

The Model Rules of Professional Conduct and the Unauthorized Practice of Law: Justification for Restricting Conveyancing to Attorneys

*The practice of the law is personal. It is open only to individuals proved to the satisfaction of the court to possess sufficient general knowledge and adequate special qualifications as to learning in the law and to be of good moral character. After one has been sanctioned in these respects, the oath as an attorney must be taken, whereby one becomes an officer of the court and subject to its discipline for violation of his obligations even to the extent of removal from his office. A dual trust is imposed on attorneys at law: they must act with all good fidelity both to the courts and to their clients. They are bound by canons of ethics which have been the growth of long experience and which are enforced by the courts. The relation of an attorney to his client is pre-eminently confidential. In addition to adequate learning, it demands on the part of the attorney undivided allegiance, a conspicuous degree of faithfulness and disinterestedness, absolute integrity, and utter renunciation of every personal advantage conflicting in any way directly or indirectly with the interests of his client.*¹

I. INTRODUCTION

There has long been heated debate, extending through the judicial and legislative bodies of numerous states, over the applicability of unauthorized practice of law regulations to real estate transactions.² Most of this debate has focused on the rights and protections of the consumer, or the client.³ Thus,

1. *In re Opinion of the Justices*, 194 N.E. 313, 316-17 (Mass. 1935) (internal citations omitted).

2. See Joyce Palomar, *The War Between Attorneys and Lay Conveyancers—Empirical Evidence Says “Cease Fire!”*, 31 CONN. L. REV. 423, 444 (1999) (maintaining only lawyers’ multi-faceted training provides buyers with essential protection necessary for conveying property).

3. See *id.* at 437 (outlining roots of dispute). The American Bar Association-proffered motivation for applying unauthorized practice laws to conveyancing has always been the protection of the public’s welfare. *Id.*; see, e.g., *Beach Abstract & Guar. Co. v. Car Ass’n*, 326 S.W.2d 900, 903 (Ark. 1959) (enforcing unauthorized practice laws to protect public’s economic welfare); *Attorney Grievance Comm’n v. Hallmon*, 681 A.2d 510, 514 (Md. 1996) (determining purpose of unauthorized practice laws to protect public from incompetent representation); *People v. Alfani*, 125 N.E. 671, 673 (N.Y. 1919) (stating unauthorized practice laws established to protect public). It should be observed, however, that public well-being is not the sole consideration with respect to the unauthorized practice of law. Shane L. Goudey, Comment, *Too Many Hands in the Cookie Jar: The Unauthorized Practice of Law by Real Estate Brokers*, 75 OR. L. REV. 889, 893 (1996) (arguing unauthorized practice of law hinders administration of justice). The fair efficient administration of justice should also be chief among unauthorized practice concerns. *Id.*

determining whether conveying real estate should be restricted to those licensed to practice law begs the analysis of how such a restriction benefits or protects the consumer, including analysis of whether protections offered by such a restriction outweigh any benefits such a restriction would remove.⁴

This note analyzes the practice of non-lawyers conducting real estate transactions and whether this constitutes unauthorized practice of law, focusing specifically on the question of whether the American Bar Association-enforced canons of professional responsibility or the Model Rules of Professional Conduct sufficiently protect consumers to give rise to the prohibition of conveyancing by non-lawyers.⁵ This note will argue that non-lawyer conveyancers are more likely to conduct real estate transactions with solely their own interests in mind, and are less likely to adequately consider and represent the interests of their clients.⁶ Therefore, to the end of protecting the public's interest, the practice of conveyancing should be limited to attorneys.⁷

As a precursor to this discussion, it is necessary to denote that which is traditionally included in the definition of "practice of law," and concurrently, that which is included in the definition of the term "conveyancing."⁸ An example of a current general definition of "practice of law" includes:

[D]irecting and managing the enforcement of legal claims and the establishment of the legal rights of others, where it is necessary to form and act upon opinions as to what those rights are and as to the legal methods which must be adopted to enforce them, the practice of giving or furnishing legal advice as to such rights and methods and the practice, as an occupation, of drafting documents by which such rights are created, modified, surrendered or secured.⁹

4. See *In re* Opinion No. 26 of the Comm. On the Unauthorized Practice of Law, 654 A.2d 1344, 1347 (N.J. 1995) [hereinafter *In re* Opinion No. 26] (asserting determination rests on whether consumers harmed). In this case, the court ultimately decided to permit non-lawyers to conduct real estate transactions, requiring only disclosure to the client of all associated risks of proceeding without a lawyer. *Id.* at 1358. The court predicated this decision on the perceived benefit of allowing consumers to choose their own agents, coalesced with a long-standing state tradition of layperson conveyancing. *Id.* at 1358-59.

5. See generally MODEL RULES OF PROF'L CONDUCT (2002) (codifying, monitoring, and directing lawyers' behavioral and ethical responsibility relative to their profession).

6. See Johnny L. Woodruff, *Certiorari to In re BFP: The Eve of Decision to a Dozen Years of Durrett Conflict—Will Resolution of the Issue Solve the Real Problem?*, 24 MEM. ST. U. L. REV. 773, 803 (1994) (noting profit incentives for broker to close sale); see also *State Bar of Ariz. v. Ariz. Land Title and Trust Co.*, 366 P.2d 1, 13 (Ariz. 1961) (deciding closing activities conducted by defendant title insurance company constituted unauthorized practice of law). The court concluded that title insurance companies, being primarily concerned with writing title insurance policies, viewed real estate closings in the context in which they impacted their own rights and interests, not those of the actual parties to the transaction. *State Bar of Ariz.*, 366 P.2d at 9.

7. See Palomar, *supra* note 2, at 437 (addressing public interest consideration).

8. See Mark Reeve, *Washington Survey: Practice of Law: Real Estate Brokers Authorized to Complete Transactions Forms—Cultum v. Heritage House Realtors, Inc.*, 103 Wn. 2d 623, 694 P.2d 630 (1985), 60 WASH. L. REV. 781, 781 n.5 (1985) (addressing tort claims against brokers engaged in practicing law).

9. *In re* Shoe Mfrs. Protective Ass'n, 3 N.E.2d 746, 748 (Mass. 1936) (providing definition for "practice of law," maintaining such definition remains fact specific). Another court in Arizona defined the practice of

Conveyancing is essentially a shorthand way for referring to “the various functions concerning the creation, transfer and termination of an interest in real property.”¹⁰ A discussion of unauthorized practice laws relative to conveyancing demands that these two definitions coincide at some juncture.¹¹

This note will address the framework that dictates and surrounds the determination of whether one has engaged in the unauthorized practice of law as a layperson conveyancer by identifying layperson conveyancers, and by defining the unauthorized practice of law both generally and with respect to real estate.¹² Further, this note will analyze relevant portions of the American Bar Association’s Model Rules of Professional Conduct.¹³ Finally, this note will pose the argument that the constraints and controls the Model Rules of Professional Conduct place upon attorneys, relative to their client’s interests, demand that all aspects of the real estate transaction be restricted to lawyers.¹⁴

II. BACKGROUND

A. Considering Layperson Conveyancers

As a class, layperson conveyancers are those persons seeking to engage in the various steps that make up the real estate transaction on behalf of another person.¹⁵ In other words, they desire to provide the services a lawyer traditionally provides for the client.¹⁶ It is important to address the exact persons or groups who seek to engage in layperson conveyancing.¹⁷

law as:

One who acts in a representative capacity in protecting, enforcing or defending the legal rights and duties of another is engaged in the practice of law. It also includes counseling or advising another in connection with their legal rights and duties. One is deemed to be practicing law whenever he furnishes to another advice or services which require the exercise of legal judgment. The practice of law creates a professional relationship of confidence and trust based upon the giving of legal advice.

State Bar of Ariz., Report of the Unauthorized Practice of Law Comm. 4 (1991) (providing definition of “practice of law”); see also Goudey, *supra* note 3, at 894 (commenting any definition of practice of law inadequate).

10. Mass. Conveyancers Ass’n, Inc. v. Colonial Title & Escrow, Inc., No. 96-2746-C, 2001 Mass. Super. LEXIS 431, at *14 (Jun. 5, 2001) (citing In re Opinion of the Justices, 194 N.E. 313, 317 (Mass. 1935)) (ruling conveyancing constitutes practice of law).

11. See generally Goudey, *supra* note 3 (examining whether conveyancing constitutes practice of law).

12. See *infra* Parts II.A.-C. (discussing layperson conveyancers, unauthorized practice laws and conveyancing).

13. See *infra* Part II.D. (discussing American Bar Association’s Model Rules of Professional Conduct).

14. See *infra* Part III (arguing for restricting conveyancing to attorneys).

15. See *supra* notes 6, 8 (providing examples of layperson conveyancers); see also, e.g., *In re First Escrow, Inc.*, 840 S.W.2d 839, 840 (Mo. 1992) (providing examples of layperson conveyancing entities); *Or. State Bar v. Sec. Escrows, Inc.*, 377 P.2d 334, 337 (Or. 1962); *Pioneer Title Ins. & Trust Co. v. State Bar of Nev.*, 326 P.2d 408, 412-13 (Nev. 1958).

16. See *supra* notes 6, 8; see also, e.g., *In re First Escrow*, 840 S.W.2d at 840; *Or. State Bar*, 377 P.2d at 337; *Pioneer Title*, 326 P.2d at 412-13.

17. See *supra* notes 6, 8; see also, e.g., *In re First Escrow*, 840 S.W.2d at 840; *Or. State Bar*, 377 P.2d at

In many situations, layperson corporations are established solely for the purpose of conducting real estate transactions.¹⁸ These companies hold themselves out as being capable of conducting real estate closings.¹⁹ Although these corporations employ lawyers, and are sometimes founded by lawyers, they also employ non-lawyers; and more often than not the non-lawyers prepare the documents and conduct the closings.²⁰ Other entities that seek to practice real estate law, or hold themselves out as real estate closing specialists, may include institutional lenders or banks, title insurance companies, escrow agents and companies, real estate brokerage houses, and venture capital firms.²¹

B. Defining the Unauthorized Practice of Law

Every jurisdiction in the United States has restricted the practice of law to those deemed qualified to engage in such exercise as a profession.²² Such qualified persons include licensed lawyers admitted to practice through their respective bar associations.²³ That the practice of law is restricted to bar-admitted lawyers is not the concept that causes difficulty—on the contrary—it is defining that which constitutes the practice of law that gives rise to discussion.²⁴

337; *Pioneer Title*, 326 P.2d at 412-13.

18. See *supra* notes 6, 8; see also, e.g., *In re First Escrow*, 840 S.W.2d at 840; *Or. State Bar*, 377 P.2d at 337; *Pioneer Title*, 326 P.2d at 412-13.

19. See *supra* notes 6, 8; see also, e.g., *In re First Escrow*, 840 S.W.2d at 840; *Or. State Bar*, 377 P.2d at 337; *Pioneer Title*, 326 P.2d at 412-13.

20. See *supra* notes 6, 8; see also, e.g., *In re First Escrow*, 840 S.W.2d at 840; *Or. State Bar*, 377 P.2d at 337; *Pioneer Title*, 326 P.2d at 412-13.

21. See *supra* notes 6, 8; see also, e.g., *In re First Escrow*, 840 S.W.2d at 840; *Or. State Bar*, 377 P.2d at 337; *Pioneer Title*, 326 P.2d at 412-13.

22. See, e.g., N.Y. PENAL LAW § 270.00 (2003) (codifying New York's restriction of law practice); OR. REV. STAT. § 9.160 (2001) (proscribing unauthorized practice of law in Oregon); MD. LAWYERS' RULES OF PROF'L CONDUCT R. 5.5 (2003) (restricting law practice to licensed members of Bar). Statutory prohibitions have excluded non-lawyers from the legal profession since the Great Depression. Susan Schwab, Note, *Bringing Down the Bar: Accountants Challenge Meaning of Unauthorized Practice*, 21 CARDOZO L. REV. 1425, 1428-29 (2000) (discussing motivation behind unauthorized practice laws). Other states have prohibited the unauthorized practice of law, not through legislative statute, but through the judiciary. See, e.g., N.J. CONST. art. 6, § 2 (granting New Jersey Supreme Court power to prohibit unauthorized practice of law); S.C. CONST. art. V, § 4 (granting South Carolina Supreme Court sole authority to regulate practice of law); *Reed v. Labor and Indus. Relations Comm'n*, 789 S.W.2d 19, 20 (Mo. 1990) (placing duty to control practice of law on Missouri judiciary). But see *Goudey, supra* note 3, at 892 (noting almost universal agreement power best rests with judicial branch); Pamela Lopata, Comment, *Can States Juggle the Unauthorized and Multidisciplinary Practices of Law?: A Look at the States' Current Grapple With the Problem in the Contexts of Living Trusts*, 50 CATH. U. L. REV. 467, 470 (2001) (addressing different vehicles through which states regulate law practice).

23. See, e.g., N.Y. PENAL LAW § 270.00 (2003) (codifying New York's restriction of law practice to licensed attorneys); OR. REV. STAT. § 9.160 (2001) (codifying Oregon's restriction of law practice to active members of State Bar); MD. LAWYERS' RULES OF PROF'L CONDUCT R. 5.5 (2003) (restricting law practice to licensed members of the Bar).

24. See *In re Shoe Mfrs. Protective Ass'n, Inc.*, 3 N.E.2d 746, 748 (Mass. 1936) (noting impossibility of framing comprehensive definition of practice of law); see also *Hogan v. Monroe*, 684 P.2d 757, 760 (Wash.

As a result of the inherent difficulty in crafting an all-encompassing definition of the “practice of law,” state courts have invariably concluded that the determination of what constitutes the practice of law must be based on the particular facts of each case.²⁵ As a standard principle, however, courts have unanimously concluded that the practice of law includes both representing the rights of another before a legal tribunal and creating, selecting and preparing documents that affect another’s rights.²⁶ Additionally, with respect to the latter form of law practice, most courts have held that the exercise of legal judgment represents the line between practicing law and merely engaging in clerical activity.²⁷

The conclusion that an individual, corporation, or other entity has engaged in the unauthorized practice of law rests on determining that the activity engaged in by such individual, corporation, or other entity constitutes the practice of law specific to the facts surrounding the activity.²⁸ However, many courts have held that the analysis does not end at this point.²⁹ Courts of every state have

1984) (explaining practice of law not easily defined). Though courts have made numerous attempts to define the practice of law, no definition has been universally accepted. *See Or. State Bar*, 377 P.2d at 337 (considering possibility exhaustive definition cannot be satisfactorily created); Schwab, *supra* note 22, at 1428-30 (noting problems resulting from lack of clear definition). Dissention regarding the definition of “practice of law” causes non-lawyers difficulty establishing the limits of their actions. *See Or. State Bar*, 377 P.2d at 337; Schwab, *supra* note 22, at 1428-30. Further, this lack of a clear definition curtails enforcement of unauthorized practice regulations. *See Or. State Bar*, 377 P.2d at 337; Schwab, *supra* note 22, at 1428-30.

25. *See Doe v. Condon*, 568 S.E.2d 356, 358 (S.C. 2002) (refraining from adopting specific practice of law definition; preferring to consider specific facts); *Attorney Grievance Comm’n of Md. v. Hallmon*, 681 A.2d 510, 514 (Md. 1996) (explaining necessity of examining facts of each case).

26. *See, e.g., Geauga County Bar Ass’n v. Canfield*, 748 N.E.2d 23, 24 (Ohio 2001) (holding practice of law includes preparation of legal documents on another’s behalf); *Perkins v. CTX Mortgage Co.*, 969 P.2d 93, 97 (Wash. 1999) (announcing practice of law includes completion of instruments establishing legal rights); *People v. Alfini*, 125 N.E. 671, 672 (N.Y. 1919) (clarifying practice of law not confined to court work). It should be noted that not all drafting of legal documents constitutes the practice of law. *See Spivak v. Sachs*, 211 N.E.2d 329, 331 (N.Y. 1965) (holding preparation of single legal document without compensation not practice of law).

27. *Or. State Bar*, 377 P.2d at 339 (establishing exercise of intelligent choice or informed decision as line). *But see Goudey*, *supra* note 3, at 894 (noting other tests used by courts).

28. *See supra* note 25 and accompanying text (defining practice of law based on facts of instant case). *But see Pioneer Title Ins. & Trust Co. v. State Bar of Nev.*, 326 P.2d 408, 412-13 (Nev. 1958) (exploring classes of cases where exceptions allow unauthorized practice of law). The Nevada court noted that the exceptions permitting a layperson to engage in the unauthorized practice of law were confined to simple, rather than complex, services, and involved specific situations where layperson law practice was a practical necessity. *Id.* at 412 (conceding not all exercise of legal judgment constitutes unauthorized practice of law). The court also mentioned a further class of cases wherein attorneys acquiesced, or impliedly approved of, layperson law practice. *Id.* at 413. The court explained, however, that such classes of cases usually involved a situation where lawyers were unable to fill the need for the specific service given the volume of that service’s need. *Id.* at 412; *see Or. State Bar*, 377 P.2d at 340 (disallowing retroactive punishment for unauthorized practice). In *Pioneer Title*, the court observed that many services have drifted away from the legal profession into the hand of laypersons. *See Pioneer Title*, 326 P.2d at 412; *see also Or. State Bar*, 377 P.2d at 340. Once this has sufficiently occurred, it becomes too late to characterize these engagements as the unauthorized practice of law. *See Pioneer Title*, 326 P.2d at 412; *see also Or. State Bar*, 377 P.2d at 340.

29. *See infra* notes 30-31 and accompanying text (considering public’s interest as factor for determining unauthorized practice violation).

unanimously opined that the primary purpose of unauthorized practice laws is to protect the public from adverse consequences resulting from incompetent legal work.³⁰ Thus, in the opinion of many courts, the determination that a party has engaged in the unauthorized practice of law does not mandate judicial action unless it is determined that such unauthorized practice has had or will have adverse public consequences, which supercede any benefit the public might receive from allowing the unauthorized practice to continue.³¹ Courts have permitted laypersons to engage in the unauthorized practice of law where the services constituting the practice of law were confined to simple, not complex, services and involved specific situations where courts could deem layperson law practice a practical necessity.³²

C. Unauthorized Practice Laws Applied to Conveyancing

The exercise of determining whether layperson conveyancing constitutes the unauthorized practice of law demands ascertaining whether conveyancing constitutes the practice of law, which, in turn, demands determining what activities constitute conveyancing.³³ As stated, conveyancing can be generally defined as “the various functions concerning the creation, transfer and termination of an interest in real property.”³⁴ This definition, however, is somewhat unsatisfying for our purposes, as it fails to enumerate the many varying activities involved in the treatment of interests in real property.³⁵

30. See, e.g., *Or. State Bar*, 377 P.2d at 338 (citing public’s protection as sole purpose for prohibiting laymen from practicing law); *Hallmon*, 681 A.2d at 514 (holding public protection as purpose of Rule 5.5 of Maryland’s Rules of Professional Conduct); *Pioneer Title*, 326 P.2d at 409 (distinguishing purpose as protection of public not protection of lawyers).

31. See *In re Opinion No. 26*, 654 A.2d 1344, 1347 (1995) (holding test for unauthorized practice should determine whether public disserved by conduct). Public interest determines what constitutes the “practice of law,” and therefore that which constitutes the unauthorized practice of law as well. See *Goudey*, *supra* note 3, at 896 (providing background for unauthorized practice conflict).

32. See *supra* notes 6, 8 (examining examples and situations where layperson law practice justified).

33. See *In re Opinion No. 26*, 654 A.2d at 1353 (deciding whether elements of real estate transaction require legal training); *In re First Escrow, Inc.*, 840 S.W.2d 839, 840 (Mo. 1992) (examining whether real estate closing services constitute unauthorized practice of law); see also *Doe v. Condon*, 586 S.E.2d 356, 358-59 (S.C. 2002) (dissecting elements of real estate closing to determine whether practice of law). Courts and legislatures provide a varying array of tests for determining whether conveyancing constitutes the practice of law. See *Palomar*, *supra* note 2, at 447.

34. See *Mass. Conveyancers Ass’n, Inc., v. Colonial Title & Escrow, Inc.*, No. 96-2746-C, 2001 Mass. Super. LEXIS 431, at *14 (Jun. 5, 2001) (holding conveyancing constitutes practice of law); see also *In re Opinion of the Justices*, 194 N.E. 313, 317 (Mass. 1935) (defining conveyancing).

35. See *Doe*, 568 S.E.2d at 358-59 (examining individual aspects of real estate closing). The court followed the lead of lower courts and divided the real estate transaction into four major steps: the title search, the preparation of loan documents, the closing, and recording the title and mortgage. *Id.* See generally *State Bar of Ariz. v. Ariz. Land Title and Trust Co.*, 366 P.2d 1 (Ariz. 1961) (attempting to determine which aspects of real estate transaction constitute practice of law); *Woodruff*, *supra* note 6 (providing history of mortgages).

1. Defining Conveyancing

A Massachusetts court held that conveyancing entails document creation, including the preparation of deeds, mortgages, releases, transfers and other instruments affecting title to real estate, as well as other agreements in connection with residential real estate closings; and conveyancing involves advising persons, firms and corporations as to their legal rights in connection with the conveyance of residential real estate.³⁶ In Delaware, the following steps comprise conveyancing services rendered to the real estate client:

1. Advising the client of their right to independent legal counsel.
2. Searching the title.
3. Clearing title defects.
4. Certifying the title or issuing a lawyers opinion of title.
5. Advising the client as to types of title insurance and issuing title insurance policies—owners and lenders.
6. Advising the client of the difference in types of surveys, ordering and reviewing the surveys to be sure there are no encroachments and compliance with zoning and deed restrictions.
7. Reviewing deed restrictions and easements.
8. Solving problems revealed by the survey. . . .
9. Counseling client(s) as to form of ownership. . . .
10. Drafting the deed and comparing legal description with survey, past deeds, microfilm plan of record.
11. Determining if the conveyance is subject to or exempt from transfer tax and drafting appropriate exemption form, Transfer Tax Return and Affidavit of Value.
12. Drafting other documents of conveyance that may be called for by the contract.
13. Drafting loan documents or reviewing loan documents drafted by the lender to insure compliance with the loan commitment, Regulation Z, RESPA and applicable law.
14. Preparing the HUD-1 settlement statement in compliance with RESPA.
15. Reviewing title search bring down to day of settlement.
16. Checking on and being advocate for client in satisfying contract contingencies. . . .
17. Advising the client about requirement or advisability of homeowners insurance.
18. Conduct settlement in accordance with the Agreement of Sale, local law, RESPA and instruction from the lender.
19. Review certificate of occupancy, release of mechanics liens and warranty where applicable.
20. Explaining all settlement documents to the client at settlement, answering clients questions and having all documents properly executed.
21. Representing client before and during settlement in resolving disputes. . . .
22. Reviewing the survey, deed restrictions, easement, subdivision notes, and zoning with the client and giving buyer copies.
23. Rendering tax advice to the client.
24. Collecting and disbursing funds. Being accountable for the proper disbursements.
25. Recording documents e.g. deed and mortgage.
26. Checking after the settlement to be sure liens are satisfied on the record and other title matters are complete. . . .
27. Handling escrows created at settlement for disputes. . . .
28. Sending 1099S to seller and filing it with the IRS or determining exempt status.
29. Report cash payments of over \$10,000.00 to IRS unless transaction is exempt.
30. After recorded documents

36. *Mass. Ass'n of Bank Counsel, Inc. v. Closings, Ltd.*, No. 90-3053-C, 1993 Mass. Super. LEXIS 239, at *4 (Sept. 2, 1993) (ruling conveyancing constitutes practice of law).

are returned from Recorders send them to appropriate parties. . . .³⁷

Generally, however, the debate surrounding layperson conveyancing focuses on the creation, selection, and preparation of the various documents associated with the real estate transaction.³⁸

2. Conveyancing Instruments: The Heart of the Debate

As the critical element courts use to designate transactional activities as the practice of law is the exercise of legal judgment or discretion, determining whether conveyancing constitutes the practice of law begs analyzing whether dealings with conveyancing instruments and other real estate memoranda require the use of legal judgment or discretion.³⁹ Generally, all state courts agree that conveyancing does in fact constitute the practice of law.⁴⁰ The basis for this determination has consistently been the fact that the creation, selection, preparation, and very much the interpretation and approval of conveyancing instruments largely affects the legal rights and interests of others.⁴¹ Adequate

37. Michael Braunstein, *Structural Change and Inter-Professional Competitive Advantage: An Example Drawn from Residential Real Estate Conveyancing*, 62 MO. L. REV. 241, 263-64 (1997) (examining attorneys' role in real estate transactions).

38. See Murray S. Levin, *Real Estate Agent Liability for Creative Financing Failures*, 39 U. MIAMI L. REV. 429, 441-42 (1985) (discussing broker liability). Document preparation receives the majority of the attention given to unauthorized practice of law in the context of conveyancing. Goudey, *supra* note 3, at 902-03 (noting overwhelming majority of conflict focuses on conveyancing instruments); see, e.g., Dressel v. Ameribank, 635 N.W.2d 328, 331 (Mich. App. 2001) (discussing treatment of conveyancing documents as practice of law); Cardinal v. Merrill Lynch Realty/Burnet, Inc., 433 N.W.2d 864, 865-67 (Minn. 1988) (considering permissiveness of layperson document drafting); *State Bar of Ariz.*, 366 P.2d at 2-3 (considering conveyancing elements constituting practice of law). Specifically, instruments referenced as being chiefly considered include purchase and sale agreements, deeds, notes, chattel mortgages, trusts deeds, assignments, escrow agreements, and bills of sale. See *Pioneer Title Ins. & Trust Co. v. State Bar of Nev.*, 326 P.2d 408, 408 (Nev. 1958) (citing items specified in Nevada State Bar's complaint for unauthorized practice).

39. See *Or. State Bar v. Sec. Escrows, Inc.*, 377 P.2d 334, 339 (Or. 1962) (establishing exercise of intelligent choice or informed decision as line); see also *Perkins v. CTX Mortgage Co.*, 969 P.2d 93, 97 (Wash. 1999) (discussing attorneys' exercise of legal judgment). In the drafting of any instrument, the exercise of judgment brings such drafting out of the sphere of clerical service and into that of a legal nature. See *Pioneer Title*, 326 P.2d at 411 (holding legal judgment standard supercedes simple versus complex standard). But see Goudey, *supra* note 3, at 894 (listing other tests used by various courts). See generally *In re Mid-Atlantic Settlement Services, Inc.*, No. 102, 2000 Del. LEXIS 243 (May 31, 2000) (utilizing exercise of legal judgment standard).

40. See *Title Guar. Co. v. Denver Bar Ass'n*, 312 P.2d 1011, 1014 (Colo. 1957) (holding conveyancing constitutes practice of law). This court held without analysis, based on concurrent holdings, that the preparation of closing documents constitutes the practice of law. *Id.*; see, e.g., *Mass. Conveyancers Ass'n*, 2001 Mass. Super. LEXIS 431, at *14 (holding conveyancing constitutes practice of law); *Mass. Ass'n of Bank Counsel, Inc.*, 1993 Mass. Super. LEXIS 239, at *4 (ruling conveyancing constitutes practice of law); *Bowers v. Transamerica Title Ins. Co.*, 675 P.2d 193, 195 (Wash. 1983) (citing *Wash. State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n*, 586 P.2d 870 (Wash. 1978)) (ruling transactional conveyancing constitutes practice of law); see also Candy M. Kern-Fuller, Comment, *Doe v. Condon: Lawyers Beware—This Unauthorized-Practice-of-Law Case May Affect You!*, 53 S.C. L. REV. 661, 664 (2002) (observing South Carolina Supreme Court's strong opinion conveyancing equals practice of law).

41. See *Geauga County Bar Ass'n v. Canfield*, 748 N.E.2d 23, 24 (Ohio 2001) (holding practice of law

and sufficient participation in these activities necessitates judgment and discretion, which can only be proficiently exercised by those with legal training and education.⁴² The issue that troubles courts, and which continues to cause debate, is whether layperson conveyancing benefits or disserves the public's interest, to the end of deciding whether layperson conveyancing should be enjoined as the unauthorized practice of law—persuasive arguments exist on both sides.⁴³

3. *Opposing Arguments*

Advocates of the position that laypersons should be prohibited from engaging in conveyancing have focused on the risks of, and potential for, adverse consequences to the client, arguing that layperson conveyancers inherently fail to recognize and account for complicated issues only the trained lawyer is adequately capable of spotting, disclosing, and managing.⁴⁴ Adherents of the alternative stance primarily impart a two-fold argument: the economically-centered assertion that restricting conveyancing to lawyers is monopolistic and contrary to a free-market society; and the functional argument that transactional conveyancing is simplistic, based largely on standardized, fill-in-the-blank forms.⁴⁵ Recent considerations, however, focus less on the

includes preparation of legal documents on another's behalf); *Perkins*, 969 P.2d at 97 (holding practice of law includes completion of instruments establishing legal rights). See generally Kern-Fuller, *supra* note 40 (examining effects of transactional law on public's interests).

42. See *In re Opinion of the Justices*, 194 N.E. 313, 317 (Mass. 1935) (stating execution of legal instruments requires legal skill); *In re Opinion No. 26*, 654 A.2d 1344, 1351 (N.J. 1995) (concluding real estate transaction only competently handled by one with legal training).

43. See *In re Opinion No. 26*, 654 A.2d at 1352 (holding test for unauthorized practice whether public disserved by conduct). It should be noted that this court allowed laypersons to engage in conveyancing based on a well-rooted practice within the jurisdiction of transacting real estate without the advice of an attorney, and on the fact that such practice had yet to disserve the public. *Id.* at 1355. The court, in dicta, voiced its opinion that the public would be better served by engaging legal counsel and made its holding contingent on complete disclosure of all risks involved in proceeding without an attorney. *Id.* at 1361; see Matthew A. Melone, *Income Tax Practice and Certified Public Accountants: The Case For a Status Based Exemption From State Unauthorized Practice of Law Rules*, 11 AKRON TAX J. 47, 51 (1995) (discussing consumer protection argument as justification for unauthorized practice laws).

44. See *In re Mid-Atlantic Settlement Services, Inc.*, No. 102, 2000 Del. LEXIS 243, at *22 (May 31, 2000) (addressing lawyer's ability to spot issues). The court noted that having lawyers handle real estate settlements significantly increases the likelihood of a multi-lateral satisfactory result, because lawyers' knowledge allows for quick and thorough problem spotting. *Id.*; see Reeve, *supra* note 8, at 784 (noting potential for hidden risks befalling innocent parties); see also Palomar, *supra* note 2, at 431 (stating basis for all unauthorized practice law potential for layperson mistakes). Palomar notes that despite the presupposition that layperson conveyancers make mistakes lawyers would not make, the committee considering the question here cites no actual instances of consumer injury, rather relying on hypotheticals. Palomar, *supra* note 2, at 431. Palomar also notes that although lawyers assume their education allows them to spot more issues and solve more problems for their clients, the customers for the most part feel layperson conveyancers do satisfactory work. *Id.* See generally Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Non-lawyer Practice*, 1 J. INST. STUD. LEG. ETH. 197 (1996) (maintaining licensing laypersons diminishes risk potential).

45. See Jennifer Gerarda Brown, *Rethinking "The Practice of Law,"* 41 EMORY L.J. 451, 454-55 (1992)

effects of conveyancing relative to the nature of the individual performing the service, and more on the role the conveyancer assumes in relation to his or her client.⁴⁶ Enter the ABA's Model Rules of Professional Conduct.⁴⁷

D. Exploring the ABA's Model Rules of Professional Conduct

The ABA's Model Rules of Professional Conduct (Model Rules) are not law—as the name indicates, they are merely a model.⁴⁸ The ABA created them to guide state legislatures and courts in drafting their own rules of attorney conduct.⁴⁹ These rules establish a code, much like that of a given state's penal law, which governs and controls the actions and behavior of attorneys.⁵⁰ The

(contending excluding laypersons from legal profession anticompetitive); Reeve, *supra* note 8, at 782 (observing courts' recognition of public perception of lawyers as monopolistic). See generally Alice M. Noble-Allgire, *Attorney Approval Clauses in Residential Real Estate Contracts—Is Half a Loaf Better Than None?*, 48 KAN. L. REV. 339, 340 (2000) (observing brokers' use of standardized forms); Mark J. Osiel, Book Review, *Lawyers as Monopolists, Aristocrats, and Entrepreneurs*, 103 HARV. L. REV. 2009 (1990) (reviewing book posing monopolistic argument); Meredith Ann Munro, Note, *Deregulation of the Practice of Law: Panacea or Placebo?*, 42 HASTINGS L.J. 203, 242 (1990) (detailing monopolistic argument and analyzing standardization of real estate forms). Additional arguments in support of layperson conveyancing include public convenience, maintaining that brokers are easier to find and retain and cause less delay; and economics, arguing that layperson conveyancers cost less money than lawyers. See Reeve, *supra* note 8, at 784 (detailing both sides of debate). Reeve notes, however, that there is no empirical data to support these contentions, yet public opinion seems to corroborate them. See *id.* at 784; see also Palomar, *supra* note 2, at 439-40 (noting public perception: attorneys slow real estate transaction). See generally Roger C. Cramton, *Symposium: The Future of the Legal Profession: Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531 (1994) (arguing restricting practice to lawyers puts legal aid out of reach for many).

46. See *In re Opinion No. 26*, 654 A.2d at 1352 n.3 (addressing duty of professional loyalty); Robin Paul Malloy & Mark Klapow, *Attorney Malpractice For Failure to Require Fee Owner's Title Insurance in a Residential Real Estate Transaction*, 74 ST. JOHN'S L. REV. 407, 420-21 (2000) (stating lawyer must remain committed to client's interests through every step of transaction); Palomar, *supra* note 2, at 448 (discussing rules of professional responsibility's requirement of attorney devotion to his client). For a comprehensive discussion of attorney professional responsibility certification, see generally Deborah L. Rhode, *Moral Character as Professional Credential*, 94 YALE L.J. 491 (1985). Rhode observes the lack of comprehensive research on attorney professional responsibility, noting that her effort is essentially the first such attempt. *Id.* at 493 (discussing attorney professionalism); see also MODEL RULES OF PROF'L CONDUCT (2002) (codifying lawyers' rules of professional responsibility and ethics). But see Todd G. Olson, Note, *Real Estate Broker Liability to the Seller in California: Seller-Financed Real Estate Sales*, 58 S. CAL. L. REV. 1073, 1078 (1985) (arguing laypersons unfairly restricted). Olson states that layperson conveyancers are in fact restricted and monitored with respect to wrongful behavior relative to their client through their fiduciary duty as an agent to a principal and through statutes giving rise to disciplinary action and civil tort liability. *Id.*; Sandra Nelson, Note, *The Illinois Real Estate "Designated Agency Amendment": A Minefield For Brokers*, 27 J. MARSHALL L. REV. 953, 957-60 (1994) (demonstrating agency principals applied to brokers).

47. See MODEL RULES OF PROF'L CONDUCT (2002) (codifying attorney ethical guidelines).

48. *Id.*

49. See *State Compensation Ins. Fund v. WPS, Inc.*, 82 Cal. Rptr. 2d 799, 806-07 (Cal. Ct. App. 1999) (discussing scope of Model Rules with respect to California). Currently, forty-four states have adopted some form of the Model Rules. See Robert R. Kuehn, *Access to Justice: The Social Responsibility of Lawyers—Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U. J.L. & POL'Y 33, 120 (2000) (addressing states' adoption of Model Rules).

50. See generally Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239 (1991) (discussing development from Canons of Professional Responsibility to Model Rules).

responsibilities set forth in the rules focus on the lawyer's role as a public citizen and as a representative of clients.⁵¹ The primary goal of the Model Rules is to protect the public.⁵²

The scope of the Model Rules is not static.⁵³ In some situations, the rules are strict and objective, placing stringent restrictions and responsibilities on lawyers to which they cannot falter.⁵⁴ In others, the rules are subjective, allowing for a lawyer's use of discretion to choose how to behave based on the specific facts and circumstances of the situation at hand.⁵⁵ Additionally, the Model Rules allow for the incorporation of outside substantive law to assist in defining and administering their provisions.⁵⁶

For the purposes of this note, the Model Rules will be considered only with respect to those rules that dictate lawyers' behavior in direct relation to their clients; in other words, those rules premised directly on the attorney-client relationship, and more specifically, those salient to real estate representation.⁵⁷ These include: Rule 1.6, Confidentiality of Information;⁵⁸ Rule 1.7, Conflict of Interest: Current Clients;⁵⁹ Rule 1.8, Conflict of Interest: Current Clients:

51. See MODEL RULES OF PROF'L CONDUCT (2002), Preamble ¶¶ 1-5 (setting forth basic principals and underlying provisions of Model Rules).

52. See Lawrence A. Dubin, *Client Beware: The Need For a Mandatory Written Fee Agreement Rule*, 51 OKLA. L. REV. 93, 100 (1998) (noting Model Rules' focus on public interest). See generally MODEL RULES OF PROF'L CONDUCT, Preamble (2002).

53. MODEL RULES OF PROF'L CONDUCT, Preamble ¶ 13 (2002) (addressing scope of Model Rules).

54. *Id.*

55. *Id.*

56. *Id.* ¶ 14 (recognizing Model Rules' place within larger legal context).

57. See MODEL RULES, *infra* notes 58-65 (presenting client-lawyer relationship based Model Rules). From this point on, any reference to the "Model Rules" will be only to those rules specifically named within this section. See *infra* notes 58-65.

58. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002). Rule 1.6 states:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b). (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or (6) to comply with other law or court order.

Id.

59. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002). Rule 1.7 states:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk

Specific Rules;⁶⁰ Rule 1.9, Duties to Former Clients;⁶¹ Rule 1.10, Imputation of Conflicts of Interest: General Rule;⁶² Rule 1.15, Safekeeping Property;⁶³ Rule

that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client gives informed consent, confirmed in writing, and: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; and (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

Id.

60. MODEL RULES OF PROF'L CONDUCT R. 1.8 (2002). Rule 1.8 states that:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking and is given reasonable opportunity to seek the advice of independent legal counsel on the transaction; and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction, including whether the lawyer is representing the client in the transaction. (b) A lawyer shall not use information relating to the representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules. (c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For the purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship. (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation. . . . (i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and (2) contract with a client for a reasonable contingent fee in a civil case.

Id. (portions omitted).

61. MODEL RULES OF PROF'L CONDUCT R. 1.9 (2002). Rule 1.9 states:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing. (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation except as these Rules would permit or require with respect to a client.

Id.

62. MODEL RULES OF PROF'L CONDUCT R. 1.10 (2002). Rule 1.10 states:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm. (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter

1.16, Declining or Terminating Representation;⁶⁴ and Rule 1.18, Duties to

representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless: (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter. (c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in the matter in which that lawyer is disqualified under Rule 1.9 unless: (1) the matter does not involve a proceeding before a tribunal in which the personally disqualified lawyer had a substantial role; (2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule. (d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

Id. (portions omitted).

63. MODEL RULES OF PROF'L CONDUCT R. 1.15 (2002). Rule 1.15 states:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation. (b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose. . . . (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property. . . .

Id. (portions omitted).

64. MODEL RULES OF PROF'L CONDUCT R. 1.16 (2002). Rule 1.16 states:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in a violation of the rules of professional conduct or other law; (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or (3) the lawyer is discharged. (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if: (1) withdrawal can be accomplished without material adverse affect on the interest of the client; (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (3) the client has used the lawyer's services to perpetrate a crime or fraud; (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (7) other good cause for withdrawal exists. (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation. (d) Upon terminating the representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Id.

Prospective Clients.⁶⁵ The comprehensive effect of all of these rules is to assure the attorney's absolute loyalty to his or her client.⁶⁶

III. ANALYSIS

Conveyancing should be restricted to attorneys because of the singular loyalty attorneys owe to their clients.⁶⁷ This loyalty is possessed only by members of the legal profession.⁶⁸ The reason the legal profession is the exclusive bearer of this trait is the existence of codified professional ethics—the Model Rules.⁶⁹ The Model Rules create a relationship between the lawyer and his or her client, whereby the lawyer can consider only the interests of the client.⁷⁰ Any straying from this formula would result in a violation of one of the Model Rules.⁷¹ No other profession attached to the real estate transaction preserves such a value.⁷²

A. The Attorney-Client Relationship: An Engagement Rooted in Loyalty

The cumulative effect of the principles the Model Rules impose upon their adherents is the establishment of a relationship between lawyer and client

65. MODEL RULES OF PROF'L CONDUCT R. 1.18 (2002). Rule 1.18 states that:

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client. (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client. (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d). (d) Representation is permissible if both the affected client and the prospective client has given informed consent, confirmed in writing, or: (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the prospective client.

Id.

66. See MODEL RULES, *supra* notes 58-65 and accompanying text (discussing Model Rules regarding attorney-client relationship); see also Gabriel J. Chin & Scott C. Wells, *Can a Reasonable Doubt Have an Unreasonable Price? Limitations on Attorney's Fees in Criminal Cases*, 41 B.C. L. REV. 1, 14 & n.62 (1999) (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 379 (1993)) (discussing nature of lawyer-client relationship). The lawyer-client relationship is one built on trust, a relationship in which the client inherently becomes dependent upon the lawyer. Chin & Wells, *supra*, at 24; see Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 345 (1995) (discussing lawyer as agent); see also REST. (SECOND) OF AGENCY § 381 (1958) (subjecting lawyers to agency principles).

67. See *supra* note 6 and accompanying text (noting profit incentives for brokers).

68. See *supra* note 6 and accompanying text.

69. See *supra* notes 58-65 and accompanying text (detailing Model Rules).

70. See *supra* notes 58-65 and accompanying text.

71. See *supra* notes 58-65 and accompanying text.

72. See *supra* note 6 and accompanying text (noting profit incentives for brokers).

founded and maintained on ideas of loyalty.⁷³ These principles dictate that the lawyer consider the interests of his or her client above those of all others.⁷⁴ The importance of such a value system is perhaps strongest felt in the context of real estate, an area that involves many different parties on many different levels, all of whom possess some degree of pecuniary or proprietary interest in the transaction.⁷⁵ Each of the relevant Model Rules provides its own contribution to this loyalty relationship.⁷⁶

B. The Groundwork: The Model Rules Considered

Rule 1.6, Confidentiality of Information, prevents the attorney from disclosing any information relating to the representation of the client.⁷⁷ Rules 1.7, Conflicts of Interest: Current Clients, and 1.8, Conflict of Interest: Current Clients: Specific Rules, prevent the attorney from taking on the representation of a client whose interests conflict with those of an existing client.⁷⁸ Further, Rule 1.8, in addition to other specific points, addresses the duty of the lawyer to avoid conflict even outside the context of client representation, namely with respect to the lawyer's own interests, such that the lawyer must meet certain criteria before he or she may enter into a business transaction with the client or acquire economic interests that are adverse to the interests of the client.⁷⁹ Rule 1.9, Duties to Former Clients, prevents the lawyer from representing a client whose interests conflict with those of a client the lawyer formerly represented.⁸⁰ Rule 1.10, Imputation of Conflicts, applies the conflicts of interest rules to entire firms, thereby preventing a firm from representing a client whose interests conflict with those of any client represented by any member of the firm, current or former.⁸¹

Rule 1.15, Safekeeping Property, is particularly relevant to conveyancing because lawyers often hold funds for, or on behalf of, the client, and this rule dictates how to manage a client's property.⁸² This rule specifically provides that the client's funds shall be kept in a separate account.⁸³ Rule 1.16, Declining or Terminating Representation, provides guidelines both for when the lawyer *must* withdraw his or her representation, and for when, if desired, he or she *may* withdraw.⁸⁴ In the latter situation, where withdrawal is merely

73. See *supra* notes 58-65 and accompanying text (detailing Model Rules).

74. See *supra* notes 58-65 and accompanying text.

75. See *supra* notes 34-36 and accompanying text (examining components of conveyancing).

76. See *supra* notes 58-65 and accompanying text (discussing Model Rules).

77. See *supra* note 58 and accompanying text (detailing Model Rule 1.6).

78. See *supra* notes 59-60 and accompanying text (detailing Model Rules 1.7 and 1.8).

79. See *supra* note 60 and accompanying text (detailing Model Rule 1.8).

80. See *supra* note 61 and accompanying text (detailing Model Rule 1.9).

81. See *supra* note 62 and accompanying text (detailing Model Rule 1.10).

82. See *supra* note 63 and accompanying text (detailing Model Rule 1.15).

83. See *supra* note 63 and accompanying text (detailing Model Rule 1.15).

84. See *supra* note 64 and accompanying text (detailing Model Rule 1.16).

permissive, the rule focuses on avoiding any adverse effects to the client.⁸⁵ Rule 1.18, Duties to Prospective Client, essentially provides that the lawyer's duty to the client begins at the moment the client seeks representation, whether or not such representation follows.⁸⁶

It is evident that these rules establish the parameters of a relationship, one that brings with it great responsibility.⁸⁷ The affiliation between the lawyer and client entails much more than a mere business transaction where services are exchanged for cash to the mutual benefit of both parties.⁸⁸ Instead, it is one person acting solely for the benefit of another, with certain fiduciary obligations to that other; it is an agency relationship.⁸⁹ The Model Rules present the guidelines that make this agency relationship work and allow the client to place the utmost faith and trust in his or her attorney.⁹⁰

C. The Application: The Attorney-Client Relationship in the Real Estate Context

Much of conveyancing involves the creation and preparation of legal documents.⁹¹ These documents direct the fate of the legal interests of the parties to them.⁹² Thus, through the execution of these instruments, legal rights are created, destroyed, modified and/or transferred.⁹³ As these instruments involve the legal rights of others, the creation, approval and management of these documents undoubtedly constitutes the practice of law.⁹⁴ As courts have held, however, it takes something more for such services to be restricted to the legal profession—the justification for such a restriction must be the existence of some disservice to the public that results from allowing a layperson to engage in this type of law practice.⁹⁵ The Model Rules reveal, however, that it is not merely the occurrence of such a disservice that warrants conveyancing's regulation, but rather the risk that such disservice will occur alone gives rise to

85. See *supra* note 64 and accompanying text (detailing Model Rule 1.16).

86. See *supra* note 65 and accompanying text (detailing Model Rule 1.18).

87. See *supra* notes 58-65 and accompanying text (examining Model Rules); see also Chin & Wells, *supra* note 66, at 14 n.62 (discussing lawyer-client relationship). The lawyer-client relationship is built on trust, to the extent that the client must become dependent upon the lawyer. See Chin & Wells, *supra* note 66, at 14 n.62.

88. See Chin & Wells, *supra* note 66, at 14 n.62.

89. See *id.*; see also Silver & Syverud, *supra* note 66 and accompanying text (discussing lawyer as agent); REST. (SECOND) OF AGENCY § 381 (1958) (applying agency law to lawyers).

90. See *supra* note 66 and accompanying text (discussing lawyer-client relationship).

91. See *supra* note 38 and accompanying text (discussing document aspect of conveyancing).

92. See *supra* note 39 and accompanying text (noting conveyancing documents involve others' legal rights).

93. See *supra* notes 39-40 and accompanying text (contending dealing with conveyancing instruments requires use of legal expertise and judgment).

94. See *supra* notes 38-40 and accompanying text (addressing preparation of conveyancing instruments as practice of law).

95. See *supra* notes 31-32 and accompanying text (discussing issue of whether public disserved).

the need for restriction.⁹⁶ Thus, it becomes the nature of the role the lawyer plays in relation to his or her client that should guide the regulation of conveyancing.⁹⁷

The Model Rules create this role.⁹⁸ They create the relationship between the lawyer and the client.⁹⁹ Additionally, the Model Rules provide guidelines to ensure that such risks to the client's interests do not exist because of a failure on the lawyer's part to adequately represent the interests of the client above his or her own interests and those of others.¹⁰⁰ Members of other professions who seek to engage in layperson conveyancing lack such client protections.¹⁰¹

D. Considering Layperson Conveyancers

Layperson conveyancers often do not conduct real estate transactions with solely their client's interests in mind, but rather they are motivated by their own best interests and those of other interested parties.¹⁰² For example, a title insurance company is at least as concerned with writing insurance policies as it is with seeing its client's transaction through to a successful result.¹⁰³ Although the two interests may coincide in some ways, the risk is present that a client's interest will be undermined in favor of those of the title insurance company.¹⁰⁴ A second example is real estate brokers, who often receive profit incentives for the sale of property.¹⁰⁵ Once again, there exists the opportunity for the broker to put his or her financial interest above the client.¹⁰⁶ In addition, various parties and companies provide incentives to the closer, whether an attorney or layperson, in the form of gifts and reduced costs; again giving rise to the risk of putting one's own interests above those of the client.¹⁰⁷

96. See *supra* notes 58-65 and accompanying text (examining Model Rules).

97. See *supra* note 46 and accompanying text (examining lawyer's role in relation to client).

98. See *supra* notes 58-65 and accompanying text (examining Model Rules).

99. See *supra* notes 58-65 and accompanying text.

100. See *supra* notes 58-65 and accompanying text.

101. See *supra* notes 6, 8, 15-21 and accompanying text (discussing layperson conveyancers).

102. See *supra* note 6 and accompanying text (noting profit incentives and conflicts for layperson conveyancers).

103. See generally *State Bar of Ariz. v. Ariz. Land Title and Trust Co.*, 366 P.2d 1 (Ariz. 1961) (deciding title insurance company primarily concerned with writing title insurance policies). The court opined that title insurance companies in the business of conducting real estate closings concern themselves with the rights of their company above those of the parties to the transaction. *Id.* at 9. The court observed that this situation lacks any attorney-client relationship. *Id.*

104. See Woodruff, *supra* note 6, at 803 and accompanying text (noting profit incentives).

105. See Woodruff, *supra* note 6, at 803 and accompanying text (noting incentives for brokers).

106. See Woodruff, *supra* note 6, at 803 and accompanying text; see also Melone, *supra* note 43, at 78 (discussing consumer protection justification for unauthorized practice laws).

107. See Woodruff, *supra* note 6, at 803 and accompanying text; see also Melone, *supra* note 43 at 78.

1. Lack of a Loyalty-Focused Relationship

The above-mentioned scenarios all pose the risk of diserving the client.¹⁰⁸ These risks exist when both a layperson engages in conveyancing and even if a lawyer conducts the transaction.¹⁰⁹ The difference is that lawyers are not even given the choice of putting their own interests above their clients' because the Model Rules eliminate such a possibility.¹¹⁰

The Model Rules create a lawyer-client relationship based on loyalty, alleviating, if not altogether eliminating, the possibility that the lawyer will succumb to the temptations that cause the risk of diserving the client.¹¹¹ Laypersons are provided with no such restraint, and thus the risk remains.¹¹² As a result, restricting conveyancing to lawyers is in the best interest of the client.¹¹³

2. Considering the Opposition

Opponents of such restriction have argued that restricting the business of conveyancing to lawyers is monopolistic and is counter to American ideals of capitalism and a free market economy.¹¹⁴ Such arguments proceed to venture that those whose legal rights are at stake should be entitled to personally assign their own degree of importance to their legal interests, and to personally decide whether to enlist the services of a lawyer or a layperson conveyancer.¹¹⁵ Further, opponents have opined that standardized fill-in-the-blank forms, commonly employed in the execution of real property interests, allow for drafting by laypersons.¹¹⁶ It is clear, however, that each of these contentions must fail because the merits on which they rest are insufficient grounds to allow laypersons to transact real estate.¹¹⁷

The legal rights involved in transacting real estate are paramount and far too important to allow the client to decide how to deal with them.¹¹⁸ This is the

108. See *supra* notes 6, 8, 15-21 (discussing layperson conveyancers); see also notes 6, 8, 31-32 and accompanying text (discussing issue of whether public disserved).

109. See *supra* notes 6, 8, 15-21; see also notes 31-32 and accompanying text.

110. See *supra* notes 58-65 and accompanying text (examining Model Rules).

111. See *supra* notes 58-65 and accompanying text.

112. See *supra* note 6 and accompanying text (discussing layperson conflicts).

113. See *supra* note 6 and accompanying text; *supra* notes 31-32 and accompanying text (discussing issue of whether public disserved); *supra* notes 58-65 and accompanying text (examining Model Rules).

114. See *supra* note 45 and accompanying text (detailing monopolistic/anticompetitiveness argument).

115. See *supra* note 45 and accompanying text.

116. See Noble-Allgire, *supra* note 45, at 340 and accompanying text (discussing use of standardized forms); Munro, *supra* note 45, at 242 and accompanying text (discussing standardization of conveyancing).

117. See *supra* note 44 and accompanying text (noting diminished risk of error with lawyer involvement); see also *supra* note 46 and accompanying text (discussing lawyer-client relationship).

118. See *supra* note 41 and accompanying text (addressing real estate instruments' effect on legal rights). Courts have repeatedly held that the preparation of legal documents involving the legal rights of another constitutes the practice of law. *Id.*

exact premise on which unauthorized practice laws are based.¹¹⁹ If such were not the case there would be no necessity of bar admission and the right to practice law would be held by any citizen.¹²⁰ Clearly, an individual's legal rights are too important to be handled by one not sufficiently trained to do so.¹²¹ Why then should conveyancing be any different?¹²² Why should principles of the monopoly be sufficient to allow layperson practice here, but not in other spheres of the law?¹²³

In addition, the argument that standardized forms have made conveyancing "simple" or "mindless" fails.¹²⁴ It is abundantly clear that the existence of such forms does not remove the need for legal judgment and analysis.¹²⁵ A lawyer is still required to determine the content of these forms and to determine what changes in legal interests occur through their execution.¹²⁶ These forms need to be understood, be interpreted, and be accurate, such that the legal interests they purport to convey are actually capable of being conveyed.¹²⁷

The focus cannot be on specific aspects of real estate practice, such as the opponents' arguments seek to base their authoritativeness on.¹²⁸ The determination of whether conveyancing need be restricted to lawyers must be based on the relationship between the conveyancer and the client.¹²⁹ The Model Rules are the only body to create such a relationship adequate to protect the client's legal interests.¹³⁰

IV. CONCLUSION

The Model Rules—that one bastion of persuasive regulation sufficient to create a virtual guarantee of client protection. These American Bar Association-enacted guidelines create a relationship between the service provider, the lawyer, and the service recipient (the client) that exists in no other such form of relationship; the participants of this relationship seek to establish

119. See *supra* notes 22-23 and accompanying text (discussing unauthorized practice laws).

120. See *supra* notes 22-23 and accompanying text.

121. See *supra* notes 6, 8, 31-32 and accompanying text (contending test for determining whether to restrict conveyancing to attorneys whether public disserved).

122. See *supra* note 45 and accompanying text (arguing restricting conveyancing to lawyers monopolistic).

123. See *supra* note 45 and accompanying text.

124. See Noble-Allgire, *supra* note 45, at 340 and accompanying text (discussing use of standardized forms); Munro, *supra* note 45, at 242 and accompanying text (discussing standardization of conveyancing).

125. See *supra* note 41 and accompanying text (noting execution of real estate instruments requires legal training and skill).

126. See *supra* note 41 and accompanying text.

127. See *supra* note 41 and accompanying text.

128. See *supra* note 46 and accompanying text (discussing lawyer-client relationship in context of Model Rules).

129. See *supra* note 46 and accompanying text.

130. See *supra* note 6 and accompanying text (discussing layperson conflicts); *supra* notes 6, 8, 31-32 and accompanying text (discussing issue of whether public disserved); *supra* notes 58-65 and accompanying text (examining Model Rules).

their stake in real estate transactions. The punitive sanctions this code inflicts upon its transgressors are so severe that the risk that these rules will be broken is minimal, if not virtually non-existent.

The message is clear—the legal rights involved in the transfer of real property are too important to go unprotected and put at risk of subordination. This is because conducting real estate transactions necessarily involves the use of legal judgment and discretion, and the level of importance assigned to the legal rights involved is such that inappropriate dealings with them have a likelihood of effectuating serious consequences. Thus, as the need for protection is established, it leaves the search for the realm wherein such protection can be provided. This realm is under the umbrella created by the Model Rules, and this umbrella only exists within the lawyer-client relationship.

Outside this relationship, away from the shield of the Model Rules' umbrella, the risk that a client's legal interests will be undermined in favor of those of another is inherent. This is not to say that this risk does not exist everywhere, even with lawyers. But, the restrictions imposed by the Model Rules prevent the lawyer from succumbing to this risk. This is the importance of rules of ethics, and this is why conveyancing should be restricted to the legal profession—those agents living under the umbrella.

Michael C. Ksiazek