



**OPINION OF THE ETHICS COMMITTEE OF  
THE REAL ESTATE BAR FOR MASSACHUSETTS, INC.**

*This opinion of the Association's Ethics Committee was approved by the REBA Board of Directors by unanimous vote on October 11, 2006.*

**QUESTION PRESENTED:**

A number of REBA members have been solicited by various settlement service providers to act as notaries at the settlement of residential real estate closings, both those involving purchases of real estate and those involving a refinance of a mortgage. In such closings, commonly referred to as "notary" closings or "witness" closings, the attorney has no control or supervision over the other activities that must be undertaken to ensure that the real estate interest is properly conveyed. The attorney's role is limited to acting as a notary at the time of the settlement. Where a settlement service provider has restricted the attorney's participation in a conveyance to that of acting as a notary at the time of the settlement, what are the attorney's ethical obligations?

**SUMMARY ANSWER:**

A settlement service provider other than an attorney that conducts substantially all of the activities of a residential real estate closing is engaged in the unauthorized practice of law. The attorney's limited participation in those activities, whereby the attorney facilitates the convey-

ance by witnessing the settlement, is not permitted under the Rules of Professional Conduct. See Rule 5.5(b) of the Rules of Professional Conduct (“A lawyer shall not ... assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law”). Under these circumstances, the attorney’s limited participation in the closing on behalf of the lender is contrary to Massachusetts law and the attorney should either decline or withdraw from such representation. Rule 1.16(a)(1) of the Rules of Professional Conduct.

## **OPINION:**

An assessment of an attorney's ethical obligations in a "notary" closing first requires an understanding of the practice of conveyancing. The term "conveyancing" refers to that continuous, interconnected series of activities that must be performed in order to convey a legal interest in real estate from one party to another. Briefly, "conveyancing" includes (a) the review of the legal title to the property to ensure that the seller has good and clear and marketable title to the property, (b) the supervision of the process by which any title issues or encumbrances are resolved, (c) controlling the settlement or "closing" of the real estate transaction to ensure that the appropriate legal documents are properly executed, the consideration for the property exchanged, and the parties' obligations to one another are fulfilled, and (d) recording the appropriate documents to create the various interests in the property.<sup>1</sup> The process is substantially the same whether the transaction is a purchase or a mortgage refinance.

In most instances involving a purchase of real estate, the homebuyer must borrow money from a bank or a mortgage lender to purchase the property. As security for its loan, the lender

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<sup>1</sup> This description is necessarily an over-simplified summary of the work involved in closing a residential real estate transaction on behalf of a lender. A number of treatises provide a more complete account of the extensive amount of work involved in completing a residential real estate transaction. See, e.g., Francis T. Talty, et al., 5 Mass. Practice: Methods of Practice, (West Group 2000) (Chapters 5 through 9 devoted to aspects of residential real estate closings); Arthur L. Eno., Jr., et al., 28 Mass. Practice: Real Estate Law (West Group 2004) (Chapters 28 through 31 devoted to aspects of residential real estate closings); Kathleen M. O'Donnell, et al., Handling Residential Real Estate Transactions in Massachusetts (MCLE 2000) (two volumes); Lynne Murphy Breen, et al., Representing Lenders in Residential Transactions: Step-by-Step, Practical Advice (MCLE 2004); Dennis P. Powers, et al., How to Handle a Residential Real Estate Closing (Mass. Bar Institute 2003); Peter M. Heintzleman, et al., Handling Residential Condo and Multi-Family Transactions: A Step-by-Step Guide (MCLE 1998); William V. Hovey, et al., Massachusetts Nuts & Bolts of Residential Real Estate Transactions (Professional Education Systems, Inc. 1998); Gayle Stone-Turesky, et al., Residential Real Estate Basics: From Offer to Closing (MCLE 1996); Ward P. Graham, et al., Residential and Commercial Title Insurance: What It Is, What It Does and How It Works (MCLE 2004); Ruth A. Dillingham, et al., How To Search a Residential Real Estate Title: A Practical Introduction to Title Abstracting (MCLE 2005). See also Arthur L. Eno., Jr., Massachusetts Real Estate Law Sourcebook, (MCLE 2005) (compilation of federal and state statutes and regulations affecting real estate).

will receive a mortgage in the property. Before actually making the loan, the lender retains a conveyancing attorney to ensure that the lender's interests in the transaction are protected. Although the seller and the buyer sometimes retain their own attorneys, because the party with the greatest risk is the lender who is providing the bulk of the purchase price, the lender's conveyancing attorney is ordinarily responsible for virtually all the conveyancing work. In those instances involving a mortgage refinance, the lender also retains a conveyancing attorney to ensure that the lender obtains a valid mortgage in the real estate. The mortgagor rarely retains his own attorney.

Below, each of the activities in the overall conveyancing process is briefly discussed.

**A. ASSESSMENT OF TITLE TO PROPERTY.**

Initially, after the lender notifies the lender's conveyancing attorney of its intent to make a mortgage loan, the conveyancing attorney conducts a review of the title to the real property that will secure the loan. Whether the transaction is a purchase or a refinance, the primary purpose of the conveyancing attorney's review is to ensure that there are no defects or clouds on the title so that the lender's lien can be perfected. However, both the homebuyer and seller, or the mortgagor in the case of a refinance, have an equally strong interest in ensuring that the legal title to the property is free of any defects or clouds. These parties necessarily rely on the review conducted by the lender's conveyancing attorney.

Because the review requires a legal assessment of all pertinent and applicable public and private records, court decisions, municipal ordinances and statutes from which a legal opinion as to the title to the property can be determined, it has long been held to be the practice of law. See

Opinion of Justices, 289 Mass. 607, 615 (1935) (practice of law includes the examination of real estate records in order to assess the legal validity of those documents and of title); In re Behenna, 92-72BD (Jan. 19, 1993) (O'Connor, J.) (“title examination, even without the rendering of advice, would constitute the practice of law”); In re James M. Oates, No. 81-11BD (Aug. 6, 1986) (Liacos, J.) (“[T]itle searching its commonly perceived by the general public to be a pursuit, if not exclusively within the realm of the legal profession, closely associated with it”); Mass. Conveyancers’ Ass’n, Inc. v. Colonial Title & Escrow, Inc., 13 Mass. L. Rptr. 633, 2001 WL 669280 (Mass. Super. 2001) (“[e]valuating title to real estate to determine the interest created, transferred or terminated and communicating that evaluation to any interested party to a residential real estate transaction” constitutes the practice of law).

In order to conduct this review, the conveyancing attorney reviews both record title matters and matters outside the record title. Significantly, though most registries now have on-line web sites that allow electronic searches of documents recorded with them, there are many off-record documents that affect title to real estate that cannot be searched in this manner.

#### **Lender’s Conveyancing Attorney Assesses Record Title Matters.**

In order to assess the quality of a record title for property in connection with a loan that will be secured by a mortgage on that property, the lender’s conveyancing attorney reviews the record documents. The examination of title generally begins at the registry of deeds in the county where the land lies. Massachusetts has two independent systems of land record-keeping. The first is the registered land system, which is a Torrens-type system under the control of the Land Court and implemented by separate local officials in each county registry of deeds. The second is the unregistered land system which is managed entirely by the local registries of deeds

of each county. Property is generally either registered land or unregistered land, though it can sometimes consist of a combination of both registered and unregistered land.

Working backwards from the deed to the present owner, the conveyancing attorney must go back, step by step, conveyance by conveyance, to a deed good on its face and which is a sufficient starting point. Using that deed as the starting point, and the grantor indices at the registry of deeds, the conveyancing attorney then “runs” the title from that grantor forward. The indices are reviewed to find every deed from the grantor or other instrument conveying an interest in the property, any and all adverse titles or claims, all liens, charges, encumbrances, including judgments against any person during the period the law makes them a lien on land, taxes, special assessments, and statutory liens, and every other matter or thing appearing of record that may affect, implicate or impair the title. This process is repeated for successive owners up to the present time.

The examination of these documents found at the registry of deeds may disclose any number of clouds on the title or encumbrances on the property, including those arising from a problem with a right of access to the property, adverse possession, attachments, bankruptcy filings, condominium issues, inaccurate descriptions in a deed or other title documents, improper discharges of mortgages, the pendency of divorce proceedings, easements, executions, homesteads, leases, lis pendens, mechanics’ liens, mortgage foreclosures, uncertain powers of attorney, or tax liens, among others. It is not possible to list here all the myriad problems that can be found from a title examination. A number of title defects and encumbrances that are identified are routine, such as the identification of outstanding mortgages that need to be

discharged, but many are more complex and require a substantive knowledge of Massachusetts real estate law.

Although most documents pertaining to real estate are recorded at the registry of deeds, depending on the property, the conveyancing attorney also may be required to review and evaluate public documents filed at the probate court or at the town or city hall, documents prepared by registered land surveyors, and documents maintained by the tax assessor. Of course, it is also possible that any one of a number of title problems could arise from one of these documents.

#### **Lender's Conveyancing Attorney Assesses Off-Record Title Matters.**

In addition to reviewing title documents recorded at the registry of deeds and other public records, the lender's conveyancing attorney may be required to review off-record matters to ensure that the lender's interest in the property will be protected. Specifically, the conveyancing attorney may be required to evaluate and to ensure that (a) all conditions of the purchase and sale agreement and of the loan commitment are or can be satisfied; (b) the property is not located in a flood plain zone, or, if it is, flood insurance can be obtained; (c) all improvements to the structures of the property are located within the boundary lines of the property and comply with zoning dimensional requirements contained in the by-laws of the town or city; (d) the property complies with Title V of the State Environmental Code (310 C.M.R. 15.301); (e) orders of condition issued by a local conservation commission, if any, are complied with; (f) adequate casualty insurance is obtained; and (g) all real estate taxes and other municipal charges that are due and payable have been paid, and there are no other outstanding municipal charges. The assessment of these matters also requires knowledge of Massachusetts real estate law.

**B. RESOLUTION OF TITLE ISSUES.**

When there is an existing defect or cloud with respect to the title to the property being conveyed, it must ordinarily be removed or cured before the lender will agree to go forward with the mortgage loan. Generally, because it is in the lender's commercial interest for the defect or cloud to be removed or cured so that the loan can be made to the borrower, the lender's conveyancing attorney is actively involved in the process of resolving any title issues.

Just as a substantive knowledge of Massachusetts law is required to identify the title defect or cloud, such knowledge is also required in order to identify a proper resolution to the title problem. In some instances, the defect or cloud can be resolved by the conveyancing attorney directly. For instance, the conveyancing attorney may use part of the loan proceeds to pay off an outstanding mortgage or attachment. In other situations, the buyer or the seller, the mortgagor, or other person may act to resolve the title defect or cloud. Even in those situations, a substantive knowledge of Massachusetts law is required because the lender's conveyancing attorney must review the steps taken by such party to ensure that the title defect or cloud has been properly resolved under Massachusetts law. See Colonial Title & Escrow, Inc., supra (reviewing legal documents that affect title to real estate constitutes the practice of law). As with the review of the title, the parties rely on the actions taken by the lender's conveyancing attorney to resolve title issues or to review the resolution by others.

**C. CONTROL OF SETTLEMENT OF TRANSACTION.**

If in the judgment of the conveyancing attorney, after reviewing the record and non-record matters, the title to the property is satisfactory, the conveyancing attorney prepares to conduct the settlement of the real estate transaction. In advance of the settlement, sometimes referred to as a “closing,” the conveyancing attorney receives from the lender, or himself prepares, a myriad number of loan documents, many of which are required by the secondary market for mortgages, and must be executed by the parties. Depending on whether the transaction is a purchase or a refinance, the documents ordinarily include the application for the mortgage loan, the acceptance of the mortgage commitment, an agreement between the buyer and seller as to the adjustment of property taxes, an affidavit of owner occupancy, a notice of the lead paint law provisions and a release of the lender from liability for any violations (G.L. c. 111, §§ 190-99 and 105 C.M.R. 460.00 et seq.), a smoke detector certification agreement (G.L. c. 148, §§ 26E and 26F), a certificate regarding the presence of an approved carbon monoxide alarms in conformance with the requirements of the board of fire prevention regulations (G.L. c. 148, § 26F1/2), a certificate of nonforeign status (Section 1445 of the Internal Revenue Code), an affidavit of the seller to permit the lender to obtain title insurance without exceptions for mechanics liens and persons in possession, the truth in lending disclosure statement required by Regulation Z (15 U.S.C.A. §§ 1601-1638), a disclosure of the lender’s intent concerning the assignment of servicing of the mortgage loan (12 U.S.C.A. § 2605(a)), the promissory note, and the mortgage with any applicable riders. Copies of these various forms of documents are attached to this Opinion.

Where the borrower is refinancing a mortgage, the borrower must be provided with a notice of his right to rescind before the expiration of three business days. There may be

additional loan documents depending on a number of factors, such as whether the home being purchased is new construction, whether the property is a condominium or co-op, and how title to the property is held. The lender's conveyancing attorney reviews these documents for accuracy and completeness in order to ensure that, if they are executed properly, they will provide the lender with a valid interest in the property.

In addition to the loan documents listed above, the conveyancing attorney prepares a settlement statement which accounts for the proceeds of the transaction. For all federally regulated mortgage loans, the conveyancing attorney is required to complete a Uniform Settlement Statement provided for under Regulation X (Code of Federal Regulations Title 24). The Settlement Statement identifies the collection and disbursement of the funds in conformity with the parties' respective obligations. In order to prepare the Settlement Statement accurately, the conveyancing attorney reviews the parties purchase and sale agreement and any other documents containing the parties' agreements. The conveyancing attorney is required to provide a draft of the Settlement Statement to the parties the day before the closing for their review.

Where the transaction involves a purchase, the conveyancing attorney also makes any necessary adjustments as required by the parties' Purchase and Sale Agreement that relate to collected rents, mortgage interest, prepaid premiums on insurance, if assigned, water and sewer charges, operating expenses (if any), according to any schedule attached to the agreement, and taxes for the then current year. The conveyancing attorney then executes the Uniform Settlement Statement and certifies that the information shown therein is accurate and that disbursement of the funds will be made in accordance with the Statement.

At the closing, the lender's conveyancing attorney provides the parties with the loan documents relative to their transaction. Almost always, whether the transaction is a purchase or a refinance, the parties have questions at the closing regarding the loan documents, the disbursement of the funds as reflected in the Settlement Statement, the mortgage obligations, and other matters regarding the transaction. The lender expects that its conveyancing attorney, consistent with his obligations to the lender, will explain the various loan documents to the parties. By doing so, the conveyancing attorney is, strictly speaking, not providing the parties with legal advice but simply assisting them, as the lender's agent, to understand what it is they are signing. See Rule 4.3 of the Rules of Professional Conduct, Comment 1 ("Explaining the lawyer's own view of the meaning of a contract, for example, does not involve the giving of 'advice' to an unrepresented person"). In addition, the conveyancing attorney is responsible for ensuring that the loan documents are executed properly with any necessary acknowledgments required by federal or state law. See Colonial Title & Escrow, Inc., supra ("[e]xplaining at the closing any documents relating to the interest in the real estate being created, transferred or terminated and relating to the agreement of the parties" is the practice of law).

The conveyancing attorney also reviews and passes on all title documents. Specifically, where the transaction involves a purchase of property, the conveyancing attorney reviews the deed provided by the seller to ensure that it conforms to the terms of the parties' contract, contains the correct description, and that it is properly dated, signed and acknowledged. In both a purchase transaction and a refinance, the conveyancing attorney also ensures that all the requirements specified in the mortgage commitment have been satisfied and all contractual obligations between the parties have been met so that the title to the property may be validly conveyed to the buyer (in a purchase transaction) and the lender, thereby, may receive a valid

interest in the property. See Colonial Title & Escrow, Inc., *supra* (“[e]valuating and ensuring that parties to a real estate transaction have complied with their agreements” is the practice of law).

**D. DISBURSEMENT OF PROCEEDS/RECORDING TITLE DOCUMENTS.**

Following the settlement, the lender’s conveyancing attorney performs a final run-down of the title at the registry of deeds to ensure that the status of the title has not changed. If there have been no changes in the status of the title, the conveyancing attorney is also responsible for recording the deed, the mortgage, and any other documents to protect the lender’s rights in the property. The recording of the deed and any other title documents also establishes the borrower’s legal rights to the property as against all others. As with the other aspects of the conveyancing process, the parties rely on the lender’s conveyancing attorney to properly record the deed and other title documents.

After the deed and mortgage are recorded, the lender’s conveyancing attorney disburses the loan proceeds in accordance with the Uniform Settlement Statement. The disbursement may include paying any real estate taxes that are due, paying any other encumbrances on the property, obtaining discharges or releases, consistent with the parties’ obligations and the lender’s instructions, and paying commissions due to the real estate brokers in a purchase transaction. Once the appropriate documents are recorded, the conveyancing attorney reports and transmits all documents to the lender.

**E. MASSACHUSETTS STATUTORY PROVISIONS AFFECTING THE PRACTICE OF CONVEYANCING.**

The Massachusetts Legislature has enacted at least three statutes that bear upon the process of conveying property in the Commonwealth. Each of these statutes, discussed below, have provisions that either anticipate or require the involvement of an attorney in the practice of conveyancing.

**Title Certification Statute – G.L. c. 93, § 70.**

In 1972, the Massachusetts Legislature enacted the Title Certification Statute, G.L. c. 93, § 70, which affords homebuyers a significant benefit. The statute provides that the attorney for the mortgage lender is required to provide the mortgagor with a certification of title to the property being conveyed. The statute specifically states that the certification must come from the “attorney” for the mortgage lender. The attorney’s title examination must extend at least fifty years back from the earliest deed which on its face does not suggest a defect in the title. The certification is to include a statement that at the time the mortgage is recorded the homebuyer holds good and sufficient record title to the property free from all encumbrances, and is effective for the benefit of the homebuyer as long as he owns the property. A similar certification is required to be provided by the attorney to the lender and is effective as long as the mortgage is outstanding.

The Massachusetts Division of Banks has recognized that a title certification is “required at closing” and may be rendered “only by a practicing attorney.” See Massachusetts Division of Banks Opinion 98-135. Moreover, under the provisions of the Title Certification Statute, any “willful failure” by the attorney to render a certification to the homebuyer shall constitute an unfair or deceptive act or practice under the provisions of G.L. c. 93A.

**Good Funds Statute – G.L. c. 183, § 63B.**

In 1994, the Massachusetts Legislature enacted the Good Funds Statute, G.L. c. 183, § 63B, which addresses how the proceeds from purchase money first mortgage loans and second mortgage loans are to be handled. The statute requires that the full amount of the mortgage loan proceeds due to the mortgagor pursuant to the Settlement Statement must be transferred to the borrower, to the borrower's attorney, or to the lender's attorney before the deed or the mortgage may be recorded. There is no provision for the loan proceeds to be held by a settlement service provider who is not the lender's attorney.

**Mortgage Discharge Statute – G.L. c. 183, § 54C.**

The Mortgage Discharge Statute, G.L. c. 183, § 54C, was enacted in response to the failure of many mortgage lenders to promptly issue discharges of paid mortgage loans. Under the statute the "attorney who, pursuant to a payoff statement" from the mortgage servicer sent funds to pay the outstanding mortgage, in other words, the conveyancing attorney, can execute an affidavit recounting the payment of the funds and the efforts to obtain a discharge. When this affidavit is filed with a copy of the cancelled check showing payment, the mortgage is discharged. Where the Mortgage Discharge Statute refers to the "attorney's" role in the conveyancing process, it clearly anticipates that attorneys, rather than laypersons, will conduct residential real estate closings. There is no provision for the affidavit to be provided by a non-attorney.

**F. ISSUANCE OF TITLE INSURANCE.**

Title insurance is a modern adjunct to most mortgage loan transactions. Ordinarily, the lender requires title insurance coverage in the amount of the loan on the property that is the subject of the transaction. The title insurance policy ensures against (a) title to the property being vested otherwise than stated in the policy, (b) any defect in or lien or encumbrance on the title, (c) the title to the property being unmarketable, (d) lack of a right of access to and from the property, (e) the invalidity or unenforceability of the lien of the insured mortgage upon the title, (f) the priority of any lien or encumbrance over the lien of the insured mortgage, and (g) lack of priority of the lien of the insured mortgage over any statutory lien for services.

In order to determine whether property being mortgaged is “insurable,” for both the lender’s title insurance and the owner’s title insurance, it is necessary for the conveyancing attorney to ascertain the status of the title to determine what, if any, defects, liens or encumbrances exist as of the date that the policy will issue. The determination of the status of title is made through a title examination that is identical in all respects to the examination conducted by the conveyancing attorney described above. For this reason, title insurance companies generally expect their agents who make decisions as to whether to issue title policies in Massachusetts to have a working knowledge of Massachusetts real estate law. Without a working knowledge of Massachusetts real estate law, it would not be possible to determine the insurability and marketability of title to real estate in the Commonwealth. See Colonial Title & Escrow, Inc., supra (issuing title certification or policy of title insurance is the practice of law).

The decision to issue or not to issue a title insurance policy is ordinarily made by the conveyancing attorney based on this review and not by the title insurance company directly. Although the title insurer has underwriting guidelines, the title insurer does not control the manner in which the conveyancing attorney or any other title insurance agent determines the

quality of title. When the conveyancing attorney determines that the “quality of title” is acceptable, i.e., insurable, and that a legally valid interest in the property has been conveyed to the lender, the conveyancing attorney issues a policy.

The conveyancing attorney also offers to the borrower an owner’s title insurance policy which ensures against many of the same risks. A borrower typically does not understand what risks are or are not covered in a title insurance policy. For the borrower to make an informed decision whether he should buy the title insurance policy, which may cost more than one thousand dollars, the conveyancing attorney must explain these risks to the borrower. Where the conveyancing attorney has also assessed the legal title to the property, he may be aware of a particular need for title insurance policy and inform the borrower of this specific risk.

### **ANALYSIS:**

Our analysis starts from the established premise that “conveyancing” is the practice of law and can only be undertaken on behalf of another by a duly qualified and licensed attorney. Opinion of the Justices, 289 Mass. at 613 (“conveyancing” is the practice of law); Closings, Ltd., supra; Colonial Title & Escrow, Inc., supra. It is also well-established that, though it requires a number of separate activities be undertaken, a conveyance of real estate is a single event. Consequently, an attorney must control or be responsible for all elements of the conveyance whether it is a purchase of real estate or a refinance. E.g., Georgia Formal Advisory Opinion, No. 00-3 (“The lawyer must be in control of the closing process from beginning to end”).

In a “notary” closing, the settlement service provider purports to divest the lender’s attorney of such responsibility. The attorney does not review any part of the title to the real

property and he is not involved in identifying or resolving defects or clouds on the title. The attorney does not substantively review any of the documents that are to be executed at the settlement. Although he may be asked to review the deed proffered by the seller, without having reviewed any of the underlying title documents, he cannot provide any meaningful assessment of it. The attorney is instructed by the settlement service provider not to answer any questions asked by the parties at the time of the settlement. He does not record the deed, the mortgage, or any other title documents. He does not receive any portion of the mortgage loan and does not disburse any proceeds. All of these activities are undertaken by the settlement service provider. The lender's attorney does nothing more than preside over the execution of the deed and other closing documents, but purports to do so merely as a "witness," not as someone who is practicing law. In essence, his role is reduced to that of a notary. But see Executive Order No. 455, § 9(c) ("notary public who is not an attorney licensed to practice law in Massachusetts, or who is not directly supervised by an attorney, shall not conduct a real estate closing and shall not act as a real estate closing agent").

As discussed below, the actions of the lender's attorney in a "notary" closing raise ethical concerns for two related, but independent, reasons. The first arises from the attorney's participation in the unlawful acts of the settlement service provider that violate the unauthorized practice of law statutes. G.L. c. 221, § 46 ("[N]o corporation or association shall draw agreements, or other legal documents not relating to its lawful business . . . or give legal advice in matters not relating to its lawful business, or practice law, or hold itself out in any manner as being entitled to do any of the foregoing acts") and G.L. c. 221, § 46A ("No individual, other than a member, in good standing, of the bar of this commonwealth shall practice law"). The

second arises from the attorney's obligations to the lender client not to limit the scope of his representation in a manner that violates the law.

**A. Participation By An Attorney In A “Notary” Closing Constitutes The Assistance In The Unauthorized Practice Of Law In Violation Of The Rules Of Professional Conduct.**

Because the settlement service provider is engaged in the unauthorized practice of law, the attorney's participation in the “notary” closing is plainly not permitted under Rule 5.5(b) (lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law). See also Restatement (Third) of The Law Governing Lawyers, § 4 (“A person not admitted to practice as a lawyer may not engage in the unauthorized practice of law, and a lawyer may not assist a person to do so”). In the states where conveyancing is deemed to be the practice of law, only two, South Carolina and Georgia, have had occasion to consider this issue. In both, the courts have held that an attorney's participation in a “notary” closing is an ethical violation. See In re Ingalls, 369 S.E.2d 569, 2006 WL 2051044 (S.C. 2006) (“by knowingly allowing a non-lawyer to close real estate transactions, [attorney] assisted in the unauthorized practice of law”); In re Boyce, 364 S.C. 353, 613 S.E.2d 538 (2005) (“participating in ‘witness only’ closings when no other South Carolina licensed attorney is involved has the effect of assisting in the unauthorized practice of law”); South Carolina Bar Ethics Advisory Comm. Opinion No. 04-02, 2004 WL 1520094 (Feb. 20, 2004) (“‘witness only’ closings expose participants to criminal sanctions”); South Carolina Bar Ethics Advisory Opinion 05-18. See also In re UPL Advisory Opinion 2003-2, 277 Ga. 472, 588 S.E.2d 741 (2003) (only lawyer may close real estate transaction and “witness only” closings not

permitted); Formal Advisory Opinion No. 04-1, 280 Ga. 227, 626 S.E.2d 480 (Ga. 2006) (The closing of a real estate transaction in Georgia constitutes the practice of law, and, if performed by someone other than a duly-licensed Georgia attorney, results in the prohibited unlicensed practice of law).

**B. An Agreement That The Lender’s Attorney Will Do Nothing More Than “Witness” The Execution Of Documents Is Contrary To Massachusetts Law And Unethical Under The Rules Of Professional Conduct.**

While the Rules of Professional Conduct permit an attorney to limit the scope of his representation, the “agreement concerning the scope of representation must accord with . . . the law.” Rule 1.2 of the Rules of Professional Conduct, Comment (5). An agreement by which a conveyance of real property is controlled and supervised by a non-lawyer, and the attorney presides over the settlement merely as a notary, is a violation of Massachusetts law. E.g., Opinion of the Justices, 289 Mass. at 613 (“conveyancing” is the practice of law). In addition to the common law requirement that conveyancing is the practice of law and can be practiced only by attorneys, the statutes cited above reflect the public policy of the Commonwealth that the conveyance of real estate be conducted by an “attorney.” Consequently, neither the lender’s attorney nor the lender can enter into any agreement that precludes the attorney from performing or controlling all aspects of the conveyance. See also Rule 1.2 of the Rules of Professional Conduct, Comment 5 (“the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1”); Rule 1.16(a)(1) of the Rules of Professional Conduct (“a lawyer shall not represent a client or where representation has commenced, shall withdraw from the

representation of a client if the representation will result in violation of the rules of professional conduct or other law”).<sup>2</sup>

## **CONCLUSION:**

As the practice of conveyancing necessarily involves judgments as to rights and obligations of others under the law, it is in the public interest that when a conveyance is entrusted to another, it can be performed only by persons who have been trained in the law, who have demonstrated a proficiency in the law by passing the bar entrance examination, who have been licensed by the Commonwealth, and who remain subject to the continuing oversight of the Board of Bar Overseers and the jurisdiction of the Courts of the Commonwealth. As explained above, the existence of “notary” closings, which are controlled by non-lawyers, is entirely antithetical to Massachusetts law and a significant public safety risk. Therefore, under the Massachusetts Rules of Professional Conduct, an attorney may not participate in such matters and should either decline or withdraw from such representations.

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<sup>2</sup> While it is not determinative, it is of significant public importance that neither the homebuyer nor the seller in a purchase transaction, nor the mortgagor in a refinance, typically retain their own attorneys to review the title to the property being conveyed. Instead, both rely on the conveyancing work performed for the lender. Cf. Nickerson v. Walsh, 13 Mass. L. Rptr. 2, 2000 WL 1513788 (Mass. Super. 2000) (homeowner may rely on conveyancing attorney to record title documents). When that legal work is performed by a non-attorney, the public is placed at risk.