UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

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Federal Trade Commission
Washington, DC 20580

Department of Justice
Washington, DC 20530

December 14, 2001

Ethics Committee
North Carolina State Bar
PO Box 25908
Raleigh, NC 27611-5908

Re: North Carolina State Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions

Dear Members of the Committee:

The United States Department of Justice and the Federal Trade Commission write to urge the Committee's reconsideration of two opinions relating to the involvement of non-attorneys in closing real estate refinancing and purchase loans, Opinions 2001-4 and 2001-8. Opinion 2001-4 requires the physical presence of attorneys at all refinancings of residential real estate deals. Opinion 2001-8 requires their presence at the closing conference for real estate purchases. Based on other states' experience, these opinions are likely to increase closing costs and increase inconvenience for North Carolina consumers. We also understand that the Committee is considering adopting an omnibus opinion that would clarify certain situations in which the Opinions do not apply, and we offer comments on the proposed clarifications.

The Interest And Experience Of The U.S. Department of Justice and The Federal Trade Commission

The United States Department of Justice and the Federal Trade Commission are entrusted with enforcing this nation's antitrust laws.

For more than 100 years, since the passage of the Sherman Antitrust Act, the Justice Department has worked to promote free and unfettered competition in all sectors of the American economy. Restraining competition can force consumers to pay increased prices or accept goods and services of poorer quality. Consequently, anticompetitive restraints are of significant concern to the Department, whether they are imposed by a "smokestack" industry or by a profession. Restraining competition has the potential to injure consumers. For this reason, the Justice Department's civil and criminal enforcement programs are directed at eliminating such restraints. As part of those efforts, the Justice Department encourages competition through advocacy letters such as this one. The Department has been

concerned about attempts to restrict non-lawyer competition in real estate closings. The Department has urged Kentucky and Virginia to reject such opinions, through letters to their State Bars and an *amicus curiae* brief filed with the Kentucky Supreme Court last year.(1)

Congress created the Federal Trade Commission in 1914 to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. The Federal Trade Commission is concerned about restrictions that may adversely affect the competitive process and raise prices or decrease quality. Because the Commission has broad responsibility for consumer protection, it is also concerned about acts or practices in the marketplace that injure consumers through unfairness or deception. Pursuant to its statutory mandate, the Federal Trade Commission encourages competition in the licensed professions, including the legal profession, to the maximum extent compatible with other state and federal goals. The Commission has challenged anticompetitive restrictions on the business practices of state-licensed professionals, including lawyers. In addition, the staff has conducted studies of the effects of occupational regulation(2) and submitted comments about these issues to state legislatures, administrative agencies, and others. The Commission also has had significant experience in analyzing and challenging restrictions on competition in the real estate industry.(3)

The Opinions

Broadly speaking, there are two types of residential real estate loan closings: those involving purchases and those not involving purchases. Prior to closing a purchase, an attorney or other authorized agent will have prepared a deed transferring ownership and will have overseen the steps necessary to ensure that the seller has clear title to the property and that the funds for purchase are properly transferred. At the closing, the closer will witness the signing of the deed transferring ownership, the execution of the documents transferring funds for purchase, and the execution of the loan documents prepared by the buyer's lender.

Prior to a closing that does not involve a purchase -- such as a refinancing or home equity loan -- the attorney or other authorized agent will have updated the title history from the time the borrower purchased the property and overseen the steps necessary to transfer funds from the lender to the borrower and/or the holder of the borrower's existing mortgage on the property. The closer will then witness the execution of the loan documents and any other necessary papers.

In lieu of hiring an attorney or other agent prepare the paperwork, search the title, and handle fund transfers, the lender can choose to perform all of these activities itself.

We understand that prior to the adoption of 2001-4 on October 19, 2001, laypersons were allowed to close residential refinancing transactions. By requiring lawyers to be physically present at all real estate refinancings, this opinion deprives North Carolina consumers of the ability to use less expensive or more convenient lay closers or paralegals working under the supervision of an attorney.

Lawyers are already required for residential real estate purchase closings, but Opinion 2001-8, which requires the physical presence of a lawyer at such closings, eliminates the possibility that paralegals or others working for the attorney could conduct the closing conference. These Opinions, and earlier opinions to this effect, prevent lay services from entering the business of providing real estate purchase closings and from continuing to close refinancing deals. Both Opinions, however, permit lenders to close their own loans. In addition, we understand from Assistant Ethics Counsel Deanna Brocker that the Ethics Committee is considering drafting an omnibus opinion clarifying the limits of these Opinions.

The Public Interest Warrants Granting North Carolinians the Choice to Use a Lay Settlement Service

In ascertaining whether a service is the practice of law in North Carolina, the Ethics Committee should consider the public interest. The rules against the unauthorized practice of law are intended to protect the public interest and

should not be construed in a manner inconsistent with that purpose. As the North Carolina Supreme Court concluded in *State v. Pledger*,

The [unauthorized practice of law] statute was not enacted for the purpose of conferring upon the legal profession an absolute monopoly in the preparation of legal documents; its purpose is for the better security of the people against incompetency and dishonesty in an area of activity affecting general welfare.

257 N.C. 634, 637, 127 S.E.2d 337, 339 (1962) (bracketed material added).

When the Supreme Court of New Jersey considered an Unauthorized Practice of Law (UPL) opinion similar to the ones at issue here, it wrote:

The question of what constitutes the unauthorized practice of law involves more than an academic analysis of the function of lawyers, more than a determination of what they are uniquely qualified to do. It also involves a determination of whether non-lawyers should be allowed, in the public interest, to engage in activities that may constitute the practice of law.

We determine the ultimate touchstone -- the public interest -- through the balancing of the factors involved in the case, namely, the risks and benefits to the public of allowing or disallowing such activities.

In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 654 A.2d 1344, 1345-46 (N.J. 1995).

In determining how best to protect the public interest, the Committee should balance the harm that would be caused by banning lay settlements against the harm that might be caused by permitting them, particularly for refinancings. As explained below, this balancing supports the conclusion that the public interest would be served by allowing competition from lay settlement services.

The Opinion Would Likely Hurt the Public By Raising Prices and Eliminating Service Competition

Free and unfettered competition is at the heart of the American economy. The United States Supreme Court has observed, "ultimately, competition will produce not only lower prices but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.'" *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978) (citing *Standard Oil Co. V. FTC*, 340 U.S. 231, 248 (1950)); *accord, Federal Trade Commission v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 423 (1990). Competition benefits consumers both of traditional manufacturing industries and of services offered by the learned professions. Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975); *National Society of Professional Engineers*, 435 U.S. at 689. In several states, non-lawyers compete with attorneys in providing real estate closings. Such competition has resulted in lower prices and more choices in how and where closing services are provided. The recently adopted Opinions likely erect an insurmountable barrier against competition from these lay settlement services.

Opinion 2001-4 could harm consumers who refinance their homes in four ways.

First, it would force North Carolina consumers who would not otherwise pay for the services of a lawyer at closing to do so. Hence, the Opinion would injure all consumers who might prefer the combination of price, quality, and service that a lay settlement service offers. Moreover, North Carolinians would be deprived of the savings that could come from using an attorney's paralegal to perform the closing; they would have to pay the lawyer's higher rate.

Second, the Opinion, by eliminating competition from lay providers, would likely increase the price of lawyers' settlement services, because the availability of alternative, lower-cost lay services currently restrains the fees that

lawyers can charge. Consequently, even consumers who would otherwise choose an attorney over a lay agent would likely pay higher prices.

Third, the Opinion could reduce competition from out-of-state mortgage lenders, harming consumers who find lower interest rates or more attractive refinancing packages with these lenders. Out-of-state lenders may not have facilities in North Carolina to close loans and often have contracted with in-state lay providers to close them. Some conduct their entire loan application and approval process via the Internet, simultaneously reducing costs and increasing customer convenience. The convenience offered by Internet-based mortgage lenders may be especially important to technologically savvy -- but busy -- families who live in, or are moving to, North Carolina's Research Triangle. The potential for lower rates may be especially important to borrowers in small communities that have fewer local lenders. The Opinion could diminish these options.

Fourth, if closings have to be delayed to wait for lawyers to be available to attend them, consumers may be hurt by changes in interest rates or delays in refinancing at lower rates. Opinion 2001-8, by continuing the ban on non-lawyer closings of real estate purchases, similarly deprives consumers of these benefits.

The use of lay closers has reduced costs to consumers in other parts of the country. In 1995, after a 16-day evidentiary hearing conducted by a special master, the New Jersey Supreme Court rejected an opinion eliminating lay closings. The Court found that real estate closing fees were much lower in southern New Jersey, where lay settlements were commonplace, than in the northern part of the state, where lawyers conducted almost all settlements. This was true even for consumers who chose attorney closings. South Jersey buyers represented by counsel throughout the entire transaction, including closing, paid $650 on average, while sellers paid $350. North Jersey buyers represented by counsel paid an average of $1,000, and sellers paid an average of $750. *In re Opinion No. 26*, 654 A.2d at 1348-49.(4)

The experience in Virginia was similar. Lay settlement services have operated in Virginia since 1981, when the state rejected an Opinion declaring lay settlements to be the unauthorized practice of law. A 1996 Media General study found that lay closings in Virginia were substantially less expensive than attorney closings.

Virginia Closing Costs

	Median	Average	Average Including Title Examination
Attorneys	$350	$366	$451
Lay Services	$200	$208	$272

Media General, *Residential Real Estate Closing Cost Survey*, September 1996 at 5. In 1997, Virginia passed a law upholding the right of consumers to continue using lay settlement services. *Va. Code Ann.* §§ 6.1-2.19 - 6.1-2.29 (Michie 1997). (At the time, the state Supreme Court had been considering an Opinion similar to the ones adopted by the North Carolina Bar. *Proposed Virginia UPL Opinion No. 183*.)

There is no reason to expect North Carolina's experience to be any different. Indeed, we have received anecdotal evidence from industry representatives that refinancing closings performed by non-lawyers are less expensive than those performed by lawyers. One representative told us that lenders may pay $200-250 less per closing. At least a part, if not all, of the savings would be passed on to consumers as borrowers.

Finally, the Opinions are likely to hurt consumers by denying them the right to choose a lay settlement provider that offers a combination of services that better meets consumer needs. Specifically, lay settlement providers often settle loans during the evenings or weekends, when consumers are off work, or are willing to come to the consumer's home or other convenient location. In the case of rural consumers, a closer who travels to their home may be particularly

important. Consumers would lose this convenience under the Opinions; our understanding is that most lawyers are less likely to accommodate consumers in this manner.

The Goal of Increasing Consumer Protection Does Not Warrant Adopting this Opinion

The Opinions offer little explanation as to why their adoption is necessary to protect consumers and no factual data to support the draconian measure of eliminating lay settlements. Antitrust law and policy are themselves very important forms of consumer protection. Consumers benefit immensely from competition among different types of service providers. As the United States Supreme Court has explained:

The assumption that competition is the best method of allocating resources in a free market recognizes that **all elements of a bargain - quality, service, safety, and durability** - and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.

National Society of Professional Engineers, 435 U.S. at 695 (emphasis added); *accord, Superior Court Trial Lawyers' Association*, 493 U.S. at 423. Allowing competition by lay agents permits North Carolina consumers to consider all relevant factors in selecting a provider of settlement services, such as cost, convenience, and the degree of assurance that the necessary documents and commitments are sufficient. In general, the antitrust laws and competition policy require that a sweeping restriction on competition be justified by a credible showing of need for the restriction and require that the restriction be narrowly drawn to minimize its anti-competitive impact. These requirements protect the public interest in competition. *See generally F.T.C. v. Indiana Federation of Dentist*s, 476 U.S. 447, 459 (1986).

The Opinions do not contain any showing of need for a near-complete prohibition on lay closing service competition. Although the question to which Opinion 2001-4 responds refers obliquely to predatory lending issues, the subject is not addressed in the Opinion itself. The Opinions contain no factual evidence or analysis showing that the availability of lay services has actually hurt consumers, that lay closers have been responsible for any predatory lending abuse, or that lay closers are any more likely than attorneys to be involved in predatory lending deals. The Opinions impose no obligation on the part of attorneys who attend closings to ascertain whether predatory lending is an issue or to prevent it. Closings may be conducted by any attorney, including those unfamiliar with predatory lending or real estate issues.

Indeed, the Opinions cite no statistics showing that the proportion of lay settlements that are problematic is greater than the proportion of problematic attorney settlements. They do not cite any instances of actual consumer injury from lay closings. A showing of harm is particularly important where, as here, the proposed restraint prevents consumers from using an entire class of providers. Without a showing of actual harm, the Committee should not restrain competition by prohibiting lay settlements. Such prohibitions are likely to hurt consumers by raising prices and eliminating their ability to choose among competing providers based on cost, convenience, and quality of services.

Furthermore, the Opinions do not guarantee that consumers will have the benefit of independent counsel or the ability to stop a transaction that is not in their best interest. Consumers are not required to hire their own lawyers to represent their interests and to advise them of all of their rights and obligations. Rather, under North Carolina Ethics Opinion RPC 210, the lender's lawyer may close the loan and may represent both the buyer and lender with disclosure of the joint representation. Alternatively, the lawyer may represent only the lender, as long as he/she gives timely notice to the buyers of this fact, to enable the buyer to decide whether to hire separate counsel or go unrepresented. Such a lawyer does not have an attorney-client relationship with anyone except the lender. While these lawyers might be able to provide some legal explanations to consumers, they would not represent them. They could not advise buyers about whether a particular deed or loan term was in their best interests. Nor would their presence likely give consumers the leverage to halt a transaction that is against their best interest. The same is true of a lawyer who represents both the lender and the buyer.

The assistance of a licensed lawyer at closing may be desirable, and consumers may decide they need a lawyer in certain situations. A consumer might choose to hire an attorney to answer legal questions, provide advice, negotiate disputes, or offer various protections. Consumers who hire attorneys may get better service and representation at the closing than those who do not. But, as the New Jersey Supreme Court has concluded, this is no reason to eliminate lay closing services as an alternative. *In re Opinion No. 26,* 654 A.2d at 1360. Rather, the choice of hiring a lawyer or a non-lawyer should rest with the consumer. *Id*.

Less Restrictive Measures May Protect Consumers

Prohibiting lay services from closing refinancing loans may impose substantially higher closing costs on North Carolina consumers. These costs should not be imposed without a convincing showing that lay closings have not only injured consumers, but that less drastic measures cannot remedy the perceived problem. Indeed, North Carolinians can be protected by measures that restrain competition less than a complete ban on lay settlement. In permitting lay settlements, the New Jersey Supreme Court requires written notice to consumers of the risks involved in proceeding with a real estate transaction without an attorney. *In re Opinion No. 26*, 654 A.2d at 1363. This measure permits consumers to make an informed choice about whether to use lay settlement services. Virginia, confronted with similar issues, adopted the Consumer Real Estate Protection Act in 1997. *Va. Code Ann.* §§ 6.1-2.19 - 6.1-2.29 (West 2001). This statute permits consumers to choose lay settlement providers, but requires the state to regulate them, providing safeguards through licensure, registration, and the imposition of financial responsibility and rules for handling settlement funds. Though more regulatory than the New Jersey approach, the Virginia approach it is clearly a more pro-competitive approach than a ban on lay closings.(5)

The Committee Should Adopt the Proposed Omnibus Opinion Clarifying the Limits of the Opinions

According to Assistant Ethics Counsel Deanna Brocker, the Committee is considering writing an omnibus opinion clarifying 2001-4 and 2001-8. Among other things, it would state that the Opinions were not intended to require the presence of a lawyer at a refinancing or purchase closed by mail, one closed with powers of attorneys, or one at which neither buyer nor seller is represented by counsel. (In most real estate transactions, the lawyer or lay person closing the loan represents only the lender.) If the Committee chooses not to rescind Opinions 2001-4 and 2001-8, we would urge it to adopt these clarifications and expand them. Parties should be able to choose to go unrepresented by counsel. RPC 210 gives consumers this choice. Moreover, consumers should be able to choose to use mail-in closings or powers of attorney as appropriate. Permitting mail-in closings without counsel may not entirely mitigate the anticompetitive effect of the Opinions. Many lenders may require in-person closings to ensure that the materials are properly completed. Nonetheless, there are buyers who would benefit from this, particularly those who may be relocating or those who may live outside the state but wish to buy property inside North Carolina.

Clarifying the Opinions in this manner would help reduce the anticompetitive effect of the Opinions, but would not eliminate their harm to consumers. Some consumers would be able to use lay closers and thus avoid paying the higher fees that lawyers would charge -- particularly those consumers who, under RPC 210, agree that the lawyer involved represents the lender only. However, other consumers still would be forced to pay for lawyers and would be deprived of the right to choose a lay closer if they believed this to be appropriate. The experience of other states suggests that repealing the Opinions is the best way to protect all North Carolinians.

Conclusion

By prohibiting lay settlements, Opinions 2001-4 and 2001-8 will likely reduce competition. Opinion 2001-4 likely raises closing costs for North Carolina consumers by requiring them to hire lawyers to close refinancing transactions; Opinion 2001-8 likely prevents costs from falling by preventing non-lawyers from entering the market for closing real estate purchases.

Other states' experience suggests that the Opinions will likely cause consumers to pay more for real estate closings. For example, in Virginia, median lay closing costs were $150 less. In parts of New Jersey where lay closings are prevalent, buyers on average paid $350 less for lay closings, and sellers paid $400 less. In addition, the Opinions could curtail competition from out-of-state and Internet-based lenders, potentially increasing costs and reducing the convenience of the loan application and approval process. The Opinions make no showing of harm to consumers from lay settlements that would justify these reductions in competition; indeed, they hardly even mention the subject.

The Justice Department and FTC appreciate this opportunity to present our views and would be pleased to address any questions or comments regarding competition policies.

Sincerely yours,

/s/

Charles A. James
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/s/

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/s/

By Order of the
Federal Trade Commission,

/s/

Timothy J. Muris
Chairman

/s/

Ted Cruz, Director
Office of Policy Planning

[Endnotes:]

1. In addition, the Justice Department has challenged attempts by county bar associations to adopt restraints similar to the North Carolina Opinions. For example, the Justice Department sued and obtained a judgment against one bar association that had restrained title insurance companies from competing in the business of certifying title. The bar association had adopted a resolution requiring lawyers' examinations of title abstracts and had induced banks and others to require the lawyers' examinations of their real estate transactions. *United States v. Allen County Indiana Bar Association*, Civ. No. F-79-0042 (N.D. Ind. 1980). Likewise, the Justice Department obtained a court order prohibiting another county bar association from restricting the trust and estate services that corporate fiduciaries could provide in competition with attorneys. *United States v. New York County Lawyers' Association,* No. 80 Civ. 6129 (S.D.N.Y. 1981).

2. Carolyn Cox and Susan Foster, The Costs and Benefits of Occupational Regulation, Bureau of Economics, FTC, October 1990.

3. *Port Washington Real Estate Board*, 120 F.T.C. 882 (1995) (consent order); *Industrial Multiple and American Industrial Real Estate Association*, 116 F.T.C. 704 (1993) (consent order); *United Real Estate Brokers of Rockland, Ltd. (Rockland County Multiple Listing System)*, 116 F.T.C. 972 (1993) (consent order); *Bellingham-Whatcom County Multiple Listing Bureau*, 113 F.T.C. 724 (1990) (consent order); *Puget Sound Multiple Listing Association*, 113 F.T.C. 733 (1990) (consent order).

4. In South Jersey, about 40% of buyers and 35% of sellers were represented by counsel at closing. In North Jersey, 95.5% of buyers and 86% of sellers were represented by counsel.

5. The Virginia approach carries some risk of consumer harm, since licensing regulation itself can be used to thwart competition. *See* Cox and Foster, *supra* note 3.