IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF:	§	
	§	
MID-ATLANTIC SETTLEMENT	§	
SERVICES, INC., MICHAEL A.	§	
PERRY, ROSS J. KELLAS,	§	No. 102, 2000
AND GREGORY A. HAYNIE,	§	
	§	
Respondents.	§	File No. UPL 95-15
	§	
	§	

Submitted: May 26, 2000
Decided: May 31, 2000

Before **WALSH, HOLLAND** and **HARTNETT**, Justices.

ORDER

This 31st day of May 2000, the Board on the Unauthorized Practice of Law having filed its Decision with this Court on March 8, 2000, pursuant to Rule 9(d) of the Rules of the Board on the Unauthorized Practice of Law; and the respondents-Mid Atlantic Settlement Services and Gregory A. Haynie having filed no objections; the respondents-Michael A. Perry and Ross J. Kellas having withdrawn their objections; and the Office of Disciplinary Counsel having filed no objections to the Board's Report; and, the Court having reviewed the matter pursuant to Rule 9(e) of the Rules of the Board on the Unauthorized Practice of Law,

NOW, THEREFORE, IT IS ORDERED, that the Board's decision filed on March 8, 2000 (copy attached) is hereby APPROVED. The matter is hereby CLOSED.

BY THE COURT:

Randy Holland
Justice

BOARD ON THE UNAUTHORIZED PRACTICE OF LAW
OF THE
SUPREME COURT OF THE STATE OF DELAWARE

In the Matter of	)	
	)	
MID-ATLANTIC SETTLEMENT	)	CONFIDENTIAL
SERVICES, INC., MICHAEL A.	)	FILE NO. UPL 95-15
PERRY, ROSS J. KELLAS, and	)	
GREGORY A. HAYNIE,	)	
	)	
Respondents.	)	

DECISION

I. FACTS

A. A hearing in this matter was conducted before a panel of the Board on the Unauthorized Practice of Law (the "Board") on November 5 and 10, 1998. After the hearing the panel received submissions from both parties[1] and an *amicus* brief from the Fountainhead Group.[2] The Office of Disciplinary Counsel (the "ODC") also filed a pre-hearing brief. Essentially all the material fats are undisputed (although the conclusions to be drawn from those facts are frequently hotly disputed). Set forth below are the panel's findings of fact.

Respondent Mid-Atlantic Settlement Services, Inc. ("Mid-Atlantic"), as its name implies, conducts settlements of real estate closings in a number of states, including Delaware. Apparently most of these settlements, at least in Delaware, are of refinancings of existing mortgages

[1]Respondents Mid-Atlantic, Ross J. Kellas and Gregory A. Haynie did not appear at the hearing. Only respondent Michael A. Perry, a principal of Mid-Atlantic, did appear. Given Mr. Perry's position, the Board believes that Mid-Atlantic is appropriately bound by the factual record created at the hearing.

[2]In its brief, the Fountainhead Group states that it conducts real estate settlements in Delaware using an attorney licensed to practice in Delaware, but would conduct those settlements without an attorney if permitted to do so.

on residential real estate. At these settlements, Mid-Atlantic does not purport to represent the persons borrowing the money (the "borrowers"); instead it acts as agent for various lenders.[3] Although Mid-Atlantic has a Delaware attorney on its staff,[4] no attorney is present during these settlements, and in most instances no Delaware attorney is involved in the loan and settlement process affecting Delaware borrowers and Delaware real estate.

In addition, no Delaware attorney reviews the documents used at the settlement. Prior to the settlement, the lender determines which documents should be used at the closing.[5] Two of the individual respondents, Messrs. Perry and Kellas, review the title abstracts to determine whether issues concerning title are present. Prior to settlement, Mid-Atlantic employees (but apparently not a Delaware attorney) determine which portion of the legal description of the property set forth on the deed should be included on Exhibit A to the mortgage. As part of this determination, Mid-Atlantic employees have decided that the so-called "and being" clause in the deed need not be included in the property description on Exhibit A to the mortgage. In one instance described at the hearing, the failure to include this description left out critical information that the persons obtaining the refinancing had only a life estate in the property, yet were certifying in other documents they were the fee simple owners in order to close the settlement loan.

Although Mid-Atlantic (through Mr. Perry) emphasized that it only represented the

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[3]Although the ODC suggested to the contrary, at the hearing Mr. Perry testified that neither Mid-Atlantic nor its principals had a financial interest in any of these lenders.

[4]As of the time of the hearing, this was Keith Sanclemente, Esq.

[5]Choosing which document is adequate under Delaware law to create a binding contract between the parties or a security interest in the property being refinanced (both of which typically would occur in a refinancing settlement) would appear to be the practice of law (as defined below). However, the lenders are not before us, and we chose not to make any decision concerning this practice in their absence. No Delaware attorney reviews any of the documents to represent the interests of the borrowers at settlement or prevent and correct legal omissions or inadequacies, if any.

lender, not the borrowers, the evidence brought out at the hearing was insufficient to determine if the borrowers were aware of Mid-Atlantic's limited role.[6] In particular, no document was introduced into evidence that substantiated Mid-Atlantic's claim that it told the borrowers at each settlement that it did not represent them. Indeed, Mid-Atlantic's package of typical settlement documents admitted as Respondent's Exhibit 1 did not contain any explanation or notice to the borrowers about their lack of representation or Mid-Atlantic's limited role. Similarly, although Mid-Atlantic claimed that it told the borrowers that they could obtain an attorney to represent them at settlement, it conceded (again through Mr. Perry) that this document was not provided to the borrowers ahead of time, but only during the settlement itself.

At settlement, Mid-Atlantic conceded that its non-attorney employees, while conducting the settlement, explained to the borrower the terms of many documents, including the note, mortgage, Planned Unit Development Rider, Truth-in-Lending Disclosure and First Payment Letter.

B. As to real estate settlements currently held in Delaware by a licensed Delaware attorney, the Board accepts the testimony of the expert witnesses who summarized and more thoroughly explained the traditional role of Delaware attorneys in transactions involving Delaware real property as set forth in ODC Exhibit 2, containing 31 descriptions of functions, which functions are either not performed at all or are performed without an attorney being present at the settlements being overseen by Mid-Atlantic in Delaware. Alternatively, the various issues, once raised and if raised by the borrower at the settlement table overseen by Mid-Atlantic, are suggested to be the

[6]The expert testimony at the hearing was uncontroverted that the interests of the lender and the borrower can be and often are different on issues relating to title matters.

subject of a separate retainer of counsel and resulting delay of the settlement date. In the course of his testimony, Mr. Perry testified that he was not aware of the certificate of occupancy requirement in Delaware listed as Item 17 in Exhibit 2. Extensive expert testimony was also adduced regarding Item 26 of Exhibit 2, having to do with steps affecting the completion of proper links in the chain of title that refer to statutory procedures that must be met in order to protect the integrity of the chain of title. The Board accepts further expert testimony confirming that ongoing legal research on real estate title matters in order to properly advise purchasers at settlement as to their legal rights constitutes an ongoing duty of an attorney that is not specifically or uniquely related to any individual settlement, per se, a function from the uncontroverted evidence that is not available to the purchasers at settlements handled by Mid-Atlantic. *See* Preamble Delaware Rules of Professional Conduct; Delaware Rules of Professional Conduct 1.1. The litigants agreed that explanations and inclusion of language in instruments at settlement regarding the choice of general warranty versus special warranty deeds, or recognition of imperfections in settlement documents as required by statutory provisions in Delaware, all have to do with the practice of law and that in many instances borrowers are making the most significant financial transaction of their lives with little or no prior experience in such transactions, rendering such buyers unable to discern defects or questions to be asked in such categories. The lender plays a dominant role in what is principally an economic transaction for the inexperienced borrower, who is sometimes financially desperate, is routinely interested in saving expenses, and relies heavily on the lender to dictate the particulars of the settlement process.[7]

[7]This Court has previously acknowledged the dominant role of lenders and realtors who direct borrowers in the process as well as the need to anticipate such dominant influence in the process through a notice requirement for Delaware lawyers. *See* The Delaware Lawyers' Rules of

While the parties agreed that an explanation to the buyer at settlement of a confession of judgment clause in a note must be given by a lawyer as part of the legal definition of the practice of law in Delaware, affording the obligor information that important rights may be waived, Mid-Atlantic suggested that these types of questions are rarely, if ever, asked by a borrower at settlement and are therefore not explained by its employees to the borrower. The Board accepts the expert testimony presented by ODC to the effect that laymen do not have sufficient expertise to know whether a boilerplate provision in a document or special terms inserted therein has either a need for specific explanation or could be negotiated and worded differently in the document, in most instances seen by the borrower for the first time at the settlement table. Further, the uncontroverted expert evidence at the hearing confirms that a pivotal function of an attorney at the real estate settlement table, as well as in preparation for settlement, is to spot legal issues and potential problems, some of which are of little or no significance to the lender as opposed to the borrower. The Board further accepts the testimony adduced by ODC at the hearing that there cannot be a definition of a "typical" settlement and that myriad factual and legal issues can be and usually are presented at settlements which, when handled by Mid-Atlantic, do not include the presence of an attorney licensed by and subject to standards of performance and discipline of the Delaware Supreme Court. Further, the Board agrees with the testimony adduced at the hearing that an attempt at categorizing or itemizing all functions to be included in or associated with any specific transaction or type of real estate settlement in the State of Delaware affecting Delaware borrowers and Delaware real estate would be an impossible task. However, the Board notes that, as in other areas of the practice of law as previously defined by the Delaware Supreme Court, individual functions

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Professional Conduct Rule 1.16 Interpretive Guideline – Re: Residential real estate transactions.

performed (i.e., calling to obtain payoff figures) can be viewed as administrative when segregated from the overall practice of law in a given transaction.

At the hearing, Mid-Atlantic steadfastly insisted that it did not represent borrowers at settlements in any fashion, being an agent for the lenders only to construct abstracts of title, issue title insurance, disburse loans, and conduct the settlements themselves. Andrew Taylor, Esquire, an expert witness on behalf of ODC, conceded that non-lawyers abstract the land records subject to the supervision and control of lawyers at various courthouses in Delaware. While Mid-Atlantic insists that it does not render opinions on title in Delaware, the testimony and exhibits at the hearing suggest that Mid-Atlantic has indeed charged fees for doing the same work on real estate settlements in Delaware traditionally done by Delaware attorneys, while at the same time, as the evidence confirms, routinely charging borrowers fees in excess of the rates charged by Delaware attorneys for the same services affecting the same real property. In its post-hearing submission, Mid-Atlantic insists that it does not draft or prepare legal documents; it does not render any legal opinions; it does not advise any persons or make any recommendations as to their legal rights, duties or responsibilities under the law of Delaware; and it does not exercise legal skills or legal knowledge. (See post-trial conclusion summary of Mid-Atlantic at p. 26.)

The Board heard testimony on and reviewed three HUD settlement statements designated as ODC Exhibits 5, 6 and 7. On ODC Exhibit 5, a $30,000 transaction, the evidence showed that Mid-Atlantic charged fees in category 1100 entitled "Title Charges" in the following amounts:

1101. Settlement or closing fee to Mid-Atlantic Settlement	$ 350.00
1102. Abstract or title search to Mid-Atlantic Settlement	150.00

1103.	Title examination to Mid-Atlantic Settlement	175.00
1104.	Title insurance binder to Mid-Atlantic Settlement	30.00
1106.	Notary fees to Mid-Atlantic Settlement	20.00
		$ 725.00

This litany of charges by Mid-Atlantic would have been charged at the total rate of $500, based on the expert testimony, by a Delaware real estate attorney providing advice to the borrower and protecting the borrower's interests, subject to the control and oversight of the Delaware Supreme Court, rendering a $225 savings to the borrower, who would also have been represented by a Delaware lawyer.

Likewise, on ODC Exhibit 6, a $47,000 transaction, settlement charges to Mid-Atlantic, including a closing fee on line 1101 in the amount of $700, totaled $1,100 as compared to a $500 charge if the same services were performed by a Delaware attorney advising and protecting the interests of the borrower in such instance.

On ODC Exhibit 7, a $57,500 transaction, Mid-Atlantic charged the following fees for the following services:

1101.	Settlement or closing fee to Mid-Atlantic Settlement	$ 350.00
1103.	Title examination to Mid-Atlantic Settlement	250.00
1104.	Title insurance binder to Mid-Atlantic Settlement	45.00
1105.	Document preparation to Mid-Atlantic Settlement	150.00
1106.	Notary fees to Mid-Atlantic Settlement	10.00
1107.	Attorney's fees to Mid-Atlantic Settlement	150.00
1108.	Title insurance to Mid-Atlantic Settlement	108.00

1111. Courier fees to
Mid-Atlantic Settlement 55.00

While Mid-Atlantic steadfastly insisted it was not charging for attorney's fees for advice to borrowers, no satisfactory explanation was given at the hearing for the charging of attorney's fees on ODC Exhibit 7, line 1107. William Schab, Esquire, an expert witness on behalf of ODC, further recounted a non-Delaware- attorney settlement with a similar company other than Mid-Atlantic which charged fees for points and other expenses benefiting the lender and settlement agent far exceeding what a Delaware attorney would have agreed to be paid on behalf of the buyer and far exceeding the expenses that would have been charged by a Delaware attorney under similar circumstances.[8] Further concerns were raised by expert witnesses on behalf of ODC regarding the lack of "typical" or "normal" settlements, referring to the myriad questions and problems that can and often do arise in various scenarios, as well as the last-minute nature of communications and drafting of documents, as well as recording practices that have legal significance of varying degrees in different settlements. The Board accepts the testimony adduced by ODC that the traditional settlement includes many people who do not know what to ask and are necessarily trusting in what they are told by whoever manages the settlement itself. While Mid-Atlantic noted that in the past there have been trust account violations on the part of Delaware attorneys, suggesting the presence of an attorney does not guarantee borrower protection, the Board takes note of the existence of a

[8]While, of course, this evidence is not directly reflective of action taken by Mid-Atlantic, the Board considered it both relevant and probative based upon decisions in Delaware and neighboring states that not only considered but sometimes turned on the community practices historically performed as informing the foundational issue of the need for protection of the public versus protecting attorneys from competition. *See Delaware State Bar Association v. Alexander,* Del. Supr., 386 A.2d 652 *cert. denied*, 439 U.S. 808 (1978); *LaBrum v. Commonwealth Title Co. of Philadelphia,* Pa. Supr., 56 A.2d 246 (1948); *In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law*, N.J. Supr., 654 A.2d 1344 (1995).

Lawyers' Trust Fund to cover these unfortunate circumstances in order to protect clients, presenting a factor not available to borrowers if settlements were allowed to take place in Delaware without the presence and oversight of a Delaware attorney.

In his testimony, Mr. Perry confirmed when questioned by the Board that Mid-Atlantic would not have gotten set up in business in Delaware without the advices and guidance of a Delaware attorney on the nature of settlement documents in Delaware and the handling of settlements themselves, since handled by trained lay employees of Mid-Atlantic. Mr. Perry testified he had no idea whether an attorney for the lender prepared the documents that were utilized by Mid-Atlantic's lay employees at settlement. The Board disagrees with the testimony of Mr. Perry that an explanation at settlement of the phrase "time is of the essence" is not the practice of law. In his testimony, Mr. Perry made it clear that if the borrower did not ask questions that required legal analysis or advice, they did not have to be answered at settlement, and some questions require both a subjective legal advice component and an "objective" factual response, the latter avoiding "legal advice" by simply alluding to the wording of the document itself. The Board rejects this "objective" type of analysis on a question-by-question basis as to whether or not the holding of settlement which includes the explanation of documents and their significance to borrowers constitutes the practice of law. Mr. Perry testified that the explanation of the concept of joint and several liability does constitute the practice of law, but the explanation of "successors and assigns" does not, the difference relying on a subjective versus objective analysis on a question-by-question basis. The Board finds from the testimony that a real estate settlement lawyer has an ethical and legal obligation to serve a fiduciary duty to fully explain to the borrower on a note or purchaser at a settlement all of their rights, and this obligation in the public interest contrasts materially from the

limited focus of a lay person on behalf of a settlement entity merely attempting to obtain signatures and transfer funds. Mr. Perry admitted that the abstracts of title on Delaware real estate were reviewed by lay persons or sometimes by attorneys not licensed to practice in Delaware who made decisions on the integrity of those abstracts for settlements handled by Mid-Atlantic as the settlement agent of the lender only.

In ODC Exhibit 11, constituting settlement documents involving Mid-Atlantic's settlement services on May 2, 1997, without any attorney being involved in the settlement, Mr. Perry agreed the affidavit signed by the borrowers for a refinance transaction indicating they were the owners of the property described in Exhibit A constituted a false statement under oath since they had, in fact, only a life estate in the property without a remainder interest. The Board noted that Mr. Perry also testified that while an attorney is required to certify a mortgage instrument in the State of Maryland for recording purposes, he believes the attorney could sign the document for recording without reading it in the limited function just to facilitate the recordation process. The Board rejects this concept of compartmentalization and analysis of the practice of law. Mr. Perry acknowledged that the title company and the settlement agent are not answerable to the Bar Association or the Supreme Court. Mid-Atlantic does not proof-read the settlement documents, as it is not being paid to do that, but rather obtains signatures at the settlement table on the lines designated therefor by the lender.

Through the testimony of Shirley Hine, office manager of Mid-Atlantic in Delaware, it was determined that in most instances no questions come up so long as the money is obtained at the time of settlement and the signatures are obtained on all of the documents. In the 20 to 25 settlements per month she has handled for Mid-Atlantic in Delaware, she was never asked the

significance of "joint and several," "presentment," "successors," "time is of the essence," "per stirpes" or "per capita" in a document. The Board found that the property description attached to the mortgage in Respondents' Exhibit 1 (packet) contained no title recital, which would have been required under 25 Del. C. §2101. As previously noted, the same defect applied to Exhibit A of the mortgage in ODC Exhibit 11, referring to a settlement conducted by Mid-Atlantic on May 2, 1997.

II. QUESTIONS PRESENTED

As framed by the ODC, the question that this panel must resolve is whether a Delaware attorney is required to conduct a closing of a sale of Delaware real property or of a refinancing loan secured by Delaware real property. Although the ODC has requested a broader ruling, because the evidence at the hearing was limited solely to Mid-Atlantic's practices at a settlement (and other settlements may be conducted differently), the panel believes that its decision must be limited to those practices that occurred here (although the determination would govern identical practices, if undertaken by persons or entities other than Mid-Atlantic).

III. ANALYSIS AND DECISION

The Delaware Supreme Court has provided this panel with some guidance as to what constitutes the unauthorized practice of law. In *Delaware State Bar Association v. Alexander*, Del. Supr., 386 A.2d 652, 661, *cert. denied*, 439 U.S. 808 (1978), the practice of law is defined as follows (quoting with approval from cases decided in other jurisdictions):

> In general, one is deemed to be practicing law whenever he furnished to another advice or service under circumstances which imply the possession and use of legal knowledge and skill. The practice of law includes "all advice to clients, and all actions taken for them in matters connected with the law." Practice of law includes the giving of legal advice and counsel, and the preparation of legal instruments and contracts of which legal rights are secured. "When the rendering of services for another involves the use of legal knowledge or skill on

> his behalf – where legal advice is required and is availed of or rendered in connection with such services – these services necessarily constitute or include the practice of law." In re Welch, Vt. Supr., 185 A.2d 458, 459 (1962).
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> "The practice of law [in addition to conduct of litigation in courts of record] consists generally, in the rendition of legal service to another, or legal advice and counsel as to his rights and obligations under the law, calling for a degree of legal knowledge or skill, usually for a fee, or stipend, i.e. that which an attorney as such is authorized to do; and the exercise of such professional skill certainly includes the pursuit, as an advocate for another, of a legal remedy within the jurisdiction of a quasi judicial tribunal." Tumulty vs. Rosenblum, N.J. Supr., 134 N.J.L. 514, 48 A.2d 850, 852 (1946).
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> "In determining what is the practice of law, it is well settled that it is the character of the acts performed and not the place where they are done that is decisive. The practice of law is not, therefore, necessarily limited to the conduct of cases in court but is engaged in whenever and wherever legal knowledge, training, skill and ability are required." Stack v. P.G. Garage, Inc., N.J. Supr., 7 N.J. 118, 80 A.2d 545, 546 (1951); In re Baker, N.J. Supr., 8 N.J. 321, 85 A.2d 505 (1951).

To put it another way (paraphrasing the ODC's presentation at the hearing): The practice of law occurs where there is an exercise of judgment on a legal matter by someone acting in a representative capacity. The practice of law would be unauthorized, of course, if it occurred in Delaware, on a matter of Delaware law, by someone not admitted to the Delaware Bar.

The ODC has presented many arguments as to why the activities of Mid-Atlantic in conducting a real estate settlement constitute the practice of law. As explained below, the panel finds that some of Mid-Atlantic's activities in connection with a settlement do constitute the practice of law. However, the Board disagrees with many of the ODC's arguments, to support the

conclusion we reach. Because this is the Board's first opinion on this issue, the panel believes that this analysis should be set forth at some length.[9]

1. Lawyers are better qualified than lay persons to handle a settlement:

a. The panel agrees that having a lawyer representing the borrower(s) participate in a settlement strongly increases the likelihood that the settlement will turn out satisfactorily for everyone involved. As the examples presented at the hearing by the ODC's experts show, attorneys are (at least typically) far more knowledgeable about legal issues than lay persons and can spot potential problems far more quickly and thoroughly. While Mid-Atlantic's witnesses testified that they rarely had problems at settlements, the unrebutted testimony of the ODC's experts was that many problems can arise at settlement that only an attorney can recognize as even *being* a problem. The panel agrees, and notes that Mid-Atlantic's history of uneventful settlements may well reflect its employees' inability to understand that a problem *did* exist. In addition, because attorneys operate under tighter ethical standards than most other professions and because attorneys generally are trained to practice with their clients' best interests in mind, the panel believes that the borrowers' interests are most likely to be better served if they retain an attorney to represent them in connection with any closing of a loan involving residential real estate.

None of this, however, justifies having this panel impose our beliefs on unwilling borrowers. If, being fully informed as to the legal and financial benefits of attorney

[9]The Board has, on several prior occasions, entered into affidavits of voluntary compliance with persons not admitted to practice law in Delaware by which these persons agreed to stop conducting real estate settlements in Delaware without the participation of a Delaware attorney. *See* In re Locke, No. UPL-6, 1992, and In re Saunders, No. UPL-2, 1994. Because those matters were resolved without a hearing or a formal opinion of the Board, this panel does not regard them as precedent.

participation and the fact that settlement services do not represent them, borrowers still wish to proceed without an attorney, they should be permitted to do so (unless doing so constitutes the practice of law not authorized by the Delaware Supreme Court). To put it another way, if we had concluded that Mid-Atlantic did *not* practice law by the method in which it handled real estate settlements, none of these reasons would be sufficient to justify the Board attempting to stop that practice.

b. Having noted the foregoing, however, the Board finds from the evidence that the practice of real estate law in Delaware is a complicated process which is not severable and can and often does differ in complexity from one settlement to another. Further, from the borrower's perspective, the process is essentially a consumer transaction begun and thereafter heavily influenced and directed by the requirements of the lender, while the consumer lacks experience and specialized knowledge in the process together with a typical recurring desire to obtain the closing of the transaction as efficiently, timely and inexpensively as possible. Moreover, since settlement expenses charged by the lender or its agent are uniformly added to the principal amount of the loan, although paid promptly to the lender or its agent at settlement, a financially desperate and unrepresented borrower is without leverage or knowledge to avoid being taken advantage of. The Board does not believe obtaining the borrower's signature on yet another detailed and fine-printed form in conjunction with a real estate settlement in Delaware, purporting to be a voluntary, intelligent, and knowing waiver of counsel, is an effective option for a typical borrower or consumer. This Court has previously addressed parallel concerns in the context of waiver of important legal rights (*see* Krewson v. State, Del. Supr., 552 A.2d 840 (1988)), especially in the context of an economic environment where the consumer is disadvantaged by knowledge and

experience. *See* State Farm Mutual Auto. Ins. Co. v. Arms, Del. Supr., 477 A.2d 1060, 1064 (1984); Bryant v. Federal Kemper Ins. Co., 542 A.2d 347, 350-51 (1988); O'Hanlon v. Hartford Acc. & Indem. Co., D.Del., 522 F.Supp. 332, 335 (1981), *aff'd* 3d Cir., 681 F.2d 806 (1982).

2. A real estate settlement is unusually important to consumers

The panel also agrees with the ODC that a residential real estate transaction is typically the largest single economic transaction in which a consumer participates. That fact, however, does not justify regulation by this Board *unless* Mid-Atlantic is practicing law by the manner in which it closes refinancings of residential real estate.[10]

3. Settlement services cost more than attorneys.

The evidence introduced at the hearing strongly supports the ODC's argument that, far from saving borrowers money, Mid-Atlantic charges substantially more than a Delaware attorney would charge for the same (or actually better) services.[11] *See, e.g.*, ODC Exhibits 5-7. This fact certainly raises questions whether the borrowers clearly understood how much they were paying Mid-Atlantic. Indeed, the evidence shows the borrowers lacked sufficient information to compare the charges with lawyer-managed settlements. However, this fact does not, in itself, justify regulation by this Board unless Mid-Atlantic is practicing law when it performs these services.

4. Representation by attorneys at real estate settlements is a long-standing Delaware tradition

In an effort to distinguish Delaware from other jurisdictions that have been changing

[10]Based on the evidence introduced at the hearing, the panel has considerable doubt that borrowers in refinancing transactions in which Mid-Atlantic is involved fully understand either Mid-Atlantic's role or their ability to obtain an attorney if they need one.

[11]In addition, of course, if an attorney were hired, he or she actually would *represent* the borrower. Mid-Atlantic made it clear that it does *not* represent the borrower in these transactions.

their rules concerning the ability of non-attorneys to conduct real estate settlements, the ODC pointed out that, unlike many neighboring states (such as Pennsylvania, parts of New Jersey, and Maryland), Delaware has a long-standing tradition of requiring attorney participation in those settlements. While certainly true, the panel again does not believe that this fact has any real significance to its decision. To put the issue another way, if the conduct of real estate settlements is *not* the practice of law, then this panel could not properly rely on tradition to justify restricting the process in the future. On the other hand, if it *is* the practice of law, whether it was conducted by attorneys in the past is irrelevant.

Nevertheless, the panel agrees that the ODC has met its burden of proving, by clear and convincing evidence,[12] that certain aspects of a real estate settlement, as conducted by Mid-Atlantic, constitute the practice of law. Because Mid-Atlantic does not have Delaware attorneys participate in those settlements, these practices currently are unauthorized by the Delaware Supreme Court.

The Board unanimously agrees that those aspects that constitute the practice of law in the manner in which Mid-Atlantic conducted its real estate settlements are the following: [13]

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[12]Rule 11 of the Board on the Unauthorized Practice of Law states: "The burden of proving action constituting the unauthorized practice of law shall be upon Disciplinary Counsel and shall be by clear and convincing evidence."

[13]In addition, a majority of the Board is of the opinion that the steps set forth in ODC Exhibit 2, viewed in a global context as performed either directly or under the supervision of a Delaware attorney, constitute the practice of law in Delaware. In so finding, the majority relies upon, *inter alia*, the inherent nature of the functions themselves when considering the Supreme Court's decisions defining the practice of law, as well as the testimony of Andrew Taylor, Esquire, that much of the practice of law involves spotting and either addressing or not pursuing issues, all viewed as parts of the whole function involving judgment in a representative capacity.

a. Determining the proper legal description of the property (as set forth on the deed) to be included on Exhibit A to the mortgage;

b. Explaining to the borrower(s) the terms of many legal documents, including the note, mortgage, Planned Unit Development Rider, the Truth-in-Lending Disclosure and the first payment letter.

The panel is unanimously satisfied that determining the proper legal description of the property to be included on Exhibit A to the mortgage is not merely a ministerial act, but instead involves the exercise of legal judgment. The evidence at the hearing proved conclusively that it is *not* obvious from the face of the deed how much of the legal description should be included on Exhibit A (such as, for example, whether the "and being" clause should be included in the description on Exhibit A), and thus this determination *is* one which requires legal judgment. Because the employees at Mid-Atlantic are making this determination for others (both the lenders and the borrowers),[14] this is the exercise of legal judgment by someone acting in a representative capacity. That is the practice of law.[15]

Similarly, the evidence showed that Mid-Atlantic's employees did not merely read each word of the legal documents to the borrowers,[16] but rather decided on their own which portions of the document to explain to those borrowers. In doing so, those employees were interpreting those

[14]To put it another way, Mid-Atlantic is not acting on its own behalf, but rather on behalf of others.

[15]Although the question of whether this determination was the practice of law was put directly to Mr. Perry during his testimony at the hearing, he was unable adequately to explain why it is not a legal issue.

[16]There appeared to be no dispute by the parties that documents such as a note, mortgage, Planned Unit Development Rider, Truth-in-Lending Disclosure, and first payment letter are legal documents in the sense that they affect the parties' legal rights.

documents, which is the exercise of legal judgment by someone acting in a representative capacity.[17] That, too, is the practice of law.

Mid-Atlantic's only argument as to why this latter activity does *not* constitute the practice of law is that their employees were doing nothing different from a borrower reading the document for her or himself. We disagree, because when a borrower reads the document for herself, she is not acting in a representative capacity. Mid-Atlantic, however, indisputably *is* acting in a representative capacity.

Although the ODC argued that the unauthorized practice of law occurs only with refinancing transactions, and not with home equity loans, the evidence at the hearing was insufficient for the panel to agree that any distinction should be drawn between the two types of loans. Accordingly, if either of the above practices also occur in the settlement of a home equity loan, they also would constitute the practice of law. Our decision, however, does not affect a home equity loan in which the borrower is acting *pro se*, because no one in that situation would be acting in a representative capacity.

IV. RECOMMENDATIONS

Although the panel has determined that several aspects of a real estate closing, as conducted by Mid-Atlantic, constitute the practice of law, we also recognize that Mid-Atlantic has handled a number of settlements which have closed and in which the relationship between the borrower and lender has ostensibly been uneventful since the closing. There are currently no

[17]Although Mid-Atlantic claimed it did not represent the borrowers, by providing them legal advice, they were still acting in a representative capacity.

licensing or regulatory requirements governing non-lawyers who seek to oversee and conduct settlements of real property in Delaware. Transcript of 11/10/98 at 71-72, 119-121. A mere formal admonishment to an inexperienced borrower unfamiliar with legal issues tendered only at or near the time of settlement that the right to retain legal counsel in the abstract exists on the part of a borrower, and which implies or suggests that some or substantial additional expenses may be incurred beyond those being charged by Mid-Atlantic, would be tantamount to no choice of counsel at all. The panel rejects Mid-Atlantic's contention that in cases where an attorney is required to sign a certification of a document for recording purposes, the attorney need not review the document before signing it. Transcript of 11/10/98 at 112-113. The panel is satisfied that Mid-Atlantic's settlement-conducting activity constitutes the practice of law primarily because it inherently is required to exercise legal judgment and act in a representative capacity throughout the settlements that it has and continues to conduct. The panel recognizes that all three of Delaware's closest neighbors, Pennsylvania, New Jersey and Maryland, permit non-attorneys to conduct real estate settlements, either by custom (Maryland) or court decision (Pennsylvania and New Jersey). La Brum v. Commonwealth Title Co. of Philadelphia, Pa. Supr., 56 A.2d 246 (1948); In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law, N.J. Supr., 654 A.2d 1344 (1995)(the "*New Jersey Opinion"*). While the purpose of restricting non-attorneys from practicing law is to protect the public (and not, for example, to protect attorneys from competition), Delaware State Bar Association v. Alexander, 386 A.2d at 661, the evidence in the case before the panel suggests requiring attorneys to conduct real estate settlements for purchases and refinancing of Delaware real estate loans is the simplest and most direct way to assure the integrity of the process and the public good. Indeed, the evidence in this case demonstrates that financial savings, together with the legal

protections inherently available through both expertise and accountability of members of the Delaware Bar, would be visited upon borrowers as members of the public conducting, in many instances, the largest single transaction of their lives.

It is the panel's recommendation, supported by clear and convincing evidence, that any process designed to carve out necessarily extensive regulations and conditions to afford certain limited functions to be performed by non-attorneys in the closing of real estate settlements for purchases and refinancing in Delaware would be designed to serve only the financial interests of non-lawyer settlement agencies like Mid-Atlantic, and would not tend to serve the legal or financial interests of the borrower members of the public. It is further noted that such conditions and regulations that might be necessary to be applied to non-attorney handling of real estate settlements would inherently lack ongoing accountability and oversight, which is and has been available through the Delaware Supreme Court, as the Court has no jurisdiction over the daily activities and need for accountability on the part of those handling real estate settlements other than through members of the Delaware Bar. This conclusion and recommendation would be in keeping with the majority of the other states besides Delaware which have directly addressed the issue of non-attorneys conducting real estate settlements, requiring that attorneys must conduct the closings and protect the borrowers retained by them. Such a process would avoid the ability of non-attorney settlement agents to hold real estate closings in Delaware and advertise that employment of an attorney was not necessary. *See* Georgia Bar Association v. Lawyers Title Insurance Corp., Ga. Supr., 151 S.E.2d 718, 721-22 (1966).

The panel does not recommend following the custom and practice of Pennsylvania although its case law does not appear to support the general legal work of Mid-Atlantic.

Pennsylvania has merely held that the preparation of deeds, mortgages, agreements, etc., as well as the conducting of real estate settlements by non-lawyer title companies incidental only to issuing their insurance, constitutes the practicing of "conveyance" instead of the practice of law, the panel noting that even Mr. Perry on behalf of Mid-Atlantic conceded that the preparation of deeds for transfer of real property as controlled by statute constitutes the practice of law. *See* La Brum, supra. Further, the La Brum Court was interpreting the limited and non-general practice of a title insurance company which was wholly incidental to insuring of titles by the company as documents were being prepared by the company's own lawyers for its own facilitation of the issuance of insurance in any given case, pursuant to authority specifically granted the title insurance company by statute. *See* La Brum, supra, at pp. 246-247 (interpreting the General Corporation Act of April 29, 1874, P.L. 73). The facts in La Brum are distinguished from the case before us in that the title company had not practiced and expressed no desire nor intention to advise or consult with anyone, doing the work of drafting documents for its own limited and legally-authorized purposes, incidental to its issuance of title insurance only pursuant to the statutory right and its charter issued thereunder:

> In considering those facts it is well to have in mind that the statute under which defendant was incorporated expressly conferred `power and right to make, execute, and perfect such and so many contracts, agreements, policies, and other instruments as may be required therefor.' La Brum, supra, at 248.
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> "The cases from other jurisdictions cited by plaintiffs can therefore not be followed in construing our statute. There is in the present case no holding out as (sic) lawyer; the legal work complained of is not general but merely incidental to the title insurance which defendant's charter authorizes." La Brum, supra, at 250.

The panel further notes that its conclusions and findings in this case were emphasized and recognized to be valid by the New Jersey Supreme Court. In re Opinion No. 26 of the

Committee on the Unauthorized Practice of Law, supra. Nevertheless, the New Jersey Court was dealing with an entrenched pattern or practice of non-lawyers handling real estate settlements in the southern portion of the state borne of historic and practical necessity from the period following World War II with the advent of thousands of Veterans Administration or Farmers Home Administration loans, which practice had a standing historical record of protections and achievement, as well as conditions emerging from a long-standing practice which the Court elected not to disturb. Id at 1359.[18] Further, the New Jersey Supreme Court attached a series of conditions and warnings, as well as requirements for the encouraging of buyers and sellers to retain legal counsel subject to the jurisdiction and accountability of the New Jersey Supreme Court as a condition for the continued practice, constituting a factual predicate we do not face here in Delaware. Id. at 1361-64. The panel notes that any attempt to wade into the complexities of a regulatory scheme designed to cover all functions and contingencies inherent in a complex real estate closing process would require extensive regulatory, supervisory, and accountability or oversight systems in place, which would likely present confusion, delay and expense to all interests involved when the evidence shows that reliance on Delaware real estate lawyers to handle real estate closings in Delaware serves the interests of efficiency, costs, accountability, and overall protection to the buying and selling public.

The distinguishing factor between this case and the New Jersey Opinion has to do with the utter lack of fees and expenses that were being charged pursuant to the South Jersey practice of some vintage, where Mid-Atlantic in this case charges all of the categories and more in

[18]For reasons expressed infra, the Board rejects long-standing tradition as a basis for changing the law of Delaware designed for the protection of the public interest, including the immediate consumer as well as the public need to protect the integrity of land titles.

terms of money for the same services that would be charged according to the evidence by a Delaware real estate attorney, the latter providing full protection and accountability to protect the public:

> In this case, the record clearly shows that the South Jersey practice has been conducted without any demonstrable harm to sellers or buyers, that it apparently saves money, and that those who participate in it do so of their own free will presumably with some knowledge of the risk; as Judge Miller found, the record fails to demonstrate that brokers are discouraging the parties from retaining counsel, or that the conflict of interest that pervades the practice has caused material damage to the sellers and buyers who participate in it. Given that record, and subject to the conditions mentioned hereafter, we find that the public interest will not be compromised by allowing the practice to continue. We note again that our prior decisions and those of the Committee on this issue did not have the benefit of such a record and were premised on the irrefutable finding that the activities of the non-lawyers in the South Jersey practice constituted the practice of law. That they do, but with the benefit of the record before us it is equally clear that the practice does not disserve the public interest."
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> "All we decide is that in *this* case, concerning *this* practice, the record demonstrates that the public interest will not be compromised by allowing what would otherwise be the unauthorized practice of law if the parties are adequately informed of the conflicting interests of brokers and title officers and of the risks involved in proceeding without counsel."
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> "That is all we decide here today. We do *not* conclude that the public is better off without lawyers in the South Jersey practice. As stated several times above, we firmly believe the parties *should* retain counsel. We decide only that given the history and experience of the South Jersey practice, the public interest will not be disserved by allowing the parties, after advance written notice of their right to retain counsel and the risk of not doing so, to choose to proceed without a lawyer; we decide only that the public interest does not require that the protection of counsel be forced upon the parties

against their will." New Jersey Opinion, supra, at pp. 1359-60. (Emphasis supplied in original.)

In contrast, the facts of this case clearly demonstrate that the public interest will be adversely served if approval is given to the former practices of companies like Mid-Atlantic, who charge greater fees for the same categories of services without the protection afforded an unrepresented public. Mid-Atlantic has acknowledged its past practices have been followed with the expectation of eventual scrutiny by this Board. Approval of Mid-Atlantic's practices in Delaware would invite a practice with no effective oversight as settlement expenses added to the principal loan debt would only result in more interest income paid to the lender. The result would likely be an unleashing of an unaccountable practice on the part of settlement agent companies to charge increasingly higher expenses, buried in the principal and interest charges, which are no longer subject to the threat of review by the Delaware Supreme Court through the Board on the Unauthorized Practice of Law, which expenses could in the future escalate sizably as they are charged to frequently unsophisticated, inexperienced, and sometimes financially desperate borrowers who are in urgent need of financing or are purchasing real estate through transactions with which they are unfamiliar, lacking leverage and representation.

The panel therefore recommends the following:

1. An attorney licensed to practice law in Delaware is required to conduct a closing of a sale of Delaware real property.

2. An attorney licensed to practice law in Delaware is required to conduct a closing of a refinancing loan secured by Delaware real property.

3. An attorney licensed to practice law in Delaware is required to be involved

in a direct or supervisory capacity in drafting or reviewing all documents affecting transfer of title to Delaware real property or where Delaware real property is used as security for the repayment of a debt or the performance of an obligation, with the exception of home equity loans in which the lender is acting in a pro se capacity and no evaluation of exceptions to title is required.

4. The participation of an attorney licensed to practice law in Delaware is necessary in evaluating the legal rights and obligations of the parties, representing the buyer in examining the title and removing exceptions to the title, supervising the disbursement of funds, and responding to questions concerning the legal effect of documents and ramifications of a transaction by which title to Delaware real property is transferred or where Delaware real property is used as security for the repayment of a debt or the performance of an obligation, with the exception of home equity loans in which the lender is acting in a pro se capacity and no evaluation of exceptions to title is required.

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Clayton E. Bunting

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Cherie Dawn Congo

Unfortunately, I must dissent from portions of the majority's findings of fact (Section I. B.), Analysis and Decision (Section III) and, especially Recommendations (Section IV). My disagreements with the majority's opinion are as follows.

A. Findings of Fact: While I join in the findings of fact set forth in Section I. A., I do not join in those set forth in Section I. B. I do so because these findings are either unnecessarily redundant to those set forth in Section I. A., irrelevant to our decision in this matter or contain

commentary with which I do not agree. Specifically, I think it is irrelevant to our decision that a borrower is "sometimes financially desperate" or is "routinely interested in saving expenses." (Op., p. 4). I also believe that it is improper to consider the testimony of Mr. Schab concerning a settlement conducted by a company *other than* Mid-Atlantic in which he believed that the fees charged by this other company "far exceeded" those that would have been charged by a Delaware lawyer (Op., p. 8). As another example, this section contains many references to the opinion of the ODC's expert witnesses that there is no such creature as a "normal" or "typical" settlement. While I have no doubt that is true, these facts do not help us determine the issue that is before the Board at this hearing–whether *Mid-Atlantic*, in the way in which it conducted a real estate settlement, committed the unauthorized practice of law.

B. Analysis and Decision: Again, while I join in most of the Board's decision here, I do not agree with, and therefore do not join, Part 1. b. This section appears to be a finding by the Board that a borrower in a real estate transaction cannot (or perhaps should not) be permitted to waive having an attorney present at a real estate settlement. Whatever one may think of the philosophical underpinnings to this argument (and I strongly disagree with them), it was no part of this Board's assignment to act as a "super-consumer protection agency" on behalf of borrowers in a real estate settlement. Our assignment was straight-forward: did Mid-Atlantic commit the unauthorized practice of law in the manner in which it conducted real estate settlements. Because this section goes beyond our assignment, I do not agree with its inclusion in our opinion.

In addition, and more importantly, I do not agree with the opinion of the majority, set forth in Footnote 13, that "the steps set forth in ODC Exhibit 2, viewed in a global context as performed either directly or under the supervision of a Delaware attorney, constitute the practice of

law in Delaware." It seems abundantly clear to me that many of the steps set forth in ODC Exhibit 2 do *not* meet the standard we have adopted for the practice of law: whether there is an exercise of judgment on a legal matter by someone acting in a representative capacity.[19] For example, none of: advising the buyer whether to obtain a survey (No. 5), supervising a title search (No. 8), advising the buyer concerning types of title insurance and issuing title insurance policies (No. 10), obtaining mortgage loan payoff figures and preparing the HUD-1 Settlement Statement (No. 15), supervising and reviewing the "bring down" title search as of the day of settlement (No. 16), advising the buyer concerning requirements for and advisability of homeowner's insurance (No. 18), overseeing the collection and distribution of funds (No. 23), recording the deed and mortgage (No. 25), handling funds in escrow for disputes such as repairs (No. 27) and returning loan documents to the lender (No. 30), involve an exercise of judgment on a legal matter, and thus are not the practice of law.[20]

C. Recommendations: I do not agree with this section of the Board's opinion. Indeed, for the reasons set forth below, I recommend that the Supreme Court exempt real estate closings from being banned as the unauthorized practice of law, provided that several conditions are met.

The evidence at the hearing (as well as the authorities cited by the parties and the *amicus*) make it clear that many, perhaps most, states now permit non-attorneys to conduct real estate settlements, usually with conditions.[21] Indeed, all three of Delaware's closest neighbors,

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[19]Indeed, elsewhere the majority seems to say that some of the functions typically performed at a real estate settlement *are not* the practice of law (Op., p. 5-6).

[20]There are other steps on ODC Exhibit 2 that could be the practice of law (specifically, advising the buyer concerning the meaning of legal documents), but they are not relevant here because there is no evidence that Mid-Atlantic performed any of those functions.

[21]Some states do so by legislation. *See, e.g.*, Consumer Real Estate Settlement Protection Act, Va. Code, 6.1-2.10 (1997). However, because in Delaware it is uniquely the province of the Supreme

Pennsylvania, New Jersey and Maryland, permit non-attorneys to conduct real estate settlements, either by custom (Maryland) or court decision (Pennsylvania and New Jersey). *LaBrum v. Commonwealth Title Co. of Philadelphia*, Pa. Supr., 56 A.2d 246 (1948); *In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law*, N.J. Supr., 654 A.2d 1344 (1995) (the "*New Jersey Opinion*"). As the purpose of restricting non-attorneys from practicing law is to protect the public (and not, for example, to protect attorneys from competition), *Delaware State Bar Association v. Alexander*, 386 A.2d at 661, it is difficult to understand why the public's need for protection is different in Delaware than in our neighboring states.

The Supreme Court should, however, condition any such permission for non-attorneys to conduct settlements on the satisfaction of several criteria. First, the evidence at the hearing was not sufficient for me to conclude that the borrowers at the settlements conducted by Mid-Atlantic understood that Mid-Atlantic did *not* represent them or that they were entitled to hire their own attorney, if they wished. Both of these rather important facts must be clearly disclosed, well in advance of the settlement, to the borrowers. The evidence at the hearing also was insufficient for me to conclude that the borrowers understood precisely how much Mid-Atlantic was charging for its services--charges that the borrowers typically would pay. Accordingly, the total charges of the settlement service should be clearly disclosed to the borrower, again well in advance of the settlement.

David A. Jenkins

Court to determine who is qualified to practice law, *see, e.g., Delaware Optometric Corp. v. Sherwood*, Del. Supr., 128 A.2d 812, 816 (1957) any permission to non-lawyers to conduct real estate settlements should be made solely by the Supreme Court.