The War Between Attorneys and Lay Conveyancers--Empirical Evidence Says 'Cease Fire'

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* Judge Haskell A. Holloman Professor of Law and Presidential Professor, University of Oklahoma. This Article could never have been written without the invaluable work of my data consultant and manager, Reginald Tempelmeyer, who designed all questionnaires, tables, and graphs and organized and compiled all data. I also am grateful to Professor Jorge Mendoza of the University of Oklahoma Psychology Department for his advice and statistical analysis and to the Program for the Empirical Study of Law at the University of Oklahoma for financial support for this research.
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I. INTRODUCTION

Rob and Sara dreamed of purchasing an acreage and building a home in the foothills of the Tortalita Mountains in Arizona. Their real estate agent found the Johnsons, a retired couple who no longer wanted to maintain the five acres on which they lived and were willing to sell two-and-a-half acres. The Johnson acreage was particularly desirable because they had a working well. The Johnsons agreed to sell Rob and Sara a half-interest in the well so that they could connect their new house to it. This saved them the expense of finding water, conducting percolation and quality tests, drilling a well, and building a well housing.

The standard form purchase contract which their real estate agent completed described the land Rob and Sara were purchasing and stated that the Johnsons also agreed to sell a half-interest in the well site on their retained land. The real estate agent passed the contract to a local office of a national title insurance company to prepare for closing. The title officer drafted the deed and obtained a release of two mortgage liens from the two-and-a-half acres being sold. The title officer failed to obtain a release of the same two mortgage liens from the half-interest in the well site being conveyed. Also, neither the title officer nor the real estate agent recognized that for Rob and Sara to have a legal right to run a pipeline to the well, they needed an easement that ran across the Johnsons' retained land to the well.

Neither the title officer nor the real estate agent ever suggested that this transaction was more complex than they were used to handling or that an attorney should be consulted.

Two years later, a job transfer caused Rob and Sara to have to sell their home. Their buyers' title company objected that the Johnsons' two mortgages still encumbered Rob and Sara's half-interest in the well site and that they had no easement giving them a legal right to the pipeline location or access to the well. The title officer who had closed Rob and Sara's purchase transaction refused to correct these title defects, asserting that the title company's only liability could be on the title insurance policy and that they were not liable on the policy due to its pre-printed exception for "water rights and claims to water rights." The title officer placed the blame on the real estate agent for not drafting the purchase contract more clearly. The real estate broker, conversely, blamed the title company, whose job he said it was to know what was needed to transfer marketable title to the interests described in the purchase contract. Rob and Sara had to (1) bear the costs of obtaining mortgage releases, a survey, and a deed of
Joseph Tiernan did not believe he could afford an attorney and, therefore, chose to have his real estate broker order his title search, survey, and the other tests and inspections necessary to close his real estate transaction. He specifically had requested a property with public sewerage. He had previously lived on property with a septic system and did not choose to do so again. The selling broker relied upon information in the multiple listing system that indicated that the property Joe Tiernan purchased was serviced by a public sewer. That broker ordered a title insurance commitment and, since no attorney was involved, sent it directly to the lender's processing department. Mr. Tiernan was not given the title search results or a copy of the title insurance commitment prior to closing. At closing, Joe Tiernan learned for the first time that the property was not serviced by a public sewer, but instead had an open cesspool. Being unrepresented, he did not know what his options were and was pushed to close and address the problem after closing. No escrow fund was created to provide for installation of a septic system or tie in to public sewers, nor was any agreement drawn regarding the real estate broker's responsibility as to the same. Mr. Tiernan was ready to move, everything was packed in his moving van, and he feared that he would lose his 5% deposit if he backed out on the day of closing. After closing, he learned he could not get a septic system certified because it was an open cesspool and that to tie into public sewers would cost him in excess of $14,000.

Mr. Tiernan filed a complaint with the state real estate commission, alleging impropriety on behalf of the listing broker for misrepresenting and failing to disclose pertinent information. Pursuant to state regulation, however, the fine for a broker's failing to ascertain or reveal pertinent information was $500. Thus, even if the listing broker were

1. Told to the author by “Rob.”
2. This anecdote is taken from Suggested Findings of Fact on Behalf of the New Jersey State Bar Ass'n and the Comm. on the Unauthorized Practice of Law at 24, In re Opinion No. 26 of the Comm. on the Unauthorized Practice of Law, 654 A.2d 1344 (N.J. 1995) (No. 35,062).
3. See id.
4. See id.
found to have violated that regulation, $500 would be little solace to Mr. Tiernan who faces a $14,000 expense.\footnote{See id.}

State bar associations proffer stories like Joe Tiernan's and Rob and Sara's as anecdotal evidence that lay providers of real estate settlement services must be barred from the unauthorized practice of law.\footnote{See Report of Special Master at 30, In re Opinion No. 26 of the Comm. on the Unauthorized Practice of Law, 654 A.2d 1344, 1361 (N.J. 1995) (No. A-85/86) (commenting that the New Jersey State Bar Association attempted to show the detrimental result to buyers who were unrepresented by attorneys by producing several witnesses who claimed losses due to such items as riparian claims, liens, and utility problems). For Joseph Tiernan's and other anecdotes, see Suggested Findings of Fact on Behalf of the New Jersey State Bar Ass'n and the Comm. on the Unauthorized Practice of Law at 24.}

Kathryn Flagg proceeded to her closing without an attorney. Her walk-through of the property the day before closing revealed that certain repairs which were supposed to have been made by the seller pursuant to the contract of sale were not done to her satisfaction. Being unrepresented, Mrs. Flagg did not know how to protect her own rights and no escrow was established to obligate the seller to complete the repairs as agreed upon. Instead, the "other attorney" prepared an agreement stating that the seller would undertake to make certain repairs. Those repairs were not made to Mrs. Flagg's satisfaction and subsequent to closing she has been unable to locate the seller since she was not provided with a forwarding address. See id. at 25.

Christine Dembowski and her husband were first-time buyers. They believed that the real estate agent was working for them. He told them that they did not need an attorney and that he could handle everything that an attorney could handle without the additional cost. She did not receive a copy of the title insurance commitment prior to closing and has no recollection of reviewing it at closing. She testified that she was unaware that the survey showed a mislocation of fences nor did she know that the title company gave affirmative insurance to her lender to insure against the mislocation of the fences. Subsequent to the closing, she had problems with her neighbor concerning the fence mislocation. See id. at 25-26.

Dolores Oliver's husband was out of the country in the military when she purchased their home. She had only a tenth grade education and so advised the real estate broker who assisted in the transaction that she wanted an attorney. He told her that he would have a lawyer for her at the closing. Her purchase was financed with a VA loan that required the seller to pay a certain amount of points. At the closing, no attorney appeared for Mrs. Oliver and the seller refused to pay the points required by the lender. The real estate broker took Mrs. Oliver to another room and prepared a note whereby she agreed to repay the seller the amount of money he was paying for points so that the transaction would close. She had moved into the home before closing and was afraid that if she did not sign the note, she would be forced to vacate. She signed under duress and was not allowed even to read the closing documents due to the fact that the title clerk told her she would be charged $50 per hour since the closing took place on Labor Day weekend. Sometime after the closing, she went to see an attorney who filed suit to void the promissory note and obtained a judgment against Mr. Walker and his brokerage company. Despite entry of that judgment, Mrs. Oliver has not been able to collect more than $200. See id. at 26.

Several witnesses testified as to their problems with riparian claims. Dr. Costabile Cilento testified that because he knew he was getting title insurance, he thought no one would have any claims against his property and was shocked when he realized that the State of New Jersey
neys generally assert that laws against unauthorized practice exist to protect the public from non-attorneys' lack of skill and conflicts of interest.7

Real estate brokers, title companies, and lenders, conversely, suggest had a riparian claim which he had to satisfy years later. He and two other witnesses testifying as to problems with riparian claims together sustained losses in excess of $120,000. See id.

Nick Woronekin agreed to purchase a condominium for $39,000. The contract was drawn by Cape Abstract and closing was to be held by Cape Abstract within approximately one month from the date of the contract. At closing Mr. Woronekin learned that a tax lien was outstanding, but that the judgment search had not yet been completed. He was persuaded to place all of his purchase funds in escrow with the title agent, pending clearance of the outstanding liens. No written escrow agreement was signed, however, and Mr. Woronekin left the closing believing that the liens would be cleared up in a short period of time. After about six weeks, he had not yet received a deed or title insurance policy and wanted his $39,000 returned if he could not get clear title. He went to an attorney who obtained a judgment search revealing that there was in excess of $500,000 in judgments and tax liens on the condominium, at which point his attorney demanded the return of all funds in escrow. Instead of sending his money back, the title company recorded a deed in his name but never issued a title insurance policy. He filed a suit against the seller, title agent, and title company and entered into a settlement, but lost in excess of $50,000 because he has not yet received any of the money to be paid plus had to expend funds for attorneys' fees, expert witness fees, and other litigation costs. See id. at 26-27.

The Virginia Legislature in 1996 also asked for evidence quantifying the incidence of error when lawyers close residential real estate transactions as compared to when non-lawyers close without attorney involvement. See Telephone Interview with James McCauley, Ethics Counsel, Virginia State Bar Ass'n (May 1997) (notes on file with author). The Legislature was faced both with a proposal to declare that the closing of real estate transactions was not the unauthorized practice of law and an antithetical proposal to prohibit non-lawyers from closing real estate transactions without a lawyer's supervision. For a discussion of this recent dispute, see infra Part II. To prove that the public needs protection, supporters of unauthorized practice laws in residential real estate transactions offered anecdotal evidence, by way of testimony from several individuals who had sustained loss in residential transactions in which they had not employed an attorney. See id.

7. Most courts enforcing unauthorized practice laws state that their purpose is to protect the public from severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law. See Beach Abstract & Guaranty Co. v. Bar Ass'n, 326 S.W.2d 900, 903 (Ark. 1959) ("This prohibition by us against others than members of the Bar of the State of Arkansas from engaging in the practice of law is not for the protection of the lawyer against lay competition but is for the protection of the public."); Statewide Grievance Comm. v. Patton, 683 A.2d 1359, 1361 (Conn. 1996) ("The preparation of legal documents involves 'difficult or doubtful legal questions . . . which, to safeguard the public, reasonably demand the application of a trained legal mind.'") (citing Baron v. Los Angeles, 469 P.2d 353, 358 (Cal. 1970)); Black v. Electronic & Missile Facilities, Inc., 250 A.2d 694 (Me. 1969); Attorney Grievance Comm'n v. Hallmon, 681 A.2d 510, 514 (Md. 1996) (stating that the purpose of the rule prohibiting attorneys from assisting unlicensed persons in the practice of law "is to protect the public from being preyed upon by those not competent to practice law—from incompetent, unethical, or irresponsible representation") (citing In re Application of R.G.S., 541 A.2d 977, 983 (Md. 1988); Cape May County Bar Ass'n v. Ludlam, 211 A.2d 780, 782 (N.J. 1965) (prohibiting the unauthorized practice of law is to protect the public against incompetent legal work); People v. Alfani, 125 N.E. 671, 673 (N.Y. 1919); State v. Buyers Serv. Co., 357 S.E.2d 15, 19 (S.C. 1987).
that unauthorized practice laws are monopolistic and protect only attorneys’ pocketbooks. In lawsuits and bar association proceedings, real estate brokers, title companies, and lenders offer their own anecdotal evidence of buyers and sellers whose interests were hurt by incompetent or dishonest attorneys.\(^8\)

The debate over applying unauthorized practice laws in order to bar real estate brokers, title companies, and lenders from completing residential real estate transactions for their customers without attorneys’ assistance has been heated to the point of boiling over into legal proceedings and legislatures in numerous states. More unauthorized practice proceedings have been brought to restrain laypersons from providing real estate settlement services than any other single type of service.\(^9\)

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8. See Report of Special Master at 30: “[T]he Realtors presented evidence of similar types of accidents happening even when a buyer was represented by counsel.” The Special Master noted that two major cases recently before the New Jersey Supreme Court had involved defalcations by attorneys. See id. at 7 (citing Client’s Sec. Fund v. Security Title & Guaranty Co., 634 A.2d 90 (N.J. 1993) and Sears Mortgage Corp. v. Rose, 634 A.2d 74 (N.J. 1993)).

See also E-mail from Alice Danner, Associate Broker, Long & Foster, to DIRT List-serve subscribers:

I had a standard . . . contract presented on a listing a few years ago that had been marked up/crossed out/massacred from here-to-eternity by an entire fleet of lawyers—from another region of the state—who were relatives of the buyers. My seller sent back his counteroffer on a fresh contract form with the suggestion that the purchaser pay his legal fees to have any changes in the standard wording reviewed by his own attorney. We did get the house sold to that buyer after beating down a few more attempts by these foreign attorneys to alter standard practice in Northern Virginia. But the story doesn’t end there.

Things deteriorated when my seller decided he needed his own lawyer and chose one from a distant county in the state where he was moving, instead of letting me recommend one locally. Net result: attorney tells my seller that it is “not customary” for sellers to show up at settlement, nor did the attorney attend on his behalf. To make matters worse, walk-through inspection issues arose at the table that could not be decided upon by me, but needed the presence of the seller. It wouldn’t have mattered anyway—seller’s own attorney had prepared the deed and had it residing in his office a few counties away, and he saw no need for it to be present and signed by the seller at the table on the day of settlement, which is “customary” here. The real net result: seller was responsible for two more days of payments on both a first and second deed of trust, because recording of the deed and the payoff of his loans were delayed.

See also Statement by Ron Rothberg, CFP, on DIRT Real Estate Law List-serve, DIRT@CCTR.UMKC.edu (April 1996): “I’ve seen lawyers do their (or worse, my) clients a disservice by advising them on marketability, value, negotiation strategy, structure, etc., when in fact they’ve never even seen the house and have no concept of the desirability and relative negotiating power of the buyer and seller.”

A significant number of unauthorized practice proceedings are pending at this writing. Additionally, several important court cases and unauthorized practice proceedings have been decided in the last few years. The dispute between attorneys and other real estate settlement service providers has been as prolonged as it has been heated, with cases reported consistently since at least 1917. The intensity and duration of the controversy is further illustrated by the extensive coverage given the issue by legal commentators and law journals.

Those who wish to restrict lay provision of real estate settlement services generally assume that real estate agents, title officers, and loan officers are both less skilled in real estate transactions than attorneys and more interested in closing the transaction just to collect their contingent fees. This group assumes that the public will suffer more loss-

Rhode, Policing the Professional Monopoly].
10. See infra Part II.
11. See infra Part IV.
12. See People v. Alfani, 125 N.E. 671, 673 (N.Y. 1919); People v. Title Guar. & Trust Co., 125 N.E. 666, 667 (N.Y. 1919); Title Guar. & Trust Co. v. Maloney, 165 N.Y.S. 280, 281 (N.Y. Sup. Ct. 1917); and other cases cited supra note 7.
es when lay providers prepare and close real estate transactions than when attorneys perform those services. Conversely, those who wish to end bar associations' use of unauthorized practice laws in order to circumscribe lay provision of residential real estate settlement services assume that lay providers' specialization in residential real estate transactions makes them as competent at that work as most attorneys and that consumers can weigh the difference in knowledge, service, and cost and make their own choices.

Several state courts and legislatures, as well as both the Federal Trade Commission and the United States Department of Justice, have declined to accept mere assumptions as grounds for permitting unauthorized practice laws to restrict lay providers' right to pursue their occupations and the public's right to choose.14

The basis for . . . all regulation of the unauthorized practice of law—is the risk that a lay person will make a mistake that a lawyer would not and thereby harm a consumer. Significantly, the proposed Opinion [of the Virginia Committee on the Unauthorized Practice of Law] cites no actual instances of consumer injury. Instead, it relies upon hypotheticals. Hypotheses alone are an insufficient basis for restricting competition in a way that is likely to harm consumers . . . . 15

14. See In re Opinion No. 26 of the Comm. on the Unauthorized Practice of Law, 654 A.2d 1344, 1347, 1359 (N.J. 1995), where the court remanded the case to develop a record on the question of whether buyers and sellers whose residential real estate transactions were conducted by brokers and title companies without the assistance of attorneys were harmed. "Judge Miller found that there had been no proof of actual damage resulting from the South Jersey practice. . . . [W]hatever problems existed did not in the aggregate exceed those in matters where the parties were represented by counsel." Id.

See also Telephone Interview with James McCauley, supra note 6. Mr. McCauley explained that the Virginia Legislature had passed the Consumer Real Estate Settlement Protection Act, VA. CODE ANN. §§ 6.1-2.19 to -2.29 (Michie 1997), to permit Virginia-licensed title insurance companies and agents, attorneys, real estate brokers, and financial institutions to provide residential real estate settlement services. Mr. McCauley believed this occurred because, when the state bar association was called upon for evidence of the incidence of error when non-lawyers conduct real estate transactions as compared to when attorneys close them, the bar did not meet its burden of proof. Mr. McCauley commented that it was difficult to blame critics of unauthorized practice laws when attorneys cannot come up with data to support their claim that such laws are needed to protect the public from harm.

See also Letter from Anne K. Bingaman, Assistant Attorney General of the U.S. Dep't of Justice and William J. Baer, Director of the Bureau of Competition of the Federal Trade Comm'n, to Thomas A. Edmonds, Executive Director of the Virginia State Bar 4-6 (Sept. 20, 1996) (on file with author).

15. Letter from Anne K. Bingaman and William J. Baer to Thomas A. Edmonds, supra note 14, at 5.
Neither is anecdotal evidence, like the stories of Rob and Sara and of Joe Tiernan, dispositive, since, for every witness that bar associations offer who has been hurt by a lay settlement service provider’s negligence or breach of duty, brokers and title companies can offer one who has been harmed by an attorney’s negligence or dishonesty.16

This Article began with one goal and one hope. The goal was to gather empirical data to replace the assumptions and anecdotal evidence described above, with the hope of finally resolving this protracted and unhealthy dispute between lawyers and lay real estate professionals. Part II of this Article describes existing disputes involving unauthorized practice laws and lay real estate settlement service providers while Part III considers the reasons for them. Parts IV and V will examine the history of the application of unauthorized practice prohibitions to lay providers of residential real estate settlement services. The Article also will discuss generally the uses of empirical data in legal research, and specifically, will analyze empirical data gathered on the question of whether more problems, in fact, occur when non-attorneys provide settlement services than when attorneys prepare and close residential real estate transactions. Finally, Part VII will contemplate solutions to the “turf” battle over which attorneys and lay providers of residential real estate settlement services have been struggling for so long.

II. OVERVIEW OF EXISTING AND RECENT DISPUTES

A. New York

In June 1997, the New York Law Journal reported pending litigation instituted by the Westchester County Bar Association against Coldwell Banker Real Estate. The Bar Association objected that real estate agents’ completing broker-created real estate purchase agreement forms constituted an unauthorized practice of law.17 Reportedly, when Coldwell Banker first announced its intention to begin preparing purchase contracts, other brokers stated their intent to commence similar contract services in Westchester and Rockland Counties and in New York City.18 The reporter commented:

16. See id. at 6; see also Report of Special Master at 30.
18. See id.
It may appear at first glance that real estate brokers and others have a desire to infiltrate into areas which have been traditionally perceived, by both law and custom, to be within the exclusive domain of lawyers. What may actually be the case is that the brokers are frustrated with the time it takes for many lawyers to get contracts prepared and signed by their clients. The brokers' fear is that lawyer-generated delay can lead to purchasers finding another deal on another house listed with another broker.19

Furthermore, in 1996, the New York State Attorney General had been called upon to issue an opinion on the practice of real estate brokers' completing form real estate purchase contracts.20 The Attorney General Opinion stated that a real estate broker may prepare a simple fill-in-the-blank real estate contract if the form either has an attorney approval condition or has been approved by a "recognized bar association in conjunction with a recognized realtor's association."21

B. Wyoming

In 1997, the Unauthorized Practice of Law Committee of the Wyoming State Bar reported a pending unauthorized practice of law complaint by a rural county bar association regarding non-attorney document preparation in residential real estate transactions.22 Also in 1997, House Bill 204 was introduced in the Wyoming Legislature to define

19. Id. The reporter continued:

Apparelly, at least in the southern part of New York State, the organized bar has gone through a period where it has actively sought to protect the real estate practice against encroachment by non-lawyers. Frequently, the bar's position coincides with the public interest. Yet it is a fact that in the northern and western parts of the state, real estate brokers have been preparing simple real estate contracts for many years, with the acquiescence of the bar and the courts.

... The issue of whether the preparation of contracts and conduct of closings should be the exclusive domain of lawyers is a hot one, and not just in New York.

Id. at S1, S8.


21. Id.; see also Prinzivalli, supra note 17, at S1. This Attorney General Opinion also required a prominent statement on the face of the contract that it is a legally binding document and recommending that the parties seek advice from their lawyers prior to signing.

22. See WYOMING STATE BAR UNAUTHORIZED PRACTICE OF LAW COMM., PROPOSED LEGISLATIVE AND REGULATORY CHANGES, submitted to American Land Title Association ("ALTA"), and summarized in ALTA, REAL ESTATE CLOSINGS BY NON-ATTORNEYS OR TITLE AGENTS/TITLE INSURERS 25 (1997) [hereinafter ALTA, REAL ESTATE CLOSINGS].

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and establish penalties for the unauthorized practice of law.

C. Iowa

In May 1997, a member of the Iowa Commission on the Unauthorized Practice of Law reported that the Commission had received at least ten recent complaints from judges, lawyers, and other citizens regarding realtors, loan closers, and other non-lawyers drafting deeds, contracts, and other instruments in real estate transactions. The Commission reportedly is considering taking one case in which they find the unauthorized practice of law and filing suit in district court, in order to obtain judicial assistance in finding the line between what is and is not the practice of law in the context of real estate transactions.

D. Massachusetts

An unauthorized practice of law proceeding was pending in 1997 in Massachusetts against Colonial Title & Escrow Company. Bills also had been introduced in the Massachusetts legislature in both 1996 and 1997 to limit the closing of real estate transactions to members of the bar. The 1996 legislature rejected such a bill. The 1997 bill was still pending in the legislature as of May 12, 1997.

E. Virginia

In Virginia, on May 24, 1996, the Committee on the Unauthorized Practice of Law issued Opinion No. 183 (Non-Lawyers Conducting Real Estate Closings), which outlawed real estate agents and title companies’ closing residential real estate transactions without the assistance of a licensed attorney. The Committee forwarded its Opinion to the Virginia State Bar Council which, according to the practice in the state, was to decide whether to forward it to the Virginia Supreme Court for approval. Before the Council could act, however, the Attorney General

23. See Telephone Interview with Joe Lauderbach, Unauthorized Practice of Law Comm’n member (May 1997) (notes on file with author).
24. See id.
25. See Telephone Interview with James Maher, Executive Vice President, American Land Title Ass’n (May 12, 1997).
26. The term “closing” as it relates to the purchase and sale of real estate is defined as “the final steps of the transaction whereat consideration is paid, mortgage is secured, deed is delivered or placed in escrow, etc.” BLACK’S LAW DICTIONARY 231 (5th ed. 1979).
27. See Telephone Interview with James Maher, supra note 25.
for the Antitrust Division of the U.S. Department of Justice and the Director of the Bureau of Competition of the Federal Trade Commission jointly issued a letter to the Virginia State Bar Association opposing Unauthorized Practice of Law Committee Opinion No. 183.²⁸ Raising the spectre of potential antitrust liability, this letter objected that Opinion No. 183 would deprive Virginia consumers of the choice to use a lay settlement service and, by ending competition, increase the cost of real estate closings for consumers. The Department of Justice and the Federal Trade Commission urged the Virginia State Bar Council to reject Opinion No. 183.²⁹

The issue appears to have been resolved in 1997, not by the Virginia Supreme Court, but by the Virginia Legislature, which passed the Consumer Real Estate Settlement Protection Act.³⁰ This Act provides that it is not the practice of law for Virginia-licensed title insurance companies and agents, attorneys, real estate brokers, and financial institutions to provide residential real estate settlement services.³¹

F. Pennsylvania

In 1996, the Pennsylvania Bar Association Unauthorized Practice of Law Committee issued Formal Opinion No. 96-102, declaring that the representation of either the buyer or seller at real estate closings by anyone other than a licensed attorney is the unauthorized practice of law.³² An exact definition of unauthorized practice of law in the con-

²⁸. See Letter from Anne K. Bingaman and William J. Baer to Thomas A. Edmonds, supra note 14, at 1.
²⁹. See id. This letter and its contents are discussed further infra Part IV.B.
³¹. See id. § 6.1-2.21A.

The representation of a seller or purchaser at a real estate settlement inevitably involves the legal interpretation of documents presented at settlement, the legal interpretation of the effect of matters that arise at the time of settlement, whether brought to the attention of the parties by the seller, the buyer, legal counsel for the other party, members of the title insurance profession, members of the real estate profession or representatives of the financial institution, and advice to the seller or purchaser as to the course of action they should take based upon the opinion of the person giving such advice.

Only a lawyer admitted to practice before the Supreme Court of Pennsylvania has the educational background and the knowledge to be able to identify properly all of the potential issues that arise from a real estate transaction, assimilate and analyze those issues and apply the statutory and case law of Pennsylvania to a satisfactory rendition of advice on that particular matter.

Id.
text of real estate settlement services reportedly will be sought from the Pennsylvania General Assembly or Pennsylvania Supreme Court.\(^{33}\)

G. New Jersey

In 1995, the New Jersey Supreme Court overturned an advisory rule that its Committee on the Unauthorized Practice of Law had issued in 1992.\(^{34}\) The Committee’s Opinion No. 26 had prohibited the Southern New Jersey practice of real estate closings by realtors and title companies without the involvement of lawyers. The New Jersey Supreme Court concluded that, while brokers and title company officers’ handling residential real estate transactions from start to finish for buyers and sellers who are not represented by counsel was the practice of law, it should be authorized so long as disclosure is made of the conflicts of interest and risks involved.\(^{35}\)

H. Illinois

In 1994, Illinois State Bar Association Ethics Advisory Opinion 94-1 declared it a breach of an attorney’s professional responsibility to simply prepare the deed for a real estate transaction while permitting a broker or title company to handle all other aspects of the transaction.\(^{36}\) Ethics Opinion 94-1 asserts that an attorney’s agreeing to draft just the deed with the knowledge that the rest of the transaction will be performed by non-lawyers is the aiding and abetting of the unauthorized practice of law. Furthermore, a bill before the 1996 Illinois legislature

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In addition, Mr. William Hoffmeyer, Chair of the Pennsylvania State Bar Association Committee on the Unauthorized Practice of Law reported in a telephone interview with the author in May 1997 that a York County bar association recently took action against one of the larger realtors, which also owns a title company, for preparing deeds and mortgages in transactions in which title insurance was not being issued. The Committee reportedly was prepared to bring a cease and desist order, but was not required to do so because the realty company entered into a written agreement with the bar association. He also reported that in 1996 the Association of Realtors attempted to amend the Pennsylvania Real Estate Licensing Act to relieve realtors from real estate malpractice liability.

34. See In re Opinion No. 26 of the Comm. on the Unauthorized Practice of Law, 654 A.2d 1344 (N.J. 1995).

35. See id. at 1349-61. In re Opinion No. 26 of the Comm. on the Unauthorized Practice of Law is discussed in more depth infra Part III.A.

would have made the unauthorized practice of law a violation of the state Consumer Fraud and Deceptive Business Practices Act. This would have given consumers a private cause of action for the unauthorized practice of law, keeping bar associations from having to be formally and visibly involved.\(^3\)

III. THE ASSUMPTIONS BEHIND THE DISPUTES

How has it evolved that bar associations and attorneys are in the role of asserting rules against the unauthorized practice of law to protect the public from losses caused by the errors of lay real estate settlement service providers? Why do home sellers and purchasers not avail themselves of the additional protection which attorneys herald that they will provide because of their broader education and fiduciary duties to their clients? The cause seems to be that attorneys, homebuyers and sellers, and non-attorney real estate professionals are operating on differing sets of assumptions regarding risks and costs. Because of their differing assumptions, they reach different conclusions about whether the cost that an attorney adds is warranted by the level of risk that exists in a residential real estate transaction.

Since its inception in the early 1930s, the bar’s campaign against the unauthorized practice of law has been characterized by its partisans as a selfless enterprise actuated solely by considerations of “public interest and welfare.” Variations abound on the theme that it is consumers, not attorneys, who suffer from unauthorized practice and that, in the words of one former American Bar Association (ABA) president, “the fight to stop it is the public’s fight.”

If so, the public has remained curiously unsupportive of the war effort. Indeed, what little evidence is available suggests that the general public is not entirely at one with its defender concerning where the unauthorized practice battle lines should be drawn.\(^3\)

This Article next examines the assumptions about costs and risks the different players in the unauthorized practice controversy make. The Article will then analyze empirical evidence gathered by the author, to determine whether it might unveil flawed assumptions and help

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37. See H.B. 2423, 89th Leg. (Ill. 1996).
38. Rhode, Policing the Professional Monopoly, supra note 9, at 3.
bring an end to this unrelenting debate.

A. Perceptions About Costs

1. Economic Costs

Economics is a primary factor in the displacement of attorneys by lay providers in residential real estate transactions. Commentators have observed that "whenever a particular task or combination of tasks performed by lawyers grows to mass proportions and the demand promises to continue, lay persons will eventually take over performance of these tasks unless deterred from doing so by unauthorized practice laws." This results, in part, because of "more efficient lay specialization and standardization and more aggressive lay advertising and solicitation." It also results from lawyers' reluctance to cut fees in order to counter lay competition.

Two telephone surveys of homebuyers provide empirical evidence of what most would have surmised: that a major reason for not having a lawyer in a home purchase transaction is the parties' desire to avoid the expense. Of 132 homebuyers surveyed in 1990 in Columbus, Ohio, most stated that expense was their reason for not hiring a lawyer. Twenty-three percent of 107 homebuyers questioned in a 1993 New Jersey survey responded similarly.

At the time the New Jersey telephone survey was conducted, the cost of legal representation to a homebuyer averaged $1,000 in Northern New Jersey. The average cost for an attorney for the seller was $750. In Southern New Jersey, a seller whose attorney did no more than prepare the deed and affidavit of title paid an average of $90.

40. Id.
41. See id.
42. See, e.g., Felbinger, supra note 13, at 329 (The "public wants absolute protection, but does not want to pay for it"); see also State Bar v. Guardian Abstract & Title Co., 575 P.2d 943, 949 (N.M. 1978) ("The uncontroverted evidence was that using lawyers for this simple operation considerably slowed the loan closings and cost the persons involved a great deal more money.").
43. See Braunstein & Genn, supra note 13, at 471-72.
44. See GUIDELINE RESEARCH CORP., A STUDY TO DETERMINE THE EXTENT OF HOME BUYER SATISFACTION OR DISSATISFACTION WITH THE TITLE CLOSING/SETTLEMENT PROCESS HAVING TO DO WITH WHETHER THE BUYER WAS REPRESENTED BY AN ATTORNEY 20, 21 (1993) [hereinafter HOME BUYER SATISFACTION STUDY].
46. See id.
47. See id.
South Jersey sellers and buyers who were represented throughout the transaction, including closing, paid an average of $350 and $650, respectively.48 In Virginia, homebuyers in 1996 could expect legal fees of around $500.49 Actually, using an attorney may add much less than the preceding amounts to the transaction’s total cost, since the attorney provides some services for which lay real estate professionals otherwise would charge. In a fact-finding proceeding for the New Jersey Supreme Court, one witness testified that when the additional fees of other real estate professionals were subtracted, the average additional cost for an attorney in New Jersey could be as small as $66.50

Attorneys assume that such amounts are insignificant when compared to the greater protection given by attorneys’ broader education in contract, property, environmental, constitutional, and local government law, their training in spotting issues and curing problems, and their professional duty to advocate for their clients. Yet, at closing time, most buyers and sellers are focused on limiting costs as much as possible so that their savings can go for more square footage, better carpeting, fixtures, and furnishings.51 Buyers and sellers assume that attorneys generally are expensive. They likely do not take time from their moving plans to educate themselves about what other real estate professionals’ charges could be saved if they hired an attorney.52 Neither do they hear about other home buyers and sellers having problems often enough to believe that there is sufficient risk in proceeding without an attorney to justify any additional cost. And, as further discussed below, lay real estate settlement service providers sometimes encourage the belief that an attorney’s services are not worth the cost.53

2. Time Costs

Home buyers, sellers, realtors, and title professionals also are reluctant to involve attorneys in residential real estate transactions because

48. See id.
53. Mr. J.R. Hippel, spokesman for a Virginia group representing realtors, bankers, land-title agents, and others was quoted in the National Law Journal as saying that homebuyers in routine closings can save $400 to $600 in “unnecessary legal fees.” See Davis, supra note 49, at A6.
they fear the attorney will slow the transaction. Most homes are shown in the evenings and on the weekend, when lawyers are not in their offices. Both buyers and realtors fear they will lose out to another if they wait to present an offer of purchase until the buyer’s attorney is available. Realtors also believe that attorneys are overly punctilious and will make unnecessary requirements that will slow or kill the transaction.

In addition, consumers increasingly are opting for the convenience of “package deals.” In such a deal, either a real estate broker, title company, builder, or lender offers to handle all details leading up to and including the closing of the real estate sale or purchase transaction.

Furthermore, to expedite residential real estate transactions and to reduce costs to consumers and themselves, the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) have implemented electronic data transmission. Closing agents are connecting with nationwide computer networks to communicate information via Electronic Data Interchange with lenders and others. It is questioned whether lawyers in private practice will be willing or able to make the investments in technology and in learning time to keep up.

54. See Guardian Abstract & Title Co., 575 P.2d at 949.
55. See Prinzivalli, supra note 17, at S1.
56. See id.

It may appear at first glance that real estate brokers and others have a desire to infiltrate into areas which have been traditionally perceived, by both law and custom, to be within the exclusive domain of lawyers. What may actually be the case is that the brokers are frustrated with the time it takes for many lawyers to get contracts prepared and signed by their clients. The brokers’ fear is that lawyer-generated delay can lead to purchasers finding another deal on another house listed with another broker.

Id.

57. This practice has been growing since the 1960s. For example, Lawyers Title Insurance Corporation offered a plan to companies to handle the entire transaction when the companies’ employees are required to transfer. Some home builders began to offer to take care of all the closing costs and complete the closing themselves. Real estate brokers also began to offer package deals. See Payne, supra note 13, at 450-51.
58. The Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) are government-chartered secondary mortgage market corporations. Their function is discussed in the next section of this Article.
59. See Letter from James R. Maher, Executive Vice President, American Land Title Ass’n, to Thomas A. Edmonds, Executive Director, Virginia State Bar 3-4 (Sept. 20, 1996) (on file with author).
60. See id. at 4.
61. See id.
B. *Assumptions About Knowledge and Ability*

Another major reason home sellers and buyers do not use a lawyer in their real property transactions is the assumption that a lawyer is not necessary.\(^6\) In the 1993 New Jersey telephone survey cited above, 84% of homebuyers queried said they did not have a lawyer present at their closing because a lawyer was unnecessary.\(^6\) This view has grown because of: (a) the belief that the residential real estate transaction has become standardized; and (b) the belief that other real estate settlement service providers serve home buyers' and sellers' needs adequately.

Regarding point (a), their previous home buying experiences as well as those of their acquaintances suggest to most that residential real estate transactions are routine.\(^6\) In fact, the residential real estate transaction has become standardized in large part.\(^6\) This is because, today, interstate lending and assignment of mortgage loans into a national secondary mortgage market\(^6\) have become the norm.

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62. See Rhode, *Policing the Professional Monopoly*, supra note 9, at 87. Lawyers practicing in these areas often delegate form preparation work to paralegals or secretaries. While in theory the attorney monitors this work and is accountable for its quality . . . in fact bar oversight mechanisms provide no meaningful assurance of competent draftsmanship . . . . Given the breadth of most law school curricula and bar examinations, many attorneys may know far less than lay specialists about the legal issues involved in . . . real property conveyances.

63. See *Home Buyer Satisfaction Study*, supra note 44, at 20.

64. See generally Braunstein & Glenn, supra note 13, at 472-73. One home purchaser contacted in their 1990 telephone survey stated "[I didn not use a lawyer] because I've owned houses before and did not see that anything he did was worth it."

65. Even President Jimmy Carter remarked that "[I]n the great number of cases there is no sound reason for a lawyer to be involved in land transfers or title searches. Simplified procedures and use of modern computer technology can save consumers needless legal fees." President Carter, Remarks of the President at the 100th Anniversary Lunch of the Los Angeles Bar Ass'n (May 4, 1978), reprinted in 64 A.B.A. J. 840, 846 (1978).

66. See generally Braunstein, supra note 13, at 249-50.

The secondary mortgage market is a securities-like market in which mortgages originated by local mortgage lenders are bundled into large packages, usually in excess of one million dollars, insured by the federal government and then sold on a national market to private investors located all over the country and, increasingly, the world. The principal players in this market are three government chartered secondary market corporations: the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), and the Government National Mortgage Association (Ginnie Mae). The purpose of the secondary market is two-fold: to smooth out cyclical periods of tight money and to enable capital rich regions of the country to provide mortgage funds to areas of the country where demand exceeds local supply. . . . The ability to participate in the secondary market is a
[T]he thrift crisis has taught everyone in the mortgage finance arena that liquidity is essential. This means, in part, that every lender's mortgage loan portfolio must be as standardized as possible—which, in turn, requires originating loans in accordance with secondary market standards even where the loan is not originally intended to be sold.67 Consequently, forms approved by the Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Association (Freddie Mac) for notes, mortgages, and deeds of trust are used in almost every residential real estate closing.68 Even a buyer or seller's attorney is not likely to negotiate a change in the terms of such forms.69 Additionally, the HUD-1 Uniform Settlement Statement is required by the federal Real Estate Settlement Procedures Act70 and is used in almost every closing.71 Furthermore, at least two states, Utah and Texas, have statutory residential real estate form contracts.72 Home buyers and sellers believe they are protected because these forms are created by professional entities that have no interest in any individual transaction.

Consumers' conclusion that the expense of an attorney is unwarranted also has been encouraged by their assumptions about the expertise and duties of lay real estate settlement service providers.73 In the

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68. See id.
69. See Braunstein, supra note 13, at 269-70.

The lending industry's comprehensive control of the residential real estate transaction leaves the attorney little room to operate within the sphere of its influence. . . lenders' documents [are] not negotiable. Because the lender wants to preserve the option to sell the mortgage on the secondary mortgage market, standardization is very important and alteration of the documents, except to fill in blanks concerning interest rate, term, etc., is not permitted. The lender presents documents on a "take it or leave it" basis.

71. See Letter from James R. Maher to Thomas A. Edmonds, supra note 59, at 3.
72. See id.
73. Consumers' assumptions about the absence of risk in closing a residential real estate transaction without an attorney's assistance is supported by officials in the U.S. Dept. of Justice
Ohio telephone survey cited above, a reason frequently given for not seeking an attorney’s counsel is that some other person in the transaction performed the role of or obviated the need for a lawyer.\textsuperscript{74} Several homebuyers said that they did not need a lawyer because they relied on the real estate agent.\textsuperscript{75} Others said they did not need a lawyer because they relied on the title insurance company’s lawyer, or even the seller’s lawyer.\textsuperscript{76} Thus, one respondent stated: “[I did not use a lawyer because] the Seller’s attorney was at the closing and I felt that he would watch over everything’s legality.”\textsuperscript{77} Many homebuyers responding in the Ohio survey assumed they did not need a lawyer because they relied on their builder.\textsuperscript{78} Typical responses included “Any questions, we asked the builder’s attorney,” and “There is no need for a lawyer when the builder is involved with so many homes.”\textsuperscript{79} Some buyers also relied on their lender and lender’s counsel.\textsuperscript{80} Buyers often believe that their investment is safe if the lender is willing to invest money in the house and is satisfied with the appraiser’s valuation, the legality of the transfer, and the title.\textsuperscript{81}

Similarly, in the New Jersey telephone survey referenced above, 5.6% of homebuyers who expressed a positive opinion about not having a lawyer present at their closing felt the realtor could handle the trans-

and the Federal Trade Commission, who stated in a joint letter:

One reason for the absence of problems may be the increasing use of standardized loan forms, now necessary for reselling a mortgage in the secondary market. These reduce the likelihood of error and the need for independent legal judgment. In addition, a substantial number of closings now involve home equity loans or refinancings of existing loans. Because a related transaction has already gone through the closing process once, legal questions are less likely to arise.

Letter from Anne K. Bingaman and William J. Baer to Thomas A. Edmonds, supra note 14, at 5-6. For additional support, see Rhode, \textit{Policing the Professional Monopoly}, supra note 9, at 88, quoting Robert Ellickson, a professor specializing in real property law, concerning use of a major Los Angeles law firm for home sale:

There is simply no evidence that consumers have experienced a disproportionate incidence of problems in the many states, including California, where attorneys rarely participate in residential real estate sales. Rather, experience in these states suggests that for many routine conveyances, retaining counsel may be tantamount to hiring a surgeon to pierce an ear.

\textit{Id.}

74. See Braunstein & Genn, \textit{supra} note 13, at 472-73.
75. See id.
76. See id.
77. Id. at 473.
78. See id.
79. Id.
80. See id. at 477.
81. See id.

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In a fact-finding proceeding for the New Jersey Supreme Court, the special master found that homebuyers assumed that the real estate broker who showed them homes represented their interests. The New Jersey study also found that homebuyers rely on the employees of the title company where their transaction is closed to protect the buyers' interests.

Conversely, many attorneys have a totally different perspective on the impact of standardized forms on homebuyers and sellers. They opine that standard real estate documents and improved technology do not make real estate transactions simpler for consumers; instead, they increase the need for an attorney:

Because of the expansion of state and federal regulations governing real estate transfers, what was at once a straightforward transaction involving half a dozen documents has become an extraordinarily complex process involving the generation and execution of as many as 50 documents, many of which have substantial impact on the rights and responsibilities of the parties.

Attorneys also assume that their broader legal education will permit them to spot more issues and solve more problems for their clients than could lay real estate settlement service providers. When the New Jersey Supreme Court attempted to find evidence on the question of whether homebuyers and sellers face unacceptable risks when they do not use attorneys, the Special Master compared the texts used in real estate licensing courses with those used in law schools. He remarked:

[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 . . . . The conclusion is inescapable that, useful as the title company's role in a real estate transaction may be in South Jersey, the buyer nevertheless is not given the essential protection that can only be provided by a qualified attorney.

82. See Home Buyer Satisfaction Study, supra note 44, at 21.
83. See Report of Special Master at 10, 24, In re Opinion No. 26 of the Comm. on the Unauthorized Practice of Law, 654 A.2d 1344 (N.J. 1995) (No. A-85/86) (citing testimony that buyers relied on "their" broker instead of retaining an attorney and were unclear about whose interest the broker was protecting).
84. See id. at 11-14.
85. Birnbaum, supra note 13, at 132.
Many further assume that attorneys will better serve homebuyers and sellers because their rules of professional responsibility mandate loyalty to their clients and proscribe conflicts of interest. Attorneys suppose that, without such strictures, real estate brokers, title company employees, and lenders too often will put their own interests ahead of the consumer’s in receiving income that is contingent on the consumer’s purchase being closed. Attorneys support their inferences with anecdotal evidence and hypothetical examples. For instance, in the New Jersey case discussed above, the Special Master reported to the New Jersey Supreme Court that many homebuyers declined the services of an attorney because they believed they could rely on the title company that prepared the documents and supervised the closing. As evidence that homebuyers’ reliance is misplaced, the New Jersey State Bar Association offered the following anecdotal evidence: i.e., that a title company often will issue a title insurance policy to a buyer’s lender that insures against encroachments and easements, but will except those same encroachments and easements from the coverage of the buyer’s title insurance policy. Neither the title company nor the lender, however, has a duty to explain to the buyer who paid for both policies and that her policy gives her less protection than the lender’s policy affords to the lender. The Special Master concluded that this inequity would be cured if an attorney were involved in the transaction who could negotiate with the title company on the buyer’s behalf.

The New Jersey State Bar Association also offered hypothetical examples of harm to home buyers if an attorney is not retained: (a) no one will really explain title insurance coverage to the buyer at closing; (b) no one will negotiate on behalf of the buyer to see that the title policy contains needed endorsements or has been accurately modified to omit exceptions and provide desired coverage; (c) no one advises that the buyer may be able to use a “Survey Affidavit of No Change” rath-

87. See id.
88. See id. at 13-14.
89. The Special Master’s report suggested that the title company in this way limits its liability to the buyer, but accepts greater risks on behalf of the lender. In fact, a title insurer takes little risk by insuring against easements and encroachments in a lender’s policy. This is because a lender has no claim under the policy from the mere discovery of the existence of an easement or encroachment; the lender has an indemnifiable loss only if the title problem causes the lender to be repaid less than the loan contract provides. So long as a homebuyer continues to pay the mortgage, the lender will have a claim against the policy, even if an easement or encroachment is discovered that affects the homebuyer’s use. See Joyce Palomar, TITLE INSURANCE LAW §§ 5.03, 6.06, 10.04 (1998).
90. See Report of Special Master at 14.
er than incur the costs of a new survey; (d) no one advises that the buyer may be able to get a "reissue rate" for a title insurance policy if the seller has an existing policy; (e) no one examines to see if the title company is over-charging on costs compared to a rate manual; (f) no one will review the contract of sale to make certain all the terms have been carried out; (g) no one looks out for the buyer's interest in determining the type of deed to be conveyed, the condition of the property, the amount of the personal property to be conveyed or the acreage to be conveyed; and (h) no one will explain the closing documents to the buyer. 91

Many attorneys further believe that homebuyers who rely on their builder or lender's experience do so in error, because most homebuyers do not realize that greater experience also can put a homebuyer at a disadvantage in dealings with the builder and lender. 92 Most attorneys also presume that home buyers who rely on "the real estate agent" do not know that the real estate agent's legal duty is to the seller, not the buyer, unless the buyer specifically retained a buyer's broker. 93 Attorneys further assume that homebuyers have insufficient information to recognize conflicts of interest with realtors, title companies, and lenders stemming from the fact that these real estate professionals do not get paid unless the purchase goes through. 94

Thus, many contend that consumers' assumption that it is safe to rely on realtors, title companies, and lenders is flawed, since it is made without knowledge of their limited education, conflicting interests, and lack of fiduciary duty. Bar associations, commentators, and many courts, therefore, have concluded that consumers need protection from

92. See Braunstein & Genn, supra note 13, at 473.
93. See Report of Special Master at 10, 24 (citing testimony that buyers relied on "their" broker instead of retaining an attorney and were unclear about whose interest the broker protects); see also supra note 43 and accompanying text (discussing Ohio survey where approximately one-third of the sample did not know that the real estate agent owed primary loyalty to the seller rather than the buyer).
94. See Hulse v. Criger, 247 S.W.2d 855, 861 (Mo. 1952).

While as an agent [the real estate broker] is required to reveal to his principal everything within his knowledge relating to the transaction and must not put himself in a position antagonistic to his interests, nevertheless, because of his personal interest in negotiating an agreement, he is not in the same completely disinterested position to give him advice about his rights and obligations as a lawyer should be. This, as well as lack of legal training, is an important reason why real estate brokers cannot be permitted to give legal advice to their customers.

Id.
their flawed assumption via unauthorized practice laws or other means. Letting the market decide whether attorneys are needed in real estate transactions may not be appropriate when the consumer does not have adequate information about the difference in the product purchased other than the difference in price. Where there is a "human inability to comprehend and process information. . . , insufficient access to information which is necessary for a decision. . . , [or] misrepresentation or strategic manipulation of information by one party to the transaction," consumers guided only by the market may not make the choice that they would have if these transactional deficiencies did not exist.95

However, what about attorneys' own assumptions? In several states, both courts and legislatures have adopted laws barring lay persons from providing complete residential real estate settlement services, based merely on attorneys' assumptions that lay providers' more narrow educations and conflicts of interest will cause injury to the public.

The next section of this Article examines the opinions that courts and legislatures have expressed regarding whether provision of residential real estate settlement services is the unauthorized practice of law.

IV. COURTS AND LEGISLATURES' OPINIONS

Courts and legislatures have devised numerous tests and reached varying conclusions regarding whether and when residential real estate services constitute the unauthorized practice of law. The most restrictive strictly limit the functions that non-attorneys may perform in settling real estate transactions.96 The most permissive grant lay residential real estate settlement service companies broad latitude to handle most if not all aspects of routine transactions.97 And, numerous courts

95. Michelman, supra note 13, at 14. Michelman believes that such market failure "may be aggravated by [I self-imposed restrictions on advertising and solicitation]." Id. at 14 n.61. Michelman supports regulation of lay providers of real estate settlement services, but not via judicial and bar enforcement of state unauthorized practice laws. "It is far from certain that the deregulation of lay competition to legal services . . . would create a consumer paradise blessed by a free flow of information and the absence of exploitation." Id. at 14.

96. See Coffee County Abstract & Title Co. v. State ex rel. Norwood, 445 So. 2d 852, 854-55 (Ala. 1983); State Bar v. Arizona Land Title & Trust Co., 366 P.2d 1, 12-13 (Ariz. 1961); Florida Bar v. McPhee, 195 So. 2d 552, 554 (Fla. 1967); In re First Escrow, Inc., 840 S.W.2d 839, 840 (Mo. 1992); Land Title Abstract & Trust Co. v. Dworken, 193 N.E. 650, 652 (Ohio 1934); Hexter Title & Abstract Co. v. Grievance Comm., 179 S.W.2d 946, 951-52 (Tex. 1944); Committee on the Unauthorized Practice of Law, Opinion No. 26, 130 N.J. L.J. 2, 26 (Mar. 16, 1992).

97. See Pioneer Title Ins. & Trust Co. v. State Bar, 326 P.2d 408, 411 (Nev. 1958); State Bar v. Guardian Abstract & Title Co., 575 P.2d 943, 949 (N.M. 1978); La Brum v. Common-
and legislatures have adopted positions between the two extremes.

A. Purpose of Prohibiting the Unauthorized Practice of Law

Most cases state that the purpose behind laws against laypersons performing legal services is to protect the public from severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law. Courts have expressed concern not only about level of skill, but also that real estate settlement service providers who are involved in transactions for their own profit will lack sufficient zeal in protecting the buyer and seller. Regarding degree of zeal, rules of professional conduct require attorneys to give their "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights . . . to the end that nothing be taken or be withheld from him, save by the rules of law . . . ."

B. Methods of Policing the Unauthorized Practice of Law

In most states, the power to police the practice of law is granted to the judicial branch of government by the state constitution. In other


98. See In re Opinion No. 26 of the Comm. on the Unauthorized Practice of Law, 654 A.2d 1344, 1350 (N.J. 1995); see also Morley v. J. Pagel Realty & Ins. Co., 550 P.2d 1104, 1107 (Ariz. Ct. App. 1976) ("purpose is to protect the public from the intolerable evils which are brought upon people by those who assume to practice law without having the proper qualifications") (quoting Gardner v. Conway, 48 N.W.2d 788, 794 (Minn. 1951)); Beach Abstract & Guar. Co. v. Bar Ass'n, 326 S.W.2d 900, 903 (Ark. 1959) ("This prohibition by us against others than members of the Bar of the State of Arkansas from engaging in the practice of law is not for the protection of the lawyer against lay competition but is for the protection of the public."); Gardner, 48 N.W.2d at 794 ("purpose is to protect the public from the intolerable evils which are brought upon people by those who assume to practice law without having the proper qualifications"); Cape May County Bar Ass'n v. Ludlam, 211 A.2d 780, 782 (N.J. 1965) (purpose behind prohibiting the unauthorized practice of law is to protect the public against incompetent legal work); People v. Alfani, 125 N.E. 671, 673 (N.Y. 1919) (purpose is "to protect the public from ignorance, inexperience, and unscrupulosity"); State v. Buyers Serv. Co., 357 S.E.2d 15, 19 (S.C. 1987) (purpose is to "protect the public from receiving improper legal advice").


100. State constitutions which give the judicial branch the power to regulate attorney conduct and the practice of law include: ARK. CONST. amend. 28; FLA. CONST. art. 5, § 15; IND. CONST. art. 7, § 4; N.J. CONST. art. 6, §§ 2-3; OHIO CONST. art. IV, § 5; UTAH CONST. art. VIII, § 4; see also Creekmore v. Izard, 367 S.W.2d 419, 425 (Ark. 1963) (McFaddin, J., dissenting) ("Amendment No. 28 of the Arkansas Constitution was adopted by the People in 1938; and the full text of the Amendment is: 'The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law.'"); Beach Abstract & Guar.
states, statutes empower the courts to license attorneys. These statutes are construed to give the courts the power to define the practice of law and prevent unauthorized practices of law. In both groups of states, the judicial branch of the government is deemed to have the power to regulate the practice of law by controlling who is admitted to the bar, upholding standards of practice, and prohibiting persons not admitted to the bar from practicing law. In both the preceding groups, the judiciary frequently delegates its power of supervising the practice of law and upholding standards to state supreme court committees or bar association committees.

In a third group of states, the legislature is considered to have the power to supervise the practice of law through the principle of legislative supremacy. In these states, statutes that define the practice of law sometimes except from the definition particular activities of lay residential real estate settlement companies. The legislature generally also delegates its power of supervising the practice of law either to a bar association committee or a state agency.

Violators of practice of law rules can be liable for civil contempt of court or for criminal penalties, if a statute makes unauthorized practice a misdemeanor. Additionally, attempts have been made in a few states to create legislatively a private cause of action for the unauthorized practice of law in favor of aggrieved consumers. In most
states, the state or a local bar association also has standing to sue for
an injunction against a party who is engaging in the unauthorized prac-
tice of law.\textsuperscript{107}

Usually, allegations that a provider of real estate settlement ser-
VICES is engaged in the unauthorized practice of law are resolved at the
level of the state bar association or supreme court’s committee on the
unauthorized practice of law.\textsuperscript{108}

C. Defining the Practice of Law

1. No Precise Definition of the Practice of Law

The unauthorized practice of law is not precisely defined.\textsuperscript{109} Courts
have been more likely to recognize an individual case of unauthorized
practice than to pronounce an exhaustive definition.\textsuperscript{110} Case law does
make clear that the practice of law is broader than appearing before a
court and may encompass activities such as advising clients of their
legal rights, preparing legal instruments, or selecting and completing
legal documents including contracts, deeds, mortgages, deeds of trust,
promissory notes, and agreements modifying such documents.\textsuperscript{111}

\textsuperscript{107} Each state’s statutes and supreme court rules must be consulted. For example, in Flori-
da and New Jersey, the state bar association is permitted to bring an action to enjoin the unau-
thorized practice of law, but a local bar association or an individual attorney is not. See Heilman v. Suburban Coastal Corp., 506 So. 2d 1088, 1089 (Fla. Dist. Ct. App. 1987); In re Opinion No. 26 of the Comm. on the Unauthorized Practice of Law, 654 A.2d 1344, 1353 (N.J. 1995). In comparison, in South Dakota a state agency is authorized to sue a party for the unauthorized practice of law, not the state or local bar association. See State ex rel Rice, 16 N.W.2d at 486-87. In Maryland, individual attorneys have been permitted to seek injunc-
tions against parties engaged in the unauthorized practice of law, but the state bar association
has no standing to sue. See Bar Ass’n v. District Title Ins. Co., 168 A.2d 395, 396 (Md. 1961). And, in South Carolina, statutes specifically prevent members of the bar from suing for the lay practice of law. See Rhode, Policing the Professional Monopoly, supra note 9, at 12.

\textsuperscript{108} See Rhode, Policing the Professional Monopoly, supra note 9, at 43.

\textsuperscript{109} See Justice, supra note 13, at 187.


of law is not confined to litigation, but extends to activities in other fields which entail special-
ized legal knowledge and ability. Often, the line between such activities and permissible busi-
ness conduct by non-attorneys is unclear."); accord Pioneer Title Ins. & Trust Co. v. State Bar,
326 P.2d 408, 411 (Nev. 1958); People v. Alfani, 125 N.E. 671, 672-73 (N.Y. 1919) (the
unauthorized practice of law not only encompasses legal proceedings in court but whatever re-
There have been numerous attempts elsewhere to define the practice of law. None has been universally accepted. The Arizona Supreme Court has said that an exhaustive definition is impossible . . . . Documents creating legal rights abound in the business community. The preparation of some of these documents is the principal occupation of some lawyers. The preparation of business documents also occupies part of the time of accountants, automobile salesmen, insurance agents, and many others. The practice of law manifestly includes the drafting of many documents that create legal rights. It does not follow, however, that the drafting of all such documents is always the practice of law. The problem, as is frequently the case, is largely one of drawing a recognizable line. Here the line must be drawn between those services which laymen ought not to undertake and those services which laymen can perform without harm to the public.112

2. Numerous Tests Devised

Because there is no precise definition, courts have devised many different tests to determine when an activity should be considered the practice of law and prohibited for lay persons. The strictness of the test each court adopts seems to depend upon the judges' assumptions about the degree of harm the public faces as a consequence of the

quires legal knowledge, including drawing of legal instruments; clients need protection even more when the work is drawing legal papers since no judge is present to protect the client); Oregon State Bar v. Security Escrows, Inc., 377 P.2d 334, 338 (Or. 1962); Bowers v. Transamerica Title Ins. Co., 675 P.2d 193, 198 (Wash. 1983); In re Disciplinary Proceedings Against Droker, 370 P.2d 242, 248 (Wash. 1962); see also In re Opinion of the Justices, 194 N.E. 313, 317 (Mass. 1935):

Practice of law under modern conditions consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. It embraces conveyancing, the giving of legal advice on a large variety of subjects, and the preparation and execution of legal instruments covering an extensive field of business and trust relations and other affairs. Although these transactions may have no direct connection with court proceedings, they are always subject to become involved in litigation . . . . The work of the office lawyer is the groundwork for future possible contests in courts. It has profound effect on the whole scheme of the administration of justice . . . . It is of importance to the welfare of the public that these manifold customary functions be performed by persons possessed of adequate learning and skill, of sound moral character, and acting at all times under the heavy trust obligation to clients which rests upon all attorneys. 112. Security Escrows, Inc., 377 P.2d at 337; accord In re First Escrow, Inc., 840 S.W.2d 839, 842 (Mo. 1992).
difference in attorneys’ and lay real estate service providers’ respective levels of knowledge, skill, loyalty to their clients, and costs. The unwieldy number of different tests devised illustrates why empirical research and evidence is needed on this question. Without factual evidence to guide them, judges’ opinions have ranged vastly—from the belief that the public must be protected from significant harm to the belief that the public faces only a small risk that is outweighed by the benefits of permitting non-attorneys to provide residential real estate services. Without empirical evidence, judges have been left to make law out of their assumptions.

One test courts have devised asks whether the challenged activity is part of a lawyer’s traditional practice or implies the existence of an attorney-client relationship and, thus, should be reserved for attorneys. A second test asks whether the activity affects the client’s legal rights and whether a non-attorney would possess the legal skill and knowledge to perform such an activity without causing the client harm. A third test focuses on the real estate settlement service provider and considers whether the activities being challenged are incidental to the provider’s statutorily-authorized business. A fourth approach determines pursuant to one or more of the preceding tests that a particular activity is the practice of law, and then considers whether it is in the public interest to authorize it for non-lawyers nonetheless.

a. Custom and Tradition

Several courts say that the practice of law is performing acts that traditionally have been committed to the exclusive charge of attorneys. Those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries, constitute the practice of law. Such acts include, but are not limited to, one person assisting or advising another in the preparation of documents or writings which affect, alter or define legal rights; the direct or indirect giving of advice relative to legal rights or liabilities; the preparation for another of matters for courts, administrative agencies and other judicial or quasi-judicial bodies and officials as well as the acts of representation of another before such a body or officer. They also include rendering to another any other advice or

113. See Justice, supra note 13, at 187; Michelman, supra note 13, at 7.
114. See People v. Title Guar. & Trust Co., 125 N.E. 666, 669 (N.Y. 1919).
services which are and have been customarily given and performed from day to day in the ordinary practice of members of the legal profession, either with or without compensation. 115

Yet, custom has long permitted lay persons to provide many real estate conveyancing services. In fact, historically, in both England and several New England states, the profession of conveyancing was recognized separately from the practice of lawyers. 116 Therefore, the logic behind using this test to limit residential real estate transactions to attorneys appears to be flawed. 117

Further, deference to a test of tradition could mean that in a location where lay persons have customarily provided real estate settlement services, that practice could not be restricted. The New Jersey Supreme Court struggled with this situation in 1995 in In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law. 118 The court highly recommended that buyers and sellers retain attorneys to supervise their residential real estate transactions, but concluded that, without empirical evidence of harm, the court should not prohibit the long-standing practice in South Jersey of lay persons providing all residential real estate settlement services without attorneys’ assistance. 119

Additionally, as long ago as 1919, the New York Court of Appeals in People v. Title Guaranty & Trust Co. 120 also held that custom and tradition defeated a claim that a title company engaged in the unauthorized practice of law when its employees completed purchase contract and mortgage forms. 121 Thus, the traditional practice test could almost

116. See Alfani, 125 N.E. at 673 (preparing legal instruments by which legal rights are secured is unauthorized practice of law, regardless of the English practice of permitting transfers of land by lay conveyancers).
117. Other commentators have criticized the traditional practice test as being overbroad, inconsistent, and unworkable because lawyers traditionally have performed varied services. See Justice, supra note 13, at 187.
118. 654 A.2d 1344 (N.J. 1995).
119. See id.; see also Oregon State Bar v. Security Escrows, Inc., 377 P.2d 334, 339-40 (Or. 1962) (suggests that long-standing practice keeps it from being unauthorized). But see Arizona Land Title & Trust Co., 366 P.2d at 14 (long-standing custom is insufficient to establish the legality of acts of title companies that constitute the practice of law).
120. 125 N.E. 666 (N.Y. 1919).
121. See id. at 668-69.

We take notice of the widely existing practice of laymen to prepare simple instruments like those before us. If it is unlawful to fill out the blank form for a chattel mortgage or bill of sale, it would be equally so to prepare various other simple instruments, which are so commonly prepared by laymen and banks, and it would be necessary to undergo the trouble and expense of summoning an attorney to perform acts which really do not
estop unauthorized practice proceedings against lay real estate settlement service providers in some regions.

b. Acts Affecting Legal Rights and Requiring Legal Skill and Knowledge

Another group of courts has defined the practice of law, not based on who traditionally has performed the acts, but on the nature of the services or acts. They ask whether the service affects legal rights or is inherently one that requires a lawyer's knowledge and fiduciary relationship to the client.122

The New Mexico Supreme Court concluded that, if the filling in of even the simplest forms affects substantial legal rights, then the protection of such rights requires legal skill and knowledge, and completing such forms must be restricted to members of the legal profession.123 The Supreme Court of Oregon also has held that the selection or preparation of even standard form documents is the unauthorized practice of law if any "informed discretion" is required.124 The court therefore limited lay real estate settlement service companies to completing form documents with the direction of its customers.125

Similarly, the Nevada Supreme Court determined that the test of

require his services.

Id.


This test has also been called the professional judgment test. See Justice, supra note 13, at 188; see also Goudey, supra note 13, at 894-95.

123. See Guardian Abstract & Title Co., 575 P.2d at 949.


For the purposes of this case, we hold that the practice of law includes the drafting or selection of documents and the giving of advice in regard thereto any time an informed or trained discretion must be exercised in the selection or drafting of a document to meet the needs of the persons being served. The knowledge of the customer's needs obviously cannot be had by one who has no knowledge of the relevant law. One must know what questions to ask. Accordingly, any exercise of an intelligent choice, or an informed discretion in advising another of his legal rights and duties, will bring the activity within the practice of the profession. We reject such artificial or haphazard tests as custom, payment, or the quality of being "incidental."

Id.

125. See id.
whether a real estate settlement service provider is engaged in practicing law is whether the tasks being performed are merely clerical or require the exercise of legal judgment.\textsuperscript{126} The Nevada court, thus, held that a title company engaged in the unauthorized practice of law when it prepared standard form deeds, notes, mortgages, trust deeds, assignments, and bills of sale because the title company exercised its judgment as to the legal sufficiency of the instruments to accomplish the parties' wishes.\textsuperscript{127} The court reasoned, however, that it was not the practice of law for the company to execute escrow instructions, because that service was purely clerical, involving only the recording of the parties' agreement as the parties presented it, with no judgment by the escrow officer as to its legal effectiveness.\textsuperscript{128}

These courts again draw their line between activities permitted to lay persons and those limited to lawyers because of their assumptions that the public will be harmed by lay persons' inferior knowledge:

The line is drawn at the point where there is any discretion exercised by the escrow agent in the selection or preparation for another of an instrument, with or without costs. This rule applies to any instrument the purpose and result of which is the creation of rights in property or the creation of obligations that can be enforced by the courts . . . . Turning, then, to the specific matter of documents vesting property rights, the exercise of discretion concerning the property rights of another should be entrusted only to those learned in the law. There are, of course, matters in which persons who are not trained in the law can give perfectly sound business advice. However, when laymen select and prepare instruments creating rights in land for other members of the public, there is always the danger that they may do the job badly . . . . A little of this mischief may flow from the carelessness of lawyers, but by far the most of it is the work product of laymen. In either case the injured party

\textsuperscript{126} See Pioneer Title Ins. & Trust Co. v. State Bar, 326 P.2d 408 (Nev. 1958).
\textsuperscript{127} See id. at 411.

The difficulty with the company's position is that its services did not end with the clerical preparation of the instruments by the escrow officer and stenographer. It was the company itself which judged of the legal sufficiency of the instruments to accomplish the agreement of the parties. In the drafting of any instrument, simple or complex, this exercise of judgment distinguishes the legal from the clerical service.

_id. (citing Title Guar. Co. v. Denver Bar Ass'n, 312 P.2d 1011 (Colo. 1957); Clark v. Reardon, 104 S.W.2d 407 (Mo. Ct. App. 1937)).
\textsuperscript{128} See id. at 411-12.
may have a cause of action for his damages, but it is in the public interest to keep these difficulties to a minimum.\textsuperscript{129}

Though sharing the same concern, courts using this approach may still draw the line at different real estate services. Some believe the public will be sufficiently protected from harm as long as attorneys have drafted the standard real estate forms that lay persons complete. They, therefore, reason that the practice of law ends when attorneys have finished drafting a document for standard transactions in blank form. Lay persons in these jurisdictions may perform the clerical function of filling in the blanks with facts pursuant to their customers’ instructions.\textsuperscript{130} Other courts believe it requires no legal reasoning for lay persons to draft “simple documents” from scratch, like affidavits of fact.\textsuperscript{131} Some of the courts that permit lay persons to complete simple

\begin{footnotesize}
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\item 129. \textit{Id.} (emphasis added).
\item 131. The Alabama Supreme Court in \textit{Land Title Co. v. State ex rel. Porter}, 299 So. 2d 289, 295 ( Ala. 1974), ruled that a title insurance company’s specifying curative work needed before the company will issue a policy and preparing simple affidavits of fact to permit issuance of the policy is not the practice of law. \textit{But see Security Escrows, Inc.}, 377 P.2d at 338-39 (soundly rejecting the “simple v. complex documents” test as the way to determine whether a lawyer’s legal knowledge and discretion are required).
\end{itemize}
\end{footnotesize}
deeds, mortgages, and other instruments add the proviso that, to avoid charges of the unauthorized practice of law, they must charge no fee for those services.\textsuperscript{132}

Whether courts believe legal discretion is sufficiently limited if lay persons merely fill in blanks in attorney-prepared forms or whether they believe that lay persons should not complete even the simplest forms if they affect legal rights, again depends on their assumptions about the knowledge, ability, and loyalty of lay persons compared to attorneys. Those assumptions also will be a factor when a court decides whether a particular form is sufficiently "simple" for lay persons or too "complex."

c. Incidental to Business Test

Several courts permit real estate settlement companies to provide services normally performed by attorneys so long as they do so only incidentally to the company's statutorily-authorized real estate settlement business.\textsuperscript{133} In fact, the majority of courts that have held that lay persons may prepare instruments and handle real estate closings without violating unauthorized practice laws have applied the incidental to business theory.\textsuperscript{134} Judges in these jurisdictions appear to assume that,

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There may be, of course, wide differences in degree. One could arrange upon a spectrum running from high to low the requisite skill and learning needed to perform each task, and no doubt could then classify all sorts of conveyancing in accordance with such an arrangement. We are invited to engage in such an exercise when the defendants argue that filling out simple forms is not the practice of law. They then proceed up the scale of forms until they contend that filling out complicated forms is not really the practice of law because, after all, a form is only a form. We agree with Pound, \textsuperscript{135} the New York Court of Appeals, that "[t]he most complex are simple to the skilled and the simplest often trouble the inexperienced." People v. Title Guarantee & Trust Co, 227 N.Y. 366, 379, 125 N.E. 666, 670 (1919). It is clear that some conveyances must be drawn by lawyers. Most conveyances undoubtedly should be examined by lawyers. The creation of estates in land is a matter that demands professional legal advice.

\textsuperscript{Id.}

\textsuperscript{132} In \textit{Hulse v. Criger}, 247 S.W.2d 855, 861 (Mo. 1952), the court held that a layperson's completing standardized forms which have previously been approved by an attorney is not unlawful provided that no advice or opinion regarding legal rights is given and that no fee is charged for preparing the forms separate from the title policy premium.

\textsuperscript{133} This test also has been called the incidental legal services test. \textit{See Justice, supra} note 13, at 189.

\textsuperscript{134} \textit{See Land Title Co.}, 299 So. 2d at 289 (review of public records and preparing simple affidavits of fact to support issuance of title policy is not practice of law); Florida Bar v. McPhee, 195 So. 2d 552, 554 (Fla. 1967) (preparation of documents fulfilling conditions of title insurance commitment are incidental to business of title insurance); Preferred Title Servs. v. Seven Seas Resort Condominium, Inc., 458 So. 2d 884 (Fla. Dist. Ct. App. 1984) (preparing
since real estate settlement companies also have a business interest in performing their services correctly, the risk to the public is small enough to be outweighed by the public benefit from "one-stop shopping."\textsuperscript{135}

The Pennsylvania Supreme Court adopted this test. In \textit{La Brum v. Commonwealth Title Company}, \textsuperscript{136} the court held that acts that have to do "with conveyances and conveyancing" are within the province of title insurance companies.\textsuperscript{137} The court reasoned that a title company must be able to examine and pass upon instruments evidencing a transfer of title before the company can decide whether to insure the title. And, if examination of instruments intended to transfer title discloses defects that the company thinks must be corrected before the title can be insured, it is in the interest of both the insurer and the applicant for the title company to be able to redraw those instruments. The Pennsylvania court then concluded that no difference exists between letting a title company approve, correct, or redraw instruments and letting the company draw instruments correctly in the first place.\textsuperscript{138} Therefore, the court found that title insurance companies are allowed to prepare documents that "are intimately connected with and grow out of" the title insurance transaction.\textsuperscript{139}

documents that are represented as legally effective is practice of law but authorized for insurance company to complete when incidental to issuance of title insurance policy); Georgia Bar Ass'n v. Lawyers Title Ins. Corp., 151 S.E.2d 718, 722 (Ga. 1966) (title insurance company "may prepare such papers as it thinks proper or necessary in connection with a title which it proposes to insure so long as it makes no charge for such papers"); Atlanta Title & Trust Co. v. Boykin, 157 S.E. 455, 458 (Ga. 1931) (examining, certifying, and guaranteeing titles and preparation of all documents in connection with conveyance that are requested by customers are not unauthorized practice of law); Pulse v. North Am. Land Title Co., 707 P.2d 1105, 1109 (Mont. 1985); People v. Title Guar. & Trust Co., 125 N.E. 666 (N.Y. 1919); Bar Ass'n v. Union Planters Title Guar. Co., 326 S.W.2d 767, 780-81 (Tenn. Ct. App. 1959) (title examination and closing are incidental to title insurance business and company not prohibited from drafting documents intimately connected with business in issuing commitment). \textit{See generally Payne, supra note 13, at 444-45; Marvel, supra note 13, at 186.}

Accepting the incidental to business theory as to services other than drafting instruments and filling in forms, see \textit{In re Opinion of the Justices}, 194 N.E. 313 (Mass. 1935) (search of records to ascertain state of title without rendering opinion is not unauthorized). For a fuller discussion of the incidental to business theory and its various incarnations, see \textit{Palomar, supra} note 89, § 13.05[1]-[5].

135. This reasoning has been criticized on the grounds that it would permit the whole of a real estate transaction to be performed by a real estate agent, lender, or title company. \textit{See generally Marvel, supra} note 13, at 186.

136. 56 A.2d 246 (Pa. 1948).

137. \textit{See id.} at 248.

138. \textit{See id.; accord Title Guar. & Trust Co. v. Maloney, 165 N.Y.S. 280 (Sup. Ct. 1917) (title company allowed to prepare documents in advance, instead of waiting to cure title problems in response to an insured's claim subsequent to policy's issuance).}

139. People v. Title Guar. & Trust Co., 125 N.E. 666 (N.Y. 1919). Courts in the state of
Of course, under this test, lay real estate settlement service providers cannot prepare instruments for transactions in which they were not hired to perform their statutorily-authorized services. In *Preferred Title Services v. Seven Seas Resort Condominium, Inc.*, the court considered the propriety of a title insurance company charging for preparing legal documents in connection with real property transactions when no title insurance policy was being issued. The charge resulted from the vendor in the transaction agreeing to pay the title insurance company a cancellation fee in cases where the vendees cancelled after the company

New York adopted the "incidental to business" test as far back as 1919. *See id.* In *Title Guarantee & Trust Co.*, the Court of Appeals ruled in favor of the title company on the basis that following a customer's directions to complete blank forms which a layperson could complete is not the practice of law. *See id.* at 668. The court added that the service complained of was only incidental to the title insurance company's statutorily-authorized business, which included placing titles in insurable condition. *See id.* In 1940, in *People v. Lawyers Title Corp.*, 27 N.E.2d 30 (N.Y. 1940), the Court of Appeals apparently affirmed its 1919 holding, but found that the title insurance company in that case had gone too far when it supervised and carried out the sales transactions of most of the homes in a development. The services complained of included the company's passing upon the regularity and legality of instruments, preparing legal documents, and causing them to be executed in accordance with requirements of the National Housing Act, providing against violations of the Fair Housing Act, and generally advising title insurance applicants and protecting their rights. *See id.* at 33. The court reasoned that the state's statutory provision exempting corporations engaged in examining and insuring land titles from prohibitions against practicing law only permitted them to perform services which could be rendered lawfully by laypersons. The court stated that a layperson obviously could not render the services complained of and they were not necessary to the examination and insuring of titles. *See id.* Therefore, the court enjoined the defendant title insurance company from "doing those acts and carrying through such transactions as were usually required to be performed by licensed attorneys and counsellors at law." *Id.* The court, however, did not overrule its prior holding that title insurance companies could perform services incidental to the issuance of title insurance policies when those services could be performed by laypersons. *See also Wollitzer v. National Title Guar. Co.*, 266 N.Y.S. 184 (Sup. Ct. 1933), aff'd, 270 N.Y.S. 968 (App. Div. 1934) (can draw papers affecting property that are necessary and incidental to examination and insuring of title); *Maloney*, 165 N.Y.S. at 281 (company entitled to advise on doubtful questions; if papers are to be drawn, company may pass upon their regularity).

The "incidental to business" theory also is illustrated by the Florida case of *Cooperman v. West Coast Title Co.*, 75 So. 2d 818 (Fla. 1954). In *Cooperman*, the court held that a title insurance company's activities up to the point of issuing a title insurance commitment and policy are incidental to the business of issuing that commitment and policy, and the company is not engaged in the practice of law up to that point. Additionally, the court ruled that a title company can take steps after issuing the commitment to effect a proper transfer of title from grantor to grantee, so that the title that passes is the title the company agreed to insure. *See id.* at 821. Therefore, the court held that a title insurance company may prepare incidental documents required to render a title insurable and to permit the company to issue a policy. *See id.*

141. *See id.* at 884.
had performed "the necessary work to provide the title insurance." The "necessary work to provide the title insurance" included search and examination of title, examination of deeds, notes and mortgages, and issuance of the commitment to insure with exceptions from coverage and requirements. The court held that a title insurance company can make no lawful charge for services that are incidental to a title insurance transaction when no policy is issued and the insurer assumes no title risks. In the absence of a title insurance transaction, those services would constitute the unauthorized practice of law. The court agreed that title insurance companies can prepare deeds, mortgages, satisfactions, and other documents affecting the legal title to be insured and perform other acts necessary to fulfill conditions described in their commitments for title insurance. But, those acts do constitute the practice of law and would be unauthorized if not done as an incident to the company's honoring its title insurance commitment and issuing a title insurance policy.

As was also suggested in Preferred Title Services, courts that permit lay real estate service providers to provide legal services that are "incidental to" their businesses prohibit the lay provider from receiving a fee for the incidental legal services. Indirect fees for title examin-
tion and document preparation services may damage a title insurance company's case just as badly as explicit separate charges. Other

insure, where no fee is charged for services rendered besides policy premium); Georgia Bar Ass'n v. Lawyers Title Ins. Corp., 151 S.E.2d 718, 722 (Ga. 1966) (holding that title insurance company may examine records, issue abstracts of title, certify to the correctness of abstracts, and issue policies of title insurance with charges therefore; but, to comply with state practice of law statutes, company must limit its preparation of papers to those necessary in order for it to be willing to insure title, making no charge for such papers); Kentucky State Bar Ass'n v. First Fed. Sav. & Loan Ass'n, 342 S.W.2d 397, 398-99 (Ky. 1960); In re First Escrow, Inc., 840 S.W.2d 839, 848 (Mo. 1992) (holding that real estate settlement service providers, including escrow closing companies, brokers, lenders, and title insurers, were prohibited from charging a fee for preparing legal documents, since state law made it a crime for a nonlawyer to be compensated for practicing); Hulsel v. Criger, 247 S.W.2d 855, 861 (Mo. 1952) (stating that title company cannot charge a fee for completing standardized forms); New Jersey State Bar Ass'n v. Northern N.J. Mortgage Assocs., 161 A.2d 257 (N.J. 1961); Union Planters Title Guar. Co., 326 S.W.2d at 767; Union City & Obion County Bar Ass'n v. Waddell, 205 S.W.2d 573, 580 (Tenn. Ct. App. 1947) (rendering opinion regarding validity of title is prohibited as unauthorized practice of law when done for consideration); Stewart Abstract Co. v. Judicial Comm., 131 S.W.2d 686, 690 (Tex. Civ. App. 1939) (holding that title company cannot collect fees for legal services).

In Florida Bar v. McPhee, 195 So. 2d 552 (Fla. 1967), the court held that title insurance companies may advise themselves regarding the status of titles they are going to insure and prepare contracts, deeds, mortgages, and other instruments of conveyance necessary to fulfill conditions contained in title insurance commitments, so long as they make no charge for those services other than the regular title insurance premium. See id. at 554. The court in McPhee enjoined title insurance companies from (a) rendering opinions concerning the status or marketability of title to real property; (b) giving advice relating to methods of taking title or concerning legal effect of any documents; (c) preparing contracts for sale, deeds, mortgages, or other instruments of conveyance of real property except those necessary to fulfill conditions contained in title insurance commitments they issue; (d) conducting closings, except those required to fulfill conditions in title insurance commitments they have issued and except when acting as escrow agent in "simple escrow" transactions; and (e) making any charge other than regular title insurance premiums for preparing documents or conducting closings. The court ruled title companies were permitted to (a) prepare abstracts; (b) examine information concerning a title to real property to determine conditions on which a title insurance commitment or policy will be issued; (c) issue title insurance commitments which list requirements that must be fulfilled before the company will issue a title insurance policy; (d) draw only those documents necessary to fulfill requirements in the title insurance commitment, so long as there is no charge but for the regular premium; (e) conduct closings incidental to fulfillment of requirements in commitments, so long as no charge is made other than the policy premium; and (f) act as escrow agent in "simple escrow" transactions, even where no title insurance is involved, so long as they do not draw legal documents and only carry out instructions given by the parties to the real estate transaction or their counsel. See id.

147. In Preferred Title Servs., the charge in addition to the policy premium resulted from vendors having to pay the title insurance company a cancellation fee in cases where the vend- ees rescinded the transaction after the company had performed "the necessary work to provide the title insurance." Preferred Title Servs., 458 So. 2d at 885.

In Coffee County Abstract & Title Co. v. State ex rel. Norwood, 445 So. 2d 852, 855 (Ala. 1983), the Alabama Supreme Court similarly concluded that consideration is present whenever the title company's fee includes an amount over the title insurance premium. The court reasoned that some, if not all, of the excess must be the title company's charge for closing
courts wholly reject the incidental to business theory on the grounds that a rule permitting lay persons to prepare legal instruments just because that service is incidental to the lay person's business ignores the public's welfare.\textsuperscript{148}

d. Public Interest Approach

A fourth approach acknowledges that drafting deeds, mortgages, and similar instruments, giving opinions about the legal status of title, and closing real estate transactions is the practice of law, but then allows lay real estate settlement companies to perform those services incidentally to their authorized businesses, if it serves the public interest to do so. Cautious judges do not make such an exception to unauthorized practice laws unless they find that a "practical necessity" exists for doing so. For example, the Nevada Supreme Court stated:

It may be conceded that professional advice or exercise of services. See id.; see also Beach Abstract & Guar. Co. v. Bar Ass'n, 326 S.W.2d 900, 902-03 (Ark. 1959) (although abstract company acting as agent for title insurance underwriter alleged that title examination and drafting of instruments to make titles insurable were performed without extra charge other than policy premium, where abstract company admitted that a deduction was given to insurance applicants who provided their own attorneys to perform the preceding functions ordinarily performed by the insurance agent, the making of a charge for the services could not be determinative of the question of what constitutes illegal practice of law); Florida Bar v. Columbia Title, 197 So. 2d 3 ( Fla. 1967) (holding that title company cannot charge other than regular title insurance premiums for preparing documents or conducting closings); In re Opinion of the Justices, 194 N.E. 313, 317 (Mass. 1935) (holding that the occasional drafting of simple deeds when not conducted as an occupation or yielding substantial income may fall outside practice of law); Hexter Title & Abstract Co., Inc. v. Grievance Comm., 179 S.W.2d 946, 951 (Tex. 1944) (imposing no separate charge other than the policy premium for drawing instruments necessary to perfect titles did not alter the court's conclusion that the company was illegally practicing law, since the title company advertised its legal services to induce customers to come in and transact other business and the cost of furnishing the legal services were included in the charge for obtaining the other business transactions).

148. See Coffee County Abstract & Title Co., 445 So. 2d at 836 (completing pre-printed forms is unauthorized practice of law and claim that it is incidental to title insurance business is subordinated to state's interest in regulating practice of law); State Bar v. Arizona Land Title & Trust Co., 366 P.2d 1, 11 (Ariz. 1961) (rejecting title company defendants' theory that, even if some of their services fell within the definition of the practice of law, by reason of long-established custom such conduct had become incidental to their lawful business); Beach Abstract & Guar. Co., 326 S.W.2d at 900 (abstracting and preparing transfer documents for closing is the practice of law and title insurer was not authorized to perform such services even though they were incidental to the title company's business of issuing title insurance policies); Title Guar. Co., 312 P.2d at 1015 (preparing of instruments to perfect title and escrow service are not incidental to company's business; title company only authorized to prepare documents to render title insurable when it is a party to the subject matter of the transaction); Hexter Title & Abstract Co., 179 S.W.2d at 952 (preparing papers related to title is not the business of a title insurance company).
judgment upon matters of law by one neither a party to the
transaction nor an attorney, does not in every case constitute
unauthorized practice of the law. There are recognized excep-
tions which are themselves founded upon the public interest.
These exceptions are confined to cases of simple rather than
complex legal services rendered in connection with a lay busi-
ness and in all such cases the key to the public interest is prac-
tical necessity.¹⁴⁹

The Nevada judges, however, declined to find a practical necessity for
an exception to unauthorized practice laws unless important lay services
could not be continued without the incidental legal services or unless
too few lawyers were available in a region for the volume of transac-
tions needing simple legal services. The court held that, in the case
before it, the title company's services of preparing deeds, notes, mort-
gages, and contracts of sale were incidental to its business, but no prac-
tical necessity existed for an exception to unauthorized practice rules.¹⁵⁰
The court concluded that the legal profession in the state was capable
of providing the necessary legal services.¹⁵¹

Courts less worried that the public may be harmed will make an
exception to unauthorized practice laws if it is merely convenient and
less expensive for the public to obtain their real estate settlement ser-

¹⁴⁹. Pioneer Title Ins. & Trust Co. v. State Bar, 326 P.2d 408, 412 (Nev. 1958) (emphasis
added). The court continued:
One class of cases involves the performing of legitimate lay services requiring coun-
seling in areas not essentially legal, such as investments, insurance and tax account-
ing. Such counseling may well require, if performance is to be substantially effec-
tive, the incidental counseling upon questions of law. It would not be in the public
interest to prevent the lay counselor from providing a legitimate public service simply
because the performance of that service requires him to counsel on legal questions
incidentally connected with his lay specialty.

But in the public interest in such cases the question should be whether the
incidental legal services are necessary to the providing of what is essentially [a] lay
[business]. It should not be enough that certain legal services can be said to be
incidental or reasonably connected. It is not the public convenience in the providing
of those legal services with which we are concerned in such a case. Rather it is
that the lay services can continue to be effectively given in the public interest.
In another class of cases the practical necessity apparently lies in a comparative
lack of lawyers in the light of the volume of transactions of the type requiring the
simple legal services. It is a situation where the legal profession is unable to pro-
vide the public with the simple services necessary to the transaction.

¹⁵⁰. See id. at 412-13.
¹⁵¹. See id. at 413.
vices from lay providers.

Denying to the public the right to conduct real estate transactions in the manner in which they have been transacted for over half a century, with apparent satisfaction, and requiring all such transactions to be conducted through lawyers, would not be in the public interest; ... the advantages, if any, to be derived by such limitation are outweighed by the conveniences now enjoyed by the public in being permitted to choose whether their broker or their lawyer shall do the acts or render [such legal] ... service[s].

It would not be in the interest of the public welfare to restrain brokers from drafting the ordinary instruments necessary to effectuate the closing of the ordinary real estate transaction .... We do not think [that] the possible harm which might come to the public from the rare instances of defective conveyances in such transactions is sufficient to outweigh the great public inconvenience which would follow if it were necessary to call in a lawyer to draft these simple instruments.

The New Jersey Supreme Court, in 1995, concluded that nearly every activity involved in contracting and closing a residential real estate transaction constitutes the practice of law. The court then considered whether the public interest would be better served by limiting or permitting laypersons' performance of those legal services. The New Jersey court attempted to obtain empirical evidence to create a record on the question of whether the public sustains more harm

153. Cowern v. Nelson, 290 N.W. 795, 797 (Minn. 1940); accord Pope County Bar Ass'n, Inc. v. Suggs, 624 S.W.2d 828, 830 (Ark. 1981) (holding that it was in the public interest to permit brokers to fill in blanks of standardized forms previously prepared by attorneys for simple transactions); Ingham County Bar Ass'n, Inc. v. Walter Neller Co., 69 N.W.2d 713, 719-21 (Mich. 1955) (ruling that possible harm to public from rare cases of defective conveyances that are part of realtor's everyday business is not sufficient to outweigh public inconvenience from hiring a lawyer to draft simple instruments).
155. See id. at 1352.

The prohibition against non-lawyers engaging in activities that are the practice of law is not automatic. Having answered the question whether the practice of law is involved, we must decide whether the public interest is served by such prohibition. Not every such intrusion by laypersons into legal matters deserves the public.

Id.
when they use lay real estate settlement service companies to handle their transactions than when they use attorneys. The New Jersey Association of Realtors offered into evidence the results of a telephone survey of 401 homebuyers that showed no significant difference in satisfaction between homebuyers who had used an attorney and those who had had only the assistance of their realtor and a title company. To counter this, the New Jersey State Bar Association offered only anecdotal evidence from a few individual witnesses who had been harmed by the negligence or self-interest of realtors and title companies; it was matched by witnesses offered by the Realtors Association who had been harmed by the negligence or defalcations of attorneys. Without clear, factual evidence proving that the public sustains more harm when they use lay real estate settlement providers, the court concluded that it was not in the public interest to continue to force protections that the public did not seem to want.

Yet, predisposed to believe that laypersons' more superficial education in property law and their conflicts of interest subject the public to risk, the judges qualified the exception to unauthorized practice laws they created for lay real estate settlement providers. They ordered that realtors and title companies make written disclosure to both sellers and buyers regarding the limited skill and representation they can give. Said written notice must be attached as a cover page to any proposed contract of sale and must state that (1) neither the real estate broker nor the title company represents the buyer; (2) the broker only makes a commission if the transaction closes; (3) the broker and title company cannot give either the buyer or seller legal advice; (4) title problems may affect the value of the property and no one will advise the buyer about title problems; and (5) the broker or title company may not be sufficiently trained to recognize that there are title or transactional problems. The New Jersey Supreme Court further admonished that title officers and brokers must have the experience and knowledge to identify situations beyond their own competence and advise when the buyer

156. See id. at 1346.
158. See id. at 30 (commenting that the New Jersey State Bar Ass'n attempted to show the detrimental result to buyers who were unrepresented by attorneys by producing witnesses who claimed losses due to such items as riparian claims, liens, and utility problems); see also supra note 6 for several of those anecdotes.
160. See In re Opinion No. 26, 654 A.2d at 1361.
161. See id.
or seller needs an attorney’s counsel, or be liable for that party’s damages.\textsuperscript{162} The State of New Jersey also statutorily requires title companies to disclose to buyers that the company does not represent them, that its employees cannot offer legal advice, and that buyers are advised to seek counsel to review exceptions in their title insurance policies.\textsuperscript{163}

3. Effect of Statutes Permitting Lay Real Estate Settlement Service Providers to Perform Particular Services

Where a state supreme court has barred non-attorneys from providing real estate settlement services without an attorney’s supervision, those who disagree with such forced protection have little recourse. Usually, if a state supreme court’s ruling is unpopular, the public’s recourse is to persuade their legislative representatives to pass statutes to change the common law. However, such action may not be helpful when the issue involves the definition of the practice of law. Because the role of policing the practice of law is allocated by most state constitutions to the judicial branch of the government, legislators arguably lack the power to authorize the practice of law by anyone the court has not admitted to the bar. Thus, in some cases where statutes allow non-attorneys to provide services that traditionally have been considered the practice of law, courts have held that the statutes violate the separation of powers doctrine and are unconstitutional.\textsuperscript{164}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{162} See id. at 1362 (stating that “their failure to inform exposes them to the risk of civil liability for resulting damages”).
\item \textsuperscript{164} For example, in New Jersey State Bar Ass’n v. Northern N.J. Mortgage Assocs., 161 A.2d 257, 266 (N.J. 1960), the court rejected the title company’s argument that the activities which the lower court had enjoined were authorized both by state statutes concerning the business of title insurance companies and by a statute which defined the practice of law and excepted certain activities of title insurance companies. Instead, the court held that the state constitution vested in the judiciary exclusive jurisdiction over admission of persons to the practice of law. Therefore, the court ruled that the legislature had no power to statutorily authorize the practice of law by anyone the court had not admitted to the bar. See id; accord Cape May County Bar Ass’n v. Ludlam, 211 A.2d 780, 782 (N.J. 1965) (“This Court has the sole responsibility for determining what constitutes the practice of law.”) (citing N.J. Const. art. VI, § II, para. 3 (1947)). Without derogating from its ruling that the legislature has no power to statutorily authorize the practice of law by anyone the court has not admitted to the bar, the New Jersey Supreme Court in 1995 did overrule the result in Northern N.J. Mortgage Assocs. See supra notes 151-59 for the discussion of In re Opinion No. 26 of the Comm. on the Unauthorized Practice of Law, 654 A.2d 1344 (N.J. 1995).
Similarly, the Supreme Judicial Court of Massachusetts, in response to the state legislature’s request for an opinion on a proposed statute, ruled that a statute could not exempt specified corporations and professions, such as title insurance companies, from the judiciary’s prohibition against the unauthorized practice of law without violating the separation of powers doc-
\end{itemize}
\end{footnotesize}
This also means that lay real estate settlement service providers cannot rely on the statutes that authorize them to do business in each state to protect them from allegations that they are violating unauthorized practice laws, even if they are providing only services described by the statutes. Some of these statutes delineate the powers permitted to lay real estate settlement companies quite specifically. Non-
lawyer real estate settlement service providers have contended that, pursuant to these statutes, their normal business activities cannot be considered the unauthorized practice of law. However, as shown above, courts could simply invalidate the legislation as an unconstitutional encroachment upon the judiciary's power to determine who may practice law.

Other courts have construed such state statutes to permit non-lawyers to provide the described legal services, but only within the limited context of the statutorily-authorized real estate settlement business. For example, the Colorado Supreme Court considered a statute that granted title insurance companies the right to make insurance pertaining to real estate titles and "the power and right to make, execute, and perfect such, and so many contracts, agreements, policies, and other instruments as may be required therefore for compensation or otherwise."167 The court interpreted the quoted language to give title insurance companies only the power to make, execute, and perfect contracts and other instruments needed to make title insurance policies.168 The court concluded that to construe the statute otherwise would be to authorize the title company to practice law and would render the statute unconstitutional as an unauthorized invasion by the legislature into the exclusive jurisdiction of the judiciary.169

issuance of policies, but also handling of escrows and closings and preparing other instruments that may be required before a title insurance policy may be issued. See FLA. STAT. ANN. § 627.7711(1) (West 1997) ("Related services" means services performed by a title insurer or title insurance agent, including, but not limited to, preparing or obtaining title information, preparing documents necessary to close the transaction, [and] conducting closings . . . ."); see also CAL. INS. CODE § 12340.3 (West 1988); IDAHO CODE § 41-2704 (1998); 215 ILL. COMP. STAT. 155/32 (West 1998); KY. REV. STAT. ANN. § 304.22-030 (Banks-Baldwin 1997); Mich. COMP. LAWS. § 500.7304 (1997); MO. REV. STAT. § 381.031 (1997); MONT. CODE ANN. §§ 33-25-105, -201 (1997); N.Y. INS. LAW § 6403 (McKinney 1984); N.Y. JUD. LAW § 495 (McKinney 1983); TEX. REV. CIV. STAT. ANN. art. 9.02; UTAH CODE ANN. §§ 31A-4-107, 31A-23-307 (1994); WYO. STAT. ANN. §§ 26-23-303, -305, -314 (Michie 1977).

168. See id.
169. See id. The Colorado Supreme Court cited with approval Stewart Abstract Co. v. Judicial Comm., 131 S.W.2d 686 (Tex. Civ. App. 1939), in which a Texas court had held that, to the extent language in state insurance commission regulations specifying charges for "preparation of all necessary current papers incident to said deal, . . . and closing of deal" could be construed to authorize title insurance companies to perform acts that amount to the practice of law, the regulations could not be valid. Id.; see Stewart Abstract Co., 131 S.W.2d at 690; accord Steer v. Land Title Guar. & Trust Co., 113 N.E.2d 763, 767 (Ohio Law Abs. 1953) (statutes giving title companies certain corporate powers do not give them the power to overreach their prescribed powers). For additional support, see Hexter Title & Abstract Co. v. Grievance Comm., 179 S.W.2d 946, 952 (Tex. 1944), in which a title company's drawing of instruments needed to perfect title was challenged as the unauthorized practice of law. The title company
Similarly, the Ohio Supreme Court reconciled a statute authorizing title companies to furnish abstracts and certificates of title with a statute giving the judiciary the exclusive power to admit attorneys to the practice of law. The practicing bar had alleged that title companies' certificates of title were opinions on the legal status of titles to land and that giving such opinions was the practice of law. Rather than finding the first statute in conflict with the judiciary's right to determine who is permitted to practice law, the Ohio court construed the first statute to permit title companies to issue a title certificate only with the issuance of a title insurance policy. The court agreed that any other interpretation of the first statute would permit title and trust companies to practice law without being admitted to the bar.

Using different reasoning, the Georgia Supreme Court also reconciled a legislature's attempt to define powers permitted to real estate settlement companies with the judiciary's right to restrict the practice of law. The Georgia court held that the state legislature's adoption of a statute that both defined the practice of law and excepted from its coverage particular activities of abstractors and title companies was not a denial of the constitutional powers of the judicial branch of government. The court found, instead, that the statute was enacted merely contended that those services were not unauthorized because its corporate charter permitted it to compile abstracts and perform other services incidental to insuring titles. Additionally, the state's statute defining the practice of law included advising or counseling others, drawing legal instruments, and giving opinions as to the validity of title to real property, but expressly excepted any person or corporation preparing abstracts of title or certifying, guaranteeing, or insuring title to property. The court ruled that the title company crossed the line permitted by the statute and the company's corporate charter when it drew instruments necessary to perfect title not only in transactions in which it planned to issue title policies, but also in transactions in which it had not contracted to issue a title insurance policy. See id. at 952-54.

The Colorado Supreme Court distinguished the Pennsylvania case of *La Brum v. Commonwealth Title Co.*, 56 A.2d 246 (Pa. 1948), on the grounds that Pennsylvania does not consider preparation of instruments of the type in the Colorado case the practice of law and that no charge was made for the documents in the Pennsylvania case. See *Title Guar. Co.*, 312 P.2d at 1016. The Colorado court also distinguished *Cooperman v. West Coast Title Co.*, 75 So. 2d 818, 820 (Colo. 1954), which seemed to permit preparation of instruments for the perfection of title, on the grounds that the *Cooperman* court limited its rule by stating it permitted only those acts which are indispensable to the determination of insurability and did not sanction a charge in addition to the policy premium for document preparation. See *Title Guar. Co.*, 312 P.2d at 1016-17.

170. See Land Title Abstract & Trust Co. v. Dworken, 193 N.E. 650, 654 (Ohio 1934).
171. See id. at 653.
172. See id. at 654.
173. See id.
175. See id. at 721.
as an aid to the judiciary in the performance of the judiciary’s functions. 176

Thus, based on the separation of powers doctrine, courts may either invalidate a legislative grant of power to lay real estate service providers or interpret the legislation strictly to permit lay persons to provide only real estate services that the court does not consider the practice of law. It is for this reason that, instead of lobbying legislators, realtors in Arizona launched a campaign to persuade voters to amend the state constitution in order to supersede the Arizona Supreme Court’s restrictions on lay provision of real estate settlement services. In 1961, the Arizona Supreme Court had held that lay real estate settlement service companies engage in the unauthorized practice of law if they: (a) prepare, by drafting or filling in blanks, deeds, notes, mortgages, satisfactions of mortgages, contracts for sale of real estate, affidavits, and any other instruments affecting interests in or title to property; (b) prepare curative instruments, even in connection with the issuance of a title insurance policy; or (c) give advice concerning legal effects or tax implications of clauses in wills or other legal instruments. 177 Citizens, who apparently did not share the Arizona judges’ perception that the risk of harm from incompetent lay settlement service providers warranted the cost and inconvenience of hiring an attorney, subsequently did vote to amend the Arizona Constitution expressly to permit real estate brokers and salespersons to “draft or fill out and complete, without charge, any and all instruments incident [to real estate sales] including,

176. See id.
In view of the historical recognition by this court of the right of the legislative branch of government to enact legislation in aid of the judiciary in the performance of its functions, we hold that the statute under attack, defining the practice of law, is not a denial of the constitutional powers of the judicial branch of government.

Id.
177. See State Bar v. Arizona Land Title & Trust Co., 366 P.2d 1, 14-15 (Ariz. 1961). The case applied specifically to title insurance companies. According to the Arizona court, title insurance companies could only perform the following services, which do not constitute the practice of law:
(a) draft and suggest clauses in documents for the title company’s own protection as fiduciary; (b) draft instruments relating to property in which the title company has an ownership interest; (c) furnish abstracts of title and similar information reports, without expressing opinions as to the validity or legal effect of documents or information contained therein; (d) state the conditions or requirements to be met before a policy will be issued and reasons for any refusal to issue a title insurance policy; (e) prepare policies of title insurance; (f) transmit notices required as a condition of delivery of any documents it holds in escrow; and (g) deliver or file documents which it is specifically required to deliver or file.

Id. at 15.
but not limited to preliminary purchase agreements and earnest money receipts, deeds, mortgages, leases, assignments, releases, contracts for sale of realty and bills of sale."^{178}

V. U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION VIEW REGARDING UNAUTHORIZED PRACTICE RULINGS AND FEDERAL ANTITRUST LAWS

The fact that the judiciary may defeat attempts by the people of a state to authorize lay provision of real estate settlement services has raised allegations of monopoly and anti-competitiveness from another source. In 1980, the U.S. Department of Justice obtained a judgment against a county bar association that had restrained title insurance companies from competing in the business of certifying titles.^{179} The bar association had adopted a resolution requiring a lawyer to examine the abstract of title before a title company could issue a title insurance policy or close a real estate transaction.^{180}

Then, in September 1996, the Department of Justice Antitrust Division and the Federal Trade Commission ["FTC"] jointly issued a letter urging the Virginia State Bar Association Council to reject Opinion No. 183 of its Committee on the Unauthorized Practice of Law. This Opinion declared that non-lawyers who close real estate transactions without the supervision of a licensed attorney are engaged in the unauthorized practice of law.^{181} The Justice Department’s Antitrust Division and the FTC objected that the prohibition would result in higher real estate closing costs and fewer choices for consumers.^{182}

The proposed Opinion would restrain competition by erecting an artificial barrier to competition from lay settlement services and would deprive Virginia consumers of the option of closing real estate transactions without the services of an attorney. The

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178. ARIZ. CONST. art. XXVI, § 1. The constitutional amendment is being interpreted to permit title insurance companies to perform these same activities as the agents of realtors.
179. See Letter from Anne K. Bingaman and William J. Baer to Thomas A. Edmonds, supra note 14, at 5.
181. See Letter from Anne K. Bingaman and William J. Baer to Thomas A. Edmonds, supra note 14, at 1.
182. See id.
proposed Opinion has the potential to increase costs for consumers in two ways. First, it would force consumers who would not otherwise hire an attorney for a real estate closing to do so. The restriction would adversely affect all consumers who might prefer the combination of price, quality, and service that a lay settlement service offers. It would particularly affect consumers who are obtaining home equity loans or refinancing existing real estate loans. A number of banks currently handle such closings without charge. Second, the proposed Opinion, by eliminating competition from lay settlement services, would likely cause the price of lawyers' settlement services to increase. Even consumers who choose a lawyer over a settlement company would likely pay higher prices. 183

The Justice Department and the FTC chose to assert their view via letter to the Virginia State Bar Council before the Committee’s Opinion was adopted and made binding by the Virginia Supreme Court. 184 The federal agencies admitted that, if the Virginia Supreme Court adopted the Opinion, its rule likely would be exempt from federal antitrust liability under the state action exception to the Sherman Act. 185

That was the result in 1991, when the Ohio State Bar Association sued a company in the business of preparing title reports for engaging in the unauthorized practice of law. 186 The company filed a counter-suit alleging that the bar association’s prosecution of actions for unauthorized practice was noncompetitive conduct in violation of the Sherman Act’s antitrust provisions. 187 The Federal District Court for the Southern District of Ohio concluded that, even if the bar association’s actions were anti-competitive, the bar association, its committees,

183. Id. at 4.
184. The Virginia State Bar Council and the Supreme Court of Virginia would have had to approve the Opinion to make it binding authority.
185. “If the Supreme Court of Virginia approves the proposed Opinion, the state action doctrine would likely exempt it from federal antitrust challenge. This doctrine immunizes some state government actions that, if taken by private parties, could violate the antitrust laws.” See id. at 5 n.9 (citations omitted).

As of this writing, the Virginia Supreme Court still has not acted on the matter. The court has neither adopted Opinion No. 183 nor formally considered whether a 1997 Act of the state legislature, which provides that it is not the practice of law for Virginia-licensed title insurance companies and agents, attorneys, real estate brokers, and financial institutions to provide residential real estate settlement services, is an unconstitutional violation of the separation of powers doctrine. See Va. CODE ANN. §§ 6.1-2.19 to -2.29 (Michie 1998).
187. See id. at 433.
and committee members were immune from federal antitrust liability under the state action exception to the Sherman Act.\textsuperscript{188} The court ruled that state action immunity applied to the Ohio State Bar Association’s action to prosecute Lender’s Service for the unauthorized practice of law, since the Bar Association’s conduct was a reasonable and foreseeable exercise of powers delegated to it by the Ohio Supreme Court and that active state supervision was present through the Ohio Supreme Court, which retained the authority to make the final determination on the issue.\textsuperscript{189} The court also found that the bar association and its members were entitled to immunity from federal antitrust liability because of the Noerr-Pennington doctrine.\textsuperscript{190} Under the Noerr-Pennington doctrine, despite the existence of an anti-competitive motive, genuine attempts to influence enforcement of laws and to define laws through legal action in courts and administrative agencies are protected by the First Amendment right to petition for redress and, therefore, are immune from antitrust scrutiny.\textsuperscript{191} Thus, the court found that the Ohio State Bar Association had not violated antitrust laws when it filed suit against Lender’s Service for the unauthorized practice of law.\textsuperscript{192}

This Article does not raise the subject of federal agencies’ allegations of monopoly and anti-competitive activity in order to analyze whether state bar associations’ policing the unauthorized practice of law actually does violate antitrust laws. Neither are the DOJ and FTC’s actions reported for purposes of analyzing whether states’ unauthorized

\textsuperscript{188} See id. at 439.
\textsuperscript{189} See id.
\textsuperscript{190} See id.
\textsuperscript{191} See id.
\textsuperscript{192} See id. In 1978, in Surety Title Ins. Agency v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va. 1978), the plaintiff alleged that the Virginia Bar Association Unauthorized Practice Committee’s issuing opinions that certain actions of laypersons were the unauthorized practice of law, with the threat of disciplinary proceedings, was an unlawful restraint of trade. Surety Title Insurance Agency planned to use non-attorney employees for searching titles. The Virginia Bar claimed that unauthorized practice procedures fell within the state action exemption from federal antitrust laws. The Federal District Court for the Eastern District of Virginia rejected that allegation, and held that the bar opinion process was not sufficiently related to legitimate state interests in preventing incompetent assistance as to outweigh its anticompetitive consequences. See id. at 307. Under this ruling, a bar association’s issuing advisory opinions prohibiting the unauthorized practice of law could make it liable for antitrust violations for creating undue restraints of trade under the Sherman Act. However, while the appeal of the district court’s decision was pending, the United States Supreme Court decided, in the case of Bates v. State Bar, 433 U.S. 350, 361-62 (1977), that the test that should apply was whether the action reflected a valid exercise of the state’s police power, not whether the benefits of regulation had to outweigh its anticompetitive effects. Therefore, it is uncertain whether the rule of Surety Title Ins. Agency remains good law. See Rhode, Policing the Professional Monopoly, supra note 9, at 55.
practice committees should be entitled to state action immunity from antitrust liability if their powers come from the states’ courts. Instead, the view and involvement of the U.S. Department of Justice and Federal Trade Commission are raised here to further illustrate (1) how unwieldy and unpredictable is the use of unauthorized practice laws to restrict lay real estate settlement services and (2) the need for bar associations to show with empirical evidence that the public needs the protection the bar is imposing by enforcing unauthorized practice laws against lay real estate settlement service providers. The letter from the Department of Justice and FTC to the Virginia State Bar Council stressed that the absence of empirical evidence of harm to the public supported the agencies’ view that bar associations’ use of unauthorized practice laws is more monopolistic and anti-competitive than protective of the public.

The basis for the proposed Opinion [of the Virginia State Bar Association’s Committee on the Unauthorized Practice of Law]—and for all regulation of the unauthorized practice of law—is the risk that a lay person will make a mistake that a lawyer would not and thereby harm a consumer. Significantly, the proposed Opinion cites no actual instances of consumer injury. Instead, it relies upon hypotheticals. Hypotheses alone are an insufficient basis for restricting competition in a way that is likely to harm consumers . . . .

If unauthorized practice laws are to appear to be protecting more than a monopoly for attorneys, empirical evidence of harm to the public from lay real estate service providers’ allegedly inadequate training and conflicts of interest must be presented.

VI. EMPIRICAL ANALYSIS OF HARM TO CONSUMERS IN RESIDENTIAL REAL ESTATE TRANSACTIONS

The preceding sections of this Article illustrate several reasons why data is needed to establish whether consumers actually do suffer more harm when lay real estate settlement service providers handle their residential transactions without attorneys. Certainly, one reason is that home buyers and sellers need to be able to make their decisions based on facts, not assumptions. Two, the present state of confusion is unfair

to real estate settlement service providers. The current varieties of factors considered, judicial attitudes reflected, and uncertainty about how statutes will apply make it impossible for authorized businesses to know what services they will be permitted to provide and what will violate the law.\textsuperscript{194} Three, lawmakers must not continue to adopt or enforce laws intending to effectuate policies of either consumer protection or consumer free choice without knowing whether consumers, in fact, face more risk when non-lawyers handle their real estate transactions without attorneys.\textsuperscript{195} Empirical evidence as to harm is needed so that lawmakers can make the decisions that best advance the public interest.

Courts and other commentators similarly have called for empirical evidence of actual harm before non-lawyers' occupations should be restricted. The United States Supreme Court refused to accept abstract claims of harm as justification for broad prohibitions against lay assistance with the provision of group legal services.\textsuperscript{196} The Supreme Court, instead, asked for concrete evidence of "abuse, of harm to clients, [or] actual disadvantage to the public."\textsuperscript{197} Additionally, the Colorado Supreme Court declined to bar realtors from giving advice and completing forms in real estate transactions where the record failed to show any "instance in which the public or any member thereof, layman or lawyer has suffered injury."\textsuperscript{198} Analogously, the New Mexico Supreme Court declined to enforce unauthorized practice laws where the court had found "no convincing evidence that the massive changeover in the performance of this [real estate form completion] service from attorneys to the title companies . . . has been accompanied by any great loss, detriment or inconvenience to the public."\textsuperscript{199} Most recently, when reviewing an unauthorized practice ruling of the New Jersey State Bar Association, the New Jersey Supreme Court assigned to a Special Master the task of gathering evidence on the costs of employing attorneys in residential real estate transactions and risks of not doing so.\textsuperscript{200}

\textsuperscript{194} "Although some of the cases reaching opposite results may be truly contrary, and others reconcilable, any comprehensive description undertaking such a catalogue would be open to argument at best . . . . Determination of what constitutes the unauthorized practice of law on a case-by-case basis creates severe notice problems for" real estate settlement service providers. Payne, supr
\textsuperscript{195} See Weckstein, supra note 13, at 649-52.
\textsuperscript{197} Id. at 225.
\textsuperscript{198} Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 312 P.2d 998, 1007 (Colo. 1957).
\textsuperscript{200} See In re Opinion No. 26 of the Comm. on the Unauthorized Practice of Law, 654
After reviewing the Special Master’s Report, the New Jersey Supreme Court held that no evidence of significant harm existed to warrant depriving consumers of their choice.201

Furthermore, the Virginia Legislature in 1996 asked proponents of opposite bills for evidence quantifying the incidence of error when non-lawyers close residential real estate transactions as compared to when lawyers close.202 The legislature was faced both with a proposal to declare that the closing of real estate transactions is not the unauthorized practice of law and an antithetical proposal to prohibit non-lawyers from closing real estate transactions without a lawyer’s supervision.203 In its attempt to satisfy the legislature’s request for evidence, the Virginia State Bar Association offered anecdotal evidence, by way of testimony from several individuals who had sustained loss in residential transactions in which they had not retained an attorney.204 Nevertheless, the Virginia Legislature ultimately passed a bill providing that “the closing of real estate transactions is not the unauthorized practice of law.”205 The Chair of the Virginia State Bar Association Ethics Committee concluded that “the Legislature had called upon the Virginia Bar to show evidence of harm sufficient to require legislation to protect the public, and the Bar did not meet its burden of proof.”206

As shown supra, the United States Department of Justice and the Federal Trade Commission also have declared that hypothetical examples and anecdotal evidence alone are an insufficient basis for restricting competition.207 Earlier articles have called for facts showing that

A.2d 1344, 1348 (N.J. 1995).
201. See id. at 1362.
202. See Telephone Interview with James McCauley, supra note 6.
203. See discussion of this recent dispute supra Part II.
204. See Telephone Interview with James McCauley, supra note 6. Testimony from even a dozen individuals who were harmed likely would not have been persuasive, in light of figures showing that approximately 494,800 residential real estate transactions had closed in Virginia in the five-year period between January 1, 1992 and December 31, 1996. See Existing Home Sales, REAL ESTATE OUTLOOK, Dec. 1994, at 14-15; Existing Home Sales, REAL ESTATE OUTLOOK, Sept. 1996, at 16-17.
205. Senate Bill No. 1173 of the 1997 session of the Virginia General Assembly, relating to attorneys at law; real estate settlements; practice of law.
Be it enacted by the General Assembly of Virginia:
1. That the Code of Virginia is amended by adding a section numbered 54.1-3915.2 as follows:
§ 54.1-3915.2. Real estate settlements not practice of law.
The closing of the sale of real estate or of loans secured by real estate shall not be deemed the practice of law.
206. Telephone Interview with James McCauley, supra note 6.
207. See Letter from Anne K. Bingaman and William J. Baer to Thomas A. Edmonds, supra
the public actually is harmed if unauthorized practice laws are to appear to protect the public, and not just attorneys' pocketbooks.\footnote{14} Thus, to determine whether unauthorized practice laws are appropriately applied, the threshold question should be whether members of the public suffer actual harm from lay provision of real estate settlement services. That goal was the impetus for this Article.

A. Use of Empirical Data in Socio-Legal Research

“There are three kinds of lies: lies, damned lies, and statistics.”\footnote{209}

The sage who made the preceding criticism suggested only one of the difficulties of using data to prove a hypothesis, i.e., that it may be offered to suggest a conclusion that is very different than the conclu-

\footnote{208. \textit{See} Rhode, \textit{Policing the Professional Monopoly}, supra note 9, at 99 ("Absent evidence of significant injuries resulting from lay assistance, individuals should be entitled to determine the cost and quality of legal services that best meet their needs."); \textit{see also id.} at 88 (quoting Robert Ellickson, a professor specializing in real property law, concerning use of a major Los Angeles law firm for home sale: "There is simply no evidence that consumers have experienced a disproportionate incidence of problems in the many states, including California, where attorneys rarely participate in residential real estate sales.").

\textit{See also} Eric L. Brossman & Moses K. Rosenberg, \textit{Title Companies and the Unauthorized Practice Rules: The Exclusive Domain Reexamined}, 83 DICK. L. REV. 437 (1979) (weighing benefits to the public against harm of unauthorized practice); K. Paul Davis, \textit{Attorney and Client—Acts of Real Estate Broker Constituting Unauthorized Practice of Law}, 69 W. VA. L. REV. 59 (1966) (citing to the state supreme court decision in which public protection is a primary concern); Goudy, supra note 13 (public interest demands broker access to the “cookie jar” of legal practice); Jayanne A. Hino, \textit{Unauthorized Practice of Law—Limited Practice of Law for Real Estate Closing Officers?}, 57 WASH. L REV. 781 (1982) (calling for the legislature to overturn state court invalidation of the layperson practice statute); Justice, supra note 13 (supporting state plan to set standards for non-lawyer practice); Michelman, supra note 13 (advocating careful judicial control of unauthorized practice); Payne, supra note 13 ("Only the most tentative answer can be given to the question whether the existing system has produced results sufficiently serious to cause concern ... Admittedly, there is no widespread public dissatisfaction with the existing system. Nor does past experience indicate that articles in mass media “exposing” the system result in great public demand for reform."); Peter J. Shedd, \textit{Real Estate Agents and the Unauthorized Practice of Law}, 10 REAL EST. L.J. 135 (1981) (arguing for reduced role of laypersons in document preparation); Maxwell P. Barret, Jr., Comment, \textit{Unauthorized Practice of Law—The Full Service Bank That Was: Bank Cashier Enjoined from Preparing Real Estate Mortgages to Secure Bank Loans}, 61 KY. L.J. 300 (1972) (discussing “substantial interest” doctrine); Andrew S. Craig, Comment, \textit{Document Preparation by the Real Estate Broker: How Far Is Far Enough?}, 14 WILLAMETTE L. REV. 475 (1978) (noting the “balancing process”).

209. This quotation has been attributed to Mark Twain, who, in turn, attributed it to Disraeli. It also has been attributed to Henry Labouch, Abraham Hewitt, and others. \textit{See} RALPH KEYES, \textit{“Nice Guys Finish Seventh”} 49-50 (1992).}
sion the facts actually should suggest. Several other difficulties are involved in obtaining data needed for socio-legal research.

Attorneys, whether in practice or in academia, have not traditionally sought empirical evidence regarding whether our laws actually accomplish the socio-legal objectives they are intended to advance. Unlike researchers in the social sciences and pure sciences, lawyers often support existing laws or statutory and judicial change without seeking factual evidence of a correlation between said laws and the socio-legal policies they hope to advance.210

Empirical research in the law has been minimal, indeed, in comparison with the amount of theoretical and doctrinal scholarship. Theoretical and doctrinal research certainly is important to the development of the law, but it talks about what is and what the author subjectively believes should be.211 Theoretical and doctrinal research, therefore, has been criticized as often “free standing, self-referential, self-justifying, even solipsistic” which “neither looks backward to a tradition of theory building nor forward to a tradition of theory testing.”212

It is not only the lack of an empirical tradition in legal literature or of an interest in testing the assumptions behind our laws that has caused most authors of law review articles to merely speculate regarding the results of their hypotheses rather than to test the realities with empirical research.213 Another reason for the absence of empirical

210. See, e.g., Teresa A. Sullivan, Methodological Realities: Social Science Methods and Business Reorganizations, 72 WASH. U. L.Q. 1291 (1994) [hereinafter Sullivan, Methodological Realities]; Teresa A. Sullivan et al., The Use of Empirical Data in Formulating Bankruptcy Policy, LAW & CONTEMP. PROBS., Spring 1987, at 195 (recognizing lack of empirical data in the bankruptcy field) [hereinafter Sullivan et al., Bankruptcy Policy]; Elizabeth Warren & Jay Lawrence Westbrook, Searching for Reorganization Realities, 72 WASH. U. L.Q. 1257, 1259-63 (1994) (inviting “those colleagues who do not labor in the field of fact to examine their thinking and to consider how their thoughts might be different if they were framed with more reference to hard data”).

211. Other articles on the topic herein certainly have taken that approach. See supra note 208.

212. Peter H. Schuck, Why Don't Law Professors Do More Empirical Research?, 39 J. LEGAL ED. 323, 327-38 (1989); see also Warren & Westbrook, supra note 210, at 1288:

We hope that discussion of the thought process that forces the researcher to frame empirical questions would make more obvious the importance of empirical questions to both academic and policy debates. Even if we cannot entice everyone else to conduct the studies, we would be enormously pleased to see the dialogue modified to highlight underlying empirical assumptions and to make theoretical work a bit less than respectable if it lacks testable hypotheses. Even better would be a general agreement that sweeping new policy pronouncements are premature until something more is known about the underlying realities.

213. See generally Warren & Westbrook, supra note 210, at 1260 (criticizing colleagues that have proposed theories with little basis in empirical testing).
support for legal theses is the difficulty of obtaining data in most areas of the law. Empirical legal studies generally use data that is available in one of two ways. One group of recent studies uses data that is in the public records, so that the legal researcher has access and needs only time to go through those records and organize the data in a manner relevant to the researcher’s inquiries. For example, because court records are public, much empirical research has focused on adjudication, civil procedure, court management, debtors in bankruptcy,


216. See also, e.g., Stanley & Girth, supra note 214, at 41 (interview results of 400 personal bankruptcy cases from seven national regions); Sullivan et al., As We Forgive Our Debtors, supra note 214, at 129 (test study showing impact of bankruptcy proceeding on the family); LoPucki & Whitford, Bargaining, supra note 214, at 134 (studying business bankrupt-
divorce proceedings,217 and distribution of probate estates.218

A second group of recent empirical legal studies uses data that the researcher can generate—by telephoning or writing directly to subjects and asking questions, the answers to which create the original data.219 Nevertheless, even when a researcher attempts to generate data first hand, results may be different depending upon the particular persons they happened to question and the different life experiences and perspectives of those persons.220

When the data that is needed to prove or disprove a legal hypothesis is not available in one of the preceding two ways, but must be obtained from third parties, several additional limitations must be overcome. One difficulty, experienced in this study, lies in retrieving data that exists, but is owned by a third party. Third parties will have

cy); LoPucki & Whitford, Corporate Governance, supra note 214, at 682 (studying committees appointed under the Bankruptcy Code of 1978 overseeing major debt restructuring); LoPucki & Whitford, Patterns, supra note 214, at 616 (study attempted to quantify asset size of companies brought under Chapter 11); Sullivan et al., Bankruptcy Policy, supra note 210, at 230 (outlining a model to be used to obtain data when analyzing business reorganizations); Warren & Westbrook, supra note 210, at 1260 (determining frequency of settlement of large business bankruptcy proceedings).


218. See also, e.g., Fellows et al., supra note 214, at 736 (inquiring into random selection of Illinois residents as to their opinion of Illinois estate laws).


220. For example, as will be further discussed infra Part VI.B, while my study was in progress, a 1997 article was published by Professor Michael Braunstein in which he reported that he had interviewed the executive director or general counsel of states’ boards of realtors to ask whether attorneys were involved in residential real estate transactions in each state. See Braunstein, supra note 13, at 264. According to these representatives of realtors, it was common for lawyers to conduct the closing in only five states: Hawaii, Maine, Michigan, Montana, and Wisconsin. See id. at 265 n.122. Just months before his article came out, I was asking that same question. I first interviewed the Research Director of the ALTA and the presidents of state land title associations by telephone. I also had obtained data that the ALTA gathered from each state’s land title association. See ALTA, REAL ESTATE CLOSINGS, supra note 22. Then, for further confirmation, I asked the same questions in the questionnaires I sent to real estate commissions, state bar associations, and title insurance underwriters. See Questionnaires infra Appendix A. Additionally, I examined the case law and statutes in each state. See citations infra Part VI.B.

Because we asked different parties, we received different answers regarding the level of involvement of attorneys in the different states. The parties who responded to my interviews and questionnaires said that attorneys also were still involved in the closings of the majority of residential real estate transactions in North Carolina, South Carolina, Massachusetts, Connecticut, and Virginia.
gathered and organized data in ways that permit them to retrieve it for their own business purposes. They may not have it saved in ways so that it can be retrieved to answer rudimental socio-legal questions. Owners of data also may be limited in the data they can supply by obligations of confidentiality to others or by fears that business advantages may be lost if particular information is revealed to their competitors. Additionally, retrieving and organizing data requires both time and effort. The legal researcher faces the question, "What incentive does this third party have to put time and resources into retrieving, organizing, and sending this data to me?" Another problem when data is sought from third parties who have gathered it in the course of their businesses is interpreting their data. For example, if a blank in a form is not filled in, does that mean "zero" or "nothing to report" or "not applicable"?

The problem of third parties' data being difficult to access may be exacerbated when the empirical legal study crosses state lines. Customs and practices vary in the different states regarding both what data is gathered and how it is stored. For example, for this study, I wanted data on whether more complaints are made against attorneys because of problems in residential real estate transactions in states where attorneys are involved in the closing of those transactions compared to states where title companies, realtors, and lenders handle the transactions. The state bars in Kansas\(^1\) and North Carolina\(^2\) record complaints against attorneys according to the rule of professional responsibility that the attorney allegedly breached. Conversely, in Missouri\(^3\) and South Carolina,\(^4\) the state bars organize their records of complaints only by the attorney's last name and case number. In Colorado, the Office of Disciplinary Council also files their data according to whether the complaint involves a criminal or a civil case.\(^5\) In Minnesota, the attorney disciplinary agency additionally organizes data according to the general practice area that the complaint involves, i.e., real estate law, family

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221. See Interview by Aleatra Williams with Disciplinary Administrator of the Kansas State Bar Association (Apr. 30, 1997) (notes on file with author).

222. See Telephone Interview with Caroline Bakewell, North Carolina State Bar (May 1997) (notes on file with author).

223. See Telephone Interview with John Howe, Missouri State Bar Office of Disciplinary Council (May 2, 1997) (notes on file with author).

224. See Telephone Interview by Aleatra Williams with Barbara Henson, Administrative Assistant, South Carolina Grievance and Disciplinary Commission (Apr. 30, 1997) (notes on file with author).

225. See Telephone Interview with Mike Henry, Colorado State Bar Association (May 3, 1997).
In Arizona, the state bar association also organizes its complaints against attorneys by practice area and uses narrower categories, including a category for residential real estate transactions. Only the Arizona Bar Association's data could have been accessed via a computer database program for my original inquiry regarding the number of complaints filed against attorneys in residential real estate transactions.

Even if data actually is obtained from third parties, a second difficulty is that variables will be harder to control when the legal researcher did not generate the data. Successful empirical studies in which authors used third parties' pre-existing data generally have had to limit variables by considering only the assumptions behind (i) a federal law, (ii) the laws in one state, or (iii) state laws that come from a uniform or model code.

Of course, performing a national empirical study on a matter of state law is difficult whether the data is being generated by the researcher or obtained from third parties, because of the variables of different state laws and practices and their possible impact on results. This likely is another major reason that legal researchers traditionally have shunned empirical research. Unless they are willing to perform sub-studies or go to other lengths to control the variables of different state laws and regional practices, they may feel limited to studying the assumptions behind a federal law or a state law that comes from a uniform or model code. Certainly, that would restrict the legal issues explored via empirical research.

The preceding conclusions about the practical difficulties of using empirical research as the basis for recommending changes in the law resulted from my own attempts to obtain empirical data to answer the threshold question of this Article, i.e., whether the public sustains significant harm when they rely solely on lay real estate settlement service

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227. See Questionnaire sent by Joyce Palomar to the Arizona State Bar Ass'n and answered and returned by Lynda C. Shely, Ethics Counsel for the State Bar Ass'n of Arizona (on file with author).

228. See, e.g., SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS, supra note 214; Braunstein & Genn, supra note 13; LoPucki & Whitford, Bargaining, supra note 214; LoPucki & Whitford, Corporate Governance, supra note 214; LoPucki & Whitford, Patterns, supra note 214; Mann, supra note 219; Sullivan et al., Bankruptcy Policy, supra note 210; Warren & Westbrook, supra note 210; and other articles written by LoPucki and Whitford based on the study by STANLEY & GIRTH, supra note 214.
providers and do not employ attorneys in their residential real estate transactions. These difficulties will be illustrated in the following sections discussing the methodology employed for this study, the data ultimately obtained, and the conclusions suggested. Other legal scholars have noted similar challenges.229

Despite all the difficulties, the value obtained from being able to test the assumptions that are the underpinnings of our laws is worth the work of experimenting to find methodologies that may yield successful empirical legal research.230 "Empirical study has the potential to illuminate the workings of the legal system, to reveal its shortcomings, problems, successes, and illusions, in a way that no amount of library research or subtle thinking can match."231

B. Methodology for This Empirical Study

My goal in beginning this Article was to verify whether empirical evidence supports the reason offered in many states for application of

229. See Schuck, supra note 212, at 331-33.

Among the reasons cited for . . . neglect of empirical research among law professors are inconvenience, lack of control, tedium, uncertainty, ideology, resources, time, tenure and training. Empirical research is inconvenient because it cannot be carried out within the confines of law school libraries and offices; . . . Control over the research hypotheses may be limited by informants who are not candid, by data that is incomplete, irrelevant, or miscoded, or by computers that don't work, or by research assistants who fail to perform assigned tasks . . . . The accumulation, management and analysis of data is tedious requiring resources that are often not readily available within the legal academy; . . . the uncertainty in the conclusions to be drawn from empirical studies stands in marked contrast to traditional legal scholarship which is often designed to arrive at a predestined conclusion. . . . The legal academy is oriented ideologically toward the pursuit of desired policy outcomes which may, or may not, be consistent with results obtained through empirical research; it is expensive and a deterrent to investment, particularly where the eventual return is contingent; . . . It is also time-consuming, which often requires collaboration with other disciplines . . . . The requisite training for empirical research often goes well beyond the analytical skills that are treasured in the legal community by requiring, in addition, an understanding of methodology and recourse to paradigms outside of the law itself, which requires a grasp of other disciplines legal scholars do not have the energy or time to acquire; and, finally, it is often difficult to find appropriate issues to investigate.

Id.; see also, e.g., Julius G. Getman, Contributions of Empirical Data to Legal Research, 35 J. LEGAL ED. 489, 493 (1985).

230. See Schuck, supra note 212, at 333.

Certainly, when measured against the value to be derived by sophisticated investigation into the underpinning for our assumptions of how well the law works or contributes to the resolution of legal controversy, empirical research deserves encouragement and even greater attention across the broad spectrum of the law and legal institutions than it has in the past.

Id.

231. Getman, supra note 229, at 493.
unauthorized practice laws to lay real estate service providers, i.e., that homebuyers and sellers will be better protected from loss if attorneys supervise their real estate transactions. The following sketches illustrate the methodology my data consultant and I designed to meet this goal:
Methodology

Objective #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 use attorneys. This requires: (A) the total number of residential real estate transactions assisted by attorneys and the number assisted only by lay real estate settlement service providers, and (B) the number of claims or complaints when residential real estate transactions were assisted by attorneys and the number when transactions were assisted only by lay real estate settlement service providers.

Sources of Data for Objective #1:

Title Insurers Regulatory Agencies and Title Insurance Underwriters; Real Estate Brokers Regulatory Agencies and Real Estate Commissions; and Attorney Malpractice Insurance Carriers and State Bar Associations.

Procedure for Objective #1:

1) Obtain data from title insurance underwriters regulatory agencies and title insurance underwriters for five “attorney-closing states” and five “title company-closing states” that shows how much title insurance underwriters collected in premiums in residential real estate transactions in those states in each of the past five years and what losses they incurred in those years.

2) Obtain data from real estate brokers regulatory agencies for five attorney-closing states and five title company-closing states that shows how many residential real estate transactions occurred and how many complaints were filed against real estate agents and brokers involving such transactions in each of the past five years.

3) Obtain data from attorney malpractice insurance carriers for five attorney-closing states and five title company-closing states that shows how many attorneys they insured and how many claims were made against attorneys involving residential real estate transactions
in each of the past five years.

**Objective #2:**

To determine statistically (a) whether a cause of title and transactional problems exists in any of the ten states that is unrelated to whether a lay person or an attorney supervises residential real estate transactions and (b) whether the source of title and transactional problems in any of the ten states is unique state or local laws. This requires (A) respondents to separate the total number of claims for the five-year period into categories and (B) the principal investigator to analyze and group the categories listed into (i) problems that an attorney could not reasonably be expected to discover or avoid, (ii) problems that an attorney reasonably could be expected to discover and avoid, and (iii) problems involving state or local laws and governmental regulations.

**Sources of Data for Objective #2:**

Title Insurance Underwriters, Real Estate Commissions, Bar Associations Disciplinary Committees

**Procedure for Objective #2:**

1) Obtain data from title insurance underwriters in five attorney-closing states and five title company-closing states that separates the total number of claims filed against title insurance policies into categories describing grounds for claims.

2) Obtain data from state real estate commissions in five attorney-closing states and five title company-closing states that separates the total number of complaints filed against real estate agents and brokers into categories describing grounds for complaints.

3) Obtain data from state bar associations and attorney malpractice insurance carriers in five attorney-closing states and five title company-closing states that separates the total number of complaints filed against attorneys into categories describing grounds for complaints.
To accomplish Objective #1, I proposed to identify five states in which attorneys examine title evidence, draft instruments, and supervise closings in the majority of residential real estate transactions and five states in which other real estate settlement service providers customarily provide those services. I first determined in which states attorneys are the primary facilitators of residential real estate transactions. I began by interviewing the Research Director of the American Land Title Association ("ALTA") and the presidents of state land title associations. I also obtained written answers to this question that each state's land title association had provided to the ALTA. Then, for confirmation, I asked the same questions in the questionnaires I sent to real estate commissions, state bar associations, and title insurance underwriters. Finally, I examined the case law and statutes of each state. The data suggested that some of the states in which attorneys still are involved in the majority of residential real estate transactions include Massachusetts, Connecticut, Virginia, North Carolina, and South Carolina.

232. In particular, James R. Maher, Executive Vice President, Richard McCarthy, Research Director, and Edmond R. Brown, Legal Counsel, all of the ALTA, Suite 705, 1828 L Street NW, Washington D.C., were extremely generous with their own data as well as with their time and insights.

233. See ALTA, REAL ESTATE CLOSINGS, supra note 22.

234. See Questionnaires infra Appendix A.


236. See Massachusetts Ass'n of Bank Counsel, Inc. v. Closings, Ltd., No. 903053C, 1993 WL 818916 (Mass. Super. Ct. Sept. 2, 1993) (holding that company controlled by laypersons that used both attorneys and non-attorneys in residential real estate closings to interpret, explain, and prepare legal documents was in violation of G.L.C. 221, § 46); accord ALTA, REAL ESTATE CLOSINGS, supra note 22, at 9 (stating that non-attorneys are not permitted to prepare documents for or close residential real estate transactions); Letter from Joyce Palomar to Richard McCarthy, Research Director, ALTA (Dec. 12, 1996) (on file with author); Questionnaire responses of Board of Bar Overseers of Massachusetts Supreme Court and the Massachusetts Office of Bar Counsel (stating that attorneys draft mortgages and deeds in approximately 80-89% of residential real estate transactions, perform the title search in 50-79%, and examine the title search results and close the transaction in 90-100% of residential real estate transactions).

237. See Grievance Comm. v. Payne, 22 A.2d 623 (Conn. 1941) (town clerk barred from issuing certificates regarding the validity of title); accord ALTA, REAL ESTATE CLOSINGS, supra note 22, at 4 ("By custom attorneys handle closings. By statute, only attorneys issue title insurance policies except certain title agencies covered under a grandfather clause in statute."); Letter from Joyce Palomar to Richard McCarthy, supra note 236 and responding phone interview.

238. I did not use states such as Illinois and New Jersey in which certain regions of the state customarily utilize attorneys' services in residential real estate transactions (Chicago; North New Jersey), but other significant regions of the same state customarily do not use attorneys...
Hereafter these five states will be referred to as the "attorney-closing states." The phrase is an abbreviation for convenience; it does not mean that attorneys are not involved before the closing or that only attorneys are involved in closings.

There were more title company-closing states from which to choose. We selected five that had a volume of residential real estate transactions similar to the volume in our five attorney-closing states. This was to avoid adding another variable. Between 1992 and 1996, the attorney-closing states of Massachusetts, Connecticut, Virginia, North Carolina, and South Carolina had approximately 500,000 home sales per year. Therefore, we used the title company-closing states of Arizona, Missouri, Colorado, Kansas, and Michigan.

Virginia is a state in which, traditionally, attorneys have prepared the legal instruments and supervised the closings of residential real estate transactions. See Blodinger v. Broker's Title, Inc., 294 S.E.2d 876 (Va. 1982); VA. CODE ANN. RULES OF VA. SUPREME COURT Pt. 6, § 1, Rule 6 (Michie 1998); Unauthorized Practice of Law Comm. of the Va. State Bar, Op. 183, 2 (May 24, 1996); Unauthorized Practice of Law Comm. of the Va. State Bar, Rule 6-103; ALTA, REAL ESTATE CLOSINGS, supra note 22, at 23; Letter from Joyce Palomar to Richard McCarthy, supra note 236 and responding telephone interview; Questionnaire responses of the Virginia Office of Professional and Occupational Licenses (stating that attorneys usually draft the deeds, mortgages, and other instruments; attorneys and title companies perform the title search; attorneys examine the results of the title search; attorneys, title companies, and real estate agents all close the transactions).

239. Statutes prohibit non-attorneys from preparing legal documents, including deeds and related real estate closing documents, though many banks routinely perform residential settlement work with the supervision of house counsel and other non-attorneys perform such work with attorney oversight. There currently is a move to enforce state statutes to limit this practice. See N.C. GEN. STAT. §§ 84-2.1, 84-4 (1997); see also Gardner v. North Carolina State Bar, 341 S.E.2d 517 (N.C. 1986); accord ALTA, REAL ESTATE CLOSINGS, supra note 22, at 17; Letter from Joyce Palomar to Richard McCarthy, supra note 236 and responding telephone interview; Letter from Harold Pilskaln, Jr., Chair of ABA Title Insurance Subcomm. on Current Issues, Executive Vice President Law and Corporate Affairs, Old Republic National Title Insurance Company, to Benjamin Weinstock (Apr. 23, 1997) (stating that an attorney is involved in the examination and/or required to supervise any paralegal doing title work and also does the closing) (on file with author).

240. See State v. Buyers Serv. Co., 357 S.E.2d 15 (S.C. 1987); ALTA, REAL ESTATE CLOSINGS, supra note 22, at 20 (preparation of instruments and performance of closings by lay persons are prohibited as the unauthorized practice of law); Letter from Joyce Palomar to Richard McCarthy, supra note 236 and responding telephone interview.

241. See supra notes 236-40.

242. See the discussion supra Part VI.A regarding the variable of different state laws and customs that cannot be avoided if one wants to do an empirical study across state lines. We specifically rejected the idea of using a state like California, though clearly a title company-closing state, because it has an average of 470,000 residential real estate sales per year. See Existing Home Sales, REAL ESTATE OUTLOOK, Sept. 1996, at 16-17. Having such a large volume makes the state quite different from the others being considered and that difference could, in some way, yield results that are not representative.


244. See ARIZ. CONST. art. 26, § 1:
which together had about 550,000 home sales per year. Again, the

Any person holding a valid license as a real estate broker or a real estate salesman . . . shall have the right to draft or fill out and complete without charge, any and all instruments incident [to a sale, exchange or lease of property] including, but not limited to, preliminary purchase agreements and earnest money receipts, deeds, mortgages, leases, assignments, releases, contracts for sale of realty, and bills of sale. See also Morley v. J. Pagel Realty & Ins., 550 P.2d 1104 (Ariz. Ct. App. 1976); accord Questionnaire responses of Ethics Counsel, State Bar of Arizona (stating that title insurance companies close and perform the title search and real estate agents examine the results of the title search); ALTA, REAL ESTATE CLOSINGS, supra note 22, at 2 ("Real estate transactions and preparation of documents are completed by escrow/title companies with the assistance of brokers."); Letter from Joyce Palomar to Richard McCarthy, supra note 236 and responding telephone interview.

245. Attorneys', title companies', real estate agents', and lenders' employees all draft deeds, mortgages, and other instruments. Attorneys and title companies do title searches and both they and lenders' employees examine search results. All four close transactions. See Questionnaire responses of Missouri Real Estate Commission; see also In re First Escrow, Inc., 840 S.W.2d 839 (Mo. 1992); Hulse v. Criger, 247 S.W.2d 855 (Mo. 1952); accord ALTA, REAL ESTATE CLOSINGS, supra note 22, at 10 (stating that attorneys are not generally used; escrow companies permitted to complete simple standardized forms of documents not requiring the exercise of judgment or discretion); Letter from Joyce Palomar to Richard McCarthy, supra note 236 and responding telephone interview.

246. See COLO. REV. STAT. ANN. tit. 10, art. 11 (1998); Title Guar. Co. v. Denver Bar Ass'n, 312 P.2d 1011 (Colo. 1957); Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 312 P.2d 998 (Colo. 1957); see also Questionnaire responses of Colorado Real Estate Commission (on file with author). Title companies draft deeds, mortgages, and other instruments; perform title search and examine results; and close transactions. See Letter from Joyce Palomar to Richard McCarthy, supra note 236 and responding telephone interview; accord ALTA, REAL ESTATE CLOSINGS, supra note 22, at 4:

[R]ealty broker permitted to prepare, in regular course of business, deeds and other related instruments, at request of customers in connection with transactions being handled by them provided that service is done without separate charge. Title companies do closings and prepare documents . . . as the agent of the real estate broker.

The "document preparation" function is limited to filling in blanks on form documents based upon the parties' instructions.

247. Attorneys draft instruments in 20-49% of residential real estate transactions; title companies draft instruments in 50-79% of transactions. See Questionnaire responses of Kansas Real Estate Comm'n (on file with author). The title search is performed and the results are examined by attorneys, title insurance companies, and realtors. Both attorneys and title insurance companies conduct closings. See, e.g., Letter from Joyce Palomar to Richard McCarthy, supra note 236 and responding telephone interview; see also ALTA, REAL ESTATE CLOSINGS, supra note 22, at 8. By custom and practice, title companies are permitted to prepare documents and close residential real estate transactions. "In general, no attorney represents the buyer or the seller in the transaction. The real estate broker or title company fills in the blanks on the deeds and other necessary documents for the closing." Id.

248. See State Bar v. Kupris, 116 N.W.2d 341 (Mich. 1962); Ingham County Bar Ass'n v. Walter Neller Co., 69 N.W.2d 713 (Mich. 1955); see also ALTA, REAL ESTATE CLOSINGS, supra note 22, at 10 (Case law permits real estate brokers to draw deeds and other instruments relating to real estate transactions and custom permits title companies to assist parties in completing forms for residential real estate transactions.); accord Letter from Joyce Palomar to Richard McCarthy, supra note 236 and responding telephone interview.

249. See Existing Home Sales, supra note 242, at 16-17.
term title company-closing state is an abbreviation; real estate brokers, loan officers, and title companies may all be involved in examining title evidence, drafting instruments, and facilitating the closing of residential real estate transactions in these states.250

We then considered where to find evidence that a homebuyer or seller has experienced harm in a real estate transaction. A homebuyer or seller who has had a problem might file a lawsuit in court against the other party or against one or more of their real estate settlement service providers. However, this is not likely. Often, the loss they sustained is not worth paying attorneys’ fees and court costs to litigate, particularly for a seller who has moved away from the state where the transaction occurred. For example, in the introductory anecdote, Rob and Sara lost approximately $3,500 because of the delay in closing on the sale of their home. Attorneys’ fees and costs of pursuing litigation against the title company and broker, together with the cost of going to Arizona for depositions and trial, would have been greater than the amount they lost. Furthermore, parties, who have moved into a new home, who are starting new jobs, and who are getting settled in a new community often do not want to take the time to consult with attorneys and bring lawsuits. Angry homebuyers or sellers are much more likely to shoot off a no-cost complaint letter to a regulatory agency about a broker or an attorney, or a claim letter to a title company than they are to file suit in court.

Therefore, as our methodology sketches illustrate, we sought data from title insurer regulatory agencies about “losses incurred” by title insurance underwriters on policies issued in residential real estate transactions in each of the ten states above. “Losses incurred” refers to amounts title insurers put in reserve to pay claims received.251 We similarly queried real estate broker regulatory agencies regarding numbers of complaints involving residential real estate transactions filed against brokers and agents. In addition, we sent questionnaires to attorney disciplinary agencies asking for numbers of complaints against attorneys involving residential real estate transactions in the ten states.252 We decided to ask for data covering a five-year period, after seeing statistics demonstrating that (a) only .1% of claims are made more than four years after a title insurance policy was issued; and (b) the average age of a title insurance policy at the time a claim is made is 2.81

250. See supra notes 244-48.
251. See Telephone Interview with Richard McCarthy, Research Director of the American Land Title Association (January 1998).
252. See infra Appendix A.
years.\textsuperscript{253}

The preceding regulatory agencies ultimately were unable to distinguish in their databases between complaints filed in residential real estate transactions and those filed in commercial real estate transactions. They did provide data about claims and complaints filed in real estate transactions generally. Again hoping to isolate residential transactions, we sent questionnaires to attorney malpractice insurance carriers asking for numbers of claims filed in residential real estate transactions compared to numbers of attorneys insured.\textsuperscript{254} For the same purpose, we also sent questionnaires directly to title insurance underwriters.\textsuperscript{255} The questionnaires to title insurance underwriters asked for the number of owners policies they had issued in residential real estate transactions during 1992, 1993, 1994, 1995, and 1996 in each of the ten selected states and the number of claims received on those policies.\textsuperscript{256} Because some underwriters' databases also failed to distinguish between residential and commercial transactions, the questionnaire alternatively asked for numbers of owner's title insurance policies issued with a policy amount of less than $400,000 and numbers of claims received on those

\footnotesize
\textsuperscript{253} See Telephone Interview with Patrick Thieson, Office of Legal Counsel for Stewart Title Guaranty Company (May 1, 1997). Mr. Thieson provided statistics demonstrating that, according to Stewart Title’s experience, 36.8% of claims come in the first year of a title insurance policy’s issuance, 20.2% of claims come between policy years one and two; 12.9% of claims come between policy years two and three; 8.4% of claims are made between years three and four; and 21.6% of claims are made in policy year four. Thus, 57% of all title insurance policy claims are made within two years of the policy’s issuance and only .1% of claims are made more than four years after the policy was issued.

Additionally, most of our subjects either did not have data going back more than five years or did not have it entered into computerized databases for more than five years.

\footnotesize
\textsuperscript{254} See Questionnaires infra Appendix A.

\footnotesize
\textsuperscript{255} I originally had wanted to compare, in each of the ten states, total owners policies issued on residential property by all title insurance underwriters to the total number of claims they received on those policies. But, not all title insurance underwriters kept such data or could access it in their databases. To avoid Judge Miller’s criticism that the sampling was too small, see Report of Special Master at 33, \textit{In re Opinion No. 26 of the Comm. on the Unauthorized Practice of Law}, 654 A.2d 1344, 1361 (N.J. 1995), I had to, instead, tabulate on Table 1 and Graph 1, the ratio of direct losses incurred by each underwriter compared to the amount of direct premiums earned in each state. This data is available on the Form 9, which state insurance regulators require each year from each title insurance underwriter licensed in the state.

Nevertheless, I persisted in seeking data from the three major title insurance underwriters who were able to access it regarding the total number of owners policies issued in residential real estate transactions and the claims received on those particular policies. My goal in continuing to pursue the latter information was to learn how the percentage of homebuyers who had claims compared to the loss to earnings ratios underwriters experienced in all title insurance transactions.

\footnotesize
\textsuperscript{256} See Questionnaires infra Appendix A.
Most owners policies issued in an amount less than $400,000 will be on residential properties, though, certainly, this excluded residential properties with values over $400,000 and did include small commercial properties.258

I want to be clear that, in employing a methodology of gathering data about claims (including "losses incurred")259 and complaints made, my data consultant and I did not believe we were determining how many times title companies, attorneys, or real estate brokers actually made errors in real estate transactions. A claim might be invalid. Certainly, in many cases, one party makes an error and the aggrieved purchaser claims against everyone involved in the transaction—attorney, real estate broker, title company, lender, and vendor alike. On the other hand, the number of cases finally decided against title companies, attorneys, or real estate brokers would not have revealed the number of errors actually made. Many people will suffer a loss and express their dissatisfaction via a complaint or claim letter, but then decide to settle or not to spend money pursuing a case. Therefore, although the fact of a claim or complaint does not mean the party complained of actually erred, it does suggest that the complainants perceived a problem in their transaction. Thus, our goal in seeking numbers of claims and complaints was to determine percentages of perceived problems per number of transactions in states where attorneys are involved in real estate transactions compared to percentages of problems experienced in states where lay persons handle real estate transactions without attorneys' assistance.

To accomplish Objective #2, we included in our questionnaires to title insurance underwriters, broker regulatory agencies, attorney disciplinary agencies, and attorney malpractice insurance carriers separate questions about the specific grounds for each claim or complaint made.260 This methodology was employed to (a) identify the impact on

257. See id.
258. The "policy amount" in an owner's title insurance policy is based on the value of the property being insured. It most often will be the amount the insured purchaser is paying for the property. See PALOMAR, supra note 89, § 4.02.
259. In the Form 9 that title insurance underwriters must submit to the state regulatory agency of each state in which they are licensed to sell policies, there is one column for "Losses Incurred" and another for "Losses Paid." If the underwriter puts an amount in its 1995 Form 9 in the column "Losses Paid," it is indicating that 1995 is the year in which that amount was paid out, even if the claim initially was made in a preceding year. If the underwriter puts an amount in its 1995 Form 9 in the column "Losses Incurred," it is reporting that, because of claims received in 1995, it set aside that amount of reserves to pay what may eventually be a loss.
260. See Questionnaires infra Appendix A.
the results obtained pursuant to Objective #1 of the variables of different state and local laws and recording practices; and (b) reveal whether the claims and complaints reported pursuant to Objective #1 resulted from causes that an attorney could or could not help to avoid.

The results of all the preceding questionnaires and queries are examined infra Part VI.C.

C. Conclusions Drawn from the Data Obtained and Limitations Thereof

1. Claims Against Title Companies and Title Insurers

Graph 1, entitled "Direct Losses Incurred by Title Insurers as a Percent of Direct Premiums Earned," and the corresponding Table 1 indicate that title insurance underwriters' losses incurred as compared to their premiums earned for the five-year period averaged 2.8% higher in the attorney-closing states than in the title company-closing states.
TABLE 1

Direct Losses Incurred by TITLE INSURERS as a Percent of Direct Premiums Earned. Data from Title Insurance Regulatory Agencies (1992 to 1996) in Attorney-Closing States and Title Company-Closing States.

<table>
<thead>
<tr>
<th>State</th>
<th>AT vs. TC</th>
<th>Market Share Studied</th>
<th>Direct Premiums Earned</th>
<th>Direct Losses Incurred</th>
<th>DLI As a Percent of DPE per State Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Connecticut</td>
<td>AT 93%</td>
<td>277,484,734</td>
<td>20,485,373</td>
<td>7.4%</td>
<td></td>
</tr>
<tr>
<td>Massachusetts</td>
<td>AT 97%</td>
<td>308,471,028</td>
<td>21,152,680</td>
<td>6.9%</td>
<td></td>
</tr>
<tr>
<td>North Carolina</td>
<td>AT 93%</td>
<td>158,951,052</td>
<td>17,313,101</td>
<td>10.9%</td>
<td></td>
</tr>
<tr>
<td>South Carolina</td>
<td>AT 90%</td>
<td>119,381,078</td>
<td>12,340,545</td>
<td>10.3%</td>
<td></td>
</tr>
<tr>
<td>Virginia</td>
<td>AT 88%</td>
<td>393,410,169</td>
<td>30,310,731</td>
<td>7.7%</td>
<td></td>
</tr>
<tr>
<td>Averages -&gt;</td>
<td>AT 92%</td>
<td></td>
<td></td>
<td></td>
<td>8.6%</td>
</tr>
<tr>
<td>Arizona</td>
<td>TC 93%</td>
<td>571,987,799</td>
<td>28,893,576</td>
<td>5.1%</td>
<td></td>
</tr>
<tr>
<td>Colorado</td>
<td>TC 90%</td>
<td>569,091,080</td>
<td>13,433,453</td>
<td>2.4%</td>
<td></td>
</tr>
<tr>
<td>Kansas</td>
<td>TC 83%</td>
<td>49,233,848</td>
<td>3,137,534</td>
<td>6.4%</td>
<td></td>
</tr>
<tr>
<td>Michigan</td>
<td>TC 94%</td>
<td>620,955,182</td>
<td>15,558,824</td>
<td>2.5%</td>
<td></td>
</tr>
<tr>
<td>Missouri</td>
<td>TC 94%</td>
<td>117,221,604</td>
<td>14,672,857</td>
<td>12.5%</td>
<td></td>
</tr>
<tr>
<td>Averages -&gt;</td>
<td>TC 91%</td>
<td></td>
<td></td>
<td></td>
<td>5.8%</td>
</tr>
</tbody>
</table>

**GRAPH 1**

AT States Average 8.6%

TC States Average 5.8%
The data shown in Graph 1 and Table 1 came from Form 9 that each title insurer must file with the state insurance regulatory agency in each state in which the insurer is licensed to sell policies. "Direct premiums earned" come from the underwriter's own sales operations in a state, and do not include premiums received from reinsuring other underwriters' risks. "Direct losses incurred" are amounts the underwriter put in reserve to pay claims received.261

Graph 1 illustrates that, in four of the five title company-closing states, the percentage of losses incurred is significantly below the percentage of losses incurred in the attorney-closing states.262 Missouri is the exception, due solely to the claims experience of one underwriter. Based on the data reported, Old Republic National Title Insurance Company's losses incurred in Missouri in 1992 were 75% of the amount of premiums the company earned that year.263 In 1993, Old Republic's losses incurred in Missouri were 94% of the premiums the company earned.264 In 1995, Old Republic's direct losses incurred in Missouri were 69% of its direct premiums earned.265 Old Republic's losses incurred in Missouri also far exceeded the company's losses incurred in any of the other nine states.266 According to an official at Old Republic, this anomaly was due to "grossly inappropriate underwriting practices out of the St. Louis area" and a resulting "unusual run of significant claims" during that time period.267

Had Old Republic's anomalous experience not been included in the Missouri average shown in Graph 1 and Table 1, the average direct losses incurred as a percent of direct premiums earned in Missouri would have been 9%.268 This would have made the title company-clos-

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261. See Telephone Interview with Richard McCarthy, supra note 251.
262. Our advisor on statistical analysis, Dr. Jorge Mendoza of the University of Oklahoma Department of Psychology, determined that it would be inappropriate to run a correlation test on the figures in Graph 1 and Table 1 because we are making a comparison of proportions, not a correlation. Additionally, because the data on direct premiums earned and direct losses incurred reported in Graph 1 and Table 1 encompasses nearly the entire population (92% average), Dr. Mendoza concluded that an inferential test was not necessary. However, we do use inferential statistics in this study whenever we rely simply on a sampling.
263. See Form 9 filed by Old Republic in Missouri in 1992 (on file with author). All other figures in this paragraph come from Forms 9 in the author's files.
264. See id.
265. See id. In the years 1994 and 1996, Old Republic National's direct losses incurred were less extreme.
266. See id.
267. Telephone Interview with Carl White, Vice President and Counsel, Old Republic Title Insurance Company (Mar. 2, 1997).
268. Data tables are available in the author's files.
ing states’ average direct losses incurred 5% of their direct premiums earned, compared to 8.6% in attorney-closing states. It may be questioned whether we should even talk about subtracting one company’s anomalous experience in one state from the title company-closing states’ averages without doing the same in attorney-closing states. However, no single company had such an extreme set of numbers in one of the attorney-closing states, just as none did in any of the other title company-closing states.

Could one hypothesize that if Missouri required that attorneys draft the instruments and supervise the closings in real estate transactions, a company like Old Republic might not have had such high risks? Probably not, since one argument that proponents of unauthorized practice laws in residential real estate transactions make is that an attorney will protect the homebuyer by persuading the insurer to accept even more risks than the insurer would assume voluntarily.\(^{269}\)

Nevertheless, even analyzing Graph 1 as printed, including Old Republic’s “unusual run of significant claims” in Missouri, Graph 1 illustrates that, on average, title insurers reported a slightly higher proportion of losses incurred to premiums earned in states in which attorneys are involved in residential real estate transactions than in states where lay real estate settlement providers handle the majority of such transactions without attorneys.\(^{270}\)

As described supra Part VI.B, in order to include the loss experience of all title insurance underwriters, in Graph 1 and Table 1 we had to use data from title insurer regulatory agencies that did not distinguish between residential and commercial real estate transactions. To confirm whether the loss experience is the same if we look only at residential transactions, we asked title insurance underwriters themselves for data. Table 2 tabulates the results of questionnaires that we sent to those title insurers who, together, held at least an 80% market share in each of our ten states.\(^{271}\) Graph 2 illustrates that the title insurers re-

\(^{269}\) See Suggested Findings of Fact on Behalf of the New Jersey State Bar Ass’n and the Comm. on the Unauthorized Practice of Law at 22, In re Opinion No. 26 of the Comm. on the Unauthorized Practice of Law, 654 A.2d 1344 (N.J. 1995) (No. 35,062); Report of Special Master at 13-14, In re Opinion No. 26 of the Comm. on the Unauthorized Practice of Law, 654 A.2d 1344 (N.J. 1995) (No. A-85/86); see also discussion supra Part III.B.

\(^{270}\) Graph 1 and Table 1 represent title insurance underwriters’ experience in all real estate transactions in which policies were issued in the ten states during the five-year period, not just residential transactions.

\(^{271}\) See supra Part IV.B. We asked for the number of policies they had issued to homeowners in each of the years 1992–1996 and the number of claims they had received on those policies.
had received claims on 19% of the homeowners’ title insurance policies they had issued in the years 1992 to 1996 in our attorney-closing states and on 16% of the homeowners’ policies they had issued in our title company-closing states.

This 3% difference between claims on homeowners’ policies issued in attorney-closing states and title company-closing states parallels the small difference Graph 1 showed between the proportion of losses incurred to premiums earned in the two groups of states. Since our studies for Graphs 1 and 2 were different measures of the same thing, the fact that each shows similarly small differences between the two groups of states tends to support and validate the other’s results (the

272. The title insurance underwriters who responded in full to this questionnaire were three of the largest national title insurance underwriters, Chicago Title Insurance Company, Stewart Title Guaranty Company, and Lawyers Title Insurance Corporation. Beth Schreiber-Murray of Chicago Title, Denise Weidner of Stewart Title, and Patricia Shelton of Lawyers Title all were extremely professional and helpful. I cannot thank them individually or their employers enough for their support and assistance.

Some of the other major national title insurance underwriters did not participate because their records were not organized as to owners or lenders, residential or commercial, policy amount, or year issued. Others simply were not interested in devoting time or personnel to the project.

We sent questionnaires to some smaller, regional title insurance underwriters because, in their own states, they held a significant market share. Connecticut Attorneys Title Insurance Corporation, again, very helpfully sent the data requested. When we were unable to obtain data from all the underwriters who, together, held an 80% market share in each of our ten states, we decided it was only appropriate to use the data of national companies that issued a significant number of policies in all ten of our states.

273. These figures were the claims received by the date the companies sent their data, approximately October 31, 1997.

274. See supra Part IV.B. Companies whose records did not distinguish between owners policies issued in residential transactions and owners policies issued in commercial transactions were asked to report the number of policies they had issued with “policy amounts” of less than $400,000. The “policy amount” in an owner’s title insurance policy’s Schedule A is based on the value of the property being insured. It most often will be the amount the insured is paying for the property. See PALOMAR, supra note 89, § 4.02.

We infer that the great majority of those with policy amounts of less than $400,000 would have been issued on residential properties. We, therefore, included them in the number of policies issued on residential properties tabulated in Table 2 and Graph 2. We recognize that this excluded policies on homes valued at more than $400,000 and included owners policies on small commercial properties.

275. Because our data for Table 2 and Graph 2 was based on a sampling from three national title insurance underwriters, rather than the entire population, our advisor on statistical analysis used a SAS program to run a Chi-square test for inferential statistical significance. Dr. Mendoza concluded that the differences shown are statistically significant because of the large sample size (886,258 “residential” owners policies). However, the results are not experimentally significant in that the proportions of claims to “residential” owners policies issued in the two groups of states are so close that they do not prove there are more claims in one group of states than the other.

276. See Interview with Dr. Jorge Mendoza, Professor, University of Oklahoma Psychology
different measures being a comparison in Graph 1 of the proportion of
title insurers' losses to their premiums earned and in Graph 2 of the
proportion of their claims to the policies they issued; the same thing
being homeowners' risk of title problems in attorney-closing states com-
pared to in title company-closing states).

Department (Sept. 18, 1998) (notes on file with author).
### TABLE 2

Percent of claims against owners policies issued in residential transactions in Attorney-Closing States compared to Title Company-Closing States (1992-1996 Policies)

<table>
<thead>
<tr>
<th>AT STATES SUMMARY</th>
<th>AT</th>
<th>1</th>
<th>2</th>
<th>2Alt</th>
<th>2Combined</th>
</tr>
</thead>
<tbody>
<tr>
<td>Totals for Connecticut</td>
<td>CT</td>
<td>92-96</td>
<td>21,154</td>
<td>79</td>
<td>10</td>
</tr>
<tr>
<td>Totals for Massachusetts</td>
<td>MA</td>
<td>92-96</td>
<td>76,304</td>
<td>136</td>
<td>78</td>
</tr>
<tr>
<td>Totals for North Carolina</td>
<td>NC</td>
<td>92-96</td>
<td>109,802</td>
<td>151</td>
<td>32</td>
</tr>
<tr>
<td>Totals for South Carolina</td>
<td>NC</td>
<td>92-96</td>
<td>44,584</td>
<td>51</td>
<td>16</td>
</tr>
<tr>
<td>Totals for Virginia</td>
<td>VA</td>
<td>92-96</td>
<td>177,089</td>
<td>177</td>
<td>82</td>
</tr>
<tr>
<td>Totals for all AT States all Years</td>
<td>AT</td>
<td>92-96</td>
<td>428,933</td>
<td>594</td>
<td>218</td>
</tr>
<tr>
<td>Percentages</td>
<td>AT ALL</td>
<td>92-96</td>
<td>428,933</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>TC STATES SUMMARY</th>
<th>TC</th>
<th>1</th>
<th>2</th>
<th>2Alt</th>
<th>2Combined</th>
</tr>
</thead>
<tbody>
<tr>
<td>Totals for Arizona</td>
<td>AZ</td>
<td>92-96</td>
<td>58,531</td>
<td>84</td>
<td>48</td>
</tr>
<tr>
<td>Totals for Colorado</td>
<td>CO</td>
<td>92-96</td>
<td>97,508</td>
<td>71</td>
<td>85</td>
</tr>
<tr>
<td>Totals for Kansas</td>
<td>KS</td>
<td>92-96</td>
<td>43,647</td>
<td>114</td>
<td>10</td>
</tr>
<tr>
<td>Totals for Michigan</td>
<td>MI</td>
<td>92-96</td>
<td>185,264</td>
<td>219</td>
<td>42</td>
</tr>
<tr>
<td>Totals for Missouri</td>
<td>MO</td>
<td>92-96</td>
<td>72,375</td>
<td>18</td>
<td>40</td>
</tr>
<tr>
<td>Totals for all AT States all Years</td>
<td>TC</td>
<td>92-96</td>
<td>457,325</td>
<td>506</td>
<td>225</td>
</tr>
<tr>
<td>Percentages</td>
<td>AT ALL</td>
<td>92-96</td>
<td>457,325</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Percent of claims against owners policies issued in residential transactions in Attorney-Closing States compared to Title Company-Closing States (1992-1996 Policies)
What conclusions may be drawn from the results in Graphs 1 and 2? Does this data suggest that attorneys make more errors in drawing instruments and closing real estate transactions than lay real estate settlement providers, resulting subsequently in more claims on title insurance policies? Or, does it support a diametrically opposite conclusion, i.e., that attorneys represent their clients better, persuading title insurers to assume more of the risks, resulting subsequently in more claims on title insurance policies and fewer for the consumer? We will see that data shown in Table 3 supports the latter conclusion. While hypotheses may be asserted, it is impossible to be certain as to the reason for the higher number of problems shown in attorney-closing states in both Graphs 1 and 2. We can certainly conclude, however, that a 2.8% to 3% difference in title problems when attorneys assist with homeowners’ real estate transactions compared to when lay persons assist is an insufficient difference to warrant forcing all homeowners to retain attorneys and depriving them of a choice.

Table 3 and Graph 3 were designed for two purposes. First, because this study compares problems in ten states, we were concerned about whether the variable of different state laws might cause some states’ claims to be higher or lower, regardless of whether an attorney or a lay person supervises real estate transactions. To determine whether differences in state laws or regulations affect the number of claims in any of the ten states, Table 3 categorizes the claims that the responding title insurance underwriters reported.
### TABLE 3

| Sources of Title Claims Data from AT States questionnaires compared to TC States questionnaires (1992-1996) |
|---|---|---|---|---|---|---|---|---|
| AT STATES SUMMARY | AT | Categories | 2Combined | 3a* | 3b | 3c | 3d | 3e | 3f | 3g | 3h | 3i |
| Totals for Connecticut | AT | CT | 92-96 | 89 | 23 | 22 | 3 | 8 | 7 | 11 | 2 | 1 | 4 |
| Totals for Massachusetts | AT | MA | 92-96 | 214 | 9 | 29 | 0 | 48 | 40 | 11 | 3 | 29 | 24 |
| Totals for North Carolina | AT | NC | 92-96 | 183 | 10 | 74 | 1 | 38 | 10 | 15 | 5 | 15 | 14 |
| Totals for South Carolina | AT | NC | 92-96 | 67 | 7 | 19 | 1 | 19 | 1 | 4 | 3 | 5 | 7 |
| Totals for Virginia | AT | VA | 92-96 | 259 | 28 | 112 | 1 | 38 | 14 | 10 | 3 | 26 | 15 |
| Totals for all AT States all Years | AT | ALL | 92-96 | 812 | 77 | 256 | 6 | 151 | 72 | 51 | 16 | 76 | 64 |
| Percent of 2Combined | AT | ALL | 92-96 | 812 | 9% | 32% | 10% | 9% | 6% | 2% | 9% | 7% |
| TC STATES SUMMARY | TC | Categories | 2Combined | 3a* | 3b | 3c | 3d | 3e | 3f | 3g | 3h | 3i |
| Totals for Arizona | TC | AZ | 92-96 | 132 | 16 | 42 | 4 | 21 | 13 | 6 | 11 | 9 | 4 |
| Totals for Colorado | TC | CO | 92-96 | 156 | 12 | 20 | 11 | 49 | 30 | 10 | 4 | 9 | 10 |
| Totals for Kansas | TC | KS | 92-96 | 124 | 2 | 40 | 1 | 21 | 4 | 12 | 4 | 27 | 13 |
| Totals for Michigan | TC | MI | 92-96 | 261 | 40 | 68 | 5 | 74 | 24 | 14 | 9 | 8 | 17 |
| Totals for Missouri | TC | MO | 92-96 | 58 | 5 | 17 | 9 | 16 | 18 | 9 | 1 | 12 | 7 |
| Totals for all TC States all Years | TC | ALL | 92-96 | 731 | 75 | 187 | 30 | 181 | 94 | 51 | 29 | 65 | 51 |
| Percent of 2Combined | TC | ALL | 92-96 | 731 | 10% | 26% | 15% | 19% | 9% | 65% | 27% | 9% | 7% |

**Categories legend:**

3a. Non-record matters, i.e., defects that were not discoverable in the "public record" as defined in ALTA title insurance policies, including, but not limited to, fraud, forgeries, deeds executed by minors, mechanics and material liens recorded after the policy date, loss of title because of creditors' claims in the seller's bankruptcy. (If you use ALTA Claims Codes Guidelines, this would be matters in Risk Category A.)

3b. Special risks that the company assumed by waiving an exception or issuing an endorsement. (ALTA Claims Codes Guidelines Risk Category B)

3c. Title plant risks from errors in obtaining information from the public land records or in entering the information into a title plant. (ALTA Claims Codes Guidelines Risk Category C.1) (C1&2 in one version)

3d. Searching/abstracting risks caused by the searchers' failure to find recorded instruments relevant to the title. (ALTA Claims Codes Risk Category C2) (C3&4 in one version)

3e. Examination and opinion errors due to errors in judgment in reviewing legal instruments or other relevant documents or the failure to correctly apply some legal principle. (ALTA Claims Codes Guidelines Risk Category D)

3f. An incorrect survey or an encroachment, overlap or boundary line dispute. (ALTA Claims Code Guidelines Risk Category E.1)

3g. An incorrect land description. (ALTA Claims Code Risk Category E.2)

3h. Closing and escrow procedures, including incomplete or unclear closing or escrow instructions or violations of instructions. (ALTA Claims Code Risk Category F)

3i. Taxes and special assessments that were of record but were missed, improperly calculated, or improperly paid. (ALTA Claims Code Risk Category H)
Sources of Title Claims
Data from AT States questionnaires compared to TC States questionnaires (1992-1996)

AT States categories identified with stripes
TC States categories identified with solid color
*See Categories Legend beneath TABLE 3

AT States categories identified with striped bar
TC States categories identified with solid bar
*See Categories Legend beneath TABLE 3
The variable presented by states having different laws and regulations cannot be completely isolated or controlled. However, Table 3 does reveal whether title problems of a nature to be impacted by different state laws are exceptionally high or low in any particular state.\textsuperscript{277} We must look to our colleagues in states where the frequency of a particular category of title problem is outside the norm to help us understand whether unique state laws or regulations could be the cause.

Question 3j\textsuperscript{278} asked directly for the number of claims resulting from state or local laws or regulations that restricted use or occupancy of the property or the character, dimension, or location of improvements. Title insurers were unable to respond to this question. Their claims databases had no such category.\textsuperscript{279} Claims Category 3a was for title defects that were not discoverable from a search of the public land records. This includes claims resulting from mechanics and material liens and fraudulent conveyance laws. Different state laws could have an impact on how frequently these claims arise. Table 3 shows that, in Connecticut, 26\% of claims were attributable to a Category 3a title problem, while the average of the other nine states' Category 3a claims was 8\%. Perhaps a Connecticut colleague could advise as to whether unique mechanics lien or other laws give priority to non-record title claims and are responsible for this difference. Nevertheless, the overall difference between 3a claims in attorney-closing and title company-closing states is only an unimportant 1\%.

\textsuperscript{277} Table 3 and Graph 3 are based on the same sampling of title insurance underwriters as Table 2 and Graph 2. When comparing the two response patterns across attorney-closing states and title company-closing states, Dr. Mendoza found the Chi-square significant at the .001 level. Further analysis indicated that the difference is mainly due to response 3b. Comparing the two categories of states across the 3b response, the Chi-square test showed significant results. Looking at the other responses (a, c, d, e, f, g, h, i), there is little difference between the groups of states; thus, the overall statistical difference is due mostly to response 3b.

\textsuperscript{278} See Questionnaires infra Appendix A. Graph 3 and Table 3 do not show results for questions 3j, 3k, 3l, or 3m of the questionnaire because none of the responding title insurance underwriters' databases used such categories. They were able to answer questions 3a to 3i because we designed those questions to follow American Land Title Association Claims Codes, which these three underwriters had built into their databases. Questions 3j and 3k are described infra. Question 3l asked for claims resulting from errors in the drafting of the deed, mortgage, or other instruments of conveyance. Question 3m was for claims resulting from failure to disclose or explain to the buyer or seller entries in the public records that were relevant to the marketability, usability, or market value of the real property.

\textsuperscript{279} This is not surprising, since a pre-printed exclusion excludes losses resulting from enforcement of states' laws from standard title insurance policies' coverage. See PALOMAR, supra note 89, § 6.01 (considering standard ALTA title insurance policy exclusions).

Underwriters similarly were unable to respond to question 3k regarding claims resulting from federal laws or regulations that restricted use or occupancy of the property or the character or location of improvements.
Claims Category 3d includes claims resulting from the title searcher’s failure to find recorded instruments relevant to title. Six percent more claims resulted from this problem in title company-closing states than in attorney-closing states.

Some of this 6% difference was due to an abnormally high number of Category 3d claims in one title company-closing state, Colorado. Thirty-one percent of the responding underwriters’ claims in Colorado fit into Category 3d. Are Colorado title companies missing that many recorded title defects? Or do Colorado recording laws or practices make it more difficult for title companies to obtain copies of the public records in a timely manner?

Colorado’s Category 3c claims, i.e., claims due to errors in obtaining information from the public land records, accounted for another 7% of the claims made by Colorado homeowners. Yet, even if Colorado’s loss rate in Category 3c is high for reasons other than those we are studying (i.e., use of laypersons to handle residential real estate transactions rather than attorneys), it has little impact on our ultimate conclusions. This is because the difference between title company-closing states and attorney-closing states’ Category 3c claims overall is only 3%.

No states had unusual percentages of claims in Claims Category 3e, 3f, 3g, or 3i. Claims Categories 3b and 3h are considered below.

Our second purpose in compiling the data in Table 3 and Graph 3 was to determine whether the causes of homeowners’ claims were title problems that an attorney in the transaction could have avoided.\footnote{Our questionnaire also had asked for numbers of claims due to errors in the drafting of the deed, mortgage, or other instruments of conveyance (question 3l) and for claims due to failure to disclose or explain to the buyer or seller entries in the public records that were relevant to the marketability, usability, or market value of the real property (question 3m). See Questionnaires infra Appendix A. These questions were intended specifically to elicit additional data about causes of homeowners’ title problems that an attorney in the transaction could have avoided. However, we received no responses to those questions because none of the title insurance underwriters’ databases included such categories. Title insurance underwriters were able to answer questions 3a to 3l because we designed those questions to follow American Land Title Association Claims Codes, which these three underwriters had built into their databases.} Graph 3 shows that most of the reported claims against homeowners title insurance policies resulted from title risks that were specific to the individual property being insured and that the insurer had expressly agreed to cover either by waiving a pre-printed policy exception or issuing an endorsement (Claims Category 3b).\footnote{See infra Table 3 and Graph 3 Category 3b.} Six percent more claims for such special risks occurred in attorney-closing states than in title company-closing states. The most likely explanation is that attor-
ney was more competent at spotting these special risks and more successful at negotiating for the title insurer to take the risk rather than the homeowner. This latter conclusion supports one assumption of proponents of unauthorized practice laws, i.e., that, if attorneys represent homebuyers, they will persuade title insurers to cover more title risks. What may surprise proponents of unauthorized practice laws, though, is that there were only 6% fewer such claims in title company-closing states. Proponents assume that, if an attorney does not represent the homebuyer, no one will negotiate with the title company to waive or endorse over special exceptions or standard exclusions. They believe title companies’ self-interest conflicts with homebuyers’ interests and title companies will not accept special risks voluntarily. The fact that 26% of the claims against homeowners’ policies in title company-closing states were for special risks that the company had specifically accepted by waiving standard exceptions or issuing endorsements defeats these assumptions.

Non-record matters (Claims Category 3a) accounted for 9% of the reported claims in attorney-closing states and a similar 10% of the reported claims in title company-closing states. Such title defects include, but are not limited to, fraud, forgeries, deeds executed by minors, mechanics and material liens recorded after the policy date, and loss of title because of creditors’ claims in the seller’s bankruptcy. Neither attorneys nor title company examiners can discover such matters even with a careful examination of the county land records. Thus, having an attorney involved in the purchase transaction would not better protect homeowners from such title problems.

Table 3 shows 3% more Category 3c claims—i.e., title problems due to errors in obtaining information from the public land records or in entering public information into its title plan—in title company-closing states than in attorney-closing states. This difference is not likely to be a consequence of having or not having attorneys in the transaction, because attorneys rarely perform stand-up title searches in the county courthouse, even in the states where they otherwise are involved in residential transactions. Today, attorneys also generally examine title reports they obtain from the local title company. Regardless, the 3% difference, again, is not enough to warrant depriving the public of the

282. See supra Part III.B.
283. See id.
284. See id.
285. See infra Table 3 and Graph 3 Category 3a.
286. See infra Table 3 and Graph 3 Category 3c.
choice to use attorneys or lay real estate settlement companies.

As discussed supra, there were 6% fewer Category 3d claims—i.e., claims caused by a title searcher’s searching and abstracting errors—in attorney-closing states than in title company-closing states. The number of Category 3d claims could be affected by the presence or absence of attorneys in the transaction. An attorney examining a title company employee’s search results might notice a title problem that the employee omitted and have it cured before the title insurance policy is issued. The fact that 6% fewer such claims occur in attorney-closing states shows that attorneys are better than title company employees at recognizing the impact of recorded instruments on a title. The question, however, is whether the risk of 6% more claims for matters that could have been discovered in the title search is enough to mandate that every homeowner must employ an attorney.

One of the most notable findings in Table 3 is that there was only a 4% greater incidence of claims for errors in judgment when reviewing legal instruments and failures to apply correctly a legal principle in title company-closing states than in attorney-closing states. This small difference defeats another assumption of proponents of unauthorized practice laws, i.e., that laypersons’ knowledge of and competence in residential real estate transactions is significantly inferior to attorneys’. If that assumption were correct, the percentage of claims in this category should be significantly higher in title company-closing states than in attorney-closing states.

The 1% difference in claims caused by incorrect surveys or encroachments, overlaps, or boundary line disputes (Category 3f) is very small, but does raise a question. Our questionnaire did not ask whether the owners policies the underwriters had issued between 1992 and 1996 were standard owners policies or short form residential owners policies. Standard owners title insurance policies generally except from coverage losses due to encroachments, boundary disputes, and other matters that an accurate survey would have revealed. Yet, proponents of unauthorized practice laws assume that vigilant attorneys will persuade title insurers to waive exceptions. Thus, one would expect that a title insurer would receive more claims for survey matters in attorney-closing states than in title company-closing states. The fact that there are only 1% more claims suggests that attorneys are not

287. See infra Table 3 and Graph 3 Category 3e.
288. See infra Table 3 and Graph 3 Category 3f.
289. See PALOMAR, supra note 89, § 7.02(2).
serving their clients well in this area. On the other hand, many homebuyers receive a short form residential owners policy which does not contain the standard survey exception. If those were the owners policies our responding title insurers issued, then encroachments, overlaps, and boundary line disputes would have been covered in all ten states. One then would not expect the number of claims for matters a survey could have revealed to be different between title company-closing and attorney-closing states. That is because neither an attorney nor a title company employee would have the skill or the duty to go onto the land being purchased to detect encroachments, overlaps, boundary line disputes, or inaccuracies in surveys.

The responding title insurers received 2% more claims due to incorrect land descriptions (Category 3g) in title company-closing states than in attorney-closing states. This could suggest that attorneys make fewer errors and notice pre-existing errors in legal descriptions more often than do lay real estate settlement service providers. But, the 2% difference, again, is very small.

Another notable result is that title insurers in the two groups of states received the same percentage of claims due to closing and escrow procedures, including incomplete or unclear closing or escrow instructions or violations of instructions (Category 3h). Proponents of mandating attorneys in residential real estate transactions have assumed that having an attorney at the closing is particularly important. They assume that no one will explain the closing documents or assist the homebuyer with issues that arise at closing if the homebuyer does not have an attorney. The results in Category 3h refute bar associations’ and courts’ assumption that homebuyers face more risks if lay real estate settlement providers close their transactions than if attorneys supervise the closing.

Claims due to taxes and special assessments that were of record but were missed, improperly calculated, or improperly paid (Category 3i) were 1% higher in attorney-closing than in title company-closing states. Again, what is notable is the lack of a larger difference.

Overall, these results refute the practicing bar’s assumption that many homeowners will suffer serious harm if lay persons handle residential real estate transactions without attorneys’ supervision. In none of the preceding categories of claims was homeowners’ risk increased in title company-closing states sufficiently to warrant laws to force

290. See Category 3g infra Graph 3 and Table 3.
291. See Category 3h infra Graph 3 and Table 3.
292. See Category 3i infra Graph 3 and Table 3.
attorneys' protection on all consumers. Admittedly, more than one conclusion could explain the differences revealed. As discussed, one explanation for higher claims against title insurers in some categories in attorney-closing states is that the attorney better protects the homebuyer by negotiating for the title insurer to assume more risks. A second explanation is that, in states where attorneys give title opinions and close residential transactions, they may not recommend that their clients also buy owners title insurance, unless risks are apparent. If owners title insurance is only purchased in transactions with high risk, then the percentage of claims to policies issued would be expected to be higher.

It is impossible to say which of the preceding conclusions is correct. But one certainly can conclude that claims proportions averaging only 3% more in title company-closing states than in attorney-closing states, and differences of only 1% to 6% in each individual category of title problem are not evidence of sufficient harm that the law should prohibit consumers from weighing for themselves whether the cost of an attorney outweighs the risks.

2. Complaints Against Real Estate Brokers and Agents

Table 4 tabulates the number of complaints filed between the beginning of 1992 and the end of 1996 against real estate agents and brokers in our five title company-closing states and our five attorney-closing states.293 Again, “title company-closing states” refers to those in which real estate agents, title companies, and lenders handle the majority of residential real estate transactions without attorneys’ assistance, while in “attorney-closing states,” attorneys usually are involved in examining the title evidence, drafting instruments, and supervising the transaction’s closing.

293. Some states recorded this data by calendar year and some states used fiscal year. We obtained monthly sales data from the National Association of Realtors so that we could make accurate five-year comparisons, whether the state used calendar year or fiscal year.

294. While the data on number of sales reflects residential sales, we were unable to obtain the number of complaints against realtors involving residential transactions only. Neither state real estate commissions’ databases nor their paper records distinguished between complaints involving residential real estate transactions and those involving commercial transactions. Hence, Graph 4 and Table 4 compare the number of complaints reported for all types of real estate transactions to the number of residential transactions. While not exactly what we hoped for, the same figures are used for all ten states, so the comparison between states is valid. Additionally, according to Tom Miller, Legal Counsel to the North Carolina Real Estate Commission, at least nine complaints are filed involving residential transactions for every one complaint filed against a realtor in a commercial transaction. Data supplied by Joe Denkler of the Missouri Real Estate Commission suggested a similar ratio. These explanations would suggest that our Graph 4 results would be very similar even if we had been able to isolate complaints filed involving residential transactions only.
### TABLE 4

Complaints against REALTORS per thousand sales over a five-year period. Data collected from Realtor Licensing Entities in Attorney-Closing States and Title Company-Closing States.

<table>
<thead>
<tr>
<th>States</th>
<th>AT vs. TC</th>
<th>Number of Complaints</th>
<th>Total Number of Sales Single Family, Apartment, Condos and Co-ops</th>
<th>Complaints Per Thousand Sales Over a 5-year period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Connecticut</td>
<td>AT</td>
<td>847</td>
<td>231,600</td>
<td>3.7</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>AT</td>
<td>2,189</td>
<td>255,100</td>
<td>8.6</td>
</tr>
<tr>
<td>North Carolina</td>
<td>AT</td>
<td>4,554</td>
<td>931,600</td>
<td>4.9</td>
</tr>
<tr>
<td>South Carolina</td>
<td>AT</td>
<td>2,259</td>
<td>658,100</td>
<td>3.4</td>
</tr>
<tr>
<td>Virginia</td>
<td>AT</td>
<td>2,550</td>
<td>487,600</td>
<td>5.2</td>
</tr>
<tr>
<td>Average -&gt;</td>
<td></td>
<td></td>
<td></td>
<td>5.2</td>
</tr>
<tr>
<td>Arizona</td>
<td>TC</td>
<td>6,758</td>
<td>552,800</td>
<td>12.2</td>
</tr>
<tr>
<td>Colorado</td>
<td>TC</td>
<td>3,988</td>
<td>383,900</td>
<td>10.4</td>
</tr>
<tr>
<td>Kansas</td>
<td>TC</td>
<td>730</td>
<td>260,900</td>
<td>2.8</td>
</tr>
<tr>
<td>Michigan</td>
<td>TC</td>
<td>2,511</td>
<td>1,718,000</td>
<td>1.5</td>
</tr>
<tr>
<td>Missouri</td>
<td>TC</td>
<td>1,651</td>
<td>521,300</td>
<td>3.2</td>
</tr>
<tr>
<td>Average -&gt;</td>
<td></td>
<td></td>
<td></td>
<td>6.0</td>
</tr>
</tbody>
</table>
Complaints against REALTORS per thousand sales over a five-year period. Data collected from Realtor Licensing Entities in Attorney-Closing States and Title Company-Closing States.
I want to clarify that, as with title claims, the data tabulated here does not represent final dispositions of complaints, only the fact that this number of complaints was filed. The filing of a complaint expresses the complainant's perception that a problem occurred. This study's objective is to determine whether homeowners suffer more problems when they do not employ attorneys in their residential real estate transactions. Admittedly, the filing of a complaint does not necessarily mean the broker or agent committed an error, any more than a complaint's being settled or dismissed necessarily means the broker or agent did not commit an error. For this latter reason, using only complaints finally decided against the real estate agent would have been under-inclusive.

Graph 4 illustrates that the average difference in complaints was less than one per thousand residential real estate transactions. These statistics suggest that, overall, no significantly greater risk of harm exists from real estate agents' errors or self-interest when homebuyers are not represented by attorneys than when they are. The data on Graph 4 also suggests that, on average, attorneys' involvement does not reduce homeowners' real estate transactional problems.

Interestingly, a unique state law does explain the reason that more than double the average complaints were filed against real estate brokers in Arizona. As discussed supra, in Arizona, a voter referendum in 1962 amended the state constitution to allow real estate brokers to prepare certain legal documents. Because the amendment had not required realtors to be educated in legal drafting or mandated a minimum standard of care, the Arizona legislature in 1963 created the Real

295. See also discussion of methodology supra Part V.1B.
296. Most of the ten states' real estate commissions did not have numbers of annual residential real estate transactions. The figures for total number of sales, single family, apartment, condos, and co-ops, came from the National Association of Realtors. An explanation of how the National Association of Realtors collects the data for its Existing Home Sales reports may be found in Ken Patton, Measuring Markets, 3 REAL ESTATE OUTLOOK 10 (Jan. 1996).

Most state real estate commissions or other brokers regulatory agencies also either had no records of numbers of complaints filed or did not want to respond. Those figures were, instead, supplied by the Association of Real Estate License Law Officials.

297. Our advisor on statistical analysis, Dr. Jorge Mendoza of the University of Oklahoma Department of Psychology, determined that it would be inappropriate to run a correlation test on the figures in Graph 4 and Table 4 because we are making a comparison of proportions, not a correlation. Additionally, because our data on complaints against realtors and number of residential real estate sales in Graph 4 and Table 4 encompasses the entire population, and is not just a sampling, Dr. Mendoza concluded that an inferential test was not necessary. However, we do use inferential statistics in this study whenever we rely simply on a sampling.

298. See supra note 165 and accompanying text.
299. See Talamante, supra note 13, at 891 n.182.
Estate Recovery Fund to indemnify persons injured by a real estate broker or agent's negligence. In other states, the funds created have only been for persons damaged by a real estate broker or agent's dishonesty. For example, in New Jersey, the Real Estate Guaranty Fund covers no negligent acts, only intentional conversions of money or property. Thus, persons who were injured as a result of a broker or agent's negligence or incompetence would be encouraged to file a complaint in Arizona, but might not bother in other states unless they can allege intentional dishonesty. Thus, Arizona's statistics actually should be discounted. This would result in an even smaller difference in the number of complaints per thousand residential transactions filed against realtors in title company-closing states compared to attorney-closing states. Therefore, disregarding the impact of Arizona's unique state real estate recovery law, our conclusion would be even more clear that homeowners have no significantly increased risk of harm from realtors' errors when they do not employ attorneys.

To attempt to identify the impact on results of unique state laws like the Arizona Real Estate Recovery Fund, the questionnaire we sent to real estate broker regulatory agencies also included a set of questions designed to determine whether the causes of homeowners' complaints were either unique state laws or matters that having an attorney's assistance in the transaction could not have avoided. Only one agency responded to these questions concerning the source of the homeowners' complaints. The Missouri Real Estate Commission reported no com-

300. See ARIZ. REV. STAT. ANN. §§ 32-2186 to -2193 (West 1997).
302. See Questionnaires infra Appendix A.
303. The Colorado Real Estate Commission sent copies of its own breakdown of complaints. During a five-year period from July 1991 through June 1996, approximately 1.5% of the complaints were for "inaccurate settlement sheets," which a homebuyer or seller's attorney likely could have spotted and corrected. However, all of the Colorado Real Estate Commission's other complaint categories were simply too broad to know whether an attorney's involvement in the transaction would have mattered. For example, 31% of the complaints that the Colorado Real Estate Commission received against real estate brokers were for "misrepresentation or false promises." There is no indication, however, whether the representations involved a matter that an attorney might have corrected—such as what legal interests the parties were receiving or the uses for which the property was zoned—or matters that an attorney would have had no involvement with or knowledge of—such as representations about the house's physical condition or market value. Another example is that 11% of the complaints filed alleged that the broker had performed "incompetently." Again, this could encompass complaints that a real estate agent's incompetently drafted a purchase contract or managed a closing, which an attorney's assistance could have helped to avoid. On the other hand, the category also could include complaints about numbers of times a broker showed a listed house or held open houses, which an attorney's representation could not have corrected.
plaints having been filed during the five-year period involving questionnaire Category (j), unique state or local laws that restricted use of the property or the character or location of improvements.

Missouri also reported that no claims against realtors in residential transactions had been due to (i) missed taxes or special assessments; (h) closing or escrow procedures, including writing incomplete or unclear closing or escrow instructions or failing to follow instructions; (e) the realtor's incorrectly judging the legal effect of instruments used in the transaction; or (k) federal laws. These were sources of real estate transactional problems that an attorney in the transaction likely could have avoided, but they caused no loss even though attorneys were not generally employed. Instead, the complaints against realtors in residential real estate transactions in Missouri were due to (a) the physical condition of the property; (b) access rights or easements; (d) failure to obtain a competent title search and examination; (f) an incorrect survey or an encroachment, overlap or boundary line dispute; (g) an incorrect land description; (l) errors in drafting the sales contract, deed, mortgage, or other instruments of conveyance; (m) failure to disclose or explain information relevant to the marketability, usability, or value of the property; (o) financing terms; and (p) water rights or well rights. Categories (b), (d), (g), (l), and perhaps (m) and (p) also are sources of complaints that having an attorney's assistance in the transaction might have cured. Conversely, Categories (a), (f), (o), and parts of (m) likely would not have been decreased even if attorneys were involved in Missouri's residential real estate transactions.

3. Complaints Against Attorneys

In most states, the entity given the responsibility of overseeing complaints against attorneys is a branch of the state bar association. With one exception, the state bar associations in the ten states we studied could provide no data to support the assumption they often advance, i.e., that consumers risk significant harm when they are not represented by attorneys in residential real estate transactions.

Only the Arizona State Bar Association answered our questionnaire regarding the number of complaints filed against attorneys in-
Involving residential real estate transactions. In Connecticut, the Statewide Grievance Committee and the Director of the State Bar Association had "no statistical breakdown of complaints whatsoever." The state bars in Kansas and North Carolina only record complaints against attorneys according to the rule of professional responsibility that the attorney allegedly breached. In Missouri and South Carolina, the state bars organize their records of complaints only by the attorney's last name and case number. In Colorado, the Office of Disciplinary Council files complaints according to whether the complaint involves a criminal or a civil case and by case number. In Michigan and Massachusetts, they mark complaints according to the general practice area that the complaint involves, i.e., real estate law, family law, criminal law, etc. However, in both states, they said they would have to go through thousands of complaint files by hand to find those cases marked as involving "real estate." They were unable to commit employee resources to that task for our study. Thus, only the Arizona Bar Association supplied any data for our original inquiry regarding the number of complaints filed against attorneys over a five-year period in residential real estate transactions.

The American Bar Association also had no data on numbers of complaints or malpractice claims filed against attorneys. Neither did they have data on numbers of residential real estate transactions in which attorneys are involved or number of malpractice insurance policies that are issued in each state. The American Bar Association did

307. See Questionnaire sent by the author to the Arizona State Bar Association and answered and returned by Lynda C. Shely, Ethics Counsel for the State Bar Association of Arizona.
308. Telephone Interview with Attorney Walters, Connecticut Statewide Grievance Committee (April 30, 1997); accord Telephone Interview with Tim Hazen, Assistant Director, Connecticut State Bar Association (May 2, 1997).
309. See Telephone Interview with Disciplinary Administrator, Kansas State Bar Association, supra note 221.
310. See Telephone Interview with Caroline Bakewell, North Carolina State Bar (May 1997).
311. See Telephone Interview with John Howe, Missouri State Bar Office of Disciplinary Council (May 2, 1997).
312. See Telephone Interview by Aleatra Williams with Barbara Henson, Administrative Assistant, South Carolina Grievance & Disciplinary Commission (April 30, 1997).
313. See Telephone Interview with Mike Henry, Colorado State Bar Association (May 3, 1997).
315. See Telephone Interview with Constance Vecchione, Massachusetts Board of Bar Overseers (May 2, 1997) (commenting that they receive approximately 200 to 250 complaints per year involving real estate transactions, but do not separate residential and commercial complaints).
identify for us the attorney malpractice insurers that issued the most policies in the ten states in our study.

Furthermore, some lawyers malpractice insurers’ records distinguished between claims involving residential and commercial real estate transactions, but others did not. This means that the claims reported could be for malpractice in a residential real estate transaction, but they could just as well be for “legal activities deal[ing] with all aspects of real property transactions including, but not limited to, real estate conveyances, title searches and property transfers, leases condominiums and cooperatives, mortgages, condemnation and eminent domain, zoning and land use planning, property taxes, real estate development and financing.”

Despite these difficulties, we ultimately were able to obtain the following data and make the following comparisons.

316. One large insurer whose databases made this distinction was unwilling to participate in the study.
### TABLE 5

Claims against **ATTORNEYS**
per thousand insured attorneys.
Data collected from seven malpractice insurers
in ten states studied from 1992 to 1996.

<table>
<thead>
<tr>
<th>Code Name for Company</th>
<th>State</th>
<th>AT vs. TC</th>
<th>Insured Attorneys Totals</th>
<th>Claims Against Attorneys Totals</th>
<th>Claims Per Thousand</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Connecticut</td>
<td>AT</td>
<td>14,313</td>
<td>78</td>
<td>5.45</td>
</tr>
<tr>
<td>A</td>
<td>Massachusetts</td>
<td>AT</td>
<td>10,001</td>
<td>386</td>
<td>38.60</td>
</tr>
<tr>
<td>A &amp; C</td>
<td>North Carolina</td>
<td>AT</td>
<td>34,076</td>
<td>369</td>
<td>10.63</td>
</tr>
<tr>
<td>A &amp; F</td>
<td>South Carolina</td>
<td>AT</td>
<td>1,858</td>
<td>69</td>
<td>37.14</td>
</tr>
<tr>
<td>A &amp; B &amp; G</td>
<td>Virginia</td>
<td>AT</td>
<td>24,935</td>
<td>329</td>
<td>13.19</td>
</tr>
<tr>
<td>A &amp; B</td>
<td>Arizona</td>
<td>TC</td>
<td>4,339</td>
<td>257</td>
<td>59.23</td>
</tr>
<tr>
<td>A</td>
<td>Colorado</td>
<td>TC</td>
<td>4,317</td>
<td>159</td>
<td>36.83</td>
</tr>
<tr>
<td>A &amp; E &amp; F</td>
<td>Kansas</td>
<td>TC</td>
<td>8,262</td>
<td>114</td>
<td>13.76</td>
</tr>
<tr>
<td>A</td>
<td>Michigan</td>
<td>TC</td>
<td>3,634</td>
<td>190</td>
<td>52.28</td>
</tr>
<tr>
<td>A &amp; D</td>
<td>Missouri</td>
<td>TC</td>
<td>24,933</td>
<td>185</td>
<td>7.42</td>
</tr>
<tr>
<td>TC States (1992-1996)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>33.91 ← Average</td>
</tr>
</tbody>
</table>
Claims against ATTORNEYS per thousand insured attorneys. Data collected from seven malpractice insurers in ten states studied from 1992 to 1996.
According to the data that the responding attorney malpractice insurance carriers did supply, for every thousand attorneys insured, claims were filed alleging malpractice in real estate transactions against fourteen attorneys in attorney-closing states and twenty attorneys in title company-closing states. We had expected the opposite. We had expected that more claims would be made against attorneys in attorney-closing states, since there they are involved in both residential and commercial transactions. Perhaps one explanation for these results is that attorneys in attorney-closing states have more opportunities to learn in basic residential transactions and, then, are less likely to err in either residential or commercial real estate transactions. Another explanation might be that, in attorney-closing states, more of the practicing bar is involved in real estate transactions and, when a problem is discovered, they work with one another to correct it before it gets to a point where someone’s client files a malpractice claim. A third conclusion might be that, in states where attorneys still have a substantial residential real estate practice, both bar associations’ continuing legal education programs and law schools provide more instruction in real estate transactions and land title law. Again I invite my colleagues’ conjectures as to other appropriate explanations for these results.

The differences shown in Table 5 and Graph 5 are statistically significant and considered representative because the data utilized considered the experience of approximately 50,000 attorneys over a five-year period. Yet, because of the deficiencies described in the availability of data, we are reluctant to draw more than one conclusion. That one conclusion cannot be stated strongly enough. That is, if attorneys want to persuade the public, federal agencies, and courts that the public is better protected when attorneys supervise residential real estate transactions than when lay providers do, then they must make an effort to generate and provide data to prove their argument.

In sum, the data tabulated in our five tables and graphs suggest several conclusions. The only clear conclusion, however, is that the evidence does not substantiate the claim that the public bears a sufficient risk from lay provision of real estate settlement services to warrant blanket prohibition of those services under the auspices of preventing the unauthorized practice of law.

318. Because our data for Table 5 and Graph 5 was based on a sampling from seven national attorney malpractice insurance carriers, rather than the entire population, our advisor on statistical analysis used an SAS program to run a Chi-square test for inferential statistical significance. Dr. Mendoza concluded that the differences shown are "statistically significant" because of the large sample size (49,868 malpractice insurance policies).
D. Future Studies

I invite my colleagues' ideas regarding methodologies to overcome the limitations that the preceding section of this Article described. We had considered easier approaches than trying to retrieve data from the above third parties.\(^{319}\) For example, we contemplated using data in the public record or generating our own data via direct questioning of homebuyers and sellers. We did not use those approaches because neither seemed likely to produce conclusive data for the following reasons. First, regarding data in the public record, the only public records on the matter of whether consumers sustain more harm when they use lay real estate settlement providers than attorneys would be court cases. We considered a survey of case law for five years in the ten selected states to see whether there are more cases involving residential real estate problems in title company-closing states than in attorney-closing states. We rejected that approach because of several factors. One, as mentioned supra, more often than not, a homebuyer or seller does not sue. The cost of pursuing litigation in the courts, particularly for a seller who has moved away, generally is more than the loss they sustained. For example, in the introductory anecdote, Rob and Sarah lost approximately $3,500 because of the delay in closing on the sale of their home. Attorneys' fees and costs of pursuing litigation against the title company and broker, together with the cost of going to Arizona for depositions and trial, would have been greater than the amount they lost. Angry home buyers or sellers are much more likely to shoot off a complaint letter to the real estate commission or the state bar association or a claim letter to the title company than to file suit in court.

A second factor that caused us to reject a survey of case law as the methodology for this study is that most cases that are filed settle before reaching the level of a final opinion that is reportable in a national reporter. One might assume a similar proportion of cases will have settled in all the states, so that it still is fair to compare the number that actually are litigated in each state. I believe that assumption would be erroneous, however, at least as to title insurance cases. Particular companies sometimes become known for being less willing to settle and more willing to litigate claims than others. States in which such companies have a larger market share, then, could have more court cases, even though the proportion of initial claims might be the

\(^{319}\) See discussion supra Part VI.A regarding the difficulties in performing empirical legal research.
same as in other states.

We also contemplated generating original data via a telephone survey of recent home purchasers, asking whether they had used an attorney or not and whether they perceived any problems in their transactions. We rejected that approach, again, for several reasons. One reason was that, in the 1995 New Jersey Supreme Court case discussed supra, the Special Master declared that statistics obtained in that manner from 200 purchasers in North Jersey and 200 purchasers in South Jersey by the New Jersey Real Estate Association were not helpful because "it was difficult to place them in a true perspective absent data as to the whole number of real estate transactions in a given period." It seemed then, that the total number of transactions in a state compared to the total number of complaints would be more conclusive.

A second reason for rejecting a telephone survey is that we did not want to duplicate a previous study that had attempted to answer this question through data the researchers generated by telephoning 132 recent home purchasers in Columbus, Ohio. A third reason is that, according to statistics cited supra, most home purchasers would not be aware of problems with their titles immediately after their purchases. Therefore, telephoning buyers who recently had recorded deeds in the county courthouse seemed premature. Fourth, people are so inundated with unwelcome telephone solicitors, we were concerned that few would be willing to answer our questions and also were simply unwilling to impose.

A methodology that we still are considering for a future study, because it could eliminate the variable of different states laws, is illustrated in the following methodology sketches.

Possible Objective #3:

To eliminate the variable of different state laws, determine statistically whether homebuyers within the same state have fewer/no more/more title or real estate transactional problems when they use title companies to close their real estate purchase transactions than when

320. Report of Special Master at 33, In re Opinion No. 26 of the Comm. on the Unauthorized Practice of Law, 654 A.2d 1344, 1361 (N.J. 1995) (No. A-85/86). The Special Master also stated that the telephone survey was not tremendously convincing because the thrust of the questions appeared somewhat skewed in favor of the South Jersey proponents who funded the survey. See id.
321. See Braunstein & Genn, supra note 13.
they use attorneys. This requires: (A) the total number of transactions in counties that are identified as attorney-closing and the total number of transactions in counties in the same state that are identified as title company-closing; and (B) the number of claims arising from those transactions.

Sources of Data for Possible Objective #3:

Virginia Land Title Association, Illinois Land Title Association, New Jersey Land Title Association, Title Insurance Underwriters, Virginia, Illinois, and New Jersey Real Estate Commissions, Virginia, Illinois, New Jersey Bar Association Disciplinary Committees, Attorney Malpractice Insurance Carriers

Procedure for Future Objective #3:

1) Obtain data from state land title associations in three states in which there are both identifiable attorney-closing counties and title company-closing counties regarding (1) the counties in which 90% of the real estate transactions are closed by attorneys and those in which 90% are closed by title companies; (2) the names of the title insurance underwriters that issue owner's title insurance policies in those counties.

2) Obtain data from title insurance underwriters that identifies (1) the total number of owners policies they issued in residential transactions in the identified counties in the five-year period being studied and (2) the total number of claims filed against those title insurance policies.

3) Obtain data from state real estate commissions that shows (1) how many residential real estate transfers occurred in each of the identified counties in the five-year period being studied and (2) the total number of complaints that were made against real estate agents and brokers pertaining to those transfers.

4) Obtain data from state bar associations and attorney malpractice insurance carriers that shows how many complaints were made against attorneys involving residential real estate transactions in the five-year period being studied.
Possible Objective #4:

To determine statistically (a) whether a particular source of title and transactional problems exists in any of the studied counties which suggests the problems in a county are not due to the difference between attorney and title company closings; and (b) whether the source of title and transactional problems in any of the counties being studied may be unique local laws. This requires (A) respondents to separate the total number of claims for the five-year period into categories and (B) the principal investigator to analyze and group the categories listed into (i) problems that an attorney could not reasonably be expected to discover, (ii) problems that an attorney reasonably could be expected to discover, and (iii) problems involving state or local laws and governmental regulations.

Sources of Data for Possible Objective #4:

Title Insurance Underwriters; VA, IL, and NJ Real Estate Commissions; VA, IL, and NJ State Bar Associations Ethics or Disciplinary Committees; and Attorney Malpractice Insurance Carriers.

Procedure for Possible Objective #4:

1) Obtain data from title insurance underwriters in VA, IL, and NJ that separates the total number of claims filed against title insurance policies issued in the studied counties into categories describing possible grounds for claims.

2) Obtain data from VA, IL, and NJ real estate commissions that separates the total number of complaints filed against real estate agents and brokers in the studied counties into categories describing possible grounds for complaints.

3) Obtain data from VA, IL, and NJ state bar associations and attorney malpractice insurance carriers that issue policies in the studied counties that separates the total number of complaints filed against attorneys into categories describing possible grounds for complaints.

Nevertheless, while comparing counties within the same states might control the variable of different state laws, it would raise another variable.
In Virginia, for example, attorney closings still are the norm in rural areas, while title company closings are increasing in metropolitan areas near Washington, D.C. In Illinois, attorney closings are the norm in Chicago, but lenders and title companies supervise the closings in other parts of the state. We then would have to ask whether the greater problems in one county or another are the result, not from the involvement or absence of attorneys, but from one county's being urban and one being rural. What influence might that have on the outcomes? The Research Director of the American Land Title Association commented that in urban areas there always will be more title claims because of more regulations, easements, special assessments, exercises of eminent domain, and more transfers of each parcel of property. Conversely, the General Counsel of one title company who has long managed residential transactions in both urban and rural settings advises that she sees more title problems with rural properties because the property changes hands less often. Consequently, attorneys and title companies have not been cleaning up problems over time, as they are able to do each time a city lot is transferred. Another factor she believes causes more title claims with rural properties is the existence of more metes and bounds legal descriptions.

It also would be interesting, though beyond the scope of this paper, to analyze differences within the group of attorney-closing states. For example, Table 3 suggests that attorneys in Connecticut serve their homebuyer clients well by recognizing most discoverable title problems and persuading title insurers to cover those risks. Thus over half the title insurance claims reported in Connecticut were either for matters that were simply undiscoverable or for specific risks that title insurers expressly assumed by waiving policy exceptions and issuing endorsements. Why then, in the attorney-closing state of Massachusetts, were more than half the reported claims caused by matters an attorney in the transaction should have been able to prevent, i.e., the title searcher's failure to find recorded instruments relevant to title (3d), examination errors resulting from errors in judgment in reviewing legal instruments or failing to apply correctly legal principles (3e), and closing and escrow procedures (3h)?

Thus, we remain in pursuit of the ideal methodology for socio-legal research on the topic of the equity of applying unauthorized practice laws to restrain the businesses of lay residential real estate settlement service providers. Until we develop a methodology that will yield a
more complete picture, we can only be confident of the two conclusions asserted in the preceding section of this Article. One, if attorneys want to persuade the public, federal agencies, and courts that the public is better protected when attorneys supervise residential real estate transactions than when lay providers do, then they must make an effort to generate and provide data to prove their argument. Two, the evidence we did obtain refutes bar associations' claim that the public bears sufficient risk from lay provision of real estate settlement services to warrant blanket prohibition of those services under the auspices of preventing the unauthorized practice of law.

VII. GENERAL CONCLUSION

As this Article has had two theses, it must have two conclusions. First, it is clear that empirical socio-legal research is challenging. It is difficult to obtain data and equally difficult to interpret the data obtained. As shown above, it also can be difficult to control variables and results can have more than one possible cause. Other limitations on and issues regarding empirical socio-legal research exist that are far beyond the scope of this Article. For example, even if results are clear and unassailable, will courts and legislators abandon long-standing legal maxims? Will factual research prevail if instinct and emotion are contrary? I must leave these questions to a forthcoming article that is intended to consider the limits on the value of empirical legal research.325

Despite the obstacles and shortcomings, empirical socio-legal research must be pursued and its methodologies further developed and refined. For it is only empirical research that can yield facts to reveal whether the assumptions upon which we base our laws may be specious.

Second, we gathered data for this Article to test the assumptions that for so long have supported courts' and bar associations' application of unauthorized practice laws to restrict lay provision of real estate settlement services. Certainly, we were not able to obtain all the data to answer all the questions we would have liked. We also were unable to perfectly control all variables. I seek input from my colleagues regarding whether

325. Furthermore, an issue that I admit must be debated is how far we can go in asking for proof of harm before we support laws proscribing certain activities. For instance, are we ready to say that if bar associations cannot come up with statistics showing harm, nonattorneys can handle driving under the influence cases, organize businesses, and try criminal cases? Without statistics showing problems, should mediation services take over litigation work, family counselors file "simple divorces," debt counselors handle bankruptcies, and financial planners write wills and trusts?
methodologies exist that could improve on this study for a future article. Nevertheless, the data we did collect suggests that the public does not bear a sufficient risk from lay provision of real estate settlement services to warrant a blanket prohibition of those services under the auspices of preventing the unauthorized practice of law. Unless they can provide data showing significant harm to the public, it will be difficult for the practicing bar to look anything other than proprietary or self-protective when insisting that only attorneys should be permitted to draft instruments and close residential real estate transactions. Courts also will appear merely to be straining to protect their own if they continue to apply the wildly variable tests and discrepant lines discussed supra, rather than concentrating on whether there is proof that the public is harmed. Perhaps, this thesis of this Article may be best concluded with a quotation from the New Jersey Supreme Court.

There is a point at which an institution attempting to provide protection to a public that seems clearly, over a long period, not to want it, and perhaps not to need it—there is a point when that institution must wonder whether it is providing protection or imposing its will. It must wonder whether it is helping or hurting the public.326

But what about Rob and Sara? What about Joe Tieman from our introductory anecdote and other individuals who are unfortunate enough to fall into the “insignificant percent” who are harmed by brokers, title companies, and lenders who got in over their heads? Should they have no protection and no remedy?

This Article does not say there should be no mechanism to ensure that homeowners have both competent representation and a remedy when they have been incompetently represented. Neither is it intended to dissuade home buyers and sellers from employing experienced attorneys to protect their interests. Instead, this Article’s goal is to begin a new dialogue about means of protecting homebuyers and sellers that better achieve that goal than have unauthorized practice laws which draw their line solely according to whether someone has a license to practice law.

More than a dozen other writers have offered more than a dozen ideas about how to protect home buyers and sellers.327 Some say ada-

327. See sources cited supra note 13.
mantly that we should not give in to the public’s desire to have protection when they have chosen not to pay for an attorney’s assistance. Others suggest an independent governmental agency should govern all residential real estate settlement providers, veteran brokers, and beginning attorneys alike. Still others propose that a legislative commission might best represent the public interest in determining unauthorized practice law policies.  

Another view suggests that the marketplace is the best regulator. Some subscribing to this view recommend that attorneys become more competitive. They encourage bar associations to better publicize the value that attorneys offer in home purchase transactions. They recommend that bar associations broadcast when a study like this has found that residential purchasers in attorney-closing states had 6% fewer problems as a result of errors in legal judgment and understanding. Homebuyers, then, could consider that data in deciding whether to employ an attorney in their next home sale or purchase transaction. Yet, others assert that, unless attorneys begin to advertise to the same extent as lenders and real estate brokers, the public does not have adequate information to make accurate marketplace cost-benefit analyses. Therefore, one commentator insists that government regulation is necessary, though not via the means of unauthorized practice laws.

Others may recommend that the United States adopt the British concept of Real Property Lawyer Specialist. Such an occupation for specially trained laypersons was created in England in the 1960s to offer conveyancing services at a cost much reduced from the “2% of property value plus extras” that solicitors in England charged. The Supreme Court of Washington has adopted a similar rule permitting a “limited real estate practice” by certain lay persons.

Also to be considered is the tort of “real estate malpractice,” recognized by both the Arizona Court of Appeals and the New Jersey Supreme Court. Full recognition by the judiciary that assuming an

328. See Morrison, supra note 13.
329. See Christensen, supra note 13; Rhode, Policing the Professional Monopoly, supra note 9.
330. See Hunter & Klonoff, supra note 13, at 22-26; Michelman, supra note 13, at 22-23.
331. See Michelman, supra note 13, at 14.
333. See WASH. CT. R. ANN., ADMISSION TO PRACTICE RULE 12(a).
attorney's role brings with it the attorney's liability for malpractice might go far in encouraging lay providers to police themselves. Wide acceptance of a tort of real estate malpractice would give an incentive to all real estate settlement service providers both to assess their competence to handle each transaction and to refer to an experienced attorney any transaction above the provider's level of expertise. Thus, bar certification would continue to have its significance as well.\textsuperscript{336} Malpractice insurance and industry funds to protect consumers harmed by negligence should be a part of such a solution, so that newly recognized rights are not lost by the expense of pursuing them.

Any further discussion of the possible solutions is beyond the scope of this paper. This Article has attempted to re-open the dialogue on the issue of how best to protect homebuyers and sellers at a level beyond mere assumptions, from a base of fact. We are not recommending that consumers not retain attorneys when buying or selling a home; certainly, a transaction that seems quite ordinary can prove to have nonstandard aspects, such that only an experienced attorney could prevent loss to the individuals involved. Nevertheless, our data suggests that, on average, the public does not bear a significant risk from lay provision of real estate settlement services. Given the lack of empirical proof of significant harm, the federal government's antitrust allegations, and the public's skepticism and resentment, it is time to stop using unauthorized practice laws to force consumers to pay for an attorney's assistance with all residential real estate transactions. It is time, instead, to build on this factual base a new legal perspective that will be more equitable to all concerned.

Any 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. Under those circumstances the broker has a duty, in accordance with the standards of the profession, to inform either seller or buyer of that fact. Presumably, the same duty applies to any title officer . . . who becomes aware of the need of either party for independent counsel. In addition to whatever potential action might be taken by the bodies that regulate brokers and title officers, as well as by their own associations, their failure to inform exposes them to the risk of civil liability for resulting damages.

\textit{Id. at} 1362.


This is not, of course, to suggest that bar certification is without significance in real estate . . . practice. Professional training equips lawyers with a global perspective not shared by lay practitioners, and thus may facilitate recognition of legal issues ancillary to the matter at hand. The question, however, is whether such issues arise with sufficient frequency, and whether lawyers make so unique a contribution to their resolution, as to justify a professional monopoly.

\textit{Id.}
APPENDIX

VERSION 2, QUESTIONNAIRE: Title Insurance Underwriters

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<td>Respondent's Name:</td>
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<td>City, State &amp; Zip:</td>
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1996:

1. In 1996, how many Owner's title insurance policies did your company issue on property in the State of that stated a policy amount in Schedule A of less than $400,000? Please insert in the blank a number or "NA" if the data is not available. →

2. How many claims has your company received involving Owner's title insurance policies that were issued in 1996 on residential property in the State of? Please insert in the blank a number. If you were able to answer Question 2, please skip Alternative Question 2Alt and proceed to Question 3. If you were unable to answer Question 2 because your company does not distinguish in its files between claims on Owner's policies issued on residential property and those issued on commercial property, then please insert “NA” in this blank and go to Questions 2Alt and 3.

2Alt. How many claims has your company received involving those Owner's title insurance policies described in Question 1, i.e., those policies it issued in 1996 in the State of that stated a policy amount in Schedule A of less than $400,000? Please insert in the blank a number or "NA" if the data is not available. →

3 How many of the claims referred to in Question 2 or 2Alt did your company characterize as involving one or more of the following? Please insert in the blank a number or "NA" if the data is not available. ↓

3a Non-record matters, i.e., defects that were not discoverable in the “public record” as defined in ALTA title insurance policies, including, but not limited to, fraud, forgeries, deeds executed by minors, mechanics and material liens recorded after the policy date, loss of title because of creditors’ claims in the seller's bankruptcy. (If you use ALTA Claims Codes Guidelines, this would be matters in Risk Category A.)

3b Special risks that the company assumed by waiving an exception or issuing an endorsement. (ALTA Claims Codes Guidelines Risk Category B.)

Continued on next page
3c Title plant risks from errors in obtaining information from the public land records or in entering the information into a title plant. (ALTA Claims Codes Guidelines Risk Category C.1 (C.1&2 in one version.))

3d Searching/abstracting risks caused by the searcher’s failure to find recorded instruments relevant to the title. (ALTA Claims Codes Risk Category C.2. (C.3&4 in one version))

3e Examination and opinion errors due to errors in judgment in reviewing legal instruments or other relevant documents or the failure to correctly apply some legal principle. (ALTA Claims Codes Guidelines Risk Category D.)

3f An incorrect survey or an encroachment, overlap or boundary line dispute. (ALTA Claims Code Guidelines Risk Category E.1.)

3g An incorrect land description. (ALTA Claims Code Risk Category E.2.)

3h Closing and escrow procedures, including incomplete or unclear closing or escrow instructions or violations of instructions. (ALTA Claims Code Risk Category F.)

3i Taxes and special assessments that were of record but were missed, improperly calculated or improperly paid. (ALTA Claims Code Guidelines Risk Category H.)

3j State or local laws or regulations that restricted use or occupancy of the property or the character, dimension or location of improvements.

3k Federal laws or regulations that restricted use or occupancy of the property or the character or location of improvements.

3l Errors in the drafting of the deed, mortgage or other instruments of conveyance.

3m Failure to disclose or explain to the buyer or seller entries in the public records that were relevant to the marketability, usability, or market value of the real property.

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1995:

1. In 1995, how many Owner’s title insurance policies did your company issue on property in the State of ______ that stated a policy amount in Schedule A of less than $400,000?
   Please insert in the blank a number or "NA" if the data is not available. °

2. How many claims has your company received involving Owner’s title insurance policies that were issued in 1995 on residential property in the State of ______?

   If you were able to answer Question 2, please skip Alternative Question 2Alt. and proceed to Question 3. If you were unable to answer Question 2 because your company does not distinguish in its files between claims on Owner’s policies issued on residential property and those issued on commercial property, then please insert “NA” in this blank and go to Questions 2Alt. and 3.

2Alt. How many claims has your company received involving those Owner’s title insurance policies described in Question 1 of this page, i.e., those policies that it issued in 1995 in the State of ______ that stated a policy amount in Schedule A of less than $400,000?

   Please insert in the blank a number or "NA" if the data is not available. °

3. How many of the claims referred to in Question 2 or 2Alt. did your company characterize as involving one or more of the following?

   Please insert in the blank a number or "NA" if the data is not available. 

   3a Non-record matters, i.e., defects that were not discoverable in the “public record” as defined in ALTA title insurance policies, including, but not limited to, fraud, forgeries, deeds executed by minors, mechanics and material liens recorded after the policy date, loss of title because of creditors’ claims in the seller’s bankruptcy. (If you use ALTA Claims Codes Guidelines, this would be matters in Risk Category A.)

   3b Special risks that the company assumed by waiving an exception or issuing an endorsement. (ALTA Claims Codes Guidelines Risk Category B.)

   3c Title plant risks from errors in obtaining information from the public land records or in entering the information into a title plant. (ALTA Claims Codes Guidelines Risk Category C.1 (C1&2 in one version.)

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3k Federal laws or regulations that restricted use or occupancy of the property or the character or location of improvements.

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3m Failure to disclose or explain to the buyer or seller entries in the public records that were relevant to the marketability, usability, or market value of the real property.

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1994:

1. In 1994, how many Owner's title insurance policies did your company issue on property in the State of [ ] that stated a policy amount in Schedule A of less than $400,000?
   
   Please insert in the blank a number or "NA" if the data is not available. →

2. How many claims has your company received involving Owner's title insurance policies that were issued in 1994 on residential property in the State of [ ]?
   
   Please insert in the blank a number. →

   If you were able to answer Question 2, please skip Alternative Question 2Alt. and proceed to Question 3. If you were unable to answer Question 2 because your company does not distinguish in its files between claims on Owner's policies issued on residential property and those issued on commercial property, then please insert “NA” in this blank and go to Questions 2Alt. and 3.

2Alt. How many claims has your company received involving those Owner's title insurance policies described in Question 1 on this page, i.e., those policies that it issued in 1994 in the State of [ ] that stated a policy amount in Schedule A of less than $400,000?

   Please insert in the blank a number or "NA" if the data is not available. →

3. How many of the claims referred to in Question 2 or 2Alt. did your company characterize as involving one or more of the following?

   Please insert in the blank a number or "NA" if the data is not available. →

   3a Non-record matters, i.e., defects that were not discoverable in the "public record" as defined in ALTA title insurance policies, including, but not limited to, fraud, forgeries, deeds executed by minors, mechanics and material liens recorded after the policy date, loss of title because of creditors' claims in the seller's bankruptcy. (If you use ALTA Claims Codes Guidelines, this would be matters in Risk Category A.)

   3b Special risks that the company assumed by waiving an exception or issuing an endorsement. (ALTA Claims Codes Guidelines Risk Category B.)

   3c Title plant risks from errors in obtaining information from the public land records or in entering the information into a title plant. (ALTA Claims Codes Guidelines Risk Category C.1 (C1&2 in one version.)

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3k Federal laws or regulations that restricted use or occupancy of the property or the character or location of improvements.

3l Errors in the drafting of the deed, mortgage or other instruments of conveyance.

3m Failure to disclose or explain to the buyer or seller entries in the public records that were relevant to the marketability, usability, or market value of the real property.

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1993:

1. In 1993, how many Owner's title insurance policies did your company issue on property in the State of ___________ that stated a policy amount in Schedule A of less than $400,000?
   Please insert in the blank a number or "NA" if the data is not available. → ________

2. How many claims has your company received involving Owner's title insurance policies that were issued in 1993 on residential property in the State of ___________?
   Please insert in the blank a number. → ________

   If you were able to answer Question 2, please skip Alternative Question 2Alt. and proceed to Question 3. If you were unable to answer Question 2 because your company does not distinguish in its files between claims on Owner's policies issued on residential property and those issued on commercial property, then please insert "NA" in this blank and go to Questions 2Alt. and 3.

2Alt. How many claims has your company received involving those Owner's title insurance policies described in Question 1 of this page, i.e., those policies that it issued in 1993 in the State of ___________ that stated a policy amount in Schedule A of less than $400,000?
   Please insert in the blank a number or "NA" if the data is not available. → ________

3 How many of the claims referred to in Question 2 or 2Alt. did your company characterize as involving one or more of the following?

   Please insert in the blank a number or "NA" if the data is not available.

   3a Non-record matters, i.e., defects that were not discoverable in the "public record" as defined in ALTA title insurance policies, including, but not limited to, fraud, forgeries, deeds executed by minors, mechanics and material liens recorded after the policy date, loss of title because of creditors' claims in the seller's bankruptcy.
   (If you use ALTA Claims Codes Guidelines, this would be matters in Risk Category A.)

   3b Special risks that the company assumed by waiving an exception or issuing an endorsement.
   (ALTA Claims Codes Guidelines Risk Category B.)

   3c Title plant risks from errors in obtaining information from the public land records or in entering the information into a title plant.
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3k Federal laws or regulations that restricted use or occupancy of the property or the character or location of improvements.

3l Errors in the drafting of the deed, mortgage or other instruments of conveyance.

3m Failure to disclose or explain to the buyer or seller entries in the public records that were relevant to the marketability, usability, or market value of the real property.

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1992:

1. In 1992, how many Owner's title insurance policies did your company issue on property in the State of ___________ that stated a policy amount in Schedule A of less than $400,000?

   Please insert in the blank a number or "NA" if the data is not available. → ___________

2. How many claims has your company received involving Owner's title insurance policies that were issued in 1992 on residential property in the State of ___________?

   Please insert in the blank a number. → ___________

   If you were able to answer Question 2, please skip Alternative Question 2Alt. and proceed to Question 3. If you were unable to answer Question 2 because your company does not distinguish in its files between claims on Owner's policies issued on residential property and those issued on commercial property, then please insert "NA" in this blank and go to Questions 2Alt. and 3.

2Alt. How many claims has your company received involving those Owner's title insurance policies described in Question 1 of this page, i.e., those that it issued in 1992 in the State of ___________ that stated a policy amount in Schedule A of less than $400,000?

   Please insert in the blank a number or "NA" if the data is not available. → ___________

3. How many of the claims referred to in Question 2 or 2Alt. did your company characterize as involving one or more of the following?

   Please insert in the blank a number or "NA" if the data is not available.

   3a Non-record matters, i.e., defects that were not discoverable in the "public record" as defined in ALTA title insurance policies, including, but not limited to, fraud, forgeries, deeds executed by minors, mechanics and material liens recorded after the policy date, loss of title because of creditors' claims in the seller's bankruptcy. (If you use ALTA Claims Codes Guidelines, this would be matters in Risk Category A.)

   3b Special risks that the company assumed by waiving an exception or issuing an endorsement. (ALTA Claims Codes Guidelines Risk Category B.)

   3c Title plant risks from errors in obtaining information from the public land records or in entering the information into a title plant. (ALTA Claims Codes Guidelines Risk Category C.1 (C1&2 in one version.)

   3d Searching/abstracting risks caused by the searcher's failure to find recorded instruments relevant to the title. (ALTA Claims Codes Risk Category C.2. (C.3&. 4 in one version.)

   3e Examination and opinion errors due to errors in judgment in reviewing legal instruments or other relevant documents or the failure to correctly apply some legal principle. (ALTA Claims Codes Guidelines Risk Category D.)

   Continued on Next Page
3f An incorrect survey or an encroachment, overlap or boundary line dispute. (ALTA Claims Code Guidelines Risk Category E.1.)

3g An incorrect land description. (ALTA Claims Code Risk Category E.2.)

3h Closing and escrow procedures, including incomplete or unclear closing or escrow instructions or violations of instructions. (ALTA Claims Code Risk Category F.)

3i Taxes and special assessments that were of record but were missed, improperly calculated or improperly paid. (ALTA Claims Code Guidelines Risk Category H.)

3j State or local laws or regulations that restricted use or occupancy of the property or the character, dimension or location of improvements.

3k Federal laws or regulations that restricted use or occupancy of the property or the character or location of improvements.

3l Errors in the drafting of the deed, mortgage or other instruments of conveyance.

3m Failure to disclose or explain to the buyer or seller entries in the public records that were relevant to the marketability, usability, or market value of the real property.

Please mail or FAX completed Questionnaire to:
Professor Joyce Palomar
University of Oklahoma College of Law
300 Timberdell Rd.
Norman, OK 73019
(405)325-5536 Office (405)325-0389 fax

Thank you for your participation.
QUESTIONNAIRE: Real Estate Commissions

Please complete the following:

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<tr>
<th>Respondent's Name:</th>
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<td>City, State &amp; Zip:</td>
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<td>Phone / FAX:</td>
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1. How many transfers of residential real property occurred in the State of ______________________ between Jan. 1, 1987 and Jan. 1, 1997? Please insert a number or "NA" if the data is not available. → 

2. How many complaints were filed against real estate agents and/or brokers related to the sales and purchases of residential real estate between Jan. 1, 1987 and Jan. 1, 1997 (i.e., those transfers referred to in Question 1)? Please insert in the blank a number or "NA" if the data is not available. → 

3. How many of the complaints referred to in Question 2 involved one or more of the following?

   3a The physical condition of the property or improvements.
   3b Access rights or easements.
   3c Problems with the title to the property.
   3d — a claim that a competent title search and examination was not obtained.
   3e — a claim that the real estate agent or broker erred in judging the legal effect of instruments used in the transaction.
   3f — an incorrect survey or an encroachment, overlap or boundary line dispute.
   3g — an incorrect land description.
   3h Closing and escrow procedures, including writing incomplete or unclear closing or escrow instructions or failing to follow instructions.
   3i Taxes and special assessments.
   3j State or local laws that restricted use of the property or the character, dimension or location of improvements.
   3k Federal laws that restricted use of the property or the character or location of improvements.
   3l Errors in the drafting of the sales contract, deed, mortgage or other instruments of conveyance.
   3m Failure to disclose or explain to the buyer or seller information that is relevant to the marketability, usability or market value of the property.
   3n The price of the property.

(Continued on the next page)
3o Financing terms.
3p Well rights or water rights.
3q Other categories on which you have data that are not listed above? Please describe in the spaces below.

<table>
<thead>
<tr>
<th>Please insert the number of claims in each category</th>
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4. In your state, deeds, mortgages, and other instruments in residential real estate purchase transactions usually are drafted by which of the following?

   Circle one: →  Attorneys  Title Companies  Real Estate Agents  Lender's Employees

5. From Jan. 1, 1987 - Jan. 1, 1997, a member of the profession you circled in Question 4 would have drafted the deed, mortgage or other instruments in approximately what percent of the residential real estate purchase transactions in your state?

   Circle one: →  0 - 9%  10 - 19%  20 - 49%  50 - 79%  80 - 89%  90 - 100%  NA

6. In your state, prior to a transfer of residential real estate, the title search usually is performed by which of the following?

   Circle one: →  Attorneys  Title Companies  Real Estate Agents  Lender's Employees

7. From Jan. 1, 1987 - Jan. 1, 1997, a member of the profession you circled in Question 6 would have performed the title search in approximately what percent of residential real estate purchase transactions in your state?

   Circle one: →  0 - 9%  10 - 19%  20 - 49%  50 - 79%  80 - 89%  90 - 100%  NA

8. In your state, prior to a transfer of residential real estate, the results of the title search usually are examined by which of the following?

   Circle one: →  Attorneys  Title Companies  Real Estate Agents  Lender's Employee

(Continued on next page)
9. From Jan. 1, 1987 - Jan. 1, 1997, a member of the profession you circled in Question 8 would have examined the results of the title search in approximately what percent of residential real estate purchase transactions in your state?

Circle one: 0 - 9% 10 - 19% 20 - 49% 50 - 79% 80 - 89% 90 - 100% NA

10. In your state, a residential real estate transaction usually is closed by which of the following?

Circle one: Attorneys Title Companies Real Estate Agents Lender's Employees

11. From Jan. 1, 1987 - Jan. 1, 1997, a member of the profession you circled in Question 10 would have closed the residential real estate transaction in approximately what percent of those transactions in your state?

Circle one: 0 - 9% 10 - 19% 20 - 49% 50 - 79% 80 - 89% 90 - 100% NA

Please mail or FAX completed Questionnaire to:
Professor Joyce Palomar
University of Oklahoma College of Law
300 Timberdell Rd.
Norman, OK 73019
(405)325-5536 Office; (405)325-0389 Fax

Thank you for your participation.
QUESTIONNAIRE: State Attorney Disciplinary Committees

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<th>Respondent's Name:</th>
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1. How many complaints against attorneys involving residential real estate transactions were filed in your office between Jan. 1, 1987 and Jan. 1, 1997? Please insert the blank a number or "NA" if the data is not available.

2. How many of the complaints referred to in Question 1 involved one or more of the following?

- 2a The physical condition of the property or improvements.
- 2b Access rights or easements.
- 2c Problems with the title to the property
- 2d A claim that the attorney failed to perform or obtain a competent title search
- 2e A claim that the attorney erred in judging the legal effect of instruments in the chain of title.
- 2f An incorrect survey or an encroachment, overlap or boundary line dispute.
- 2g An incorrect land description.
- 2h Closing and escrow procedures, including writing incomplete or unclear closing or escrow instructions or failing to follow instructions.
- 2i Taxes and special assessments.
- 2j State or local laws that restricted use of the property or the character, dimension or location of improvements.
- 2k Federal laws that restricted use of the property or the character or location of improvements.
- 2l Errors in the drafting of the sales contract, deed, mortgage or other instruments of conveyance.
- 2m Failure to disclose or explain to the buyer or seller information that is relevant to the marketability, usability or market value of the property.
- 2n The price of the property.
- 2o Financing terms.
- 2p Well rights or water rights.

(Continued on the next page)
2q Other categories of complaints on which you have data that are not listed above? Please describe in the spaces below.

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<thead>
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<th>Complaint Category</th>
<th>Number of Complaints</th>
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Please insert the number of complaints in each category.

3. Does the have records of how many malpractice actions were filed in civil courts against attorneys between Jan. 1, 1987 and Jan. 1, 1997?

Circle one: Yes No

4. If you answered "Yes" to Question 3, how many of the malpractice actions filed against attorneys between Jan. 1, 1987 and Jan. 1, 1997 involved residential real estate sales and purchases?

Please insert in the blank a number or "NA" if the data is not available.

5. Please list names & addresses of the insurance carriers that have issued attorneys' malpractice insurance in your state between Jan. 1, 1987 and Jan. 1, 1997? If possible, please state the approximate percentage of the total policies that each company issued in your state between Jan. 1, 1987 and Jan. 1, 1997.

<table>
<thead>
<tr>
<th>Name &amp; Address</th>
<th>Percentage of Policies Issued</th>
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(Continued on the next page)
6. In your state, deeds, mortgages, and other instruments in residential real estate purchase transactions usually are drafted by which of the following?

Circle one:  
- Attorneys  
- Title Companies  
- Real Estate Agents  
- Lender's Employees

7. In your opinion, from Jan. 1, 1987 - Jan. 1, 1997, a member of the profession you circled in Question 6 would have drafted the deed, mortgage or other instruments in approximately what percent of the residential real estate purchase transactions in your state?

Circle one:  
- 0 - 9%  
- 10 - 19%  
- 20 - 49%  
- 50 - 79%  
- 80 - 89%  
- 90 - 100%  
- NA

8. In your state, prior to a transfer of residential real estate, the title search usually is performed by which of the following?

Circle one:  
- Attorneys  
- Title Companies  
- Real Estate Agents  
- Lender's Employees

9. In your opinion, from Jan. 1, 1987 - Jan. 1, 1997, a member of the profession you circled in Question 8 would have performed the title search in approximately what percent of residential real estate purchase transactions in your state?

Circle one:  
- 0 - 9%  
- 10 - 19%  
- 20 - 49%  
- 50 - 79%  
- 80 - 89%  
- 90 - 100%  
- NA

10. In your state, prior to a transfer of residential real estate, the results of the title search usually are examined by which of the following?

Circle one:  
- Attorneys  
- Title Companies  
- Real Estate Agents  
- Lender's Employees

11. In your opinion, from Jan. 1, 1987 - Jan. 1, 1997, a member of the profession you circled in Question 10 would have examined the results of the title search in approximately what percent of residential real estate purchase transactions in your state?

Circle one:  
- 0 - 9%  
- 10 - 19%  
- 20 - 49%  
- 50 - 79%  
- 80 - 89%  
- 90 - 100%  
- NA

12. In your state, a residential real estate transaction usually is closed by which of the following?

Circle one:  
- Attorneys  
- Title Companies  
- Real Estate Agents  
- Lender's Employees

13. In your opinion, from Jan. 1, 1987 - Jan. 1, 1997, a member of the profession you circled in Question 12 would have closed the residential real estate transaction in approximately what percent of those transactions in your state?

Circle one:  
- 0 - 9%  
- 10 - 19%  
- 20 - 49%  
- 50 - 79%  
- 80 - 89%  
- 90 - 100%  
- NA

Please mail or FAX completed Questionnaire to:
Professor Joyce Palmar
University of Oklahoma College of Law
300 Timberdell Rd.
Norman, OK 73019
(405)325-5536 Office (405)325-0389 Fax

Thank you for your participation.
QUESTIONNAIRE: Malpractice Insurance Carriers

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1. How many attorneys did your company insure in the State of _________________ in each of the following years?
   *Please insert in each blank a number or "NA" if the data is not available.*
   
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2. How many claims against attorneys in the state named in Question 1 involving real estate transactions were filed with your company in each of the following years?
   *Please insert in each blank a number or "NA" if the data is not available.*
   
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3. How many claims against attorneys in the State named in Question 1 involving residential real estate transactions were filed with your company in each of the following years?
   *Please insert in each blank a number or "NA" if the data is not available.*
   
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4. Comments? Attach additional pages for comments if necessary.

Please mail or FAX completed Questionnaire to: Professor Joyce Palomar
University of Oklahoma College of Law
300 Timberdell Rd.
Norman, OK 73019
(405)325-5536 Office (405)325-0389 Fax