforementioned concerns, the State Bar began an immediate inquiry into the legality and justifications surrounding Opinion 8 and Opinion 4, as the Bar desired to avoid a costly lawsuit with the DOJ and FTC.⁸⁵ The State Bar recognized that similar litigation had proved fruitless for other state bar associations.⁸⁶ Thus, the State Bar formed a Special Committee on Real Estate Closings, which penned 2002 Formal Ethics Opinion 9 and the Advisory Opinion.⁸⁷ These Opinions were based upon testimony garnered from the North Carolina legal, real estate, title insurance, and lending communities.⁸⁸ The State Bar Council adopted 2002 Formal Ethics Opinion 9 draft on October 16, 2002⁸⁹ followed by the

84. *See id.*

85. Rawlings, *supra* note 10, at 1.

86. *See id.* In 1980, the DOJ litigated a similar matter against a county bar association which barred title insurance companies from competing in title certification. Palomar, *supra* note 4, at 471. The DOJ won. *Id.* On numerous occasions, the FTC has also brought into court multiple listing services and brokers which restrict competition through their requirements. *See, e.g.,* In re: Puget Sound Multiple Listing Ass'n, 113 F.T.C. 733 (1990); In re: United Real Estate Brokers of Rockland, Ltd., 116 F.T.C. 972 (1993); In re: Port Washington Real Estate Board, Inc., 120 F.T.C. 882 (1995); In re: Bellingham-Whatcom County Multiple Listing Bureau, 113 F.T.C. 724 (1990). As the FTC and DOJ had litigated the matter of restricting the role of non-attorneys within the real estate transaction, the FTC and DOJ's concern stood as a serious threat. However, some query whether the FTC or DOJ could prosecute a state bar rule once approved by the state Supreme Court. *See* Letter from the Federal Trade Commission and the Department of Justice to The Honorable Thomas A. Edmonds, Executive Director, Virginia State Bar, <http://www.ftc.gov/be/v960015.htm> (Sept. 20, 1996). This belief stems from the DOJ and FTC's joint letter to Virginia, which confessed that once such a provision gained the approval of the state Supreme Court, the Sherman Act's state action exception would bar suit by a federal governmental agency. *Id.* The federal District Court for the Southern District of Ohio reached such a holding in a case involving suit by a title reporting company against the Ohio State Bar Association which sought to prohibit the company from preparing title reports as the unauthorized practice of law. *See* Palomar, *supra* note 4, at 472-73. The court held that the bar association possessed immunity from such a suit under the state action exception of the Sherman Act. *Id.* at 472-73.

87. *See* Rawlings, *supra* note 10, at 1; ADVISORY OP., *supra* note 17; FORMAL OP. 9, *supra* note 18.

88. *See* Rawlings, *supra* note 10, at 1; Letter from Dudley Humphrey, *supra* note 80. It should be noted that the North Carolina Bar Association's Real Property Section worked closely with the State Bar to resolve this issue. Rawlings, *supra* note 10, at 1.

89. FORMAL OP. 9, *supra* note 18.

adoption of the draft Advisory Opinion on October 18, 2002.⁹⁰ The State Bar continued to seek comments regarding these measures until January 24, 2003,⁹¹ at which time it formerly adopted these Opinions.⁹²

1. 2002 Formal Ethics Opinion 9

2002 Formal Ethics Opinion 9 (Opinion 9) establishes that an attorney-supervised lay assistant, outside of an attorney's presence, may identify the documents to be executed to the parties of the transaction, show the client the correct place for signature on each document, and handle the proceeds' disbursement for residential real estate transactions.⁹³ This Opinion formally withdraws the requirement that an attorney must be physically present at the presentation of closing documents as mandated in Opinions 13, 4, and 8.⁹⁴ Opinion 9 also creates the possibility of attorneys conducting closings "by mail, by e-mail, [or] by other electronic means."⁹⁵ The State Bar, however, emphasizes its belief that attorney representation at closings serves as the best protection for consumers against closing mishaps.⁹⁶

2. Authorized Practice Advisory Opinion

The Advisory Opinion first states that a non-lawyer may not legally represent any party in a residential real estate closing.⁹⁷ The State Bar lists the primary phases of a closing⁹⁸ and classifies

90. N.C. State Bar, Proposed Real Estate Opinions Published for Comment, at <http://www.ncbar.org/media/oldindex/2002/index102202.asp> (last visited Feb. 15, 2003).

91. *Id.*

92. *See* Limited Role, *supra* note 19.

93. *See* FORMAL OP. 9, *supra* note 18.

94. *Id.*; *see* FORMAL OP. 13, *supra* note 60; FORMAL OP. 4, *supra* note 8; FORMAL OP. 8, *supra* note 8.

95. FORMAL OP. 9, *supra* note 18.

96. *See id.*

97. *See* ADVISORY OP., *supra* note 17.

98. *Id.*

Residential real estate transactions typically involve several phases, including the following: abstraction of titles; application for title insurance policies, including title insurance policies that may

many of these services as the practice of law as defined by the North Carolina legislature.⁹⁹ The opinion expressly lists eight activities, if provided by a non-attorney, that will constitute the unauthorized practice of law within North Carolina.¹⁰⁰ These are:

- 1) performing abstracts or providing an opinion as to the title of real property;
- 2) explaining the legal status of a real estate title, the legal impact of anything found in the chain of title, or the legal effect of any title insurance commitment exception, unless a licensed title insurer, agency, or agent explains an underwriting decision to the insured or prospective insured;
- 3) explaining or giving advice regarding the rights or responsibilities of parties concerning the land survey to the extent such explanations affect the parties' legal rights or obligations;
- 4) providing legal opinions or advice at the request of any party;
- 5) advising or instructing a party to the transaction regarding alternate means of taking title to the property or the legal consequences of acquiring property in a particular manner;
- 6) drafting legal documents for a party to the transaction or assisting a party in the completion of a legal document or aiding a transaction party in choosing the appropriate legal document form from among several forms;

incorporate tailored coverage; preparation of legal documents, such as deeds . . . and deeds of trust; explanation of documents implicating parties' legal rights, obligations, and options; resolution of possible clouds on title and issues concerning the legal rights of parties to the transaction; execution and acknowledgement of documents in compliance with legal mandates; recordation and cancellation of documents in accordance with North Carolina law; and disbursement of proceeds after legally-recognized funds are available.

Id.

99. *See id.* For further discussion of what constitutes the unauthorized practice of law in North Carolina see N.C. GEN. STAT. §§ 84-2.1 to 84-5 (2001).

100. ADVISORY OP., *supra* note 17. These eight activities do not serve as an exhaustive list of acts regarded as the practice of law within the closing context, but merely as examples. *See id.*

- 7) explaining or recommending a course of action which requires legal judgment or will affect a party's legal rights or obligations;
- 8) attempting to resolve or settle a dispute between the parties that will affect their legal rights or obligations.¹⁰¹

The Opinion next queries:

May a non-lawyer who is not acting under the supervision of a lawyer licensed in North Carolina (1) present and identify the documents necessary to complete a North Carolina residential real estate closing, direct the parties where to sign the documents, and ensure that the parties have properly executed the documents; and (2) receive and disburse the closing funds?¹⁰²

The State Bar has ruled that a non-lawyer may oversee a closing as long as he does not participate in any of the aforementioned eight activities which constitute the practice of law.¹⁰³ The Bar emphasizes, however, the benefits derived from attorney presence during a closing.¹⁰⁴ Such benefits derived from employing a licensed North Carolina attorney include the State Bar's Client Security Fund, which may provide financial assistance to a person injured by an attorney's misappropriation of funds in a real estate closing.¹⁰⁵ Another benefit gained from using an attorney's services stems from the State Bar's ability to professionally discipline attorneys.¹⁰⁶ The Opinion also warns non-attorneys seeking to conduct closings that their actions will be judged against bar-created standards of what constitutes the practice of law and that they may be prosecuted criminally if they engage in the

101. *Id.*

102. *Id.*

103. *See id.*

104. *See id.*

105. *See id.*

106. *See id.*

unauthorized practice of law.¹⁰⁷ Such a statement clearly establishes the well-defined role of attorneys within this process and places non-attorneys on alert that they may not completely enter the field of conducting closings.

IV. WHAT CONSTITUTES THE PRACTICE OF LAW IN NORTH CAROLINA?

By warning non-attorneys who seek to conduct residential real estate closings of the penalties associated with the unauthorized practice of law, the Advisory Opinion highlights the important question of what constitutes the unauthorized practice of law.¹⁰⁸ North Carolina law, through both statutes and State Bar ethics opinions, addresses the issues of the unauthorized practice of law in regard to the real estate community.¹⁰⁹ North Carolina prohibits persons other than members of the State Bar from practicing law.¹¹⁰ North Carolina General Statute § 84-4 states,

it 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 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.¹¹¹

107. *See id.*

108. *Id.*; *see* N.C. GEN. STAT. §§ 84-2.1 to 84-5 (2001).

109. *See infra* notes 110-121 and accompanying text.

110. N.C. GEN. STAT. § 84-4 (2001).

111. *Id.* *State v. Pledger* applies this statute in the context of business transactions by holding that a non-attorney, acting on behalf of an institutional lender and within that business's course of dealings, may prepare documents to effectuate a loan where the business has a primary interest in the transaction. *See State v. Pledger*, 127 S.E.2d 337 (N.C. 1962); Judith Wegner, *Real Estate and Unlicensed Practice in North Carolina: When the FTC Comes Calling*, 15 (2002) (on file with N.C. Banking Inst.).

The North Carolina legislature further defines the practice of law as “performing any legal service for any other person, firm, or corporation, with or without compensation, specifically including . . . abstracting or passing upon titles . . . and to advise or give opinion upon the legal rights of any person, firm or corporation.”¹¹²

The North Carolina Rules of Professional Conduct also address the issues surrounding the unauthorized practice of law.¹¹³ Rule 5.5 states that a “lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.”¹¹⁴ Rule 5.3 states that

a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the nonlawyer’s conduct is compatible with the professional obligations of the lawyer; and a lawyer shall be responsible for conduct of such a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: the lawyer ordered the conduct involved; or the lawyer has direct supervisory authority over the nonlawyer and knows of the conduct at a time when its consequences can be avoided, but fails to take reasonable action to avoid the consequences.¹¹⁵

Rule 8.4 also states that “[i]t is professional misconduct for a lawyer to: violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.”¹¹⁶

These statutes and rules frequently have been applied to define what constitutes the practice of law within the real estate

112. N.C. Gen.Stat. § 84-2.1 (2001).

113. *See infra* notes 114–121 and accompanying text.

114. NORTH CAROLINA REVISED RULES OF PROF. CONDUCT R. 5.5(b) (N.C. STATE BAR, 2001 LAWYER’S HANDBOOK 113) (2001).

115. NORTH CAROLINA REVISED RULES OF PROF. CONDUCT R. 5.3(b) & (c) (N.C. STATE BAR, 2001 LAWYER’S HANDBOOK 112) (2001).

116. NORTH CAROLINA REVISED RULES OF PROF. CONDUCT R. 8.4(a) (N.C. STATE BAR, 2001 LAWYER’S HANDBOOK 121-24) (2001).

closing setting in the form of State Bar Formal Ethics Opinions.¹¹⁷ In an opinion dated April 16, 1998, the North Carolina State Bar prohibited an attorney from participating in a closing or signing a preliminary title opinion without making reasonable inquiry into whether these documents were prepared by a licensed North Carolina lawyer.¹¹⁸ The State Bar reasoned that an attorney possesses a duty to supervise all non-lawyer assistants involved in the closing process, even if the non-lawyer assistant is not that attorney's employee.¹¹⁹ In Rule of Professional Conduct 216, the State Bar further held that an attorney may enlist a non-lawyer independent contractor to conduct a title search provided this person conducts the search under proper attorney supervision.¹²⁰ Opinion #2 of this ruling further sets forth that an attorney unaccustomed to searching titles and preparing real estate documents may not supervise a non-lawyer in such activities because the attorney would lack competence in this area of the law and would thus be unable to supervise someone else in performing such tasks.¹²¹

117. See *supra* notes 67-107 and accompanying text.

118. N.C. STATE BAR, 98 FORMAL ETHICS OPINION 8, 2001 LAWYER'S HANDBOOK 236-37 (Apr. 16, 1998).

119. *Id.* at Op. #4.

120. RPC 216, *supra* note 31.

121. *Id.* at Op. #2. Several other rules are also pertinent. North Carolina Rule of Professional Conduct 210 delineates the circumstances in which an attorney may represent all parties to a real estate transaction. RPC 210, *supra* note 37. For an attorney to represent the buyer/lender as well as the seller, there must be a reasonable alignment of interests. *Id.* If the attorney believes all interests to be reasonably aligned, he must obtain consent from all the parties after full disclosure of the risks of common representation. *Id.* Likewise, if the attorney does not intend to represent all of the parties he must disclose this fact. *Id.* North Carolina Rule of Professional Conduct 41 allows an attorney, with proper notice to the borrower, to represent only the lender and in this capacity prepare the closing documents. RPC 41, *supra* note 36. North Carolina Rule of Professional Conduct 29 holds that "an attorney may not rely upon title information from a non-lawyer assistant without direct supervision by said attorney." RPC 29, *supra* note 31.

V. AN ANALYSIS OF THE DEBATE SURROUNDING
NORTH CAROLINA'S RECENT ADOPTION OF THE AUTHORIZED
PRACTICE ADVISORY OPINION ON THE ROLE OF LAYPERSONS IN
THE CONSUMATION OF RESIDENTIAL REAL ESTATE
TRANSACTIONS AND 2002 FORMAL ETHICS OPINION 9

The recently adopted Advisory Opinion¹²² and 2002 Formal Ethics Opinion 9¹²³ supersede former Opinions mandating physical attorney presence at a closing.¹²⁴ These Opinions fail to broaden a layperson's ability to conduct a closing beyond directing clients where to sign closing documents and disbursing closing proceeds outside of an attorney's physical presence.¹²⁵ Thus, North Carolina continues to support the belief that attorneys are necessary in the closing process despite sharp criticism by layperson closing proponents.¹²⁶ Many continue to urge North Carolina to accept more lenient rules regarding a layperson's ability to conduct a closing.¹²⁷ While North Carolina has ruled on this issue for now, it remains to be seen whether the current Opinions will satisfy the DOJ and FTC as not restraining trade.¹²⁸ While only time will answer this question completely, an analysis of four central themes—economics and competition, efficiency, skill, and

122. See *supra* notes 97-107 for a discussion of the Advisory Opinion on the Role of Laypersons in the Consumption of Residential Real Estate Transactions.

123. See *supra* notes 93-96 for a discussion of 2002 Formal Ethics Opinion 9.

124. See *supra* notes 67-79 (discussing North Carolina State Bar Opinions which mandated physical attorney presence at a residential real estate closing).

125. See ADVISORY OP., *supra* note 17; FORMAL OP. 9, *supra* note 18. The Advisory Opinion reaffirms the definition of legal services within the closing context to include crucial activities such as explaining the legal status of titles, advising the parties as to alternate means of taking title, and drafting legal documents. See ADVISORY OP., *supra* note 17. 2002 Formal Ethics Opinion 9 broadens a layperson's ability to perform a closing, requiring only attorney supervision, by allowing a supervised legal assistant to execute closing documents and disburse closing proceeds. See FORMAL OP. 9, *supra* note 18.

126. See ADVISORY OP., *supra* note 17; FORMAL OP. 9, *supra* note 18; TAVMA, Title/Appraisal Vendor Management Association (TAVMA), Unauthorized Practice of Law Statutes at <http://www.tavma.com/content/unauthorizedlaw.pdf> (last visited Feb. 15, 2003).

127. TAVMA, *supra* note 126.

128. See generally North Carolina Letter, *supra* note 10. Remember, the recent Opinions were created in response to a joint letter from the FTC/DOJ to the North Carolina State Bar warning that North Carolina's laws regarding the role of an attorney within residential real estate closings potentially served as an illegal restraint on trade. *Id.*

consumer choice and protection—¹²⁹ illuminates the debate that led to the recent adoption of the Advisory Opinion and 2002 Formal Ethics Opinion 9, surrounding the degree to which laypersons should be allowed to conduct closings apart from attorneys as well as the potential effects of the new Opinions.

A. *Economics and Competition*

1. Debate Surrounding Whether to Allow Layperson Closings

Proponents for allowing laypersons to conduct closings primarily argue that it will increase competition and decrease costs.¹³⁰ The idea is that by allowing laypersons to perform closings, the number of individuals eligible to perform, and hence performing, closings will increase and therefore the price of such services will decrease.¹³¹ Some believe that laypersons engage in more aggressive advertising¹³² and standardizing of the closing process than attorneys.¹³³ Such activities may serve to increase competition within the market.¹³⁴ Also, laypersons are often more willing to decrease fees to maintain their competitiveness within the industry, unlike attorneys who may be reluctant to decrease their fee schedules.¹³⁵ The Title Appraisal Vendor Management Association (TAVMA) asserts that prohibiting laypersons from conducting closings may serve to increase closing costs by up to \$400.¹³⁶

129. See *infra* notes 130-241 and accompanying text.

130. See generally Somerville, *supra* note 3, at 14.

131. See generally TAVMA, *supra* note 126. This idea follows from the law of demand which is that when the supply increases, the price falls. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 8 (1998).

132. See N.C. PROF. CONDUCT R. 7.2 (2001) for a discussion of an attorney's ability to advertise within North Carolina.

133. Palomar, *supra* note 4, at 438.

134. If laypersons decrease the costs of closing services through advertising, making their price easily ascertainable to consumers and competitors, and standardizing, they can increase their supply of closing services. See generally POSNER, *supra* note 131, at 8 (discussing the law of demand). The law of demand will result in lower consumer costs. See *id.*

135. See generally Palomar, *supra* note 4, at 438.

136. *Early Alert*, TITLE/APPRaisal VENDOR MANAGEMENT ASSOCIATION, Aug. 2002, at <http://www.tavma.com/News/aug02alert.pdf> (last visited Feb. 15, 2003) [hereinafter Newsletter]. While TAVMA makes this assertion while addressing the

In the fight to involve non-attorneys, many layperson proponents point to studies completed in New Jersey where residents in the southern portion of the state typically did not use attorneys in residential real estate closings while residents in the northern portion of the state commonly employed attorneys.¹³⁷ The New Jersey Supreme Court found that the presence of attorneys in such closings served to increase closing costs by approximately \$660 for the seller and \$1,000 for the buyer.¹³⁸ Furthermore, the court found that when the southern New Jersey resident chose to employ an attorney, attorney fees for residential closings were less expensive than those in the north by \$100 for the seller and \$650 for the buyer.¹³⁹

While allowing laypersons to conduct closings may increase the competition within the industry as more individuals compete to provide closing services,¹⁴⁰ the counter argument is that

specific battle over laypersons conducting closings in North Carolina, one may question whether such dramatic savings would occur in North Carolina, a state with one of the lowest closing costs in the nation. *See id.*; Somerville, *supra* note 3, at 14.

137. In re: Op. No. 26 of Comm. on Unauthorized Practice of Law, 654 A.2d 1344, 1345 (N.J. 1995). New Jersey stands as a unique state case study in the question of what real estate laymen should be allowed to do in regard to a closing. *Id.* Historically, New Jersey faced a division between the northern and southern portions in its real estate practices. *Id.* at 1349-51. Attorneys played an active role in real estate closings in the northern sector of the state while attorneys in the southern part of the state were largely absent from the event. *Id.* In analyzing whether or not to allow the southern practice of non-attorney closings to continue, the New Jersey state Supreme Court analyzed the public's interest in the matter. *Id.* at 1351-55. While the Court emphatically supported the presence of attorneys at real estate closings, the Court currently permits the continuation of the South Jersey layperson practice, finding no evidence of harm to sellers or buyers but rather a decrease in closing costs. *Id.* at 1345, 1360, 1361. The New Jersey Supreme Court held,

a real estate broker may order a title search and abstract; an attorney retained by a title company or a real estate broker may not prepare conveyance documents for a real estate transaction except at the specific written request of the party on whose behalf the document is to be prepared; a title company may not participate in the clearing of certain legal objections to title [citations omitted]; and the practice of conducting closings or settlements without the presence of attorneys shall not constitute the unauthorized practice of law.

Id. at 1348.

138. *Id.* at 1349.

139. *Id.* at 1345.

140. According to the economic law of demand, when the supply of closing services increases (due to an increased number of closing service providers), the cost of the closing service should decrease. POSNER, *supra* note 131, at 8.

competition already exists among North Carolina attorneys conducting closings as North Carolina boasts one of the lowest closing costs in the nation.¹⁴¹ Thus, many fail to believe that there could be any benefits in changing a system that already produces such low costs.¹⁴² For instance, legal fees for residential real estate closings in the Triangle area range from \$300 to \$600,¹⁴³ prices comparable to those found in southern New Jersey where laypersons competed with attorneys to conduct closings.¹⁴⁴ Some proponents for maintaining the current system of attorney involvement also fear that while laypersons may begin by charging lower rates, those rates will rise once laypersons become fully integrated into the closing services market, eventually leaving consumers with fees equal to those of attorneys but quality of service beneath the attorney benchmark.¹⁴⁵

Many proponents of layperson closings also argue that classifying closings as the unauthorized practice of law essentially creates a monopoly for the legal profession.¹⁴⁶ This argument contends that classifying closings as the practice of law serves as a self-protectionist measure for “money hungry” attorneys.¹⁴⁷ Such a view is not entirely without merit. One needs only to consider cases in which attorneys have acted unethically in the pursuit of money. For instance, Ralph Falls, a Charlotte attorney, was disbarred in April 2001 following the disclosure of his involvement in a real-estate scheme with a local broker to defraud real estate consumers of money through the closing process.¹⁴⁸ Those desiring attorney involvement in closings, however, assert that classifying closings as the practice of law does not create an unnecessary

141. Somerville, *supra* note 3, at 14.

142. *See generally id.* (As this article shows, many question why the current North Carolina real estate closing system needs to change.)

143. *Id.*

144. *See In re: Op. No. 26 of Comm. on Unauthorized Practice of Law*, 654 A.2d 1344, 1349 (N.J. 1995).

145. *See* Somerville, *supra* note 3, at 15.

146. *See* Palomar, *supra* note 4, at 429; *see also* Alan Morrison, *Defining the Unauthorized Practice of Law: Some New Ways of Looking at an Old Question*, 4 NOVA L. REV. 363, 365 (1980).

147. *See* Palomar, *supra* note 4, at 429.

148. Frazier, *supra* note 33, at 1D.

monopoly.¹⁴⁹ As the New Jersey Supreme Court stated, “the licensing of attorneys ‘is not designed to give rise to a professional monopoly, but rather to serve the public right to protection against unlearned and unskilled advice and service in matters relating to the science of the law.’”¹⁵⁰

2. Effect of the New Opinions

One must ask what effect the new Opinions will have on competition. It may be argued that the recently adopted Opinions will have little real effect on the level of competition within the closing market. The Advisory Opinion and 2002 Formal Ethics Opinion 9 fail to greatly expand a layperson’s ability to conduct closing procedures.¹⁵¹ A layperson may not perform any tasks that were previously disallowed as the unauthorized practice of law apart from executing closing documents and disbursing closing funds outside of an attorney’s physical presence.¹⁵² While an attorney need not be in the room at the moment the closing papers are signed, an attorney must have supervised the events of the closing transaction.¹⁵³ Thus, an attorney will still be involved in completing a closing within North Carolina, as an attorney must supervise the closing process and perform critical closing services which are classified as the practice of law under the Advisory Opinion.¹⁵⁴ In this way, it may be unlikely for new layperson closing providers to enter the market under the new Opinions.¹⁵⁵ Potential entrants would still need a North Carolina attorney to supervise their work and would not be able to avoid the costs of employing an attorney.¹⁵⁶ If new closing providers fail to enter the market, it follows that the supply of closing services may remain relatively unchanged, resulting in the price of closing services

149. *See In re: Op. No. 26*, 654 A.2d at 1353.

150. *Id.*

151. *See* ADVISORY OP., *supra* note 17; FORMAL OP. 9, *supra* note 18.

152. *See id.*

153. *Id.*

154. *Id.*

155. *See supra* notes 151–154 and accompanying text.

156. *See id.*

remaining constant.¹⁵⁷ Thus, the new Opinions may not lead to increased competition and the availability of lower cost alternatives to attorney closings as the DOJ/FTC encourage in their letter to the North Carolina State Bar.¹⁵⁸

Even if the new Opinions fail to draw new entrants into the closing market, they could engender increased competition among attorneys providing residential real estate closing services.¹⁵⁹ Attorneys regularly bill at higher rates than attorney supervised laypersons, such as paralegals.¹⁶⁰ When attorneys may avoid unnecessarily attending a closing, their time spent on the closing decreases, thereby decreasing their costs. Thus, allowing attorney supervised laypersons to conduct closings outside of an attorney's presence may allow closing providers greater control over their costs, allowing them to decrease their costs and pass their savings on to consumers.¹⁶¹ If, however, the Opinions do not increase competition, then the question remains as to whether the DOJ/FTC will continue to classify North Carolina's closing procedures as anticompetitive and threaten a lawsuit.

B. *Efficiency*

1. Debate Surrounding Whether to Allow Layperson Closings

Apart from considering the cost and competition implications of involving attorneys in the supervision of real estate closings, the efficiency of such a choice should be examined. Proponents of layperson closings forcefully emphasize the practical need of closing deals quickly.¹⁶² They fear that attorneys slow down the sale,¹⁶³ or worse yet, kill the deal.¹⁶⁴ They desire to consult attorneys only when the need becomes apparent, thus

157. See POSNER, *supra* note 131, at 8.

158. See North Carolina Letter, *supra* note 10.

159. See *infra* notes 160-161.

160. See North Carolina Letter, *supra* note 10.

161. See *generally id.* (reasoning that less expensive and more convenient alternatives to attorney closers may exist).

162. Palomar, *supra* note 4, at 440.

163. See *id.*

164. See Goudey, *supra* note 30, at 941.

achieving the most efficient use of services tailored to an individual client's needs.¹⁶⁵ Many real estate laymen such as brokers, title companies, builders, and lenders also seek to offer customers package deals where one person or company may handle all the details relating to the sale or purchase including the closing.¹⁶⁶ This serves to streamline the transaction, potentially creating quicker, more efficient, and less expensive transactions.¹⁶⁷ Closing agents and lenders have also recently begun to invest in technologies which connect each of these groups to the other in order to allow more efficient and streamlined transactions.¹⁶⁸ Many layperson closing advocates claim that most attorneys are unwilling to invest in such inter-office technology, which further complicates and slows the transaction.¹⁶⁹

Involving attorneys in the real estate transaction process may also create scheduling difficulties which may slow the transaction.¹⁷⁰ House showings and sales occur most frequently during nights and weekends, times attorneys have traditionally been unavailable for consultation.¹⁷¹ Thus, coordinating buyer, seller, and attorney schedules may unnecessarily increase the complexity of the transaction.¹⁷² Proponents of layperson closings also advocate that consumers desire to spend their money in the most value achieving manner possible—which for most consumers means focusing on details such as carpet, fixtures, and square footage rather than attorney consultation.¹⁷³

165. See generally *In re: Op. No. 26 of Comm. on Unauthorized Practice of Law*, 654 A.2d 1344, 1362 (N.J. 1995) (stating that “[a]ny broker participating in a transaction where buyer and seller are not represented should have the experience and knowledge required at least to identify a situation where independent counsel is needed”).

166. John C. Payne, *Title Insurance and the Unauthorized Practice of Law Controversy*, 53 MINN. L. REV. 423, 450-52 (1969).

167. See generally *id.* (discussing the provision of a “package deal” in the context of a closing).

168. See generally Palomar, *supra* note 4, at 440 (discussing the phenomena of Electronic Data Interchange between lenders and closing agents).

169. See *id.* at 440.

170. *State Bar v. Guardian Abstract & Title Co., Inc.*, 575 P.2d 943, 949 (N.M. 1978).

171. Palomar, *supra* note 4, at 440.

172. See *id.*

173. See *id.* at 439.

2. Effect of the New Opinions

Will the new Opinions affect the efficiency of the closing transaction? A likely answer is yes. 2002 Formal Ethics Opinion 9 permits an attorney to avoid unnecessarily attending a closing meeting as long as the layperson conducting the closing is attorney supervised.¹⁷⁴ By failing to mandate the attorney's presence at the closing conference, potentially one less individual is involved with whom to coordinate schedules.¹⁷⁵ Laypersons likely have more flexible schedules than attorneys. Hence, when the closing is one of merely form signing, and the presence of an attorney is not needed, a more efficient transaction would appear to result.¹⁷⁶ Indeed, the DOJ/FTC letter to the North Carolina State Bar complained that requiring an attorney's physical presence at the closing may result in inefficient and harmful delays in the closing process having adverse consequences due to interest rate fluxes.¹⁷⁷ By removing the barrier of physical attorney presence, the new Opinions would appear to satisfy one of the DOJ/FTC's complaints.¹⁷⁸ However, if attorneys routinely begin skipping closing meetings when they are needed to answer legal questions or give legal advice, which the layperson is unauthorized to give, then an inefficient result may occur if time must then be taken to contact the attorney before the closing can occur.

C. Skill

1. Debate Surrounding Whether to Allow Layperson Closings

While layperson closing proponents primarily argue on the merits of increased competition, decreased costs, and efficiency, those in support of attorney closing supervision argue that attorneys possess training which laypersons lack.¹⁷⁹ Thus, another

174. FORMAL OP. 9, *supra* note 18.

175. *See id.*

176. *See id.* Efficiency would result from not having to coordinate the schedule of another person—the attorney. *See id.*

177. *See* North Carolina Letter, *supra* note 10.

178. *See* ADVISORY OP., *supra* note 17; FORMAL OP. 9, *supra* note 18.

179. *See generally* JASPER, *supra* note 29, at 2 (noting that many questions arising

line of argument centers on the type and amount of skill and training necessary to conduct closings.¹⁸⁰

Those favoring attorney closings emphasize the fact that attorneys possess more extensive legal training than laymen.¹⁸¹ Hence, attorneys are better equipped to educate clients about their rights pertaining to the transaction.¹⁸² Such facts led the New Jersey Supreme Court to state, “[H]ow shallow and restricted is the horizon of the real estate or title agent compared to the lawyer’s. Moreover, the lawyer’s training is multi-faceted; the agent’s is not.”¹⁸³

While laypersons cannot deny superior attorney training and regulation,¹⁸⁴ they emphasize their expertise within the industry.¹⁸⁵ The DOJ supports laymen in their cause by stating that the mere assertion that an attorney possesses superior training and that a consumer may be harmed by a layperson performing a traditional attorney service will not be enough to bar such laypersons from performing such acts.¹⁸⁶ Indeed, those favoring attorney closings frequently base their arguments on the often nebulous link between attorney training and skill and consumer harm.¹⁸⁷ A recent empirical study conducted by Joyce Palomar¹⁸⁸

within the real estate transaction require legal counsel).

180. *See id.*

181. *See Braunstein, supra* note 6, at 259, 271.

182. *See id.* at 259-60.

183. Palomar, *supra* note 4, at 444.

184. *See id.* at 428.

185. *Id.* at 430-31. For instance, fifty-three percent of paralegals hold a bachelor’s degree and eight percent have earned a Master’s degree. Flaming, *supra* note 31, at 489.

186. Palomar, *supra* note 4, at 431.

187. *See Braunstein, supra* note 6, at 271.

188. This 1999 study empirically challenged the assertion by several state bar associations that the application of unauthorized practice of law statutes to real estate service providers is needed to protect home-buyers and sellers during the real estate transaction. Palomar, *supra* note 4, at 481. The study contained two objectives:

[1]) To determine statistically . . . whether consumers have more title or real estate transactional problems when they use only lay real estate settlement service companies to handle their residential real estate purchase transactions than when they sue attorneys [and 2]) To determine statistically whether a cause of title and transactional problems exists in any of the ten states [analyzed in the study] . . . that is unrelated to whether a lay person or an attorney supervises residential real estate transactions and whether

on the subject of attorney versus layperson closings found that layperson closings result in legal document review or application error only four percent more than attorney closings.¹⁸⁹ This same study found no difference among the number of claims arising from improper closing or escrow procedures among states that involve attorneys in closings and those that do not.¹⁹⁰ Furthermore, for every 1,000 attorneys insured against malpractice suits, there were fourteen claims on such insurance by clients in states involving attorneys in the closings process as opposed to twenty such claims in states where attorneys are not typically used.¹⁹¹

Laypersons desiring to conduct closings also point to the fact that most real estate transactions employ standardized forms created by attorneys.¹⁹² Such forms require a closer to be familiar with form structure rather than have an in-depth understanding of the law.¹⁹³ The North Carolina Bankers Association Executive Vice President contends that more questions arise relating to the loan as opposed to the title during closing— questions a non-attorney may be more qualified to answer than the attorney.¹⁹⁴

the source of title and transactional problems in any of the ten states [analyzed in the study] is unique to state or local laws.

Id. at 485-86.

Data from real estate transactions spanning from 1992 to 1996 from ten states was utilized. *Id.* at 491. The ten states included the attorney-closing states of Connecticut, Virginia, North Carolina, Massachusetts, and South Carolina and the non-attorney closing states of Arizona, Colorado, Kansas, Michigan, and Missouri between the years of 1992 and 1996. *Id.* at 488-90.

189. *Id.* at 508.

190. *Id.* at 509.

191. *Id.* This finding may appear surprising as one might imagine there would be a greater number of claims in regions where attorneys are involved more frequently. *See id.* The author of this study suggests that attorneys regularly involved in the closing process may be more knowledgeable than attorneys in states where there involvement is less frequent, leading to a greater number of problem incidents where attorneys are less familiar with the procedure. *Id.* at 520-21.

192. Goudey, *supra* note 30, at 906-07.

193. *See id.*

194. Somerville, *supra* note 3, at 14. This conflict may also be analyzed from the real estate industry's perspective. Many laypersons within the North Carolina real estate industry believe themselves unqualified to conduct closings. *Id.* George Munford, the president of the Winston-Salem Regional Association of Realtors, stated unofficially that allowing laymen to close real estate transactions "could be one of the worst things that could happen to the real estate industry." *Id.* Munford claims that in the absence of attorney presence at closings, many brokers may begin

Laypersons desiring to conduct closings may ask why an attorney should become involved when it is unlikely she will make any changes to the standardized forms.¹⁹⁵ For this reason, many states permit laypersons to fill in standardized closing forms when done incidental to business.¹⁹⁶ Several organizations, such as TAVMA, would like North Carolina to follow the lead of states with less restrictive practice of law statutes and allow a layperson more authority over completing a residential real estate closing.¹⁹⁷

On the other hand, attorneys emphasize their involvement educates clients of their legal rights, obligations, and needs from the start rather than after the transaction when problems arise.¹⁹⁸ While many real estate forms are indeed standardized, document creation is not the sole reason to employ an attorney.¹⁹⁹ Document selection is a critical choice.²⁰⁰ As many as fifty standardized documents, each critically affecting a given buyer or seller's legal rights or obligations, may be available for use in any given transaction.²⁰¹ Thus, the more efficient transaction handling involves attorney involvement early on in order to avoid legal problems later.²⁰² Indeed, areas of the country where attorneys are highly involved in real estate transactions witness fewer post-

requiring clients to sign forms releasing brokers from liability. *Id.* Another North Carolina broker fears closings without attorneys on the basis that "[p]eople will always have questions," many of which brokers are not qualified to answer. *Id.* Indeed, many brokers believe that attorneys are worth the price just for the assurance they provide. *Id.*

195. Newsletter, *supra* note 136; see Palomar, *supra* note 4, at 444. It is especially unlikely for attorneys to request changes to standardized forms in many states, such as Utah and Texas, where the legislature has statutorily adopted residential real estate closing forms. *Id.* at 442.

196. L.S. Tellier, *Drafting, or Filling in Blanks in Printed Forms, of Instruments Relating to Land by Real-Estate Agents, Brokers, or Managers as Constituting the Practice of Law*, 53 A.L.R.2d 788, 789 (1957).

197. Newsletter, *supra* note 136.

198. See N.C. State Bar, Proposal of the Special Committee on Real Estate Closings of the North Carolina State Bar Proposed Authorized Practice Advisory Opinion on the Role of Laypersons in the Consummation of Residential Real Estate Transactions (June 21, 2002 draft), in INFOBYTES (Goodwin Procter, Boston, MA) June 28, 2002, available at http://www.goodwinprocter.com/publications/IB_6_28_02.pdf (last visited Feb. 15, 2003).

199. See generally Palomar, *supra* note 4, at 441.

200. *Id.*

201. *Id.* at 444.

202. See *id.*

closing attorney consultations than areas where attorneys take a less active role.²⁰³

2. Effect of the New Opinions

The Advisory Opinion and 2002 Formal Ethics Opinion 9 appear that they will have little effect on the skill or training required of either attorneys or closing industry laypersons as the Advisory Opinion continues to mandate attorneys perform activities within the “practice of law.”²⁰⁴ Neither Opinion changes the level of skill necessary to perform closing activities.²⁰⁵

D. Consumer Analysis

1. Debate Surrounding Whether to Allow Layperson Closings

There is much debate over how much deference should be given to customer choice in deciding whether to employ an attorney.²⁰⁶ Does the average home buyer truly understand the risks associated with foregoing legal counsel?²⁰⁷ Should the bar association paternalistically look out for an unwary public in such matters?²⁰⁸ One court sums up this issue in saying,

the conclusion that the determination of whether someone should be permitted to engage in conduct that is arguably the practice of law is governed not by attempting to apply some definition of what constitutes that practice, but rather by asking

203. Moore, *supra* note 41, at 351.

204. See ADVISORY OP., *supra* note 17; FORMAL OP. 9, *supra* note 18.

205. See *id.*

206. See generally *In re: Op. No. 26 of Comm. on Unauthorized Practice of Law*, 654 A.2d 1344 (N.J. 1995) (discussing New Jersey’s analysis of whether or not to require attorneys within the closing transaction).

207. See Michael Braunstein & Hazel Genn, *Odd Man Out: Preliminary Findings Concerning the Diminishing Role of Lawyers in the Home-Buying Process*, 52 OHIO ST. L.J. 469, 476-77 (1991).

208. *In re: Op. No. 26*, 654 A.2d at 1352.

whether the public interest is disserved by permitting such conduct.²⁰⁹

Do consumers truly understand the risks of closing without an attorney?²¹⁰ Sellers face many risks which they may fail to fully comprehend.²¹¹ For instance, an unrepresented seller may not fully appreciate the risks involved in a transaction or realize the extent of the broker's self-interest in closing the sale quickly.²¹² An attorney requisitioned by the lender may also create a false sense of security for the seller if such attorney seeks to please his "client," the lender, rather than the seller.²¹³ Buyer and seller also tend to become absorbed with the transaction details, failing to consider the legal ramifications of their actions.²¹⁴ The New Jersey Supreme Court in *In Re: Opinion No. 26 of the Committee on the Unauthorized Practice of Law* laments, "[i]t would take a volume to describe each and every risk to which the seller and buyer have exposed themselves without adequate knowledge."²¹⁵

Buyers, too, face potentially hidden risks. The buyer, without an attorney's opinion, may lack the knowledge of whether the title is one with which he should be satisfied.²¹⁶ Often lenders may loan money in spite of risks regarding the title's validity.²¹⁷ Buyers often fail to realize such risk surrounding their title's validity and gain a false sense of security in an investment now backed by a lending institution.²¹⁸ Furthermore, purchasers may not know whether the sales contract addresses all relevant legal

209. *Id.*

210. *Id.* Risks of foregoing an attorney at closing include: seller may fail to fully understand the legal liabilities he agrees to in the sales contract; buyer may not know if the title the seller provides is one with which he should be pleased; and buyer may be unable to read and understand the title opinion. *Id.* at 1348-51.

211. *See generally id.* (stating buyers and sellers face risks without employing counsel at the closing).

212. *Id.* at 1349.

213. *Id.* at 1350.

214. Palomar, *supra* note 4, at 439; *see also* Braunstein & Genn, *supra* note 207, at 472-73.

215. *In re: Op. No. 26*, 654 A.2d. at 1351.

216. *Id.* at 1349-50.

217. Palomar, *supra* note 4, at 443; *see also* Braunstein & Genn, *supra* note 207, at 478.

218. *See* Braunstein & Genn, *supra* note 207, at 477-78.

concerns.²¹⁹ The mere presence of an attorney may also lead the buyer unwarily to believe that his best interests will be represented when the attorney, in reality, seeks to advance the interests of another party to the transaction.²²⁰

Should unwary consumers be protected from their misunderstandings regarding the risks of non-attorney closings?²²¹ The DOJ as well as the FTC—proponents of free trade and competition—even acknowledge the importance of protecting consumers from deceptive or unfair practices and the role licensed professions can play in combating such abuses.²²² The American Bar Association asserts that attorneys seek to limit the unauthorized practice of law by laymen not to further the legal profession but to protect consumer welfare.²²³ Many layperson closing proponents, however, question the sincerity of such a belief as the public does not appear to want the legal profession's aid in protecting members of the general public from themselves.²²⁴

While it is important to protect an unsuspecting public from danger consequent to the unauthorized practice of law, non-attorney closing proponents emphasize that consumer choice should dictate.²²⁵ By classifying a closing as an activity within the practice of law, many consumers who would not choose to employ an attorney and would accept the additional risk consequent to such a decision are forced, against their will, to hire an attorney.²²⁶ Allowing consumer preference to dictate would allow consumers to decide individually whether to accept the risk of foregoing attorney presence.²²⁷ Consumers choosing to forego legal counsel during the closing may even seek attorney advice *ex post facto*

219. *See In re: Op. No. 26*, 654 A.2d at 1349-50.

220. Palomar, *supra* note 4, at 443.

221. *See generally In re: Op. No. 26*, 654 A.2d. at 1436, 1350-51 (analyzing the public interest involved in determining whether to require attorney involvement in the closing process).

222. *See North Carolina Letter*, *supra* note 10 (the letter acknowledges in an indirect manner that licensed professions, within limits, can protect consumers from unfair or deceptive business practices).

223. Palomar, *supra* note 4, at 437.

224. *Id.*

225. Newsletter, *supra* note 136.

226. North Carolina Letter, *supra* note 10.

227. *See Newsletter*, *supra* note 136.

under a federal law granting a three day rescission period following all real estate closings.²²⁸

Furthermore, evidence fails to support a finding that non-attorney closings pose such an unidentifiable risk to consumers that they need protection.²²⁹ The United States Supreme Court emphatically states that abstract claims of public harm will not be enough to support broad prohibitions against laypersons engaging in practices deemed to be the unauthorized practice of law.²³⁰ The DOJ also pointed out the irony of the North Carolina Bar Association's contention that attorneys could represent multiple parties to a transaction, so long as they made adequate disclosures, as in such instances attorneys may not truly "represent" the consumer.²³¹

2. Effect of the New Opinions

The recently adopted Advisory Opinion and 2002 Formal Ethics Opinion 9 could have a large impact on the consumer. 2002 Formal Ethics Opinion 9 allows an attorney supervised layperson to conduct the closing meeting as long as she does not participate in the practice of law, defined in the Advisory Opinion.²³² Thus, consumers may now choose whether to have an attorney present at the closing.²³³ This choice would appear to partly satisfy the FTC/DOJ complaint that mandating an attorney's physical presence took discretion away from the consumer regarding whether to hire an attorney.²³⁴ Whether these Opinions fully satisfy this complaint remains to be seen. Attorneys continue to play a vital role in the real estate closing process under the new Opinions as attorneys still must conduct elements of the closing defined as the "practice of law."²³⁵

228. *Id.*

229. See North Carolina Letter, *supra* note 10.

230. Palomar, *supra* note 4, at 475.; see United Mine Workers, Dist. 12 v. Ill. State Bar Ass'n, 389 U.S. 217, 224 (1967).

231. See North Carolina Letter, *supra* note 10.

232. See ADVISORY OP., *supra* note 17; FORMAL OP. 9, *supra* note 18.

233. See ADVISORY OP., *supra* note 17; FORMAL OP. 9, *supra* note 18.

234. See North Carolina Letter, *supra* note 10.

235. See ADVISORY OP., *supra* note 17.

Consumers may also have less contact with the attorney, even though the attorney continues to supervise the transaction.²³⁶ This may be problematic. Consumers may arrive at the closing conference with multiple legal questions which the layperson will be unqualified and unable by law to answer.²³⁷ If this situation should arise, a layperson *should* contact the supervising attorney,²³⁸ but will she? Obviously, there will be the temptation for the layperson to answer the consumer's questions in order to proceed quickly with the closing.²³⁹ The fact that many consumers may not be able to differentiate which questions hold a legal impact, thus barring the layperson from answering them, further complicates the problem.²⁴⁰ A consumer may unknowingly act on advice given by a layperson that holds legal ramifications.²⁴¹ Whether laypersons begin abusing their newfound liberty under 2002 Formal Ethics Opinion 9 will largely depend on the layperson's own ethics and her ability to recognize legal issues requiring attorney consultation.

VI. THE LENDER'S PERSPECTIVE

Lenders play a critical role in the residential real estate transaction.²⁴² Without their aid, many sales would never reach completion as buyers lack the necessary funds for a given purchase.²⁴³ Banks, therefore, have a vested interest in becoming involved in the real estate transaction. Thus, the recently adopted Advisory Opinion holds many implications for North Carolina lenders and their role within the closing process.²⁴⁴ Before the

236. See FORMAL OP. 9, *supra* note 18.

237. See ADVISORY OP., *supra* note 17.

238. See *id.*

239. See *id.*

240. See generally Palomar, *supra* note 4, at 442-48 (discussing the reliance homebuyers may place on the representations and advice of non-attorneys involved in the closing process and the argument that these laypersons may provide the homebuyer with erroneous legal advice).

241. See *id.*

242. Moore, *supra* note 41, at 354-55; see also HETRICK & OUTLAW, *supra* note 32, at 543.

243. See SIEDEL & CHEEZEM, *supra* note 25, at 308.

244. See generally ADVISORY OP., *supra* note 17 (a ruling which holds ramifications for lenders as result of the connection between lending institutions and

adoption of the Advisory Opinion, some speculated that lenders desired “no-lawyer closing conferences” and that many mortgage brokers wanted to earn closing fees²⁴⁵ and expand their offered services.²⁴⁶ It was also argued that mandating physical attorney presence at the closing would limit a lender’s ability to offer an efficient, client-centered product.²⁴⁷ Others contended that a high degree of attorney involvement within the real estate closing process protected lenders from the risk that a buyer would trust the bank’s opinion to be in the buyer’s best interest, which may not be true.²⁴⁸ In allowing laypersons to conduct closings while under the supervision of a licensed North Carolina attorney, 2002 Formal Ethics Opinion 9 grants North Carolina lenders greater freedom in some respects, as they may now conduct closings absent physical attorney presence.²⁴⁹ However, this freedom is not absolute as a licensed North Carolina attorney must supervise the closing process, even if physically absent from the closing.²⁵⁰

The adoption of 2002 Formal Ethics Opinion 9 grants lenders greater freedom in their ability to offer closing services to clients because an attorney need not be physically present at the closing.²⁵¹ Such freedom may be welcomed by lenders who seek to exercise a greater degree of control over the closing process in order to ensure that their legal and business interests are addressed.²⁵² For instance, bankers must often address questions regarding the loan at a closing.²⁵³ Paul H. Stock, the N.C. Bankers

the real estate industry).

245. Frazier, *supra* note 33, at 1D.

246. Somerville, *supra* note 3, at 14. Paul Stock, the North Carolina Bankers Association Executive Vice-President & Counsel, does not believe that banks desire to rush into the market of providing closings; however, he notes that in a competitive industry, the ability to “bundle” services often appeals to consumers. E-mail from Paul Stock, *supra* note 43.

247. See generally North Carolina Letter, *supra* note 10 (worrying that North Carolina’s former mandate of attorney presence at real estate closings may interfere with business efficiency).

248. E-mail from Anne Watson, President, Triangle Mortgage Lenders Association, to Janet K. Dawson (Oct. 9, 2002, 13:04:57 EST) (on file with N.C. Banking Inst.).

249. See FORMAL OP. 9, *supra* note 18.

250. See *id.*

251. See *id.*

252. Somerville, *supra* note 3, at 14.

253. *Id.*

Association Executive Vice-President & Counsel, testified to the State Bar on this issue that “more questions during closings relate to the loan rather than the title.”²⁵⁴ Thus, by allowing banks the freedom from attorney presence at closings, the closing may arguably focus more centrally around the buyer’s concerns over the loan and its ramifications.²⁵⁵

Perhaps the greatest benefit from this new ruling comes in the area of residential real estate refinancings. Such refinancings typically employ standardized forms and many customers who have been through the process before.²⁵⁶ Banks will now most likely be able to streamline the refinancing process, better serving customers since they will no longer have to organize refinancing closings around the physical presence of an attorney.²⁵⁷ Furthermore, many banks in other states currently offer closing services following a refinancing for free.²⁵⁸ Thus, North Carolina consumers may benefit from the recent ruling if North Carolina banks follow this national trend, offering refinancing closings for free, as these financial institutions no longer face the added cost of employing an attorney to be physically present.²⁵⁹

Forgoing the attorney presence requirement also frees lenders to conduct closings through nontraditional means, such as the Internet.²⁶⁰ Allowing lenders to offer closings via a technological alternative may improve a lender’s economic efficiency as electronic communication will likely prove to be a cheaper alternative to the traditional closing meeting.²⁶¹ Such electronic closings may also allow lenders to serve clients who were previously unreachable due to the physical attorney presence

254. *Id.*

255. *See id.*

256. *See id.*

257. *See generally* ADVISORY OP., *supra* note 17 (holding an attorney’s physical presence will no longer be required in all real estate closing and refinancing transactions).

258. Palomar, *supra* note 4, at 472.

259. *See id.* However, Paul Stock, the North Carolina Bankers Association Executive Vice-President & Counsel, doubts if North Carolina banks would begin to offer such services for free as other costs beyond that of an attorney are involved. E-mail from Paul Stock, *supra* note 43.

260. *See* Letter from Dudley Humphrey, *supra* note 80.

261. *See id.*

requirement which in effect mandated a traditional, physical meeting of the parties.²⁶² In a letter explaining the Special Committee on Real Estate Closing's findings, the Committee stated that the State Bar "does not disapprove of the increasingly popular and widespread practice of closing residential real estate transactions by mail and other 'remote' means that do not involve a traditional conference attended by the parties and the lawyers."²⁶³ The Committee further commented that it realized technological means serve as a viable manner of communication.²⁶⁴

Out-of-state lenders may also seek to more actively pursue the North Carolina lending market via the Internet in the future.²⁶⁵ The former mandate of the physical presence of a licensed North Carolina attorney in a real estate closing may have served to complicate the provision of closing services by out-of-state Internet lenders.²⁶⁶ Indeed, the FTC, before North Carolina adopted the new Opinions, asserted that North Carolina's stance in prohibiting layperson closings "restrict[s] the ability of Internet-based lenders to compete in North Carolina."²⁶⁷ It may be questioned whether mandating attorney supervision continues to restrict Internet lenders from competing within North Carolina, and whether the FTC will press such an issue in a lawsuit. While the requirement that a licensed North Carolina attorney supervise the closing transaction remains,²⁶⁸ the ability to forego physical attorney presence may ease some of the burden of conducting closings for such lenders.²⁶⁹

In removing the physical attorney presence requirement, North Carolina has potentially widened her doors to out-of-state lenders who face one less requirement in conducting closings within North Carolina.²⁷⁰ Whether out-of-state Internet lenders

262. See North Carolina Letter, *supra* note 10.

263. See Letter from Dudley Humphrey, *supra* note 80.

264. *Id.*

265. See Federal Trade Commission, *FTC Staff Testify Today in Support of Low-Cost Real Estate Closings in North Carolina* (June 7, 2002) available at <http://www.ftc.gov/opa/2002/06/ncrealestate.htm> (last visited Feb. 15, 2003).

266. See *id.*

267. Harrington, *supra* note 80.

268. See FORMAL OP. 9, *supra* note 18.

269. See *id.*

270. See North Carolina Letter, *supra* note 10.

will take advantage of the lack of mandated physical attorney presence at a closing as an event that grants easier access to the North Carolina closing market remains to be seen. If more lenders do enter the North Carolina market, North Carolina consumers may benefit from the increased competition, which will result in lower rates and more convenient closing services.²⁷¹

While lenders may no longer be limited to conducting closings solely in the presence of an attorney, the recent Advisory Opinion and 2002 Formal Ethics Opinion 9 continue to limit a lender's ability to enter into the closing market by ruling that a licensed North Carolina attorney must supervise certain aspects of the closing procedure, even though physically absent at the closing meeting.²⁷² These rules restrict lenders from fully expanding into providing closing services.²⁷³

VII. CONCLUSION

The recently adopted Advisory Opinion and 2002 Formal Ethics Opinion 9 hold many implications for real estate agents, lawyers, and lenders. Most importantly, these rulings allow laypersons to take a more active and separate role from that of the attorney. However, the freedom to conduct closings does not come without limits as residential real estate closings still require the supervision of a licensed North Carolina attorney.²⁷⁴ While North Carolina may not be as progressive as some other states in this area,²⁷⁵ this ruling will likely lead to increased competition over closings within the real estate industry, as real estate agents and lenders may be able to cut closing costs by sidestepping attorney presence at closing. Furthermore, the North Carolina consumer benefits as the choice of whether or not to employ an attorney at closing conference is no longer a mandated decision but a question left to the individual consumer. In all, this ruling appears to be one that recognizes the need for closing flexibility

271. *See id.*

272. ADVISORY OP., *supra* note 17.

273. *See id.*

274. *See id.*

275. *See id.*

with the increasing use of technology while attempting to maintain the traditional boundaries of the practice of law.

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