Structural Change and Inter-Professional Competitive Advantage: An Example Drawn from Residential Real Estate Conveyancing

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I. INTRODUCTION

This article examines the role of attorneys and other professionals in a highly structured and routine transaction—residential real estate conveyancing. Lawyers have become marginalized in the residential real estate transaction. They are involved only in about forty percent of residential transactions, and even when they are involved, their involvement is typically late and shallow. In almost all states the real estate agent drafts and negotiates the contract of sale without the aid of an attorney.¹ Lawyers are not involved in the closing most of the time, and the trend is toward less lawyer involvement rather than more.² The

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¹ See infra Part IV.B.1.
² See infra Part IV.B.2.
article explains how United States lawyers lost the monopoly they once enjoyed over residential real estate conveyancing and how structural change, whether economic, technological, or both, influences the demand for professional, including legal services.

Part II of this article reviews the academic literature concerning the role of the lawyer in residential real estate transactions. It demonstrates that the current literature, primarily because of its reliance on out-dated and self-interested sources, tends to position the lawyer at the center of the residential transaction even though the lawyer was pushed aside long ago. Part III analyzes the structural changes that resulted in the marginalization of lawyers in the residential transaction and demonstrates how the change in structure of the residential transaction affected the demand for legal services. The most important of these structural changes were the concomitant emergence of an enormous federally sponsored secondary mortgage market and the related surge in the popularity of title insurance. The Bar’s failed efforts to resist marginalization, often in the form of unauthorized practice of law litigation, and final capitulation to the inexorable imperialism of title insurance are examined in the context of these structural changes.

Part IV employs empirical data derived from surveys or real estate agents, lawyers and house purchasers to accurately portray the current role of lawyers and other real estate professionals in the residential transaction. It examines what lawyers do from the perspective of the organized real estate profession and from the perspective of lawyers engaged in residential conveyancing. Finally, Part V evaluates the assertions that lawyers make about the value and necessity of their services in light of the empirical data concerning what lawyers actually do. It concludes that these assertions typically are vague, trivial, or implausible. Given the weakness of these assertions, it is not surprising that the trend is in favor of increased lawyer marginalization in residential conveyancing.

II. BRIEF REVIEW OF THE LITERATURE—PRINCIPALLY THE CASE BOOKS

Academic legal literature draws a distorted picture of the role of the lawyer in the residential real estate transaction. Details aside, the portrayal is inaccurate in three major respects. First, this literature portrays the involvement of the lawyer in residential conveyancing as much more desirable than it really is; second, it portrays the role of the lawyer as much more central to the transaction than it really is; and third, it portrays the residential real estate transaction as much more complex (hence demanding of legal skills) than it really is. Each of these distortions is discussed in turn.

First, the casebooks claim that it is desirable that each party to the residential real estate transaction be represented by an attorney at all stages of the
transaction.3 “At every step [of the real estate transaction] it has been said that buyers and sellers should have representation, advice and draftsmanship.”4 Lawyers should be involved in drafting the brokerage contract, negotiating and drafting the contract of sale, performing the title search, advising the parties as to survey results, taking curative action to make title marketable, drafting the mortgage and the bond or note it secures, as well as the deed, obtaining title insurance, and preparing a closing statement as well as any other incidental paper work, such as the Truth-In-Lending form.5

According to this literature, lawyers are, or should be, central to the residential real estate transaction based on two distinct roles that they play: the advocacy role and the cautionary role. The lawyers’ advocacy role is illustrated by the following: “It is sometimes said the parties require disinterested advice. This misstates the case . . . each requires the assistance of someone dedicated to that person’s interest and equipped with sufficient skill to protect that person.”6 The attorneys also play a cautionary role. “Before tendering such an offer [of purchase], a cautious buyer would, no doubt, hire an attorney to prepare or review the document.”7 In this role, lawyers provide expertise in advising their client about the consequences of differing courses of action. After parol haggling with the broker, “the reasonable and prudent buyer will employ his own attorney to draft a proper contract and steer him through the legal and financial shoals which lie ahead.”8

Neither form contracts nor brokers are an adequate substitute for the lawyers. For example, Professor Donahue points out various deficiencies in a form purchase agreement which is neither “a model of fine draftsmanship” nor “atypically bad.”9 The broker is also an ineffective substitute for the lawyer. The broker is interested only in consummating a sale and getting her


4. BRUCE & ELY, supra note 3, at 464; GOLDSTEIN, supra note 3, at 163; CASNER & LEACH, supra note 3, at 673.

5. BRUCE & ELY, supra note 3, at 457-64; GOLDSTEIN, supra note 3, at 156-62; CASNER & LEACH, supra note 3, at 667-73.

6. CASNER & LEACH, supra note 3, at 674.


9. DONAHUE, supra note 7, at 590.
commission, while the lawyer is paid whether or not the sale is consummated. Thus the lawyer, unlike the broker, is not tempted to sacrifice the parties' interests to close the deal.\textsuperscript{10} Furthermore, the broker does not have the knowledge or skill a lawyer possesses. "Usually ... the broker will know relatively little law outside the narrow confines of her expertise, and title problems, for example, are not her responsibility. Breathes there a broker with soul so dead that she knows the intricacies of the Rule in Shelley's Case?"\textsuperscript{11} Secondly, the casebooks portray the lawyers' role as central to the residential real estate transactions.

Historically, land transfer servicing was one of the principal types of work performed by American lawyers ... it is still of tremendous importance to many in practice today .... Small private firms and solo practitioners in the general practice of law are particularly active in sales of single-family residences and family farms .... \textsuperscript{12} According to the casebooks, lawyers are involved in negotiating and drafting the contract of sale.

The purchase and sale agreement [is] generally prepared by a lawyer who may work either for the buyer or the seller. Many transactions will involve lawyers on both sides, for the buyer and the seller (as well as lawyers for the banks lending the money for the transaction). At the same time, many transactions may involve a lawyer only on one side, with the other side unrepresented by counsel.\textsuperscript{13}

Even if not directly involved, attorneys draft form contracts. "Attorneys ... frequently prepare standardized contract forms for the sale of real estate, which may be published and sold for general use or used only in connection with a particular real estate development."\textsuperscript{14} The casebooks also describe the lawyer as an important player during the executory period of the contract\textsuperscript{15} and at closing.\textsuperscript{16} Attorneys remove defects in

\begin{thebibliography}{99}
  \bibitem{10} SHIELDON F. KURTZ & HERBERT HOVENKAMP, CASES AND MATERIALS ON AMERICAN PROPERTY LAW 1050 (2d ed. 1993).
  \bibitem{11} JOHN E. CRIBBET ET AL., PROPERTY 1087 (7th ed. 1996); \textit{see also} SANDRA H. JOHNSON ET AL., PROPERTY LAW CASES, MATERIALS AND PROBLEMS 445 (1992) ("[R]esidential real estate contracts are often drafted, however, by brokers more eager to make a sale than to identify potential problems ... ").
  \bibitem{12} JOHNSON ET AL., \textit{supra} note 11, at 420.
  \bibitem{13} JOSEPH WILLIAM SINGER, PROPERTY LAW RULES, POLICIES AND PRACTICES 854 (1993).
  \bibitem{14} OLIN L. BROWDER, JR. ET AL., BASIC PROPERTY LAW (5th ed. 1989).
  \bibitem{15} GEORGE J. SIEDEL III, REAL ESTATE LAW 314 (1979); \textit{see also} JOHNSON ET AL.,
\end{thebibliography}
title, dicker over coverage with the title insurance company, and advise clients about such insurance. Also, it is “often a lawyer” who evaluates the record to determine the state of the seller’s title. Lawyers help to draft deeds as well. “At closing, lawyers may represent the mortgage lender and the title insurer,” in addition to the buyer and seller.

Third, the casebooks portray the residential real estate transfer process as so complex as to demand legal skills. “No two transactions are identical, and none is simple. Because of the complexity of property law a ‘minor’ slip may cause great expense and inconvenience. To the buyer, at least, the purchase of a house may be the most important legal and financial transaction of a lifetime.” This complexity results from three principal sources. First is the contract of sale. In addition to the normal requirements for forming a contract, the parties must consider provisions for marketability of title, risk of loss, earnest money, fixtures, contingencies, easements to the seller, time for performance, proration, type of deed to be used and estate passed, and other terms.

\[supra\] note 11, at 422 (“Settlement services include most types of work performed by lawyers in relation to loans covered by the [Real Estate Settlement Procedures] Act. Some examples are title search and examination, document preparation, and final closing.”).

16. “Closing” or “settlement” are used interchangeably to describe the time when the executory real estate contract becomes fully executed, i.e. the consideration is paid by the buyer and the deed is delivered by the seller.


18. DUKEMINIER & KRIER, \[supra\] note 8, at 687; see also BROWDER, \[supra\] note 14, at 917; KURTZ & HOVENKAMP, \[supra\] note 10, at 1172 (“[L]awyers still search titles in many states.”).

19. GOLDSTEIN, \[supra\] note 3, at 161.

20. See, e.g., JOHNSON ET AL., \[supra\] note 11, at 428 (“[L]awyers clearly have a role in conveyancing, if only to review documents for lenders and for title insurers.”).

21. At least one casebook avers the complexity is not just an attribute of the present method of transfer, but is a quality of real property itself. Unlike personal property, real property is not fungible. This non-fungibility, combined with the relatively high cost of real property, increases dickering and thus complicates the bargain. KURTZ & HOVENKAMP, \[supra\] note 10, at 1035-36.

22. CASNER & LEACH, \[supra\] note 3, at 673-74.

23. DONAHUE ET AL., \[supra\] note 7, at 576-90; see also LUTHER L. MCDouGAL III & MYRES S. MCDouGAL, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT 63 (2d ed. 1981) (“[A]ny agreement contains some gaps, ambiguities, or contradictions . . . .”).

24. See, e.g., SIEDEL, \[supra\] note 15, at 191-99; RABIN & KWALL, \[supra\] note 17, at 851-54 (listing twenty-one of the “most important” items to consider when drafting a residential real purchase agreement).
The second source of complexity is the title search. The length of title to
be searched, the crudeness of public records, the limited scope of the
records, and the inability to check for formal defects in recorded instruments all combine to make the title search difficult.

To a foreign anthropologist land transfer in the United States would probably look... much like an aboriginal, ritualistic clambake... The vendor must have opportunity to prove and the vendee to determine that the vendor has what he says he has... Eventually accepting or being forced to accept the proffered deed and land, the vendee still has no assurance that he will be able to keep the land or even be reimbursed if he loses the land... Such are but minimum indications of the difficulties and absurdities of the [public records] system.

Third are difficulties of performance. Financing is hard to understand. "The law of real estate financing is a complex and highly technical field." Further, all the paper and money which must change hands make the closing confusing. "[O]ne characteristic of modern conveyancing is the bewildering
amount of paper that it generates.” The alleged complexity of residential real estate transfer resulted in calls for more lawyer involvement. “The net result of the defects referred to above has been increasing criticism of our present system of conveyancing . . . as requiring a degree of professional supervision by lawyers incompatible with the use of land as a liquid commercial asset . . .”

The research reported in this article demonstrates the extent to which academic legal literature distorts the role of the lawyer and other professionals in the residential real estate transaction. Contrary to the casebook portrayals, the residential real estate transfer is a routine, standardized transaction, in which lawyer involvement is hardly ever required. Moreover, even when lawyers are involved, outcomes for the parties are not significantly enhanced.34

III. HOW LAWYERS BECAME MARGINALIZED IN RESIDENTIAL CONVEYANCING

A. The Imperialism of Title Insurance

This section focuses on the process by which the lawyer’s title opinion, and hence the lawyer, was displaced from the residential land transfer process in almost all markets in the United States and replaced with the policy of title insurance. Interviews with lawyers who practiced law in the United States, both before and after lawyers were marginalized in the residential market, indicate without exception that the cause of the marginalization was the growth in popularity of title insurance.35 Thus, one attorney commented: “I just think probably with the title company coming in and doing things there is less of a perception that you need someone else there explaining the documents to you.” Another respondent (AT15) elaborated, stating:

confusing to most sellers and purchasers . . . . [A] large number of documents and checks change hands in a very short time.

32. DONAHUE ET AL., supra note 7, at 572.
33. BROWDER, supra note 14, at 893.
34. See infra Part VI.
35. “Now if independent legal services and independent title insurance could get along indefinitely side by side this would no doubt be a satisfactory situation. But it simply does not work out that way. The uniform experience has been that the more commercial title insurance flourishes, the more legal services involved become a mere appendage of the insurance operation, and the more the independent lawyer tends to disappear from the scene.” ABA SPECIAL COMMITTEE ON LAWYERS TITLE GUARANTY FUNDS, THE CONCEPT, ORGANIZATION AND OPERATION OF BAR-RELATED TITLE ASSURING ORGANIZATIONS, vi (1968) (emphasis added).
I think that the title insurance is basically providing one of the services that lawyers were probably historically called upon to give and that is giving opinions as to title. Lawyers to some extent are reluctant to give title opinions because there is substantial malpractice consequences associated with that and . . . title companies are now well-suited to do that [because] they are multi-million dollar industries that do this day in and day out. If you have a title company and a Realtor who has done thousands of real estate closings, the lawyers sort of get lost in that loop.

Before title insurance became common, purchasers needed lawyers to examine and pass on title; therefore, virtually all home purchasers were represented by an attorney. Lawyers were consulted fairly early in the process and gave advice on a number of matters in addition to title. Although title assurance was the motivating reason for retaining the lawyer, buyers felt comfortable consulting their attorney about all matters related to the purchase. Typically, the attorney and client would meet a number of times and spend at least one meeting discussing the title opinion in detail.

The growth of title insurance in the United States resulted from three factors. First, judicial decisions early established that conveyancers and other real estate professionals were liable only for their negligence; thus, certain losses that fell on the purchasers of real estate could not be shifted to the real estate professionals who had assisted them. In response to these decisions the first title insurance company in the United States, the Real Estate Title Insurance Company, formed in 1876. Unlike a lawyer’s opinion, title insurance provides coverage against hidden risks. Thus, title insurance protects the purchaser against such defects as a forged, stolen, or undelivered deed, while the lawyer’s opinion will not. Moreover, the title insurance companies provide this coverage at less cost than lawyers do, at least in some markets. This relative efficiency reflects the inferiority of the publicly maintained land records compared to the privately maintained “title plants” owned by the title companies.

The second reason for the growth of title insurance is the rapid development of the western United States at the end of World War II. During this period, the

37. DANIEL D. GAGE, JR., LAND TITLE ASSURING AGENCIES IN THE UNITED STATES 80-84 (1937). Title insurance is available in the United Kingdom, but the volume written is small. Insurance in Aid of Conveyancing I, 100 SOL. J. 139 (1956); Insurance in Aid of Conveyancing II, 100 SOL. J. 157 (1956).
38. D. BARLOW BURKE, JR., LAW OF TITLE INSURANCE 15 (1st ed. 1986). I am told by Columbus, Ohio attorneys that under the pre-title insurance system of relying on abstracts, the attorney’s title opinion could be produced more cheaply than title insurance. If the abstract were not available, or had not been kept up to date, which is the current situation, then the cost of the lawyer’s title opinion would be substantially more than title insurance.
demand for development capital outpaced the locally available supply. The traditional sources of development capital were banks and savings and loans. These institutions typically invested the great bulk of their mortgage loan portfolio in mortgages secured by real estate in the locality in which the institution operated. Consequently, western developers could not look to eastern savings and loans for funds. "Life insurance companies, however, are national lenders, and the larger companies hold mortgages on lands located in all parts of the United States." 39 Since the insurance companies were in need of title protection, it is not surprising that they readily accepted the idea of title insurance as the source of that protection. Moreover, life insurance companies are regulated by state laws requiring that their real estate loans be secured by a first lien; title insurance provided an easy means of establishing regulatory compliance.

The third reason for the growth in popularity of title insurance is the growth in size and importance of the secondary mortgage market. 40 The secondary mortgage market is a securities-like market, organized by the federal government, in which residential mortgages originated by local mortgage lenders are bundled into large packages, usually in excess of one million dollars, insured by the federal government and then sold on a national market to private investors located all over the country and, increasingly, the world. The principal players in this market are three government chartered secondary market corporations: the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), and the Government National Mortgage Association (Ginnie Mae). The purpose of the secondary market is twofold: to smooth out cyclical periods of tight money and to enable capital rich regions of the country to provide mortgage funds to areas of the country where demand exceeds local supply. 41 It is estimated the sixty-five to seventy percent of all new mortgage loans are sold annually on the secondary market. 42

The ability to participate in the secondary market is a great advantage to a lending institution. Participation enables the lender to increase liquidity, obtain a hedge against future inflation, and engage in the profitable mortgage servicing business. In order to participate in these markets, however, federal government

40. Local attorneys to whom I have spoken attribute the rise of title insurance to the large scale FHA insured housing developments constructed in the Columbus area during the 1950s and early 1960s. *See also* Quintin Johnstone, *Land Transfers: Process and Processors*, 22 VAL. U. L. REV. 493, 507 (1988) (claiming the spread of title insurance is the result of the secondary mortgage market).

regulations require title insurance. Because any lender wants at least the option to participate in the secondary mortgage market, "every lender insists that the buyer obtain title insurance."

B. Organized Resistance

1. Introduction

The legal profession’s response to the ascendency of the title insurance company in residential conveyancing took three forms. First, lawyers mounted a frontal assault based on the unauthorized practice of law statutes that exist in many states. Second, some lawyers, and the organized bar, followed the maxim: "If you can’t beat them, join them.” These lawyers, frequently under the auspices of their state bar associations, formed title insurance companies of their own. Third, many lawyers simply capitulated and abandoned the residential real estate transaction as a part of their practice.

2. Unauthorized Practice of Law

The relationship between the part of the legal profession engaged in residential conveyancing and the real estate profession is characterized by hostility. That hostility has frequently expressed itself in legal contests over which services each profession may appropriately or exclusively perform.

Beginning in the mid 1940s (not coincidentally, about the time that title insurance began seriously to challenge the lawyer’s title opinion) and continuing today, portions of the organized bar have fought the participation of non-lawyers in the residential real estate transaction under the rubric of unauthorized practice of law.

Most of the cases involving the unauthorized practice of law by title insurance companies and real estate brokers were decided subsequent to World War II. Of the twenty-four states with supreme court decisions directly on

44. Interviewee response to survey conducted by the author, copy on file with Ohio State University Socio-Legal Center Library.
45. The legislation has also been a forum for the contests.
46. But see People v. Title Guar. & Trust Co., 125 N.E. 666 (N.Y. 1919).
47. The breakdown of the states with cases on point and the date of the decision is as follows: Coffee County Abstract & Title Co. v. State of Alabama, 445 So. 2d 852 ( Ala. 1983); State Bar v. Arizona Land Title & Trust Co., 366 P.2d 1 ( Ariz. 1961); Beach Abstract & Guar. Co. v. Bar Ass’n, 326 S.W.2d 900 ( Ark. 1959); Title Guar. Co. v. Denver Bar Ass’n, 312 P.2d 1011 ( Colo. 1957); Conway-Bogue Realty Inv. Co. v. Denver Bar Ass’n, 312 P.2d 998 ( Colo. 1957); Cooperman v. West Coast Title Co., 75
point, five cases were decided in the 1940s, seven cases in the 1950s, seven cases in the 1960s, and four cases have been decided since 1975.

The litigation typically seeks to enjoin lay conveyancers from preparing deeds, mortgages, and other instruments affecting rights to real property; 48 from giving advice on the legal effect of certain documents; 49 and from holding themselves out to the public as qualified in the legal aspects of residential real estate transactions. 50


49. Almost all of the state supreme court decisions have either specifically or by inference restricted lay conveyancers from giving specific legal advice to customers on such matters as the legal effect of certain documents, a customer’s legal rights and obligations under certain contracts, and more. The bar has been successful in this aspect of their unauthorized practice of law litigation. Hulse v. Criger, 247 S.W.2d 855, 862 (Mo. 1952) (no legal advice can be given); Chicago Bar Ass’n v. Quinlan and Tyson, Inc., 214 N.E.2d 771, 774 (Ill. 1966); State v. Indiana Real Estate Ass’n, Inc., 191 N.E.2d 711, 716-17 (Ind. 1963) (no legal advice).

The claims made by real estate lawyers have failed to resonate convincingly with either the public or the courts. Both are skeptical about whether lawyers are needed in residential real estate transactions for the protection of the public.51

The reported cases are usually decided favorably to lay conveyancers.52 Perhaps the decision most favorable to lawyers, at least on its face, is that of the South Carolina Supreme Court in \textit{State v. Buyers Service Company}.53 There, the court held that providing forms useful for conveyancing, preparing documents affecting title, handling real estate and mortgage closings, and even transporting or mailing documents to the county recorder's office as part of real estate transfer all constituted the unauthorized practice of law.54 \textit{Buyers Service Company} is aberrational, however, and even in South Carolina is likely to be limited to "egregious violations of the ban on the unauthorized practice of law. . ."55 Most of the cases are much less favorable to lawyers than \textit{Buyers Service Company}, and the trend is to allow title companies and real estate agents to do all that is necessary to complete a routine residential real estate transaction except giving specific legal advice or handling difficult or involved real estate transactions involving legal discretion.56

Title companies and real estate brokers are, however, subject to some restrictions in conducting of residential real estate transactions. Some of the most common restrictions are that standardized forms must be prepared or approved by an attorney,57 such forms must contain attorney review clauses,58 buyers' and
sellers' right to counsel must be prominently disclosed, and no future interests in land may be created. These conditions and restrictions have been imposed by statute, by agreement, and by judicial decision.

In sum, although some courts have reserved certain legal instruments solely for preparation by lawyers, the current trend and the current practice are to permit conveyancers to fill in the blanks of standard form deeds, mortgages, and other instruments of conveyance, as well as escrow documents, title insurance papers, abstracts, earnest money agreements, purchase and sale agreements, affidavits, short form leases, bills of sale, options, and more. Indeed, in most parts of the United States there is no service required in the typical residential real estate transaction that is prohibited to lay conveyancers.

The courts have developed four principal tests to define the permissible scope of lay conveyancers' services in residential real estate transactions. These tests reflect the courts' preference for the claims of lay conveyancers over those of the legal profession, and, by and large, are quite liberal concerning the services of a technically legal nature that may be performed by lay conveyancers.


59. Id. at 1358.

60. Hulse, 247 S.W.2d at 862; Ingham County Bar Ass'n v. Walter Neller Co., 69 N.W.2d 713, 717 (Mich. 1955) (allowed if the person "acts as a mere amanuensis").

61. See, e.g., TEX. REV. CIV. STAT. ANN. art. 6573a, § 16(e) (West Supp. 1997), contained infra note 108.

62. These agreements, sometimes referred to as "Statements of Principles," are discussed in Rhode, supra note 50, at 9. They have recently come under fire as an illegal attempt by the bar to perpetuate a monopoly. Rhode, supra note 50, at 9.

63. See, e.g., Hulse v. Criger, 247 S.W.2d 855 (Mo. 1952).


65. See infra Part IV.B.

a. Real Party in Interest

First is the "real party in interest test." Real estate agents and title insurance companies are allowed to fill in forms and prepare legal instruments if they are a real party in interest. This exception is a natural extension of the accepted proposition that an individual has an absolute right to represent himself in legal matters. The courts usually allow a party to the transaction (i.e., a title insurance company that is issuing insurance on the land in question) to prepare documents purporting to create a legal relationship between the title company and one or more parties to the transaction.67

Using similar reasoning, the Colorado Supreme Court invalidated a decree enjoining a title insurance company from preparing promissory notes and deeds of trust and mortgages in which it was named as payee.68 The Court found that the company was acting as its own counsel and held that this was a completely lawful activity. Four other states have followed the reasoning of the Colorado court in adopting the real party in interest test.69

67. Title Guar. Co. v. Denver Bar Ass’n, 312 P.2d 1011, 1014 (Colo. 1957); Hexter Title & Abstract Co. v. Grievance Comm., State Bar, 179 S.W.2d 946, 953 (Tex. 1944); Cooperman v. Guarantee Abstract Co., 75 So. 2d 818 (Fla. 1954); Georgia Bar Ass’n v. Lawyers Title Ins. Co., 151 S.E.2d 718, 722 (Ga. 1966). Colorado, Texas, Florida, and Georgia allow brokers and title companies to participate in what would be practice of law provided that they have or will acquire a real interest in the transaction.

68. Title Guar. Co. v. Denver Bar Ass’n, 312 P.2d 1011, 1018 (Colo. 1957).

69. State Bar v. Arizona Land Title & Trust Co., 366 P.2d 1, 12 (Ariz. 1961); Title Guar. Co. v. Denver Bar Ass’n, 312 P.2d 1011, 1014 (Colo. 1957); Cooperman v. Guar. Abstract Co., 75 So. 2d 818 (Fla. 1954); Coffee County Abstract & Title Co. v. State of Alabama, 445 So. 2d 852 (Ala. 1983); Guardian Abstract & Title Co. v. San Antonio Bar Ass’n, 278 S.W.2d 613 (Tex. Civ. App. 1955). Arizona and Colorado ("only documents affecting fiduciary duties"), Florida ("no deeds, mortgage, or instruments of conveyance"), Alabama ("for own purposes and not to be recorded"), and Texas generally limit this exception to a title insurance company which is seeking to prepare documents in connection with commitments contained in the title insurance issued by the company. For example, Arizona only allows title insurance companies to "prepare escrow documents, examine and prepare abstracts of title, title insurance papers, and documents affecting the fiduciary duties of the title insurance company." Arizona Land Title, 366 P.2d at 12. Wisconsin, however, allows a broker to participate in the practice of law, "providing they are acting as a broker to the transaction." State ex rel. Reynolds v. Dinger, 109 N.W.2d 685, 688 (Wis. 1961).
b. No Separate Fee Charged

Second is the "no separate fee" test. Although some states have discarded this test as "haphazard,"\textsuperscript{70} the separate fee test is still a popular means of permitting an activity that would otherwise be enjoined.\textsuperscript{71} The rationale for this test is that the fee indicates the lay conveyancer holds himself out as having some legal skill.\textsuperscript{72} If a separate fee is charged, it also shows that the lay conveyancer is not preparing the document for his own interest, but is acting as counsel for the paying party.\textsuperscript{73}

c. No Legal Discretion Required

The third test evaluates whether the transaction requires the "peculiar skill of a lawyer"\textsuperscript{74} as opposed to "common business sense."\textsuperscript{75} Most courts using this test have found that the simple filling in of blanks on standard forms requires no more than "ordinary intelligence"\textsuperscript{76} and should be allowed. Indiana (except for deeds), Minnesota, Missouri, Nevada (only escrow documents and earnest money agreements), New Mexico (no choice between competing forms), and Ohio all use variations of the discretion/difficult question of law tests to create exceptions allowing real estate agents and title companies to fill in blanks on forms and documents affecting legal rights to real property.\textsuperscript{77}


\textsuperscript{71} Ingham County Bar Ass'n v. Walter Neller Co., 69 N.W.2d 713, 717 (Mich. 1955) (payment is required for violation of statute); Hexter Title & Abstract Co. v. Grievance Comm., State Bar, 179 S.W.2d 946, 951 (Tex. 1944) (violation of "both... statute and... decisions of the court on the subject"). Michigan and Texas both consider the payment of a separate fee for services rendered in connection with document execution enough to find the activity unauthorized practice of law.

\textsuperscript{72} Hulse v. Criger, 247 S.W.2d 855, 860 (Mo. 1952); State Bar v. Guardian Abstract & Title Co., 575 P.2d 943, 949 (N.M. 1978).

\textsuperscript{73} Hulse, 247 S.W.2d at 861.

\textsuperscript{74} Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 214 N.E.2d 771, 774 (Ill. 1966).

\textsuperscript{75} Gustafson v. V.C. Taylor & Sons, Inc., 35 N.E.2d 435, 436 (Ohio 1941).

\textsuperscript{76} Hulse, 247 S.W.2d at 861.

\textsuperscript{77} In contrast to the cases above, using the "difficult question of law" test the Oregon Supreme Court found that the preparation of simple documents would be unauthorized practice of law unless they were done under the direction of a customer on forms chosen by the customer. Oregon State Bar v. Security Escrows, Inc., 377 P.2d 334 (Or. 1962). If the customer was unsure of what forms to use or what information to fill in, then he or she should seek legal advice. Id. at 93. The New York court also followed
This test has proved an effective tool for lay conveyancers who wish to usurp some of the territory previously held by lawyers. The general trend of the courts that allocate the contested services based on the presence or absence of “legal discretion” has been to find against the bar and allow the services to be performed by lay conveyancers.78

d. Incidental to Lawful Business of the Defendant

The fourth test used to allocate the contested services among those competing to perform them evaluates whether the contested service is incidental to the lawful business of the person claiming the right to perform it. The “incidental” test, like the “no discretion” test, is little more than an exercise in judicial labeling.79 Those courts that label an activity as “incidental” find for the brokers and title companies, while those that label the activity as “not incidental” find for the bar.80 While the labeling of an activity helps to rationalize the

this standard when it found that any preparation of legal documents not at the express direction and authority of the customer to be unauthorized practice of law. Judge Pound stated in his concurring opinion: “The most complex are simple to the skilled, and the simplest often trouble the inexperienced.” People v. Title Guar. & Trust Co., 125 N.E. 666, 670 (N.Y. 1919). Alabama considers the filling in of blanks on standard forms to be legally significant and refuses to allow brokers or title insurance companies to do deeds, mortgages, or other instruments of conveyance. Coffee County Abstract & Title Co v. State of Alabama, 445 So. 2d 852 (Ala. 1983).

78. Five of the nine cases that adopted the discretion test used it to create exceptions to unauthorized practice of law prohibitions. These cases are also generally the more recent of the decisions. Beach Abstract & Guar. Co. v. Bar Ass’n, 326 S.W.2d 900 (Ark. 1959) (unauthorized practice of law); Conway-Bogue Realty Inv. Co. v. Denver Bar Ass’n, 312 P.2d 998 (Colo. 1957) (not unauthorized practice of law); Cooperman v. West Coast Title Co., 75 So. 2d 818 (Fla. 1954) (unauthorized practice of law); State v. Indiana Real Estate Ass’n, 191 N.E.2d 711 (Ind. 1963) (not unauthorized practice of law); Ingham County Bar Ass’n v. Walter Neller Co., 69 N.W.2d 713 (Mich. 1955) (not unauthorized practice of law); Cardinal v. Merrill Lynch Realty/Burnet, Inc., 433 N.W.2d 864 (Minn. 1988) (not unauthorized practice of law); Hulse v. Criger, 247 S.W.2d 855 (Mo. 1952) (unauthorized practice of law); Commonwealth v. Jones & Robins, Inc., 41 S.E.2d 720 (Va. 1947) (unauthorized practice of law); State ex rel. Reynolds v. Dinger, 109 N.W.2d 685 (Wis. 1961) (unauthorized practice of law).


80. See, e.g., Beach Abstract & Guar. Co. v. Bar Ass’n, 326 S.W.2d 900 (Ark. 1959); Title Guar. Co. v. Denver Bar Ass’n, 312 P.2d 1011, 1014 (Colo. 1957); Hexter Title & Abstract Co. v. Grievance Comm., State Bar, 179 S.W.2d 946, 953 (Tex. 1944); Commonwealth v. Jones & Robins, Inc., 41 S.E.2d 720, 723 (Va. 1947). Colorado allows preparation of documents incidental to commitments contained in the title insurance issued by the company. However, Colorado deems charging a separate fee for the service sufficient to make the activity no longer incidental. Title Guar. Co. v. Denver
decision, it is usually unaccompanied by reasoning sufficient to explain the
decision. For this reason, decisions involving the same or similar services are
often contradictory. In Virginia, for example, "deeds of bargain and sale, release
deeds and deeds of trusts (and notes secured thereby) . . . are not contracts
incident to [the] regular course of business of realtor[s]."81 By contrast, in
Pennsylvania, which like Virginia allows lay conveyancers to perform services
"connected with [their] immediate business,"82 the preparation of deeds,
mortgages, and other instruments of conveyance is incidental to the business of
real estate brokers.83

C. The Process of Capitulation

1. If You Can't Lick Them, Join Them:
Bar Sponsored Title Insurance

While lawyers battled with lay conveyancers over contested services in the
courts, on a separate front they fought the encroachment of title insurers into
their domain by forming bar sponsored title insurance companies. The purpose
of these companies is to protect real estate lawyers from the "terrifying" threat
that their property practices would be taken over by title insurance
companies.84 Although many lawyers have entered the title insurance business to protect their
practices, these bar related title insurance companies are not significant to the
present discussion. The lawyers who operate them are acting as title agents and,
hence on behalf of the title insurer, not as the attorney for either the buyer or
seller. Indeed, it has been suggested that the role of the attorney is so different
from the role of the title agent that "[i]reconcilable conflicts of interest result
. . . when an attorney for a buyer or seller of real estate also functions as a title
insurance agent."85

2. A Split in the Ranks

The organized bar has not presented a unified front in opposition to the fight
by lay conveyancers to perform the contested services. The division among the
organized bar was observable in many of the unauthorized practice of law cases,
discussed above. The trend of those cases, as noted, has been to find in favor of

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Bar Ass'n, 312 P.2d 1011, 1014 (Colo. 1957).
82. LaBrum v. Commonwealth Title Co., 56 A.2d 246, 249 (Pa. 1948).
83. Id. at 247.
85. Note, Conflict of Interest: Attorney as Title Insurance Agent, 4 GEO. J. L.
the lay conveyancers and not lawyers. To the extent judges are deciding cases adverse to lawyers, there is a split in the ranks. Moreover, within the practicing bar itself, there has also been a split in the ranks.

Those segments of the organized bar actively engaged in real estate claim that lawyers are an essential part of residential real estate transactions, pointing to such factors as: (1) the high ethical standards imposed by the lawyer’s canon of professional ethics; (2) the degree of training and proficiency required by the state bar examinations; (3) the funds created by the bar to compensate victims injured by a lawyer’s incompetence; and (4) the regulatory power the courts hold over members of the bar.86 A typical position of the residential real estate bar is summed up by the following passage:

Any program of education must begin with an attack upon two beliefs widely held in this country. The first is that only one lawyer is needed to complete a title transaction. The second is that, if a lawyer is employed, the lawyer is needed only late in the transaction. . . .

. . . .

The conclusion to be drawn from the previous discussion is that it is desirable for all parties in the residential real estate transaction, the seller, the buyer and the lender, to be represented by counsel. The most glaring defect in the system that now generally prevails is the lack of representation of the buyer. . . .87

This view, however, is not representative of the bar as a whole. For example, the American Bar Association has stated: “[I]t can no longer be claimed that lawyers have the exclusive possession of the esoteric knowledge required and are therefore the only ones able to advise clients [about real estate closings].”88 Indeed, “[l]awyer resistance to such inroads [by title companies and real estate agents] for selfish reasons only brings discredit on the profession.”89


88. AMERICAN BAR ASSOCIATION REPORT OF THE COMMISSION ON PROFESSIONALISM 52 (1986).

89. Not surprisingly, the position of the ABA was controversial within the organized Bar. See Richard J. Patterson, Residential Real Estate Practices, BARRISTER, Fall 1987, at 47.
IV. PATTERNS OF LAWYER USE AND NON-USE THROUGHOUT THE UNITED STATES

A. Introduction

This section describes what lawyers do, and do not do, in the residential real estate transaction from the perspectives both of the organized real estate profession and the lawyers in the United States who are engaged in residential real estate work. It emphasizes those services about which conflicting jurisdictional claims are made by two or more professions (the "contested services") and those services concerning which one or more professions disavows jurisdiction (the "abandoned services"). It also identifies and describes the claims that professionals make about the need for and the contribution of their special skills to the home purchase process. These claims involve, for example, protection of capital, facilitation, avoidance of conflict, negotiation, translation and simplification, provision of information (misinformation) and education.90

The question of what professionals do is central in the sociology of the professions.91 There is a growing body of research that provides qualitative insights into the content of lawyers' work and theories about what functions they actually perform for clients. Examples are managing uncertainty,92 translation,93 mediation and transformation,94 control,95 and constructing advantages.96

The claim to professional authority is often based on the assertion that the special knowledge and expertise of the profession is unique and wholly distinct from other forms of knowledge;97 hence the special practice of the profession can be clearly distinguished from the practice of other occupations.98 This type of

90. See infra Part V.
98. Susan Sterrett, Comparing Legal Professions 15 L. & Soc. Inquiry 363, 365-
assertion is common to lawyers engaged in residential conveyancing. Thus, one lawyer stated: "If [the transaction] is done without legal skills, then basically there has been no handling of the matter with a view towards either avoiding or limiting litigation or with a view of protecting the client’s rights in the event of litigation..."99

Lawyers’ claims of expertise might be expected to be convincing in conveyancing, as the law governing title is arcane and complex. In Abbott’s terms, “inference” rather than routine connection of diagnosis and treatment might be thought to predominate.100 Nonetheless, these claims have lost much of their force in the United States, possibly because title insurance companies have changed the way people think about transfers of title and the risk of defective title. Indeed, research indicates that title insurers have been so successful at this that consumers generally perceive the title insurance to give them more protection than it actually does.101 Moreover, residential conveyancing lawyers make no claim to professional authority based on their experience concerning titles. Indeed, when asked what the role of lawyers was in securing good title, the most common response was “this is what the title company does.”102 On being asked why, a typical answer was “because there is not a lender around that will give mortgage money unless there is a title policy.”103

B. The Perspective of the Organized Real Estate Profession

Concurrent with the diminution of the lawyers’ role in residential transactions has been an increase in the role of the real estate agent. Indeed, the real estate agent is the dominant player in the residential real estate transaction in almost all parts of the United States. By this I mean that the real estate agent is the “gate keeper” and either does the work or assigns various aspects of it to other professionals, as deemed necessary. While there is some regional variation, most of the work of residential conveyancing is controlled or performed by real estate agents.

In 1992 a survey was conducted of the executive directors and the general counsel of the Board of Realtors of all fifty states. Each board was asked to

99. Interviewee response to survey conducted by the author, copy on file with Ohio State University Socio-Legal Center Library.
102. See supra note 99.
103. See supra note 99.
respond to four questions concerning local customs and procedures for the purchase and sale of residential real estate in their respective state. The purpose of this survey was to determine the relative prominence of the various professions involved in the typical residential real estate transaction. Specifically, interviewees were asked:

1. State what roles are played by attorneys and realtors with regard to negotiating and preparing contracts of sale.
2. Give the same information with regard to the ordering of title searches, readying the transaction for closing and the preparation of the closing documents, such as deed, affidavits of title, note, mortgage, etc.
3. Do attorneys normally represent buyers and sellers at title closing? Moreover, what duties are performed by attorneys for buyers and sellers in the overall closing process?
4. Has the closing procedure been the cause of friction or litigation? Please give details.

The survey results indicate a great deal of uniformity throughout the U.S. in professional roles and duties in residential real estate transactions, notwithstanding the conventional wisdom to the contrary. These results also corroborate the paucity of attorney involvement in residential real estate transactions.

1. The Pre-Contract and Contract Stage

Respondents indicated that in 35 of the 40 states responding, the real estate agent typically negotiates and drafts the contract of purchase and sale without the aid or assistance of an attorney. In these states, the real estate agent prepares the contract and other necessary documentation on standardized forms. Usually, these forms have been approved by the local board of realtors, the local bar association or both. In these states, attorney involvement is often limited
to transactions in which no realtor is involved or transactions that are unusually complicated, such as those involving contract for deed or seller financing.

Within the general framework of real estate agent dominance, there are still a few contested services that may require attorney involvement. For example, in a few states, the realtor is permitted to fill in forms commonly in use in the community, "but may not modify terms or conditions of the contract that would effect the legal relationship of the parties." A few states have attorney approval clauses. These clauses provide that either party may have the contract reviewed by an attorney within a specified number of days after the execution of the contract. If the attorney does not approve of the contract as written she may suggest changes and, if these are not agreed to by the other party, the contract is nullified. Even in states where such clauses are used, however, actual attorney review and involvement is rare.

There are only five states where it is still customary for the attorney to draw the contract of sale. In each of these states, although procedures differ slightly, it is customary for the real estate agent to draft a binder outlining the terms of the agreement, but typically for the attorney to draw the contract.

In two of these states, Massachusetts and Connecticut, it is common for both buyer and seller to have their own attorney. New Jersey attempted to

In the best interest of the public the commission may adopt rules and regulations requiring real estate brokers and salesmen to use contract forms which have been prepared by the Texas Real Estate Broker-Lawyer Committee and promulgated by the commission; provided, however, that the commission shall not prohibit a real estate broker or salesman from using a contract form or forms binding the sale, exchange, option, lease, or rental of any interest in real property which have been prepared by the property owner or prepared by an attorney and required by the property owner.

109. Illinois. Information that follows is taken from interviews with the General Counsel to the respective states' Board of Realtors, copy on file with Ohio State University Socio-Legal Center Library.


111. They are Alabama, Connecticut, Illinois, Massachusetts, and New York. See supra note 109.

112. Even in the handful of states where lawyer use is prevalent in residential real estate transactions, the practice varies within the state and lawyer use is generally limited to those parts of the state involving large population centers. Thus, in Massachusetts, lawyer use is limited to the Boston area, in New York to New York City and the upper Hudson River Valley and in Illinois to Cook County and the area surrounding Chicago. See supra note 109.

113. The practice in these states is very similar to the practice in Britain. There, once the parties agree on terms, the real estate agent refers the matter to the buyer's solicitor, who draws the contract and conducts the necessary inquiries, including those relating to title. Once the matter is referred, the estate agent's task is essentially completed.
require a similar practice. *In re Matter of Lanza* held that an attorney who undertook to represent both parties in a residential real estate transaction had to go through a rigorous and extremely difficult process of disclosure before undertaking the dual representation. In addition, if any conflict materialized, the attorney could not attempt to negotiate or resolve the conflict. Instead, she had to withdraw from representation of both parties. Although *Lanza* held against the lawyer involved, the case is viewed by commentators as a full employment act for lawyers, or at least an attempt at one. It requires two lawyers in every real estate transaction, and three in some. If *Lanza* was intended to promote lawyer use, however, it backfired. Because it eliminated the cost savings of both buyer and seller sharing one lawyer, buyers and sellers in New Jersey have tended to opt for no lawyers rather than two.

2. The Post-Contract and Closing Stage

Moving a transaction from the contract stage to the closing involves a number of steps. The following description taken from the Delaware Board of Relators survey response lays out most of them:

1. Advising client of their right to independent legal counsel.
2. Searching the title.
3. Clearing title defects.
4. Certifying title or issuing a lawyer's 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 by obtaining an administrative variance, confirmation of a non-conforming use, variance, easement, license agreement, and title insurance coverage, if possible for restriction violations.
9. Counseling client(s) as to form of ownership, e.g., tenants in common, joint tenants, tenants by entirety.

115. GOLDSTEIN, supra note 3, at 169-70.
116. See discussion of Opinion 26, infra Part VI.B.
117. In some states the closing is referred to as the settlement. Whatever the terminology, this is the time when the obligations of the contract are performed by both buyer and seller and the contract thus becomes fully executed. While the closing may involve a number of technical steps, the most important of these are the payment of the purchase price by the buyer and the delivery of the deed by the seller.
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, e.g. wood destroying insect infestation report.
17. Advising 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 client at settlement, answering clients questions and having documents properly executed.
21. Representing client before and during settlement in resolving disputes, e.g. property defects discovered during pre-settlement inspection.
22. Reviewing the survey, deed restrictions, easement, sub-division notes, and zoning with client and giving buyer copies.
23. Rendering tax advice to client.
25. Recording documents, e.g. deed and mortgage.
26. Checking after settlement to be sure liens are satisfied on the record and other title matters are complete such as tax clearance issued on estates and these estates properly closed.
27. Handling any escrows created at settlement for disputes such as escrows for repairs.
28. Sending 1099S to seller and filing it with IRS or determining exempt status.
29. Report cash payments of over $10,000.00 to IRS unless transaction is exempt.
30. After recorded documents are returned from Recorders send them to appropriate parties, e.g. deed to buyer and mortgage to lender.

At least to the uninitiated, the quantity and technicality of these steps may be daunting. Although most real estate professionals would agree that these steps are routine and largely mechanical, lawyer involvement after the purchase contract is executed is greater than in the pre-contract stage. Still, in most cases attorneys are not involved in readying the transaction for closing and frequently
are not present at the closing. In only eight states of the forty states reporting is it customary for either the buyer’s or the seller’s attorney to ready the transaction for closing. In the rest of the states the preparation of the closing documentation and the closing itself are handled by the real estate agent, the title insurance company, a corporate closing company, an escrow agency, or some combination of them.

The historical trend is in favor of even less lawyer involvement during the closing. A 1983 survey conducted by First America Title Insurance Company listed fifteen states where it was common for residential real estate transactions to be closed by lawyers. The 1992 survey reported in this article obtained responses from thirteen of those fifteen states. Of the thirteen responding states it was still common for lawyers to conduct the closing in only five of them.

In the remaining eight states, closings were conducted by lay conveyancers. No state that reported using lay conveyancers to close residential real estate transactions in the 1983 survey reported using lawyers for this work in the 1992 survey. Thus, in the nine years between the 1983 and the 1992 survey, the number of states in which closings were conducted primarily by lawyers declined by sixty percent.

Representative of most respondents in the 1992 survey were the responses from North and South Dakota. The North Dakota respondent said, “Attorneys are, of course, welcome [at the closing], if requested, but this is rather the exception than the rule.” The South Dakota respondent remarked that lawyers are hardly ever present at South Dakota closings “and, of course, with no attorneys present things run smoothly.” A contrary view is expressed only in the few states where attorney involvement during closings is high. Thus, the New York respondent said, “We have suggested to some that they [the real estate agents] sit in the same room but not at the closing table since they are...

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118. They are Alabama, Connecticut, Illinois, Indiana, Massachusetts, New York, Tennessee and Vermont.

Data to follow is extracted from interviews with the General Counsel to the respective states’ Board of Realtors, copy on file with Ohio State University Socio-Legal Center Library.

119. See supra note 118.

120. They were Delaware, Georgia, Hawaii, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Montana, New Hampshire, New York, South Carolina, Vermont and Wisconsin. See supra note 118.

121. See supra Part IV.B.

122. They were Hawaii, Maine, Michigan, Montana and Wisconsin. See supra note 118.

123. They were Connecticut, Delaware, Georgia, Kentucky, Massachusetts, New York, South Carolina and Vermont. See supra note 118.

124. See supra note 118.
primarily there to answer any questions that might arise with respect to the property and collect their commissions.\textsuperscript{125}

\section*{C. The Perspective of The Practicing Lawyer in the United States}

Twenty-five attorneys were interviewed for this part of the study: thirteen had their principal office in rural areas and twelve in urban areas. The sample included attorneys from the West Coast, the East Coast, and the Midwest. The sample was stratified by region to elicit a variety of responses, to avoid repetitive responses, and to control for the effect of a particular, but perhaps unarticulated event. For example, I was concerned that a recent court decision or news story might alter the perception of interviewees in that locale more persuasively than the interviewee’s own experiences.

Twelve solo practitioners, ten partners, and three associates were interviewed. The attorney-interviewees were selected from those who identified themselves as engaging in residential conveyancing. For this purpose, advertising and professional affiliations (e.g., membership in the real property section of the local bar association) were considered. We also selected a portion of the sample from lawyers identified to us by the other professionals that we interviewed.

Interviewees had been members of the bar between three and thirty-six years. On average, they had spent 14.2 years in residential real estate practice. Residential real estate as a percentage of the attorney’s total work varied greatly: between five percent and ninety percent, with an average of twenty-eight percent. Residential real estate as the percentage of a firm’s work ranged from one percent to ninety. Residential real estate work was twice as important to rural lawyers than to urban ones (38.1 percent vs. 17.9 percent) and more important to solo practitioners than to lawyers in firms (35 percent vs. 22.3 percent). Generally, as firm size increased, the time devoted to residential real estate decreased. Lawyers in the very largest firms reported that they did virtually no residential real estate (1 percent) and that what they did was usually undertaken as an accommodation only to those who were already clients of the firm. Residential real estate is not an “elite” practice.

\subsection*{1. Attorney Practices: Overview}

The following is a brief outline of what the respondents stated an attorney should do in residential conveyancing:

1. Review contract with buyer.

\textsuperscript{125} See \textit{supra} note 118.
2. Make any addenda to the contract and try to negotiate with the seller on the addenda.
3. Search the title and clear any title defects.
4. Certify the title or issue a lawyer's opinion of title.
5. Advise client as to types of title insurance.
6. Order surveys and review them to make sure there are no encroachments.
7. Solve any problems revealed by the survey.
8. Review deed restrictions and easements.
9. Render tax advice to the client.
10. Collect and disburse funds.
11. Record documents such as the deed and the mortgage.
12. After settlement, make sure liens are satisfied on the record and check that other title matters are completed.
13. Handle any escrows created at settlement.
14. After recorded documents are returned from Recorders, send them to appropriate parties.

As seen below, most attorneys do not perform most of these services most of the time. Indeed, most of the time none of these services are performed by an attorney.\textsuperscript{126}

2. Attorney Practices: Point of Involvement

Seventy-five percent of the attorneys interviewed stated that they are usually contacted by the buyer after the buyer has entered into a real estate purchase contract.\textsuperscript{127} Although attorneys say it is important for them to be involved in the process from the beginning, only one attorney (AT25) stated that she would refuse representation unless she was involved in the transaction from the point of the offer.

In the usual case, where the buyer executes a contract before retaining an attorney, respondents stated that they review the contract and make necessary changes or addenda. Respondents "rarely" or "infrequently" made changes to the contract, however. This was true even in states requiring that contracts drafted by a real estate agent have an "attorney review period" clause in the agreement. This clause gives the attorney for either the buyer or seller the opportunity to disapprove the contract within a specified number of days after execution.

\textsuperscript{126} See also supra Part III.

\textsuperscript{127} This is consistent with the Board of Realtors survey. See supra text accompanying note 107.
3. Attorney Practices: Structural Factors

The study asked attorneys whether structural factors concerning the nature of the transaction affect their role. Specifically it asked about condominiums, chain transactions, age of property, and requirements of lenders. The most important of these factors turned out to be lenders' requirements.

a. Condominiums

Most attorneys surveyed stated that there was not much difference in their activities when they represent a buyer who is purchasing a condominium as opposed to a single-family home, except that condominium purchases require a review of the association documents, which are often very lengthy. The reasons given for this review were either vague or trivial. The following (AT5) illustrates:

This [review] may not seem important to the buyer now, but in five years when something needs to be replaced, the buyer will definitely want to know what is and is not common property. For example, windows may be considered common area because they are on the outside of the building, or they may be considered something that the individual unit owner can replace herself.128

Significantly, not one attorney stated that her review of condominium documents had resulted in either a modification of the documents or the failure of a purchase transaction. “By the time I get involved, all this is cast in stone,” said one. “The buyer can take it or leave it.” Only one attorney said that he charged more to condominium buyers than to single family home purchasers.129

b. Chains of Transactions

Chains are common in many American cities: the buyer’s obligation to proceed is contingent on the buyer first selling his existing home. The presence of chained transactions did not seem to have a significant effect on what attorneys did.130

128. Interviewee response to survey conducted by the author, copy on file with Ohio State University Socio-Legal Center Library.
129. See supra note 128.
130. One attorney (AT21) stated that he advised his clients against entering into contracts in which the sale of one home was contingent on the sale of another home because “there are too many variables” and “things may drag on.” However, most attorneys stated that they do not discourage buyers from entering into contracts in which such contingencies exist.
c. Age of Property

When asked if the age of a property is likely to have any influence on the work they do, about three-fourths of the attorneys stated "yes." Surprisingly, many attorneys stated that it was their duty to ensure that the property was physically suitable for their client. Traditional legal doctrine would place responsibility for this not with the attorney but with the seller, builder, or realtor. Among the concerns expressed by attorneys were leaking roofs, termites, and compliance with environmental laws enacted after the construction of the home. Respondents believed that recent construction presented fewer inspection issues because, in the attorneys' opinion, problems of defective quality are less frequent.

On the other hand, title problems may be more likely with newer property. Several attorneys noted that there may be easements or uses that are unknown, or other problems that have not had a chance to be exposed. With older property the attorneys felt it was more likely that these matters would have become apparent and been previously addressed.

d. Requirements of Mortgage Lenders

About half of the respondents stated that mortgage lenders have no influence on the services they perform. If this statement is taken at face value it is surprising, because the lending industry is generally perceived as dictating the structure of the residential real estate transaction. When probed, however, what these attorneys reveal is that lending industry demands are contained in non-negotiable, standardized forms, including such things as the form of mortgage, note, disclosure documents, and the form and necessity of the title insurance policy.

The lending industry's comprehensive control of the residential real estate transaction leaves the attorney little room to operate within the sphere of its influence. It is against this background that one must understand statements such as that of one respondent (AT15), who described the mortgage lending industry as very standardized and said, consequently, "its only influence is its timetable and whether the mortgage will be approved." Or that of another attorney (AT13) who depicted mortgage lenders as creating various contingencies, all of

132. This opinion is not supported by the facts. Research in the Columbus, Ohio area indicates that most disputes over quality arise in cases involving new construction. See Braunstein & Genn, supra note 101, at 473 n.12.
133. See supra note 128.
which must be met in order to get a loan; however, "these contingencies have no effect on the services" that the attorney himself performs. 134

All of the attorneys agreed that the lenders' documents were not negotiable. Because the lender wants to preserve the option to sell the mortgage on the secondary mortgage market, standardization is very important and alteration of the documents, except to fill in blanks concerning interest rate, term, etc., is not permitted. The lender presents documents on a "take it or leave it" basis. Thus, while the attorney can explain the documents, he cannot change them.

4. Attorney Practices: Securing Good Title

Attorneys do not search titles because "this is what the title company does." 135 Title insurance is vital in these transactions "because there is not a lender around that will give mortgage money unless there is a title policy." The title company delivers to the attorneys the title insurance commitment, which commits the company to issue its policy subject to some exceptions if specified conditions are met. These exceptions are the title defects, such as restrictions, liens, easements, etc., that the company finds in its search. Most attorneys said that they review the title documents once they receive them to see if there are any problems they do not "feel uncomfortable with." 136 If the attorney finds such a problem, he will try to resolve it. The attorneys revealed, however, that in many cases they do not see the title commitment until the day of the closing. One wonders, therefore, how a meaningful review could occur and whether there is time to remedy objectionable matters.

5. Attorney Practices: Lengths of Transaction

When the attorneys were asked how long a typical transaction takes from offer to closing, the responses ranged from as short as four weeks to as long as one year. The average time reported was sixty days, with about half of the attorneys stating between forty-five to sixty days and the other half sixty to ninety days. Only three attorneys suggested that the length of these transactions could be as little as thirty days. One attorney remarked that the length of time from offer to closing depended on the type of financing. For instance, the time frame may be longer or shorter depending on whether the buyer obtains a VA, FHA or a conventional loan. In addition, contingencies in the contract had an effect on the length of the whole transaction.

134. See supra note 128.
135. See supra note 128.
136. See supra note 128.
Most attorneys gave a number of reasons why buyers need to be represented in residential real estate transactions. The most notable thing about these claims made by lawyers is that they are (1) vague, (2) trivial or (3) implausible.

A. Vague Claims

1. The Prophylactic Function

One of the most common claims made by attorneys to enhance their importance in the residential real estate transaction is that they insure against the possibility of some undesirable consequence. Thus, a typical respondent said, "The cost of hiring an attorney to protect (the buyer's) interest is inconsequential with respect to the purchase price and it is just my opinion like buying another policy of insurance." Others explained that people hire attorneys in these transactions for the mental comfort of knowing that they are protected, and some respondents described it as "a holding hand process." In the same vein, another respondent (AT17) reported that there are many states where real estate brokers draft the contracts and the lawyers do not get involved in the residential real estate transaction, but he opined that it is important for attorneys to be involved. "You need . . . to be able to protect your client. That is why clients have lawyers."

Generally, the attorneys had difficulty specifying the hazards against which their advice insured, even when probed. The following typifies: "If [the transaction] is done without legal skills, then basically there has been no handling of the matter with a view towards either avoiding or limiting litigation or with a view of protecting the client's rights in the event of litigation . . . ." With but one exception, no particular hazard that might give rise to litigation was mentioned; the one hazard mentioned was the unethical behavior of real estate agents. Thus, one respondent (AT3) remarked that many buyers make the mistake of thinking that the real estate agent is the professional that is looking out for their interest, but that is frequently a very costly mistake because the agent actually represents the seller. An attorney with fifteen years of experience in residential real estate (AT12) stated that buyers need attorneys "because the realtors are usually cheating them, lying to them. I know very few transactions

137. See supra note 128.
138. See supra note 128.
139. See supra note 128.
where the realtor hasn’t failed to disclose something or lied about something.”

Another respondent (AT10) explained: “The realtor who is selling a house obviously gets a commission of the house sold, so although they may have an obligation ethically to care for their client, they also have a fee at the end of the rainbow.”

2. The Exegetic Function

Most respondents stated that the most important thing they do in the whole transaction is to explain the documents to the buyer. Many expressed the importance of having the buyer understand what she is signing and the responsibilities that it entails. Thus, many respondents commented that buying a house is probably the largest purchase a person will ever make and, therefore, one needs the assistance of someone who knows the system, and who can explain to the buyer her rights and the “legal ramifications” of the operative documents. Other respondents stated that the attorney’s main function is to answer the buyer’s questions regarding the mortgage and title documents.

When one listens to this explanation of the importance of lawyers’ work, and the necessity of their involvement in the residential real estate transaction, it is easy to understand why buyers are unpersuaded. The attorneys’ central claim is that they function like a Greek chorus—explaining the action without influencing the outcome. As modern dramatic techniques have made the chorus unnecessary, so standardized “non-negotiable” forms have made the exegetic role of the attorney largely superfluous.

The exegetic function is distinct from the attorney’s role in negotiating for more favorable terms. In most cases the attorney does not become involved in the transaction until after the contract of sale has been executed. Thus, the attorney has no opportunity to negotiate the terms of that document. Moreover, mortgage and other forms required by lending institutions are standard forms required for participation in the secondary mortgage market. These documents are “cast in stone” and not subject to negotiation. Thus, the exegetic function must be understood not as part of a larger strategy to negotiate more favorable terms for the client, but as an end in itself.

B. Trivial Claims

Many of the claims that lawyers make about the importance of their services in the residential real estate transaction seem trivial. Thus, one lawyer (AT2) said, when asked why lawyers were needed, “if the buyer has trouble

140. See supra note 128.
141. See supra note 128.
142. See supra Part IV.C.2.
obtaining financing, serious problems will result if the contract does not contain a financing contingency, as an attorney representing the buyer would have inserted.4143 It would hardly seem that legal skills are needed here, however, because every real estate agent interviewed said that they routinely inserted a financing contingency in the contracts they drew.

Not infrequently, attorneys described their role as “hand holding.” One lawyer said that, because buying a home is a very emotional experience, the attorney’s most important contribution to the process is to “try to be sensitive to [their] clients as people.”144

Although not the majority, some attorneys engaged in residential conveyancing readily admit the trivial nature of the services they perform. If the buyer is “astute enough to read, said AT6, “here is no real need to hire an attorney.” Another attorney (AT10) stated, “Certainly one is safer by getting an attorney and in my view wiser, but I wouldn’t say that someone is a fool if they don’t . . .”145 Three-fifths of the respondents, even those that thought it was important for buyers to have an attorney, agreed that legal skills are not necessary to represent buyers in home purchase transactions, and many of the respondents described much of what they do as “paper pushing.”

C. Implausible Claims

Another of the most common claims made by attorneys has to do with their importance as negotiators. This claim perplexes because it is disconnected from the reality of what attorneys in the typical transaction have the opportunity to do. In approximately seventy-five percent of the cases the attorney does not become involved in the transaction until after the contract of sale has been executed,146 and in almost all cases the mortgage and other forms required by lending institutions are standard forms required for participation in the secondary mortgage market. These documents by their very nature are non-negotiable.147

Thus, one respondent (AT15) stated that buyers may find themselves in very one-sided transactions if they do not procure an attorney, and that “You need to negotiate certain things at the outset or else things will be in favor of the seller.”148 Another attorney (AT7) remarked that the buyer may think that he is being wise and saving money by not using an attorney, but the seller will have a very pro-seller contract drawn up so that in reality the buyer will pay more than if he had used an attorney. “The buyer will end up paying for things that he

143. See supra note 128.
144. See supra note 128.
145. See supra note 128.
146. See supra Part IV.C.2.
147. See supra Part IV.C.3.d.
148. See supra note 128.
VI. RELATIONSHIP BETWEEN DIVISION OF LABOR AND OUTCOMES

There is an implicit assumption that lawyers are involved in transactions because they make a difference. However, many other actors perform or could perform similar functions; therefore, it is legitimate to ask what difference is made when a lawyer does it. Therefore, this research assessed the impact on outcomes of having the contested services provided by one profession or another (or, indeed, not provided at all). Outcomes were measured in terms of consumer understanding of the risks assumed, avoidance of disputes, satisfaction with the process, and the cost of transactions.

The research reveals that purchasers who are represented by lawyers tend to be satisfied with their lawyers, but they are not substantially benefited by them. This result might be due to self-selection. Those who use lawyers may decide to do so because they know that their case is more difficult or more prone to an undesirable outcome than the typical case.

Until recently, local custom and bar rules required that virtually all home buyers in northern New Jersey be represented by counsel. However, different customs and rules in southern New Jersey resulted in very few home buyers being represented. There is no reason to believe that there are significant differences among buyers in the two regions of this geographically small state. Thus, by comparing outcomes in the northern and southern parts of the state, we could control for self-selection. We observed that outcomes in all parts of the state were similar, thus discounting the hypothesis that insensitivity of outcomes to lawyer participation was the result of buyer self-selection, and supporting the conclusion that lawyer use does not have a significant positive effect on outcomes.

A. Ohio Study

In the Fall of 1989, interviews were conducted of 132 recent home buyers in the Columbus, Ohio area. A commercial service (Ameristate) was used to

149. See supra note 128.


151. Conclusions based on survey results, see supra note 44, copy on file with Ohio State University Socio-Legal Center Library.

152. See supra note 151.
identify buyers. The Columbus data were collected from lengthy telephone surveys of recent home purchasers and in-person open-ended interviews of real estate service specialists. Survey results indicate that increased lawyer involvement does not have a beneficial effect on outcomes of home purchase transactions in the following respects:

a) Purchasers who use lawyers are no better informed than those who do not.

b) Purchasers who use lawyers are no more satisfied with the purchase transaction. In fact, the general satisfaction level of those who did not use a lawyer was greater than those who did. (eight-four percent vs. seventy-eight percent).

c) Purchasers who use lawyers are just as likely to find after signing the contract that it contains matters which had not been explained to them or which they did not expect. For example, some typical respondents who had hired lawyers said:
   "A home warranty plan was not what I expected—it did not cover the kitchen appliances."
   "Occupancy that I was expected to let him live in the house rent free for 30 days."
   "Taxes were 50% higher than I was told they would be."
   "Seller put in contract that they didn’t have to repair some things that I thought they would repair."
   "Realtor’s commission was higher than I had been told."

d) Purchasers who use lawyers were no less likely to avoid disputes than those who do not.153 Thirty-eight percent of those represented by lawyers and thirty-seven percent of those not represented by lawyers said that they had been involved in some dispute during the process of purchasing their home. These disputes range from the fairly trivial to the substantial. From concerns about whether ornamental potted plants were included in the purchase to concerns about flooding, collapsing septic tanks, unsafe gas lines, condemned garages and misrepresentations by the seller about the quality of the property.

B. New Jersey Study

In the fall of 1993, interviews were conducted of 401 New Jersey home buyers. New Jersey was chosen because the survey was commissioned by attorneys representing the New Jersey Board of Realtors in connection with

153. This observation may be the result of the reduced role that lawyers play in the typical transaction. Anecdotal evidence suggests that before the advent of title insurance buyers were better informed by their lawyers than they are today. None the less, preliminary survey results suggest that buyers who are represented by lawyers are no better off than buyers who are not.
litigation then occurring in the state. At the time the survey was conducted, northern New Jersey buyers of residential real estate were generally represented by attorneys. In southern New Jersey, on the other hand, buyers were generally not represented. The Committee on the Unauthorized Practice of Law of the New Jersey State Bar Association issued its Opinion 26, which was the subject matter of the litigation. Opinion 26 sought to eliminate the difference between northern and southern New Jersey practice by making the use of attorneys by buyers a requirement throughout the State.

The purpose of the survey was to assess the advantages, disadvantages, risks, costs, and benefits to buyers of residential property in having an attorney present or not having an attorney present in northern and southern New Jersey real estate transactions. Home buyers were identified as either northern or southern New Jersey buyers by zip code. The study was designed and implemented by Guideline Research Corporation.154

The results of the New Jersey survey were consistent with the results of the Columbus survey described above. In northern New Jersey, almost all residential closings occur with the buyer’s attorney present, while in southern New Jersey, an attorney is present about forty percent of the time.155 Levels of buyer satisfaction with the home purchase process were not significantly affected by the use of a lawyer. There was a high degree of satisfaction in both northern and southern New Jersey with the closing process as it is now practiced in each part of the state.

In northern New Jersey, the vast majority of buyers (83.6 percent) were either “completely” or “mostly” satisfied with the closing process. Over four in ten buyers (43.8 percent) were “completely” satisfied. Only a small minority (8.0 percent) expressed dissatisfaction.

In southern New Jersey, satisfaction levels were comparable to or better than those observed in the northern part of the state. Over eight in ten (82.5 percent) buyers in southern New Jersey were either “completely” or “mostly” satisfied.156 The level of “complete” satisfaction in southern New Jersey was fifty-one percent, seven percent higher than the level of complete satisfaction in northern New Jersey.157

The presence of a buyer’s lawyer at the closing does not appear to influence the degree of satisfaction with the settlement in southern New Jersey. Over half (51.2 percent) of southern New Jersey buyers without a lawyer were

154. The author was retained as an expert witness by the attorneys for the Board of Realtors in connection with the Opinion 26 litigation and had some initial input into the survey design.

155. The forty percent representation rate in south New Jersey is the same as in Columbus, see Braunstein & Genn, supra note 101.

156. See supra note 151.

157. See supra note 151.
"completely" satisfied, virtually the same as the percent of "completely" satisfied southern New Jersey buyers who used a lawyer (50.6 percent).158

In southern New Jersey, reasons for lack of satisfaction focused on the mortgage lender, the realtor or the title company representative. No buyer expressed dissatisfaction with the fact that he or she did not use a lawyer. Dissatisfaction with the realtor centered on the relator's not telling enough about the property or its condition.

By contrast, in northern New Jersey about one in four (27.3 percent) of those expressing lack of satisfaction with the closing process specifically mentioned the lawyer, particularly that the "lawyer wasn't as much help as I'd hoped" or "was incompetent."159

The New Jersey study also looked at experiences of buyers in their capacity as seller of a previously owned home. Of the total interviewees, forty-six buyers were identified who had previously purchased a home and then sold it without the benefit of a lawyer. "A total of only three respondents . . . reported any problem with the sale arising from the fact that at the time of the original purchase, a lawyer had not represented them at the closing."160

C. Court Opinions

The courts, no less than the consumers of legal services, have been unpersuaded by the claims of lawyers and the organized bar concerning their place in residential conveyancing. Indeed, the legal161 deconstruction of the monopoly once held by the United States legal profession over parts of the residential conveyancing transaction resulted from a general preference in the courts for the claims of the lay conveyancers over those of the legal profession.162 The following illustrates: "We do not think that the possible harm which might come to the public from the rare instances of defective conveyances in such transactions is sufficient to outweigh the great inconvenience which would follow if it were necessary to call in a lawyer to draft these simple

158. See supra note 151.
159. See supra note 151.
160. See supra note 154 and accompanying text.
161. I am making a distinction here between the change in the law that has permitted lay conveyancers to provide services that were previously considered the practice of law, and the structural changes in the residential real estate market that created the need for such change. These structural changes are considered in Part IV.C.3, supra.
instruments.” Similarly, another court found: “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 [where lawyers are least used] exceeds that experienced elsewhere.”

This observation is consistent with the Columbus data. There is a lot that might be done in an ideal world by lawyers to improve the residential real estate transaction. In the real world, however, what lawyers actually do in residential real estate transactions does not have much impact.

VII. CONCLUSION

Lawyers have tended to become marginalized in the residential real estate transaction, and it is very unlikely that this tendency will be reversed. The cause of the marginalization is not hard to identify. The concept of title and the process by which the real estate purchaser is assured of good title is the most difficult and abstract part of the residential conveyance. Once title insurance companies took over this part of the residential real estate transaction, it was inevitable that the simpler and more routine parts of the transaction would be handled by others as well. If a lawyer was not needed for the hard part, it would not take the buyers and sellers of real property long to realize that the lawyer was probably not needed for the easier parts of the transaction either.

There is a certain irony in all this. It is hard to imagine that the structural changes wrought by the federal government at the conclusion of World War II were intended to displace lawyers from residential conveyancing. The creation of the secondary mortgage market was designed to further national goals of affordable and plentiful housing. The secondary market accomplished these goals, in part, by demanding that participants in the market conform their transactions to standardized forms and assure the validity and priority of residential mortgages with title insurance. As the transaction became more standardized and title insurance became more prevalent, the marginalization of the residential real estate lawyer was assured: an unintended and yet unavoidable consequence of fundamental structural changes in the residential real estate transaction.

Notwithstanding how obvious it is, the legal profession, both academic and practicing, has been slow to realize what has happened. Academics publish

163. Cowern, 290 N.W. at 797.
164. Opinion No. 26, 654 A.2d at 1346. The quote refers to the south New Jersey practice of not requiring the presence of counsel. In contrast, northern New Jersey requires the presence of counsel during residential real estate transactions.
casebooks that seem mired in the past and continue to portray the role of the lawyer in the residential transaction as more important and more central to the transaction than it really is. Practicing lawyers continue to resist the imperialism of title insurance in the courts and legislatures. These lawyers make claims about the importance of their work to the public, but the public is largely unimpressed because claims are alternately vague, trivial and implausible.

Finally, in a larger sense, this research sheds light not just on why lawyers were marginalized in a particular transaction, but on how the demand for professional services is formed. The demand for professional services is not created by the professions themselves. It is true that the professions abandon some services and squabble over certain other contested ones. Witness the seemingly never ending unauthorized practice of law suits brought by lawyers to enjoin lay conveyancers from performing certain services. But to focus on the professions themselves misses most of the picture. Even when lawyers have won their lawsuits they have failed to achieve their objective. The marginalization of lawyers has continued apace. The best explanation for the demand for professional services is that the professions respond to structural change in the society. Structural change which has the effect of routinizing what had been professional activity, creates opportunities for others outside the profession to perform the activity. To the extent that the newcomers are more accessible, efficient, or less expensive than the profession which was performing the service, the newcomers will thrive and the profession will perish. Certainly this is the lesson to be learned from the experience of the legal profession in residential real estate conveyancing.