

Chief Justice Elliot E. Maynard  
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Charleston, WV 25305

June 7, 2004

Chief Justice Maynard:

HALT—*An Organization of Americans for Legal Reform* urges the Supreme Court of Appeals, using its inherent power to regulate the practice of law in West Virginia,<sup>1</sup> to refrain from regulating non-lawyers by continuing to allow them to perform routine real estate title and closing services. HALT is a national, non-profit, non-partisan public interest organization dedicated to helping all Americans handle their legal affairs simply, affordably and equitably. HALT's Freedom of Legal Information Project defends the right of consumers to have access to legal information and to inexpensive alternatives to hiring a lawyer. HALT's national research on issues of access to the legal system can provide a framework for the Court in formulating its rules.

The public benefits from competition between different types of service providers because competition drives down prices and increases the convenience of services. In addition, restrictions on the unauthorized practice of law protect attorneys, not consumers. Consumers actually have better protection from fraudulent or incompetent non-lawyer service providers than from fraudulent or incompetent attorney service providers. The national trend to allow non-lawyer real estate services providers has supplied mounting evidence that non-lawyers can perform real estate services competently and without adverse consequences.

Additionally, the overzealous enforcement of laws prohibiting unauthorized practice has a chilling effect on legitimate legal service providers. Indeed, to avoid the possibility of liability—or even prosecution—title service companies may err on the side of caution and refuse to offer services that no one would classify as the practice of law, such as delivery of blank forms to consumers or delivery of completed forms to a clerk's office. Such an expansive interpretation can not be in consumers' best interest.

The Supreme Court's commitment to protecting the public interest requires that non-lawyers be allowed to continue providing real estate transaction services. Consumers benefit from the choice between attorney and non-lawyer service providers

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<sup>1</sup> *Committee on Legal Ethics of W. Va. State Bar v. Graziani*, 157 W. Va. 167, 200 S.E.2d 353 (1973), cert. denied, 416 U.S. 995, 94 S. Ct. 2410, 40 L. Ed. 2d 774 (1974); *West Virginia State Bar v. Earley*, 144 W. Va. 504, 109 S.E.2d 420 (1959).

because they are able to choose the provider that supplies them with the most appropriate level of service for their needs. The consumer's ability to choose between service providers creates competition, which drives down prices and increases the convenience of services. To restrict access to a whole category of service providers based on anecdotes and unsubstantiated claims about potential harm would hurt consumers more than allowing non-lawyers to continue providing these services.

Choice benefits consumers by providing them with better options with regard to price and convenience. In the marketplace, consumers are given a choice among thousands of companies competing for their business. These companies will lower prices and increase the quality of their services to induce consumers to choose their company. Consumers purchasing real estate transaction services deserve no less than those purchasing other goods and services. A consumer looking to buy a car has the ability to compare different dealers, models and options and then choose the combination best suited for her. Likewise, a legal consumer should have the ability to choose between different types of real estate transaction services and decide what level of service best suits her needs.

If qualified laypeople are prohibited from completing real estate transactions in West Virginia, there will be less competition, increased prices and decreased convenience for consumers purchasing a home. The burden of higher prices and decreased convenience will be borne disproportionately by low and moderate-income consumers, making a bad situation even worse. A 1994 study by the American Bar Association on Comprehensive Legal Needs found that the most-often cited unmet legal need for middle income consumers is real estate transaction services.<sup>2</sup> If West Virginia prohibits qualified non-lawyers from providing real estate transaction services, the cost of purchasing a home will increase and further reduce the availability of a service that is unmet by current legal practitioners. Assuming the basic purpose of the rule against unauthorized practice of law is for the protection of the citizens, then the definition of the practice of law should not include routine title and closing services.

Recognizing the importance of reducing the cost of legal services, several states have recently acted to explicitly protect the ability of non-lawyers to conduct real estate transactions, including Kentucky, New Jersey and Virginia. In these states, real estate transaction costs, on average, are lower whether a person chooses a lawyer or a qualified non-lawyer. By protecting competition and consumer choice, these states have allowed normal market forces to operate, which has lowered prices for everyone. In 1995, for example, the Supreme Court of New Jersey found that the average homebuyer in northern New Jersey, where attorneys conduct most of the real estate transactions, pays \$250 more than the average person in southern New Jersey, where there is free competition for these service.<sup>3</sup>

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<sup>2</sup> American Bar Association Consortium on Legal Services and the Public, Legal Needs and Civil Justice: A Survey of Americans, 11 (1994).

<sup>3</sup> *In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law*, 654 A.2d 1344, 1348-49 (N.J. 1995).

The results of a 1996 survey in Virginia are equally revealing. Since 1981, when the state legislature rejected a Virginia Supreme Court decision declaring lay closings the unauthorized practice of law, non-lawyers have competed with attorneys on the same footing. The result is that legal consumers in Virginia are able to hire a qualified layperson for nearly half the price of an attorney. The average consumer in Virginia pays \$451 for closing costs if she hires an attorney and \$272 if she hires a lay service provider.<sup>4</sup>

If West Virginian consumers are unable to purchase non-lawyer real estate transaction services, they will also lose some of the convenient services that they have enjoyed in the past. For example, non-lawyer service providers often settle loans during the evening or weekend hours, so that consumers don't have to take time off work. In addition, non-lawyer service providers often come to the consumer's home or a convenient location for free. Lawyers, on the other hand, will come to a convenient location, but they will charge consumers for their travel time.<sup>5</sup> This makes convenience expensive.

If non-lawyer service providers are prohibited from offering these extra services, West Virginia's most vulnerable consumers will disproportionately suffer. Already struggling low-income consumers will be forced to take valuable time off work to complete a real estate closing. Coupled with an overall increase in real estate closing costs, low-income consumers will be particularly impacted by the loss of non-lawyer service providers. For low-income rural consumers, a service provider that is willing to travel to their home is even more important. These consumers will not only have to take off for the closing, but also for travel. This could mean that signing some papers could force someone already struggling to make ends meet to take an entire day off work—hardly in the consumer's best interest. On the whole, low and moderate income consumers will be hurt more by an increase in cost and decrease in convenience than by any potential harm from the services of a qualified non-lawyer.

Non-lawyer real estate service providers cause less harm to consumers than lawyers providing these services. The first comprehensive study on the provision of real estate closing services by title companies demonstrates that non-lawyer providers generate fewer complaints than their attorney counterparts. In this study, University of Oklahoma Professor of Law Joyce Palomar discovered that there are actually 2.8 percent fewer complaints when an attorney performs a closing than when a title company performs the same service.<sup>6</sup> In addition, Palomar remarked that:

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<sup>4</sup> Letter from Jessica N. Butler-Arkow, Attorney, United States Department of Justice Antitrust Division and Ted Cruz, Director, Office of Policy Planning, Federal Trade Commission to North Carolina State Bar Ethics Committee 6 (Dec 14, 2001).

<sup>5</sup> *Id.*

<sup>6</sup> Joyce Palomar, *The War Between Attorneys and Lay Conveyancers—Empirical Evidence Says “Cease Fire!”*, 31 Conn. L. Rev. 423, 493 (1999).

One of the most notable findings in [the study] is that there was only a 4% greater incidence of claims for errors in judgment when reviewing legal instruments and failures to apply correctly a legal principle in title company-closing states than in attorney-closing states. This small difference defeats another assumption of proponents of unauthorized practice laws, i.e., that laypersons' knowledge of and competence in residential real estate transactions is significantly inferior to attorneys'. If that assumption were correct, the percentage of claims in this category should be significantly higher in title company-closing states than in attorney-closing states.<sup>7</sup>

Professor Palomar debunked the bar's often-voiced warning that homeowners suffer serious harm when laypersons conduct real estate transaction. In fact, homeowners using a title closing company were in no greater risk of harm than those using an attorney in any of the categories she studied.

The New Jersey Supreme Court reached a similar conclusion in 1995.<sup>8</sup> In this case, the Court compared southern New Jersey, which allowed lay participation in closing, with northern New Jersey, which did not. The Court noted that:

The record fails to demonstrate that the public interest has been disserved by the South Jersey practice over the many years it has been in existence. While the risks of non-representation are many and serious, the record contains little proof of actual damage to either buyer or seller. Moreover, the record does not contain proof that, in the aggregate, the damage that has occurred in South Jersey exceeds that experienced elsewhere.<sup>9</sup>

Finding that there was no more harm from lay closings than attorney closings, the New Jersey Supreme Court held that there was no reason to prohibit laypersons from conducting real estate closing services.

An overbroad interpretation of the definition of the practice of law also serves to protect lawyers at the expense of consumers. Consumers are already adequately protected against fraudulent or incompetent lay service providers. The real estate and insurance industries have safeguards in place to ensure the quality of layperson employees. If an individual company does not police the quality of its lay employees, it runs the risk of going out of business because consumers will not choose to purchase services from a company with a poor reputation. The federal government has also created laws that protect consumers from fraudulent lay service providers. Unfortunately,

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<sup>7</sup> *Id.* at 508.

<sup>8</sup> *In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law*, 654 A.2d 1344 (N.J. 1995).

<sup>9</sup> *Id.* at 1346.

safeguards against fraudulent or incompetent attorneys are not as rigorous as those regulating laypersons and provide little recourse to the victimized consumer. The attorney discipline system and legal malpractice suits are unable to effectively discourage recklessness by lawyers and fall short of offering legal consumers viable remedies. Prohibiting consumers from using layperson real estate service providers will increase the likelihood that a consumer will be unable to receive compensation if she is victimized. This is not in the public interest.

Proponents of an expansive interpretation of the prohibitions against unauthorized practice claim to be protecting consumers from unethical paralegals. While there may be some isolated instances where consumers have not been well served by non-lawyer real estate service providers, there is no evidence that this is a common or significant occurrence in West Virginia or across the nation. Under any circumstances, such misconduct is already actionable under consumer fraud statutes or as common law fraud in every state. It is hypocritical for the real estate bar to claim that paralegals and others must be banned from participating in real estate transactions because of the speculative harm created by a few bad actors, when lawyers (who in most jurisdictions are not even subject to consumer fraud laws) face over 121,000 complaints to state disciplinary agencies in a typical year.<sup>10</sup>

In addition, as the Kentucky Supreme Court recently highlighted in its decision permitting non-lawyer real estate service providers, consumers are protected from loss by required errors and omissions insurance:

The evidence shows that national title insurance underwriters require their agents, whether attorneys or non-attorneys, to carry errors and omissions insurance. And, most of the title industry representatives testified that these same underwriters exercise strict control over their agents by periodically monitoring their use of funds and their competence. Also, nearly every witness testified that title insurance is available and offered to most homebuyers to protect them against errors in title.<sup>11</sup>

In short, the Kentucky Court held that consumers are already adequately protected from fraudulent or incompetent laypersons. The insurance and real estate industries monitor the performance of their non-lawyer employees to ensure that there are no incompetent service providers. The Court also noted that normal market forces would eliminate incompetent service providers over time. “[T]he nature of our economy is such that incompetent and unethical closing agents, whether attorneys or non-attorneys, will be nudged aside by consumers who will choose the most effective and efficient providers.”<sup>12</sup> Market forces work in concert with industry regulation to ensure the high quality of non-

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<sup>10</sup> See American Bar Association, Survey on Lawyer Discipline (2002), at [www.abanet.org/cpr/discipline/sold/sold-home.html](http://www.abanet.org/cpr/discipline/sold/sold-home.html)

<sup>11</sup> *Countrywide Home Loans, Inc. v. Kentucky Bar Association, et al.*, 113 S.W.3d 105, 121 (Ky. 2003).

<sup>12</sup> *Id.* at 120.

lawyer service providers. Therefore, there is no need to ban all qualified laypersons from conducting real estate closings.

In addition to market forces and industry regulation, consumers are protected from fraudulent and incompetent real estate service providers by the Real Estate Settlement Procedures Act (RESPA), Home Mortgage Disclosure Act, and Consumer Credit Protection Act.<sup>13</sup> Consumers are also protected from layperson fraud and misrepresentation under the West Virginia Consumer Credit and Protection Act.<sup>14</sup> All of these measures ensure that consumers are protected from fraudulent or incompetent lay service providers. There is no need to deny access to all lay closing agents because consumers are already adequately protected.

Those who support a broad definition of the practice of law argue that real estate attorneys, unlike their non-lawyer counterparts, are regulated by a dependable system of internal oversight. They assert that the attorney discipline system and legal malpractice lawsuits successfully protect consumers from incompetent lawyers and deter unsavory conduct by attorneys. Unfortunately, our research demonstrates that these systems typically offer little recourse to victimized consumers.

The attorney discipline system, plagued by inadequate resources and hamstrung by secrecy requirements, rarely metes out meaningful sanctions. The ABA's most recent survey shows that lawyer discipline in West Virginia lags far behind the unimpressive national mean; out of the 1,107 complaints investigated, the Lawyer Disciplinary Board formally charged only 15 West Virginian lawyers—less than two percent.<sup>15</sup> Ultimately, this trickle of discipline reflects a regulatory system that fails to hold lawyers accountable for misconduct.

In West Virginia, the rigorous standard for proving legal malpractice also places an often impracticable burden on individuals who have been victimized by attorney negligence, incompetence or misconduct. A client only receives restitution if she can demonstrate that “but for” an attorney’s misconduct, she would have prevailed in her underlying suit.<sup>16</sup> To make this showing, the client must present a “suit within a suit”—a hypothetical version of the underlying trial as it would have been conducted had the attorney refrained from misconduct.<sup>17</sup> This demanding method requires a plaintiff to undergo enormous speculation and present evidence from former opposing parties, former counsel for former opposing parties and equally adverse witnesses. The length of such litigation makes a malpractice suit cost-prohibitive and does little to deter misconduct by lawyers.

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<sup>13</sup> 12 USCS §§ 2601-2617; 12 USCS §§ 2801-2811; 15 USCS §§ 1601-1667.

<sup>14</sup> W. Va. Code § 46A-6-104.

<sup>15</sup> See American Bar Association, Survey on Lawyer Discipline (2002), at [www.abanet.org/cpr/discipline/sold/sold-home.html](http://www.abanet.org/cpr/discipline/sold/sold-home.html)

<sup>16</sup> See *Rowe v. Sisters of the Pallottine Missionary Soc’y*, 211 W. Va. 16, 23 (2001).

<sup>17</sup> See *McGuire v. Fitzsimmons*, 197 W. Va. 132, 135 (1996).

Unfortunately, the attorney discipline system and legal malpractice suits fail to effectively discourage recklessness by lawyers and fall short of offering legal consumers viable remedies. Non-lawyer real estate service providers receive far better oversight than their lawyer counterparts.

Many states have found through years of experience that non-lawyers can effectively perform closing activities without injuring consumers. Lawyers are allowed to participate in some aspects of the real estate closing process in, among other states, Arizona, Colorado, Kansas, Kentucky, Ohio, Michigan, Missouri, New Jersey, Pennsylvania and Virginia.<sup>18</sup> Qualified lay real estate agents perform an important function and should be allowed to provide a low-cost service that consumers clearly want. New Jersey, Virginia and Kentucky are among the most recent states to allow non-lawyers to participate in the real estate closing process.

New Jersey—In 1995, The New Jersey Supreme Court overturned Opinion No. 26 of the Committee on the Unauthorized Practice of Law and held that consumers should have the choice to purchase non-lawyer real estate closing services as long as they are made aware of the risks involved.<sup>19</sup> Ultimately, the Court’s decision was based not on anecdotal evidence and dire predictions supplied by bar organizations, but on the research of the special master appointed by the Court to study this issue. The special master’s research found that not only were prices for both attorney and non-lawyer real estate services lower in Southern New Jersey, where lay closings were allowed, but also that there was no demonstrable harm from this practice. Specifically, the special master concluded:

[T]here had been no proof of actual damage resulting from the South Jersey practice, or more accurately that whatever problems existed did not in the aggregate exceed those in matters where the parties were represented by counsel, that many of the activities undertaken by brokers and title officers, taken in isolation, did not involve the practice of law in any sense.<sup>20</sup>

Again citing a lack of evidence showing the necessity of banning all qualified laypersons, the Court held that consumers should have the right to choose.

Virginia—Likewise, in 1996, Virginia lawmakers decided that the public interest would be better served by continuing to allow non-lawyers to provide real estate closing services. In this instance, the Virginia legislature responded to Opinion No. 183, authored by the Committee on the Unauthorized Practice of Law, by passing the Consumer Real Estate Settlement Protection Act (CRESPA).<sup>21</sup> This Act provided that

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<sup>18</sup> Palomar, *supra* at 489.

<sup>19</sup> *In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law*, 654 A.2d 1344 (N.J. 1995).

<sup>20</sup> *Id.* at 1347.

<sup>21</sup> Va. Code Ann. §§ 6.1-2.19 to 6.1-2.29

conducting a real estate closing and performing services necessary for insuring a title were not the practice of law.

In passing CRESPA, the Legislature agreed with the testimony of HALT, the United States Department of Justice (DOJ) and the Federal Trade Commission (FTC), among others, that any decision that prohibits non-lawyers from performing closings would not be in the public interest. HALT testified that it did not oppose the use of attorneys, but opposed *requiring* their use in situations where their expertise may not be needed. The DOJ and FTC echoed this sentiment in their letter to the Virginia State Bar in opposition to Opinion No. 183. “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 not a reason to eliminate lay closing services as an alternative for consumers who wish to utilize them.”<sup>22</sup>

Kentucky—The Kentucky Supreme Court has also recently addressed the question of whether laypersons may conduct real estate closings. In 2003, the Court unanimously overturned Advisory Opinion U-58 of the Unauthorized Practice of Law Committee and ruled that laypersons should be allowed to continue conducting real estate closings.<sup>23</sup> Specifically, the Court held that “[b]ecause lay closing agents conduct closings in a nearly identical fashion [to attorneys], the supervision or even presence of an attorney at the closing offers no more protection to the parties with regard to their unasked questions.”<sup>24</sup>

The Court disagreed with the Kentucky Bar Association’s (KBA) claim that the Advisory Opinion had nothing to do with discouraging competition. Citing the KBA’s “unnecessary effort” put into proving that the fees charged by attorneys and real estate closing companies are similar, the Court noted that:

What the KBA has glossed over is the fact that, before title companies emerged on the scene, its members' rates for such services were significantly higher -- in some areas as much as 1% of the loan amount plus additional fees. While KBA witnesses attributed the significant decreases in attorney's [*sic*] closing rates to market conditions, we believe this explanation disingenuous and observe that if this were in fact the case, the KBA likely would not have put so much effort into comparing the rates between its members and title companies. Thus, we believe, if nothing else, the presence of title companies encourages attorneys to work more cost-effectively.<sup>25</sup>

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<sup>22</sup> Letter from Federal Trade Commission and Department of Justice to Thomas A Edmonds, Executive Director of the Virginia State Bar, September 20, 1996, 5.

<sup>23</sup> *Countrywide Home Loans, Inc. v. Kentucky Bar Association, et al.*, 113 S.W.3d 105 (Ky. 2003).

<sup>24</sup> *Id.* at 123.

<sup>25</sup> *Id.* at 120.

In short, the Court held that “point and sign” real estate closings are not the practice of law, and barring evidence that the practice injures consumers more than attorney closings, there is no just reason for disallowing the practice.

Experiences nationwide have shown that non-lawyers perform a valuable function in real estate closings. Yet, state bar associations and lawyers continue to bring suits that pretend to be in the “public interest.” On this subject, the New Jersey Supreme Court offered this opinion:

There is a point at which an institution attempting to provide protection to a public that seems clearly, over a long period, not to want it, and perhaps not to need it -- there is a point when that institution must wonder whether it is providing protection or imposing its will. It must wonder whether it is helping or hurting the public.<sup>26</sup>

HALT urges the West Virginia Supreme Court to recognize that the public interest would be best served by allowing non-lawyers to continue providing real estate closing services. Non-lawyers have been allowed to compete with attorneys for real estate closing business for decades without adverse effects, and there is little indication that the public desires a departure from the status quo.

HALT thanks the Court for the opportunity to present its views and would be happy to assist the Court in any way it can in further analyzing this issue.

Sincerely,

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<sup>26</sup> *In Re Opinion No. 26 of the Committee on the Unauthorized Practice of Law*, 654 A.2d at 1360-61 (N.J.,1995).