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Title Insurance and the Unauthorized Practice of Law Controversy*

John C. Payne**

I. INTRODUCTION

Title insurance companies are undoubtedly legal entities vested with the usual attributes of corporate power. To say this does not admit that they have unlimited capacities or are free to engage in any activities their managements deem profitable and desirable. Like other corporations they are restricted by their own charters, the statutes of the state of their creation, and the general law of the land.

It has elsewhere been established that, except in a small minority of states, charter provisions or legislation purporting to permit title insurance companies to practice law are unconstitutional and abortive. Even within the minority states, where no constitutional inhibitions exist, a charge that the companies are practicing law raises questions of statutory construction. In such states the question is not whether the state can give the corporation the power to practice law, but whether it has done so, thus precluding the charge that the company is acting ultra vires. However, this article will not be primarily concerned with the small minority. We will assume that statutory authority cannot constitutionally be given to a corporation, and will inquire whether the activities of the companies fall within common law definitions of the practice of law. Where the definitions are so vague and uncertain as to permit considerable latitude in their application, the question will be: What issues of policy are involved, and what course should the courts follow in dealing with the title insurance enterprise?

In pursuing this inquiry, attention will be centered upon cases in which individuals are purchasing homes. The use of title insurance in commercial transactions may sometimes be spectacular because of the sums involved, but businessmen are generally flanked by their own attorneys and receive adequate

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advice and assurance. Problems involving unauthorized practice do not ordinarily arise in such a context. Although the single house transaction may seem less significant than many commercial transactions, home purchases constitute the bulk of property transfers, are the stock in trade of the title insurance industry, and raise the most acute problems of unauthorized practice. The average home buyer is unrepresented by counsel and is unaware of the legal complexities normally a part of the conveyancing process. For this reason he turns to the layman, not infrequently a title insurer, for the assistance he requires. Therefore, the possibility that title insurance companies are illegally practicing law can best be considered if their activities are scrutinized in connection with the sale of an ordinary home.

II. THE MATRIX OF POSITIVE LAW

A. DEFINING THE PRACTICE OF LAW

The general law of unauthorized practice is a recent phenomenon, hardly pre-dating the Depression of the 1930's. It therefore still lacks clearly enunciated principles. Although it has been stated that statutes forbidding the unauthorized practice of law are sufficiently definite and embrace acts commonly understood to be the practice of law, it is more often assumed


In Stern v. State Bd. of Law Examiners, 245 Ind. 526, 199 N.E.2d 850 (1964) and State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961), modified on rehearing, 91 Ariz. 293, 371 P.2d 1020 (1962), it was admitted that while the definition of the practice of law might be somewhat hazy, it had a fairly well-defined connotation which had developed through long usage.

In 1955 the representative of the American Bar Associations Standing Committee on Unauthorized Practice, reporting to the House of Delegates, took the position that "the phrase, practice of law, is a well defined one and has been constantly applied by the courts over a long period of time...." 80 A.B.A. Rep. 169 (1955).
that no all-embracing definition can be formulated, and that courts should use a case-by-case approach based upon the facts presented in each. The consequence of such a pragmatic approach has been referred to as a "wilderness of single instances." Yet, review of the general principles employed by the courts in determining whether certain activities are to be made the monopoly of the bar should preface any discussion of specific cases.

Initially it can be said that lawyers are officers of the court. At common law corporations cannot engage in practice, nor—except in legislative supremacy states—can they be given any such power by statute. The monopoly enjoyed by the bar is conferred not to enhance its own interest but to protect the public.


8. It has been said that there exists "no judicial dissent" from this proposition. Annot., 73 A.L.R. 1237, 1328 (1931). See also supplementary annotations, 105 A.L.R. 271, 282 (1936); W. Fletcher, Cyclopaedia of the Law of Private Corporations § 2524 (rev. 1950).

The rule forbidding practice by corporations or unlicensed individuals has nothing to do with competence in a particular field. It is predicated upon the hypothesis that those engaged in legal practice should not only have minimal training but should also be subject to canons of ethics and disciplinary action by the courts. The relation between attorney and client is confidential; the same relationship cannot exist between a corporation and an individual or between two corporations. Similar reasoning prohibits a corporation or unlicensed individual from practicing law through licensed attorneys. To allow this would be to establish conflict in the attorney's loyalty to his employer and to his client, a conflict forbidden by traditional canons of ethics and inconsistent with a trust relationship.


12. E.g., People ex rel. Lawyers Institute v. Merchants' Protective Corp., 189 Cal. 531, 209 P. 363 (1922); Kentucky State Bar Ass'n v. First Fed. Savings & Loan Ass'n, 342 S.W.2d 397 (Ky. 1961); In re Shoe Mfrs. Protective Ass'n, 295 Mass. 369, 3 N.E.2d 746 (1936); In re Cooperative Law Co., 198 N.Y. 479, 92 N.E. 15 (1910); Rhode Island Bar Ass'n v. Automobile Serv. Ass'n, 55 R.I. 122, 179 A. 139 (1935); Richmond Ass'n of Credit Men v. Bar Ass'n, 167 Va. 327, 189 S.E. 153 (1937); W. Fletcher, supra note 8.


Courts have often attempted to define the practice of law in broad language. These definitions are not confined simply to court appearances and preparation of pleadings, but embrace the drafting of instruments, the giving of advice and similar activities. The decisive question, therefore, is the nature of the act and not where it is done.

The most celebrated exposition of what constitutes legal work is found in the Opinion of the Justices, a Massachusetts Supreme Court advisory opinion declaring unconstitutional a proposed statute exempting certain types of corporations, including title insurance companies, from the prohibition against lay practice. The court found that the statute invaded the inherent power of the judiciary:

Practice of law under modern conditions consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. It embraces conveying, the giving of legal advice on a large variety of subjects, and the preparation and execution of legal instruments covering an extensive field of business and trust relations and other affairs. Although these transactions may have no direct connection with court proceedings, they are always subject to become involved in litigation. They require in many aspects a high degree of legal skill, a wide experience with men and affairs, and

issue the court said in Hightower v. Detroit Edison Co., 262 Mich. 1, 9, 247 N.W. 97, 99 (1933),

The rights and duties arising out of the relationship of attorney and client are not measured by the yardstick of commercial or trade transactions. The relation is purely personal. The lawyer owes to his client undivided allegiance. There is no place in the relationship for its establishment by a middleman, having an interest in the res or control of the procedure.

Another court has stated, "A lawyer cannot serve two masters." State v. James Sanford Agency, 167 Tenn. at 345, 69 S.W.2d at 898. For an excellent general summary, see Note, The Unauthorized Practice of Law by Law Organizations Providing the Services of Attorneys, 72 Harv. L. Rev. 1334 (1959).

15. E.g., People ex rel. Lawyers Institute v. Merchants Protective Corp., 189 Cal. 531, 209 P. 363 (1922); People v. Association of Real Estate Taxpayers, 354 Ill. 102, 187 N.E. 823 (1933); In re Shoe Mfrs. Protective Ass'n., 295 Mass. 369, 3 N.E.2d 746 (1936); In re Battelle Memorial Institute, 170 N.E.2d 774 (Ohio C.P., 1960) [for subsequent proceedings, see 172 N.E.2d 917 (1961) and 173 N.E.2d 201 (1961)].

16. The four most widely quoted cases are: People v. Peoples' Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931); Eley v. Miller, 7 Ind. App. 529, 34 N.E. 836 (1893); Opinion of the Justices, 289 Mass. 606, 194 N.E. 313 (1935); In re Duncan, 83 S.C. 186, 65 S.E. 210 (1909).


a great capacity for the adaption to difficult and complex situations. These "customary functions of an attorney or counselor at law" (as they are described in question 2 of the order) bear an intimate relation to the administration of justice by the courts. No valid distinction, so far as the question set forth in the order, can be drawn between the part of the work of the lawyer which involves appearance in the court and that part which involves advice and drafting of instruments in his office. The work of the office lawyer is the groundwork for future possible contests in courts. It has profound effect on the whole scheme of the administration of justice. It is performed with that possibility in mind, and otherwise would hardly be needed. In this country the practice of law includes both forms of legal service; there is no separation, as in England, into barristers and solicitors. It is of importance to the welfare of the public that these manifold customary functions be performed by persons possessed of adequate learning and skill, of sound moral character, and acting at all times under the heavy trust obligation to clients which rests upon all attorneys. The underlying reasons which prevent corporations, associations and individuals other than members of the bar from appearing before the courts apply with equal force to the performance of these customary functions of attorneys and counsellors at law outside of courts. Decisions of the courts, some of which deal with statutes, are unanimous on these points, so far as we are aware. If these established principles as to the practice of law are ever to be changed, the judicial department of the government must act to that end.

But no definition of the practice of law has proved satisfactory. Obviously the illegal practice doctrine cannot be invoked in every instance where an instrument having legal effect is drafted by a person not a party thereto. Nor does it apply whenever advice predicated upon legal assumptions is given. As a practical matter, the world's business, including a large percentage of its commercial transactions, could not be carried on if the courts were to hold otherwise, since every businessman cannot perpetually carry a lawyer in his hip pocket. Where then is the line to be drawn? The answer the law gives is that each type of endeavor—banking, accountancy, claims adjusting, collections, and the like—will be considered on its own merits. By a process of inclusion and exclusion the courts will determine which acts can be performed by laymen and which require the services of an attorney.

There are few cases dealing specifically with title insurance. These deal almost exclusively with peripheral activities of the companies and ignore crucial underlying issues. They exhibit

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19. For a penetrating analysis of the difficulties involved in definition, see Sanders, Foreword, supra note 2.
20. Meyer, Title Companies and Their Relationship with the Bar, 37 J. State Bar of Cal. 309 (1962).
no "feel" for nor awareness of the mechanics of property transfers nor for the conceptual distinctions forced upon us by judicial, as compared with legislative, supremacy theories. They often rely upon cases which do not involve title insurance. While such reliance is sometimes justified, often functional distinctions between dissimilar enterprises are ignored.

Extra-judicial discussion has been equally unsatisfactory and sterile. Non-academic writers have tended toward the polemical and self-serving, while the schoolmen have made short shrift of the whole question, apparently upon the assumption that title insurance companies will take over traditional conveyancing in its entirety, and that nothing is to be gained by creating theoretical obstacles to the inevitable. Whether such a supposition is well-grounded or not, it contains a vice of self-fortification and cuts off debate at the very point where it should begin. Admittedly, some companies have succeeded in taking over conveyancing within their own locale. Other companies have the same objective and are moving rapidly toward its achievement. But must the courts accept as legal a fait accompli that would otherwise violate sound principle? Even if no retreat from the status quo is attempted, will the courts permit the movement which produced that situation to continue unchecked and unmodified in the future? At this point no one can confidently predict the answers to these questions. We can, however, examine existing doctrine and consider what functional questions may be relevant to future discourse.

21. The best treatments are found in Annot., 85 A.L.R. 2d 184; Adler, Lawyers and Title Insurance Companies, 22 Unauthorized Practice News 13 (No. 3, 1956); Balbach, Title Assurances: A New Approach to Unauthorized Practice, 41 Notre Dame Law. 192 (1965); Hamner, Title Insurance Companies and the Practice of Law, 14 Baylor L. Rev. 384 (1962); Murphy, The Activities of Title Insurance Companies in National Conference on the Unauthorized Practice of Law 149 (mimeo. 1962); Note, Unauthorized Practice of Law by Realtors and Title Insurance Companies, 49 Ky. L.J. 384 (1961); Note, Unauthorized Practice of Law by Real Estate Brokers and Title Insurance Companies, 36 Notre Dame Law. 374 (1961); Comment, 7 N.Y.L.F. 191 (1967). The reader should also consult the annual reports issued by the American Bar Association's Committee on the Unauthorized Practice and the reports and pamphlets issued by the Special Committee on Lawyers' Guaranty Funds.

B. TRADITIONAL JUSTIFICATIONS FOR TITLE INSURANCE COMPANY ACTIVITIES

When a national title insurance company issues a policy predicated on a certificate furnished by an independent attorney, the company's officials may exercise some legal judgment. For example, they may decide whether reported title defects should be waived and, if not, what curative action will be demanded. This is no more thought to constitute corporate practice of law than a demand by a corporate trustee that certain provisions be included in a trust instrument. Generally, the title insurer performs purely ministerial duties in issuing the policy, thereby providing protection against errors made by the examining attorney and defects not of record. Purely national insurers are not engaged in unauthorized practice. To hold otherwise would be to hold title insurance illegal in toto, a result fraught with far ranging and deleterious consequences.

A radically different situation arises when companies maintain their own title plants, issuing insurance policies based upon the examination and legal evaluation of title by their own salaried employees. While such policies are sometimes issued only to practicing attorneys, coverage may also be furnished to lay individuals and corporations. Yet, it has apparently been universally assumed that in neither instance is the company practicing law, even though peripheral activities of the companies have been enjoined by the courts. The remarkable fact is that in only scattered cases does the question seem to have been touched on at all, and nowhere can there be found any real discussion of the point.

The rationale, whether tacit or expressed, upon which conventional assumption seems to rest can be stated as follows:

25. E.g., Cooperman v. West Coast Title Co., 75 So. 2d 818 (Fla. 1954). The recent case of Georgia Bar Ass'n v. Lawyers Title Ins. Corp., 222 Ga. 657, 151 S.E.2d 718 (1966), appears to be a judicial “sport.” Neither the original pleadings nor the evidence are contained in the printed report. The former are so confused, prolix, and redundant that it is difficult or impossible to tell what issues were raised by the parties. However, the answer of the defendant bar association specifically states that the defendant “is not objecting to the defendant’s issuing policies of insurance but to its illegal practice of law in the preparation of title instruments by salaried attorneys.”
Title insurance is a legitimate sector of the insurance industry as a whole, and it has never been suggested that the underwriting of insurance is the practice of law. Moreover, title insurance companies are lawful bodies empowered by their charters and by legislation to insure titles.

In any event, long toleration and the development of beneficial institutions based on such toleration have now created an estoppel.

If the companies function as insurers, they have the right to examine the risk they are undertaking and may do so even though the examination involves the exercise of legal judgment—a conclusion supported by the well-recognized rule that a layman may represent himself.

Although superficially, this line of reasoning is highly persuasive and has been unquestioningly accepted, yet it may be fallacious in all its premises. Before any fallacies are examined, however, a rather startling line of inquiry presents itself. Why, up to now, has an entire industry been built on dubious legal assumptions with no challenge of these assumptions? The title insurers have invaded and threaten to usurp one of the traditional fields of legal practice. The key to the whole conveyancing process is the examination of title, work requiring the most detailed knowledge of property law. Title examination is also the element of the conveyancing process for which the major portion of the compensation is paid. For laymen to abrogate this function without even a suggestion from the bar that they are engaged in unauthorized practice is a phenomenon so extraordinary as to demand explanation. None has been offered, and one can theorize only that the reasons lie in history rather than in logic.

The first title insurance company was organized in Pennsylvania in 1876. It was incorporated under a specific statute in a state where conveyancing has always been considered a lay function. The company was established by lawyers to protect

26. D. GAGE, LAND TITLE ASSURING AGENCIES IN THE UNITED STATES, 80-82 (1937). Roberts, in Urban Conveyancing, supra note 22, has done something to take the glamor out of the traditional account and has elsewhere said that the title industry was the “product of improvisation in the face of crisis.” Roberts, Title Insurance: State Regulation and the Public Perspective, 39 Ind. L.J. 1, 7 (1963).


the public against the non-liability of lay scriveners following the decision in *Watson v. Muirhead.* It appears that the next companies were organized in Washington (presumably the District of Columbia) and in Maryland. Maryland was a legislative-supremacy state, and in the District there was no regulation of the practice of law. In 1882 or 1884, title insurance spread to New York City under statutory authorization of the

29. 57 Pa. 161 (1868).
32. As late as 1965 a Congressional committee pointed out the great difficulty of regulation in the District and said that title companies habitually carried out complete title transactions without an attorney. The dispute at that time was between real estate agents and lawyers. *Practice of Law: Hearings on H.R. 556 before Subcomm. No. 3 of the House Comm. on the District of Columbia,* 89th Cong., 1st Sess. (1965).
33. D. Gage, *supra* note 26; G. Richards, *Treatise on the Law of Insurance* § 10 (2d ed. 1892). In *Roberts,* supra note 30, at 2, it is indicated that the actual organization of a title insurance company in New York may have been as late as 1887. This discrepancy in no way alters the basic history of the title insurance movement.
34. In New York City title examination has virtually ceased to be a part of lawyers' work. *Johnstone & Hopson,* supra note 5, at 153. However a *modus vivendi* has been reached between the bar and the companies. Under this arrangement the companies confine their activities to examining titles and lawyers perform the "legal work." *Proposed Standard,* supra. *Johnstone & Hopson,* supra note 5, at 145-46 seems to conclude that real estate practice has become highly specialized and that title work is only a "small-time" activity carried out in peripheral areas. But *see Condominium Title Closings,* 44 Title News 21-22 (No. 9, 1965). This arrangement has recently broken down, with the companies taking over work previously performed by independent lawyers. The Wall Street Journal, Aug. 6, 1965, at 1, col. 6. In 1958 Nelson stated that 93.85 per cent of all title policies written in the state were issued on property located in New York City, Westchester, Nassau and Suffolk counties. Nelson, *Conveyancing in New York,* 43 Cornell L.Q. 617, 623 n.52 (1957). Outside these areas the greatest diversity of title practice prevails. Reiffenstein, *Pitfalls in Title Closings,* 27 N.Y. State Bar Bull. 352 (1955); *Proposed Standard of Fair Practice for Title Companies and Attorneys, Unauthorized Practice News* 45 (No. 1, 1958).
35. *Laws of New York* ch. 992 (1882); id. ch. 387 (1883); *id.*
The 1871 destruction of the Cook County land records by the Chicago fire made some new form of title assurance imperative. An abstract company, the predecessor of the Chicago Title and Trust Company, had saved its records from the holocaust, so continued to sell abstracts. In 1887 the company issued its first title insurance policy.36

The subsequent spread of title insurance to other states has not been adequately traced, although progress is generally thought to have been relatively slow, centering in the large cities. What is apparently the first encyclopedic discussion of the new institution37 in 1904 cited cases from New York, Pennsylvania, Minnesota,38 New Jersey, and Georgia.39 In 1911 another encyclopedia40 cited additional cases from Missouri41 and California.42


37. 28 American & English Encyc. of Law 229 (2d ed. 1904). The topic is omitted from the first edition (1887-1895). The discussions found in 1 R. Cooley, Briefs on the Law of Insurance 12 (1905); T. Frost, A Treatise on Guaranty Insurance, ch. XVII (1902); J. Joyce, Treatise on Insurance § 13 (1897); Richards, supra note 33; and Note, Guarantee and Title Insurance, 42 Cent. L.J. 445 (1896), are not helpful in tracing the spread of title insurance. They simply treat it as one branch of the law of insurance and discuss the cases decided up to that time.

38. Title insurance companies were first authorized by statute in Minnesota in 1877. See Historical Resume, Minn. Stat. Ann. § 281 (1946).

39. It is impossible from the report of the case relied upon, Ex parte Calhoun, 87 Ga. 359, 13 S.E. 694 (1891), to determine whether a title insurance company or an abstracting company was involved.

40. 38 Cyc. 344-55 (1911).

41. In the report of the merger of the Kansas City Title Insurance Company with the Chicago Title & Trust Company it is stated that when the former was incorporated in 1915 "it was the first Missouri company established for the purpose of insuring titles to real estate." 46 Title News 25 (No. 7, 1967). However, at least one Missouri case in which a title insurance company was a defendant was decided as
Gage asserts that at the turn of the century there were probably not more than 20 companies operating in the large cities of California, Washington, Minnesota, Illinois, Ohio, Pennsylvania, New Jersey, Maryland, New York, Massachusetts and the District of Columbia. By 1930 the number had increased to approximately 263 companies in 35 states. That number has since been drastically reduced, but this reduction has been the result of mergers and has been accompanied by an over-all increase in premium income and area of operations.

early as 1902. Purcell v. Land Title Guar. Co., 94 Mo. App. 5, 67 S.W. 726 (1902). This case originated in Jackson County (Kansas City). The problem of proper title assurance in some parts of Missouri presents peculiar difficulties. First, there was a great deal of fraud connected with alleged Spanish and French grants antedating the Louisiana Purchase and titles derived from such grants were the subject of much uncertainty and litigation. Gill, The Beginning of Title in St. Louis, 7 St. Louis L. Rev. 69 (1923); Litz, Spanish Land Grants, 23 J. Mo. Bar 206 (1967); Nelles & King, Contempt by Publication in the United States, 28 Colum. L. Rev. 401, 423 passim (1928). Secondly, in five southern counties the public records were destroyed by fire or flood. Russ v. Sims, 261 Mo. 27, 169 S.W. 69 (1914). This latter difficulty led to the enactment of the so-called Carleton's Act, Mo. Laws 251 (1901). This act was declared unconstitutional but was re-enacted in a constitutional form by Mo. Laws 271 (1907), now found as Mo. Rev. Stat. § 446.190 (1959). See M. Gill, Missouri Titles § 385 (4th ed. 1960).

42. Title Insurance was established in California prior to 1910. Title Ins. & Trust Co. v. City of Los Angeles, 61 Cal. App. 232, 214 P. 667 (1923). The relationship between the development of title companies and the acute need created by the destruction of the public land records in the San Francisco earthquake of 1906 does not seem to have been investigated. It should be kept in mind that although California has ultimately become a judicial supremacy state, early cases recognized the power of the legislature to regulate practice. E.g., State Bar v. Superior Court, 207 Cal. 323, 278 P. 432 (1929); In re Weymann, 92 Cal. App. 646, 268 P. 971 (1923); In re Chapelle, 71 Cal. App. 129, 234 P. 906 (1925); In re Collins, 188 Cal. 701, 206 P. 990 (1922); Ex parte Galusha, 184 Cal. 697, 195 P. 406 (1921); Ex parte Johnson, 47 Cal. App. 465, 190 P. 552 (1920); City of Sonora v. Curtin, 137 Cal. 593, 70 P. 674 (1902); Ex parte Yale, 24 Cal. 241 (1862); Cohen v. Wright, 22 Cal. 293, (1863).

43. D. GAGE, supra note 26, at 83.

44. This last named state comes somewhat as a surprise. Traditionally New England has been considered a personal search area and the recent modest spread of title companies into the area has occasioned comment. Nevertheless, the Massachusetts Title Insurance Company currently advertises itself in 2 Martindale-Hubbell Law Directory 777 (1968) as "One of the oldest title insurance companies in the United States and the only title insurance company with its home office in Boston."

45. D. GAGE, supra note 26, at 85. This expansion was probably encouraged by the enactment of a large number of statutes purporting to legitimize the institution. See, for a list of earlier statutes, Pelkey, The Law of Title Insurance, 12 Marq. L. Rev. 39 n.4 (1927).

46. The number was reduced to an estimated 150 in 1966. See Payne, supra note 1.
This brief historical summary indicates that title insurance began at a time when no efforts were being made to check lay practice. After starting in Pennsylvania, it spread first into states where either legislative supremacy prevailed or an emergency situation presented itself. By the time the unauthorized practice controversy arose, title insurance companies were taken as a matter of course and their assumption of the right to pass judgment upon land titles was not questioned.

The failure to raise such a fundamental issue was partly due to the form of the dialogue. It would have been possible for the courts to relate title insurance directly to the conveyancing process, which would have undoubtedly been proper. Instead, the insurance label was accepted at face value and the courts habitually spoke as though they were simply dealing with a new facet of an old and well recognized lay enterprise. No distinction was made between the work of pure insurance and that of title examination. To be sure, the courts had no occasion to do otherwise, for the bar was too weak to challenge the new companies on the grounds that they were illegally practicing law, and the companies were not likely to question the validity of their own activities. As a result, the cases have not distinguished between the functions of local and national companies, and it has been assumed without analysis that if the companies can insure title, they can also examine it. Thus it would appear that the tra-

47. The weakness of the bar was accentuated in this case because in New York and Chicago, at least, the title insurance companies were closely affiliated with banks, who insisted on title insurance as a prerequisite to acquisition of loans. Roberts, Urban Mortgage Techniques in America, 27 Convex. 240 (1963); Viele, The Problem of Land Titles, 44 Pol. Scis. Q. 421, 430-31 (1929). Roberts states that in Pennsylvania title insurance was part and parcel of the banking industry, almost every bank having its own title department. Whereas in New York City the title insurance phase of banking may simply have been a lucrative sideline, in Pennsylvania title insurance was a device used to get around restrictive banking laws which limited the number of banks in any given area. This was done by opening a title company, which had the ancillary power to lend money and accept deposits, the "Title and Trust Company" shortly becoming a standard feature of the Pennsylvania scene.

ditional assumption that title insurance companies may make independent searches of the titles they insure and may rely upon the opinions of their own salaried employees is the result of historical accident and is not supported by authority binding on the courts. The entire question can, therefore, be considered anew.

1. **State Authority to Permit Illegal Practice of Law**

The argument that corporate title examination is a lawful enterprise sanctioned by statute is most easily disposed of. In those few states, such as New York and Pennsylvania, where the doctrine of legislative supremacy prevails or conveyancing is not held to be the practice of law it is difficult to deny that the legislature can authorize corporations to engage in title practice. Elsewhere, however, any such legislative effort is a nullity. Legislatures can authorize title companies to engage in the insurance business, and so long as the companies do nothing but insure, their business is a legitimate one. But permission to insure does not mean that the company may, under the guise of such activity, illegally practice law. This same essential question has arisen where casualty companies have unsuccessfully attempted to appear before workmen's compensation boards. As was said in *People v. Title Guarantee & Trust Company,* whether a layman is engaged in the unauthorized practice of law "is to be decided by the nature of the act, and not by the identity of the individual who most frequently performs it."

2. **Estoppel Theory**

The second contention—that even if the courts should have

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v. Title Guar. & Trust Co., 191 App. Div. 165, 181 N.Y.S. 52, aff'd mem., 230 N.Y. 578, 130 N.E. 901 (1920) (the title company making its own examinations by virtue of a New York statute); Bar Ass'n v. Union Planters Title Guar. Co., 46 Tenn. App. 100, 326 S.W.2d 767 (1959), noted in 22 UNAUTHORIZED PRACTICE NEWS 56 (No. 3, 1956); cf. Hager v. Louisville Title Co., 27 Ky. Rep. 345, 85 S.W. 182 (1905); Hager v. Kentucky Title Co., 119 Ky. 850, 85 S.W. 183 (1905). It is notable that in Ehmer v. Title Guar. & Trust Co., 156 N.Y. 10, 50 N.E. 420 (1898), the New York Court of Appeals recognized that in making a search the title company was performing the same duties as an attorney.

49. Payne, *supra* note 1. The reliance on New York cases in states where the doctrine of judicial supremacy has been expressed in its strongest form is an anomaly difficult to explain. *See, e.g.,* Judd v. City Trust & Savings Bank, 133 Ohio St. 81, 12 N.E.2d 288 (1937).


originally confined title companies to the issuance of pure insurance, long tolerance now estops judicial intervention—ignores the well-settled doctrine that estoppel does not run against the sovereign even when custom is alleged. Where the act is not authorized by the corporate charter, the rule has been correctly stated by Fletcher:

The fact that it has been the custom of a corporation to enter into transactions which are not authorized by its charter cannot render such transactions any the less ultra vires. "The usage of a corporation does not become the law of its existence, or the measure of its powers. The general law of the state (speaking of a corporation organized under a general law), of which all persons are presumed to have knowledge, is the source and limit of all its powers and duties; these cannot be varied either by usage or contract." Since a state cannot, either by charter or statute, authorize a corporation to engage in the practice of law, an attempt to practice is ultra vires and can not be defended on grounds of custom. As the Rhode Island Supreme Court stated with regard to unauthorized practice, "[m]ere length of time does not and cannot convert into a legal act what is illegal." The Arizona and Washington courts, in dealing with the activities of real estate agents and title insurance companies, have disposed of the estoppel theory more picturesquely, by stating that it is tantamount to saying "we have been driving through red lights for so many years without serious mishap that it is now lawful to do so."

53. FLETCHER, supra note 8, at § 2495.
54. Rhode Island Bar Ass'n v. Automobile Service Ass'n, 55 R.I. 122, 179 A. 139 (1935).

Although these general doctrines are unquestioned, they have, for practical purposes, been modified in two respects. In some jurisdictions custom has been considered, not to answer the question whether an estoppel has been created, but to assist the court in finding whether the activities in question constitute the unauthorized practice of law. E.g., Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E.2d 27 (1943); Pioneer Title Ins. & Trust Co. v. State Bar, 74 Nev. 188, 326 P.2d 408 (1958); Auerbacher v. Wood, 139 N.J. Eq. 599, 58 A.2d 800 (1947), aff'd, 142
3. The Right of an Insurer to Examine the Risk

We now come to the argument that the examination of title by local title companies is not the practice of law because, as insurers, they are entitled to examine the risk which they are assuming. Indeed, it would appear that, except in the legislative supremacy states, the validity of the whole local title insurance business must stand or fall on the basis of this contention.

An examination of this conventional hypothesis should begin with the understanding that it is easy to become word-bound by the term “insurance,” since the expression carries strong implications of legality and utility. Even its most fervid proponents grant that title insurance differs radically from other conventional forms of insurance. As stated by Roberts:

It has been axiomatic today to observe that title insurance ends at the point that other forms of insurance begin. Thus, a New York court in 1903 observed [quoting from Trenton Potteries Company v. Title Guaranty & Trust Company, 176 N.Y. 65, 68 N.E. 132 (1903)]: “The risks of title insurance end where the risks of other kinds begin. Title insurance, instead of protecting the insured against matters that may arise during a stated period after the issuance of the policy, is designed to save him harmless from any loss through defects, liens or encumbrances that may affect or burden his title when he takes it. It must follow as a general rule, therefore, that when the insured gets a good title the covenant of the insurer has been fulfilled and there is no liability.”

In a sense, title insurance is somewhat analogous to boiler insurance, the primary purpose of both forms of insurance being the elimination of risk and the avoidance of loss. Neither form of insurance is based upon mere guesswork. Both of them involve reports evaluating the risk prepared by skilled technicians.

N.J. Eq. 484, 59 A.2d 863 (1948); People v. Title Guar. & Trust Co., 191 App. Div. 165, 181 N.Y.S. 52, aff'd mem., 230 N.Y. 573, 130 N.E. 901 (1920); Oregon State Bar v. Security Escrows, Inc., 233 Ore. 484, 367 S.W.2d 419 (1963); State v. Dinger, 14 Wis. 2d 193, 109 N.W.2d 685 (1961). In several other cases where unauthorized practice has been admitted, custom has been considered in determining whether the court will exercise its discretionary equitable jurisdiction where an injunction has been requested. Creekmore v. Izard, 236 Ark. 558, 367 S.W.2d 419 (1963); Conway-Bogue Realty Inv. Co. v. Denver Bar Ass’n, 135 Colo. 398, 312 P.2d 998 (1957); State v. Dinger, supra. See also dissenting opinion in Keyses Co. v. Dade County Bar Ass’n, 46 So. 2d 605 (Fla. 1959).

56. Johnstone & Hopson, supra note 5, at 183. In Cooperman v. West Coast Title Co., 75 So. 2d 818 (Fla. 1954), after pointing out that all the company was doing was investigating the risk it was undertaking, the court said, “... for to practice law one must have a client and in such instances their clients are themselves.”

57. Roberts, supra note 30, at 4-5.
To put the matter somewhat differently, in the case of conventional insurance the insurer assumes that a certain future harm may occur to any one of several assureds. There is no way of foretelling the particular person upon whom the harm will fall, but the risk is spread by charging each assured a premium based on his proportionate share of the total anticipated loss. In title insurance, the insurer is concerned with past events affecting a particular title. In the face of these events an assertion is made as to an existing fact, that is, the present rather than future condition of the title. This assertion names and generally exempts from coverage the very risks against which it is supposed to insure. It is based upon an inspection by a "skilled technician," a person trained in the law of real property. The certificate issued on the basis of this inspection is not only a guaranty but an assertion of legal judgment. Unlike the conventional self-representation case where, for example, a corporation is itself purchasing property, this representation is not made for the benefit of the company. The intention is that it be relied upon by the assured.

58. E.g., Title Ins. & Trust Co. v. City of Los Angeles, 61 Cal. App. 232, 214 P. 667 (1923); Booth v. New Jersey Highway Authority, 60 N.J. Super. 534, 159 A.2d 460 (1960); Metropolitan Life Ins. Co. v. Union Trust Co., 283 N.Y. 33, 27 N.E.2d 225 (1940); Foehrenbach v. German-American Title & Trust Co., 217 Pa. 331, 66 A. 561 (1907). In the St. Louis, Missouri area, title companies in fact issue two types of assurance, one a title insurance policy and the other a "certificate of title." Of the latter, it is said that "[i]n other localities an abstract and opinion takes the place of a certificate" and that it "protects its holder only against unexpected encumbrances or defects shown of record, and not against any encumbrances or defects that are not shown of record." M. Gill, TREATISE ON REAL PROPERTY LAW IN MISSOURI 177 passim (1949). See also HOUSING & HOME FINANCE AGENCY, LOAN CLOSING COSTS ON SINGLE FAMILY HOMES 11 (1965) [hereinafter cited as LOAN CLOSING COSTS]. A title insurance executive, while admitting that a title policy is, in effect, similar to an attorney's opinion, with a guarantee, contends that it goes beyond that and also "insures" against hidden risks. Lemley, Title Insurance Aspects of Tort Liability, 16 CLEV.-MAR. L. REV. 256 (1967).

59. The element of reliance upon legal judgment has been strongly stressed in several unauthorized practice cases. State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961); Kentucky State Bar Ass'n v. First Fed. Savings & Loan Ass'n, 342 S.W.2d 397 (Ky. 1961); Pioneer Title Ins. & Trust Co. v. State Bar, 74 Nev. 186, 326 P.2d 408 (1958); cf. Maggio v. Abstract Title & Mortgage Corp., 277 App. Div. 940, 88 N.Y.S.2d 1011 (1950). Carter has suggested that the difference between a title policy based on "insurability" and a lawyer's title opinion based on "marketability" can be "based only on distinctions that have little if any substance." Carter, Proposed Legislation Further Regulating Title Insuring, 39 FLA. B.J. 36, 41 (1965). The same conclusion was reached in Lewis, Corporate Capacity to Practice Law—A Study in Legal Hocus Pocus, 2 Minn. L. Rev. 342, 346-49 (1938).
Whether the potential purchaser or mortgagee of land will complete the contemplated transaction depends upon what the policy indicates about the state of the title. Thus, the policy has no other purpose than to induce action by the person to whom it is issued. As Justice Cardozo said in Glanzer v. Shepard regarding a public weigher's certificates obtained by the seller but relied upon by the purchaser:

The plaintiffs' use of the certificates was not an indirect or collateral consequence of the action of the weighers. It was a consequence which, to the weighers' knowledge, was the end and aim of the transaction.60

The contention that a local title insurance company issuing policies of insurance based on its own examination of title is doing more than merely evaluating a risk to be assumed is supported by the recent case of Kentucky State Bar Association v. First Federal Savings and Loan Association.61 In that case when the defendant lending institution made loans on real estate it charged a "service" fee covering, *inter alia*, the cost of title examination. The examination was made by a salaried employee attorney. When charged with unauthorized practice the defendant contended that it was acting merely in its own behalf and that it came within the rule of self-representation. In rejecting this argument the court said:

It is apparent that the title examination is not made exclusively for the benefit of respondent. A clear title is one of the conditions upon which it will make a loan. The examination is made primarily for the benefit of the borrower so that he can comply with this essential condition. The fact that a charge is made to the borrower for this service, if such a charge is made, simply confirms the fact that the legal service is being rendered for him.

The court further pointed out that the defendant profited by the transaction, that there was a complete lack of professional relation between the borrower and the defendant's attorney, and that there was no question but that:

a "title examination" (which includes an analysis of recorded interests in land coupled with an opinion as to its legal status) is a service which lawfully can be performed for others only by a licensed attorney.

The Court continued in a somewhat obscure dictum:

Even when a company is engaged in the title insurance business, it cannot sell to the public, though a relatively insignificant part of the transaction, the legal services of its own salaried attorney.62

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60. 233 N.Y. 236, 135 N.E. 275 (1922).
61. 342 S.W.2d 397 (Ky. 1961).
62. Similarly, it was found that a corporate trustee was not simply acting on its own behalf but was performing legal services for
When we extricate ourselves from the verbal trap created by the word "insurance" and admit that a title policy is merely an opinion of title backed by a warranty and relied upon by persons outside the insuring company, some curious contradictions appear. For example, in Land Title Abstract & Trust Company v. Dworken it was held that the defendant could issue title insurance policies but could not furnish opinions in statements of title and/or certificates of title, and otherwise, as to the condition of the title to real estate, when defendant does not insure or guarantee such title or the validity and due execution of securities prepared by it.64

The same rule was followed in Steer v. Land Title Guarantee & Trust Company,65 a widely cited and relied upon case from the Common Pleas, which assumed throughout that the defendant could engage in the title insurance business but could not sell "title opinions." The court stated:

This court . . . is . . . of the opinion that a salaried lawyer for a title company may render an opinion to his own corporate principal without being guilty of unauthorized practice of law; but when the corporate principal "sells" that opinion, legal in nature, to an outsider, that corporate principal is guilty of illegally practicing law. We feel quite strongly that the corporate principal is still guilty of unauthorized practice of law by making such a "sale" of a legal opinion to a third party even though that legal opinion was prepared for it by its salaried lawyer, directly in the course of the corporate principal's own legitimate business activities. The vice in the equation comes from "sale," for a consideration, to an outsider. It is, as we view it, a clear duty of the cor-


63. It is universally held that the giving of title opinions constitutes the practice of law. E.g., People v. Hanna, 127 Colo. 481, 256 P.2d 492 (1953); Grievance Comm. v. Payne, 128 Conn. 325, 22 A.2d 623 (1941); Florida Bar v. McPhee, 195 So. 2d 552 (Fla. 1967); Boykin v. Hopkins, 174 Ga. 511, 162 S.E. 796 (1932); People v. Peoples' Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931); Kentucky State Bar Ass'n v. First Fed. Savings & Loan Ass'n, 342 S.W.2d 397 (Ky. 1961); Grand Rapids Bar Ass'n v. Denkema, 290 Mich. 56, 287 N.W. 377 (1939); Darby v. Mississippi Board of Bar Admissions, 185 So. 2d 684 (Miss. 1966); Hulse v. Criger, 363 Mo. 26, 247 S.W.2d 855 (1952); Land Title Abstract & Trust Co. v. Dworken, 129 Ohio St. 23, 193 N.E. 650 (1934); Union City & Obion County Bar Ass'n v. Waddell, 205 S.W.2d 573 (Tenn. App. 1947); Hexter Title & Abstract Co. v. Grievance Comm., 142 Tex. 506, 179 S.W.2d 946 (1944); State ex rel. State Bar v. Cunningham-Nield Realty, Inc., 25 UNAUTHORIZED PRACTICE NEWS 306 (Wis. Cir. Ct. 1960); cf. In re Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (1935); Ferris v. Snively, 172 Wash. 167, 19 P.2d 942 (1933). But see note 58 supra as to St. Louis practice. See generally Annots., 151 A.L.R. 781 (1944), 125 A.L.R. 1173 (1940), 111 A.L.R. 19 (1937).

64. 129 Ohio St. at 26, 193 N.E. at 651.

65. 113 N.E.2d 783 (Ohio C.P. 1953); cf. Judd v. City Trust & Savings Bank, 133 Ohio St. 81, 12 N.E.2d 288 (1937).
porate principal to keep the legal opinions prepared by its salaried employees to itself. The outsiders should quite clearly under the Ohio Supreme Court decisions in the Dworken and Judd cases . . . obtain their own legal opinions from lawyers of their own choosing. Parenthetically, it might well be observed that, if such outsiders so desire, they could have their own salaried lawyers prepare legal opinions for them without the violation of any unauthorized practice of law rules. It is only when the legal opinions of captive, salaried lawyers become, in effect, the subject of barter on the market place by the corporate principals of such captive lawyers that we have the type of illegal, unauthorized practice of law by the corporations which has been so consistently condemned by the Supreme Court of Ohio in the past.

The rule that the sale of a title policy based on the opinion of a title company's legal staff is not the "subject of barter in the market place" but a legitimate lay function, is not confined to Ohio. In the New Jersey Mortgage Associates case, it was held initially that the defendant abstract company could not pass on title; but later, when the abstract company was converted into a title insurance corporation, no question as to the validity of its insuring activities seems to have been raised and only ancillary activities were enjoined.

The cases dealing with an abstract company acting as the representative of a title insurance company show similar confusion. In Beach Abstract & Guaranty Company v. Bar Association it was held that where the agent abstract company examined the title it was illegally practicing law, although the decision tacitly assumes that the same function could be carried out by the principal title insurance company. Florida cases reach the result that an abstract company may examine title for the title insurance company but "may not render, orally or in writing, opinions concerning the status of marketability of title to real property." It has further been held that a title insurance company is illegally practicing law when it gives opinions of title where no bona fide application for insurance has been made.


68. Florida Bar v. McPhee, 195 So. 2d 552 (Fla. 1967); Cooperman v. West Coast Title Co., 75 So. 2d 818 (Fla. 1954); cf. Florida Bar v. Columbia Title, 197 So. 2d 3 (Fla. 1967). But see Florida Bar Commences Action Against Out-of-State Lawyer and Insurer, 32 Unauthorized Practice News 88 (No. 1, 1966).

Nor can a title insurance company issue commitment papers indicating an opinion as to the validity of title where there has been no bona fide application for insurance. The Texas agency cases are similarly unsatisfactory when considering the relative rights of agent and the insurer. They deal specifically with abstract companies which have performed all or virtually all of the services required in the closing of title transactions, and hold that the abstract company may not give an opinion even though it is assumed that it is entirely legitimate for the title insurance company to do so.

When the central issue is other than unauthorized practice of law, the courts show a much greater readiness to admit that title insurance companies are, in fact, practicing law. For example, in *Inter-County Title Guaranty & Mortgage Company v. Rasquin*, the defendant title company had simply examined titles for the HOLC without guarantee. This was the principal activity of the company, and it was held to be legal work. As a consequence, the company was not an insurance company within the terms of the Internal Revenue Act. Similarly the courts have frequently distinguished between insuring activities and title examination aspects of conveyancing in cases where litigants have sought to hold insurance companies liable for negligently performing the latter. When liability has been imposed it has

70. *Title Companies Can Not Give Opinions of Title, Florida Court Holds*, 2 Unauthorized Practice News 1 (1936).

71. *Alamo Title Co. v. San Antonio Bar Ass'n*, 360 S.W.2d 814 (Tex. Civ. App. 1962); *San Antonio Bar Ass'n v. Guardian Abstract & Title Co.*, 156 Tex. 7, 231 S.W.2d 697 (1956); *Hexter Title & Abstract Co. v. Grievance Comm.*, 142 Tex. 506, 179 S.W.2d 946 (1944); *Stewart Abstract Co. v. Judicial Comm'n*, 131 S.W.2d 686 (Tex. Civ. App. 1939). In Virginia, although there is no reported case in point, the Bar Association's Committee on Unauthorized Practice has ruled that, although an abstract company may act as the agent for a title insurance company, it may not express an opinion as to title. *Virginia Committee Holds Lawyers in Abstract Business Can Not Give Legal Advice, 12 Unauthorized Practice News* 7 (1946). The same result has been reached in Minnesota by agreement between the bar and at least one abstract company. *St. Paul Title Company Enters into Agreement, 5 Unauthorized Practice News* 71 (1939).

72. 38 F. Supp. 735 (E.D.N.Y. 1941).

been said that the company must be held to the same standard as an attorney.

It would appear, therefore, that if title insurance were being considered as a new enterprise, there would be strong logic supporting the contention that the local companies are illegally practicing law. A specific holding supporting such logic might even now be expected in jurisdictions where local title insurance has not become generally accepted. In those areas where this form of title assurance has become conventional, however, to outlaw it completely might result in serious economic repercussions. Such a possibility will be treated later in this article. For present purposes it is sufficient to say that, when faced with a decision, the courts may decide to make an exception to the unauthorized practice rule. But in doing so they should recognize that an exception has been made, and that such limitations as the courts deem expedient may be established.

C. THE LEGALITY OF ANCILLARY ACTIVITIES

In localities where title companies habitually examine the titles they insure, their activities may not extend beyond that point. But in addition to this principal work of examining and insuring, they may perform a number of ancillary services which may or may not be characterized as practicing law.

1. Drafting Documents and Giving Advice

The most obvious ancillary service is the drafting of deeds,
mortgages, and other instruments which constitute the legal means in which the transfer takes place. The general rule is that such drafting constitutes the practice of law. The same is true regarding advice as to the legal effect of the transaction.

Some courts have created an exception to these rules. Although the exception has been rejected by some, has not been uniformly applied, and is too vague to constitute an adequate guide for prediction of future court action, it must be considered in any systematic examination of doctrine. The exception is that a layman may perform legal services which are merely "incidental" to other permitted activity. When the "incidental-to-other-work" theory has been raised in drafting cases, a variety of holdings has been the result. But, broadly speaking, two approaches have been employed. Some courts have permitted simple drafting incidental to what is otherwise lay work, while

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74. Although the expressions "conveyancing" and "conveyances" do not have clearly defined legal meaning and are used loosely by the courts, it is almost universally held that conveyancing is legal work and, as such, cannot be carried out by laymen or corporations. E.g., In re Mathews, 57 Idaho 75, 62 P.2d 578 (1936); Grand Rapids Bar Ass'n v. Denkema, 280 Mich. 56, 287 N.W. 377 (1939); Darby v. Mississippi Bd. of Bar Admissions, 185 So. 2d 684 (Miss. 1966); Hulse v. Criger, 363 Mo. 26, 247 S.W.2d 355 (1952); Cape May County Bar Ass'n v. Ludlam, 45 N.J. 121, 211 A.2d 730 (1965); Rattikin Title Co. v. Grievance Comm., 272 S.W.2d 948 (Tex. Civ. App. 1954); Commonwealth v. Jones & Robins, 186 Va. 30, 41 S.E.2d 720 (1947); Ferris v. Snively, 172 Wash. 167, 19 P.2d 942 (1933).


76. The "public convenience" exception is also sometimes used, but generally in connection with the activities of real estate agents. See Comment, The Completion of Deed Forms by Real Estate Brokers, 44 Marq. L. Rev. 519 (1961). Thus, it may be more convenient to permit such agents to prepare contracts of sale since a lawyer may not be available at the time a contract is signed. The same rationale does not apply to title company activities, nor is it swallowed up in the larger "incidental to business" exception.

others have denied any such limitation upon the general inhibition against illegal practice.\textsuperscript{78} The confusion created by this conflict has been compounded by attempts to distinguish between “simple” instruments, generally on printed forms, and those which are “complex.” Some decisions state that completion of the former is not the practice of law, often adding the caveat that there must be no compensation for the draftsman.\textsuperscript{79} However, if any legal judgment is demanded, the act is forbidden to laymen.\textsuperscript{80} On the other hand, many courts entirely repudiate the “simple instrument” rule and hold that even completion of standard forms is the practice of law.\textsuperscript{81} These latter cases are based upon the theory enunciated in Judge Pound’s concurring opinion in \textit{People v. Title Guarantee & Trust Company},\textsuperscript{82} that he was “unable to rest any satisfactory test of the distinction between simple and complex instruments. The most complex are simple to the skilled, and the simplest often trouble the inex-


\textsuperscript{79} E.g., In re Mathews, 58 Idaho 772, 79 P.2d 535 (1938); State v. Indiana Real Estate Ass'n, 244 Ind. 214, 191 N.E.2d 711 (1963); Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E.2d 27 (1943); Cain v. Merchants Nat'l Bank & Trust Co., 66 N.D. 746, 268 N.W. 719 (1936); Goodman v. Beall, 130 Ohio St. 427, 200 N.E. 470 (1936); State v. Dinger, 14 Wis. 2d 193, 109 N.W.2d 685 (1961).


\textsuperscript{81} E.g., Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 53 Ill. App. 2d 388, 203 N.E.2d 131 (1964), modified on appeal, 34 Ill. 2d 116, 214 N.E.2d 771 (1966); People v. Lawyers Title Corp., 282 N.Y. 513, 27 N.E.2d 30 (1940); Martineau v. Gressner, 182 N.E.2d 48 (Ohio C.P. 1962); Hexter Title & Abstract Co. v. Grievance Comm., 142 Tex. 506, 179 S.W. 2d 946 (1944). In People v. Schaefer, 404 Ill. 45, 87 N.E.2d 773 (1949), the court, speaking of the simple document test, pithily disposed of it by saying, “[I]f his service does not amount to the practice of law it is without material value; but if it is of material value it would likely amount to the practice of law.”

\textsuperscript{82} 227 N.Y. 366, 125 N.E. 666 (1919).
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The "incidental-to-other-work" exception is apparently more freely admitted when applied to drafting than when applied to advice. While it is true that advice depending primarily upon non-legal factors may be furnished by laymen, if predicated primarily upon legal judgment it may not be given even when incidental to work of a non-legal nature. This rule has sometimes been extended to drafting on the ground that it is "quasi-counseling."

In addition to this general exception, other factors may be relevant in determining whether a layman is engaged in unauthorized practice. Whether he has received compensation is sometimes material, but remuneration may not be necessary for the specific act alleged in violation of the law. Also, courts have


84. E.g., M. Maye, The Lawyers 42 (1967).

85. See, e.g., cases cited note 78 supra.


87. E.g., Fink v. Peden, 214 Ind. 584, 17 N.E.2d 95 (1938); Bump v. District Court, 232 Iowa 623, 5 N.W.2d 914 (1942); Fitchette v. Taylor, 191 Minn. 582, 254 N.W. 910 (1934); Hulse v. Criger, 363 Mo. 26, 247 S.W.2d 855 (1952); Cain v. Merchants Nat'l Bank & Trust Co., 66 N.D. 476, 268 N.W. 719 (1936); Haverty Furniture Co. v. Foust, 174 Tenn. 203, 124 S.W.2d 694 (1939); State ex rel. Junior Ass'n of Milwaukee Bar v. Rice, 258 Wis. 38, 394 N.W. 559 (1940).

88. E.g., Chicago Bar Ass'n v. Quinlan & Tyson, 53 Ill. App. 2d 388,
been quick to reject the contention that the services are free when, in fact, they constitute a "leader" for other compensated work. As was said in Grievance Committee v. Dacey, the work is not "done as a favor to a friend." Moreover, it has been pointed out by way of dictum in the same case that the public may be in greater danger from strictly free services than from those for which compensation is given.

2. Curative Action

In addition to giving advice and drafting, a title insurance company may, where title is found to be defective, attempt to take curative action—another "ancillary service." Such action, when called to the attention of the courts, is universally declared to be the practice of law.

3. Escrow and Closing Services

Although it is common knowledge that escrow and closing services are frequently furnished by title insurance companies, institutional lenders, and other lay bodies, the exact extent to which this practice is sanctioned by the courts is uncertain. In the first place, when the practice has been enjoined it has generally come within the scope of transactions by which laymen

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have taken over the entire conveyancing process. Secondly, the terms "closing" and "escrow" themselves are so flexible as to embrace a great variety of practices about which we have little or no precise information. The closing is, in general terms, the completion of the transaction. After the preliminary contract has been signed, the title examined, and the necessary documents prepared, the parties must be brought together, the documents executed, delivered, and the funds disbursed. A proper closing will also embrace updating the title and advising the parties regarding the effect of what they are doing. Although this work is routinely carried out by laymen in many sections of the country, when it has been brought to the attention of the courts it has generally been held to constitute the practice of law.

In its simplest form, an escrow has been defined as "a deed delivered to a stranger to be by him delivered to the grantee upon the happening of certain conditions, upon which last delivery the transmission of title is completed." In theory, whether the escrow holder is practicing law will depend upon the conditions to be met. If, for example, the sole preliminary to delivery is the payment of the purchase price, his duties are purely ministerial. On the other hand, where the escrow holder is to determine the validity of title, supervise the closing, draft instruments, or the like, he will in all probability be practicing law. In practice, the term "escrow" is used indifferently to describe all sorts of arrangements between the parties, and appears to be increasingly employed as the equivalent of complete examination and

92. See notes 100-126 infra and accompanying text.
95. It has been called a "generic term." 30A C.J.S. Escrows § 1 (1965).
There is scant authority as to the validity of particular kinds of escrows in terms of the illegal practice of law. In at least some cases escrows of a strictly limited nature have been tolerated, while more comprehensive escrow service has sometimes been enjoined. Where a title insurance company does not insure, it will not be permitted by way of an escrow to carry out acts otherwise characterized as the practice of law.

D. THE "PACKAGE DEAL"

For a number of reasons there is an increasing tendency today for the parties to a title transaction to use a "package deal," sometimes referred to as "complete closing service." Functionally, these terms imply that after the buyer and seller have reached a bargain, the entire transaction is placed in the hands of a layman or corporation to handle all details leading up to and including the final closing. This practice has unquestion-
ably received widespread de facto toleration,\textsuperscript{101} although its practical result is to make conveyancing a lay function.\textsuperscript{102} In

In another variation, a developer sells houses with the provision that the mortgage shall be given to a particular lender and closing costs shall be paid in bulk by the seller. This latter type of transaction has occasioned the American Bar Association's Standing Committee on Professional Ethics some uncertainty as to the position of the attorney employed to carry out the transactions. See Informal Opinions No. C-472 (Dec. 26, 1961), 886 (Sept. 28, 1965), and 954 (Aug. 8, 1966).

\textsuperscript{101} Home Title Ins. Co. v. Rinaldi, 81 A.2d 923 (D.C. Mun. Ct. App. 1951); Practice of Law: Hearing Before Subcomm. No. 3 of the House Comm. on the District of Columbia, 89th Cong., 1st Sess. (1965); Fiflis, Land Transfer Improvement, 38 U. Colo. L. Rev. 431, 446 (1966); Jones, Conveyancing in Cleveland, 104 Sol. J. 773 (1960); Real Estate Brokers Offer Package Deals, 25 Unauthorized Practice News 196 (1959); Report of the Special Committee on Lawyers' Title Guaranty Funds, 91 A.B.A. Rep. 235 (1966); Report of the Standing Committee on Unauthorized Practice of the Law, 84 A.B.A. Rep. 590 (1959). As Roberts has said, "In urban centers the title companies began to take over conveyancing and the whole conveyancing process was centered in the companies' offices." Roberts, Title Insurance: State Regulation and the Public Perspective, 29 Ind. L.J. 1, 9 (1963). As illustrative of the services expected of the lender's attorney, the proposed Alabama minimum fee bill, after setting fees for attorneys closing loans guaranteed by F.H.A. or V.A. or conventional loans which originate with lenders outside his community or county, provides:

\begin{quote}
Such fee shall include the drafting of the customary papers, examining title and securing title insurance (if required), closing of transaction in the attorney's office, and disbursing the proceeds. The attorney shall make an additional charge for drafting deed and shall charge for all curative work pursuant to all other provisions of the schedule.
\end{quote}

In other words, he will carry out the entire transaction—except to give advice and protection to the buyer-mortgagor.

\textsuperscript{102} The title insurance companies undoubtedly attempt to play two roles simultaneously. On the one hand, they insist that they are engaged solely in the title insurance business. Indeed, in their current attack upon bar-related title guaranty funds, the commercial insurers' principal argument is that it is improper for the bar to engage in a business. On the other hand, they stress that their "profession" "encompasses the entire field of legal technicalities and complexities which enshroud real estate titles." McKillop, Title Insurance is Heady Stuff, Lawyers Title News 10 (No. 12, 1962). Schmidt, appearing at an American Bar Association symposium as the representative of the title insurance industry, contended that title insurance was "a commercial operation in the insurance field," while at the same time stressing the high degree of legal skill required in the work. Schmidt, The Lawyer and Title Insurance, 45 Title News 14 (No. 10, 1966). Burlingame, a title insurance executive, speaks of the title insurance "industry" and the need to "professionalize" in almost the same breath. Burlingame, Can This Marriage Be Saved?, 47 Title News 75 (No. 1, 1968). Title companies, in training their own employees, have been careful to instruct them in property law, e.g., M. Gill, Land Title Course (1955); Title Insurance and Trust Co., Handbook for Title Men (11th ed. 1968); Land Title Curriculum Developed by Northwood of Texas, 46 Title News 18 (No. 9, 1967), and uniformly employ lawyers on their salaried
the simplest such situation, a real estate broker advertises that he will take care of the details of completing land transfers which he has negotiated. Here a quo warranto or similar proceeding will be successful.103 Somewhat akin to this type of case is one in which an attorney uses a real estate, mortgage, or escrow company simply as a "front" to solicit business.104 Here it is possible either to proceed against the attorney for unethical practice or against the company for unauthorized practice. The most famous such case was that of In re Rothman105 in New Jersey. Rothman, an attorney, was the alter ego of his real estate and mortgage company and was unquestionably guilty of gross misconduct in advertising and soliciting business. After he was formally disciplined he reorganized his operations in such a fashion as to set in motion the prolonged Northern New Jersey Mortgage Associates litigation.106 In the first case reported, it was found that he had supplemented his mortgage company by an abstract company and used the paid attorneys of the latter to complete transactions for the former. After an injunction was issued, the assets of the abstract company were transferred to a title insurance corporation and the scope of operations considerably reduced. In subsequent proceedings against the new organization, the defendants were limited to investigation of title and drafting of instruments where they themselves were the mortgagees.107

In some cases individual attorneys have used corporations to carry on unethical practices, but corporate use of the attorney to engage in unauthorized practice is more common. When this is

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104. In re Rothman, 12 N.J. 528, 97 A.2d 621 (1953); In re L.R., 7 N.J. 390, 81 A.2d 725 (1951); San Antonio Bar Ass'n v. Guardian Abstract & Title Co., 156 Tex. 291 S.W.2d 667 (1959); In re Droker, 59 Wash. 2d 707, 370 P.2d 242 (1962); see Akron Bar Association Reports on Real Estate Situation, 23 UNAUTHORIZED PRACTICE NEWS 51 (No. 2, 1957).
105. 12 N.J. 528, 97 A.2d 621 (1953).
done, the usual strategy has been to move directly against the corporation rather than resort to disciplinary proceedings against its lawyer. Thus, in a leading Illinois case a bank was en-

108. Counsel employed by a lay corporation may, depending upon the circumstances, be guilty of unethical practice under any one of the following A.B.A. Canons of Ethics:

No. 6—Forbidding the representation of conflicting interest without full disclosure;
No. 27—Forbidding solicitation, direct or indirect;
No. 34—Forbidding the division of fees, except with another lawyer, based upon a division of service or responsibility;
No. 35—Forbidding the use of lay intermediaries;
No. 38—Forbidding the acceptance of compensation, commission and rebates without knowledge and consent after full disclosure;
No. 47—Forbidding the giving of aid to unauthorized practice.

The cases dealing with unauthorized practice by lay individuals and corporations in the real estate field are replete with assertions that it is unethical practice for the layman to employ an attorney and then interject himself between the attorney and his client. Cf. State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 336 P.2d 1 (1961), modified on rehearing, 91 Ariz. 293, 371 P.2d 1020 (1962). The commentators are also unanimous in pointing out that the principal way in which laymen and corporations are able to engage in unauthorized practice is through the use of employed attorneys, and that such employment violates canons of ethics. See, e.g., Hurst, supra note 2, at 321; Johnston & Hopson, supra note 5, at 27; Cedarquist, Lawyers Aiding Unauthorized Practice, in NAT'L CONFERENCE ON THE UNAUTHORIZED PRACTICE OF LAW 91 (mimeo. 1962); Gambrell, Lay Encroachments on the Legal Profession, 29 Mich. L. Rev. 989 (1931); Hamner, Title Insurance Companies and the Practice of Law, 14 Baylor L. Rev. 384 (1962); Hicks & Katz, The Practice of Law by Laymen & Lay Agencies, 41 Yale L.J. 69 (1931); Murphy, The Activities of Title Insurance Companies, in NATIONAL CONFERENCE ON THE UNAUTHORIZED PRACTICE OF LAW 149 (mimeo. 1962); Report of the Standing Committee on Professional Ethics & Grievances, 55 A.B.A. Rep. 476 (1930); Report of the Standing Committee on Unauthorized Practice of Law, 75 A.B.A. Rep. 242 (1950); Report of the Special [later Standing] Committee on Unauthorized Practice of the Law, 56 A.B.A. Rep. 470 (1931).

However, beyond those cases where an attorney was clearly using a corporation merely as a “front” to solicit business there seems to be no reported case in which any effort has been made to discipline an attorney who has been doing the work of unauthorized practice for the corporation. Readers should ponder the words of S. B. Houck, then chairman of the A.B.A.’s Committee on the Unauthorized Practice of Law, who on the floor at the annual meeting of the A.B.A. in 1935 said:

The thing which makes possible much of the illegal practice of law is the fact that it is being done by lawyers in cooperation or partnership, or in some other form of association with laymen. We feel that in many instances we are subjecting ourselves to rather serious criticism when we direct our activity to the layman and let the lawyer who has made possible this illegal practice go unscathed, uncriticized, untouched.


The thrust of the present article is the unauthorized practice of
joined from handling all details of real estate transactions through its own legal department. The same line of attack was used in Kentucky, where a building and loan association was the defendant.110

The most spectacular litigations brought against title companies on the grounds of unauthorized practice have been those Texas cases, already cited, in which the primary complaint was against abstract company agents of title insurers. Here it has ordinarily been held that the abstract or title company is illegally practicing law when it attempts to render "complete title service," even though it employs legal counsel.111 The same result

corporations and the ramifications of the unethical practice controversy will not be explored. However, before leaving the subject some rather harsh and disagreeable questions which, up to now, seem to have been carefully swept under the rug should be posed to committees on ethics. If a title insurance company is engaged in unauthorized practice of law, are its employed attorneys subject to disbarment for aiding laymen in such practice? If attorney X, who practices "independently," does all of the title work for Y Mortgage Co. and the latter actively solicits business and renders "complete title service," is X soliciting through a lay intermediary and assisting the intermediary to engage in unauthorized practice? The Declaration of Principles Between State Bar of Texas, Texas Land Title Ass'n and Title Underwriters of Texas, Inc. (adopted April 26, 1963), provides:

Lawyers who accept referrals of professional employment from a title company in such volume and regularity and under such circumstances whereby the interests of their clients are subordinated to the interests of the title company, do so in violation of the Canons of Ethics and also of the fundamental principle that a lawyer must represent his client with unqualified allegiance.

The Standing Committee on Professional Ethics of the American Bar Association has ruled only on peculiarly complex arrangements. It has treated these arrangements in terms of the dual representation question but has not considered the question of solicitation. See Informal Opinions, No. C-472 (Dec. 26, 1961), 886 (Sept. 28, 1965), and 854 (Aug. 8, 1966).


110. Kentucky State Bar Ass'n v. First Fed. Savings & Loan Ass'n, 342 S.W.2d 397 (Ky. 1961).

has been reached in Arkansas,\textsuperscript{112} although in Florida the most recent cases permit such service.\textsuperscript{113} Elsewhere it has been found that title insurance companies offering full title service are subject to injunction,\textsuperscript{114} the only clear exception coming from those states in which legislative supremacy prevails.\textsuperscript{115} The reason for the majority view is perhaps best summed up in \textit{Pioneer Title Insurance & Trust Company v. State Bar,}\textsuperscript{116} where it was argued by the company that it was doing little more than the clerical completion of standardized forms. The court responded:

The difficulty with the company's position is that its services did not end with the clerical preparation of the instruments by the escrow officer and stenographer. It was the company itself which judged of the legal sufficiency of the instruments to accomplish the agreement of the parties. In the drafting of any instrument, simple or complex, this exercise of judgment distinguishes the legal from the clerical service...

We may note that notwithstanding the standardization of procedures, self-reliance upon questions involving one's legal

\footnotesize{14 BAYLOR L. REV. 384, 386 (1962). Correspondence by the author with practicing attorneys in Texas in 1967 indicates that abstract and title companies in the larger cities generally ignore the rules laid down in these cases, but that beyond these urban areas there is relatively little unauthorized practice. For an attempt by one local bar to obtain a \textit{modus vivendi} with the title companies, see San Antonio Bar Association Committee on Unauthorized Practice of Law Secures Cooperation of Title Companies, 17 Unauthorized Practice News 6 (No. 1, 1951).


The actual practices carried out by the Florida companies have been unusually varied. Jennings, \textit{Common Problems of the Mortgage & Title Man}, 30 Title News 5 (No. 5, 1951). But that the companies' objective is to take over the complete title transaction is clear. Craig, \textit{Abstracters, Title Insurance Agents and Bar Funds}, 46 Title News 99 (No. 1, 1967).

It is reported that in Florida while "some reputable brokers recommend that parties seek the advice of their lawyers . . . many affirmatively advise that the parties do not need a lawyer." Committee on \textit{Real Estate Contracts, Construction Contracts and Closings}, 2 Real Prop. Prob. & Trust J. 325 (1967).


116. 74 Nev. 186, 192-93, 326 P.2d 408, 411-12 (1958).}
rights in the acquisition of a home is not yet to be regarded as common. The average layman, in a transaction of such comparative importance to him, wishes the assurance of a competent adviser that all is properly in order.

This, then, was not a case of self-reliance. It is clear from the record that the company not only exercised its judgment in this regard but invited the parties to rely on it. It is clear that there was such reliance. The parties were assured that the transaction in all respects would be legally effective; that the company would see to that. This assurance appears not only from testimony as to the procedure followed but also from evidence of television advertising employed by the company.

It is no escape that the company, through its obligations as insurer, might well be liable for lack of legality with respect to title. This does not resolve the case into one of the company acting for itself. It is one thing to pass judgment for others as to the legality of their transaction. It is quite another to indemnify them against loss through failure of legality. Insurance may well be reassuring; but it is no complete substitute for legality. The parties wish to avoid all legal trouble; even trouble with their insurer. They wish peaceful legality and not a monetary substitute.

As to any independent obligations the company may have had as escrow holder, we may simply note that one may not legitimatize his otherwise unlawful practice of the law by contractually obligating himself to achieve legal effectiveness. This is but a contract to pass legal judgment; that is, a contract to practice law.

In the instant case judgment as to legal sufficiency was, it is true, made by an attorney. The problem of lack of competence is not, therefore, present. We are, however, still faced with a complete lack of the essential attorney-client relationship in connection with the legal rights of the parties. The company attorney's concern with the legality of the instruments was from the point of view of the company's rights and obligations and not from the point of view of the rights and obligations of the parties to the transaction. The attorney was not advised that he was to serve as attorney for the parties and was to examine the instruments with an eye to the legal rights of those parties as his own clients independent of the company. Had this been done, in the light of the parties' apparent consent that the company attorney act as their own attorney and in the absence of any conflict of interest in the drafting of the instruments, the case might well be different.

And at another point the court said:

The need for legal counseling in any transaction is a question which must be decided by the person whose legal rights are involved. If, in his judgment, he does not need advice as to his legal rights or assistance with respect to them, no one can complain of his self-reliance. Such a case must be a true case of self-reliance, however. If reliance be placed upon the judgment of others as to his legal rights, the case is different. If advice or judgment is professionally given by one not a party to the transaction and not an attorney, a problem of unauthorized practice is presented.

It is clear, therefore, that the reason title companies and similar
lay institutions or individuals are forbidden to give complete title service is that such service is relied upon by the buyer. The inducement of such reliance is the essence of practicing law. A layman cannot avoid the rule by employing salaried attorneys nor by using so-called "independent" attorneys who are essentially the creatures of their employer.\textsuperscript{117} This rule, of general application in all unauthorized practice litigation, is of equal force when lay excursions into the title field are involved.\textsuperscript{118}

E. The Effect of Inconsistency

At best, the foregoing review of present authority leaves one in a state of confusion as to what the courts will or will not permit title companies to do.\textsuperscript{119} At worst, it takes one into a never-never land in which courts ignore the real substance of day-to-day title transactions, the needs of the participants, and the need for clearly enunciated goals.\textsuperscript{120} The courts have adopted halfway measures incompatible with legal logic or functional utility. Such legal confusion is important, since until it is resolved home buyers will lack proper protection, and the various land transfer institutions will be unable to act vigorously and purposefully. Strong public policy considerations require that home buyers receive advice and assurance not presently afforded, and that, in

\textsuperscript{117} See cases cited note 14 supra.


\textsuperscript{119} In the summary to the annotation found at 85 A.L.R.2d 184, dealing with title examination activities by lending institution, insurance company, or title and abstract company, as illegal practice of law, the annotator says:

In conclusion, the varieties of factors involved, statutes applied, and judicial attitudes reflected, makes substantially impossible the formulation of any neat legal statement as a basis for predicting results. Although some of the cases reaching opposite results may be truly contrary, and others reconcilable, any comprehensive description undertaking such a catalogue would be open to argument at best.

\textit{Id.} at 188.

\textsuperscript{120} \textit{Johnstone \& Hopson}, supra note 5, at 173, have said:

Uncertainty in the law of unauthorized practice has been increased by failure of the courts to clarify adequately policy on the subject. They have failed to sufficiently explore and articulate the goals they are working towards in allocating functions to the bar and its competitors. Nor have they fully considered the implications of the goals that they apparently do articulate.
return for the one to three billion dollars paid each year in closing costs, they obtain maximum protection. At the same time the interests of institutions involved in the transfer process cannot be ignored. Title insurance is used primarily to protect mortgagees; mortgage credit is an integral part of most home buying; and the bulk of these mortgages are held by institutional lenders having legitimate needs which must be fulfilled if revolutionary changes in the economy are to be avoided. Institutional financing undergirds the entire construction industry, which is probably the largest segment of the industrial mix. Although completely consistent data is unavailable, in 1966 the outstanding mortgage indebtedness on one to four bedroom family houses was $255.1 billion of a total countrywide mortgage indebtedness of $347.1 billion. In that year the total value of new residential buildings was between $15 billion and $19 billion of a total of all new construction of between $61 billion and $74 billion. Also to be considered is the personal welfare of a host of individuals besides home buyers—lawyers, owners and employees of financial and insuring institutions, their suppliers, and the entire construction industry. The title insurance companies themselves must be considered. Allegedly, they collect premiums of some $130 million per year, have an invested capital of $500 million, and pay employees, numbering 42,000, annual salaries of $280 million. The very size of the enterprise demands serious circumspection before suggesting innovations. However, if innovation is needed it should be given high priority.

Judicial failure to establish a clear doctrinal basis for such innovation may be the source of frustration to those who are eager for immediate answers to all the questions which have been shoved under the rug. But in many respects this failure is a singular blessing. A new start is called for. Satisfactory legal doctrine cannot be developed until there is clear understanding

121. The Director of Research of the National Association of Real Estate Boards estimates that in recent years nine out of ten housing sales have involved a mortgage. LAWYERS' TITLE NEWS 8 (Jan., 1968).
122. The American Bankers' Association's estimate for that year was $225 billion. SUBCOMM. ON HOUSING AND URBAN AFFAIRS, COMM. ON BANKING AND CURRNCY, UNITED STATES SENATE, A STUDY OF MORTGAGE CREDIT 146 (1967).
123. STATISTICAL ABSTRACT OF THE UNITED STATES 462 (1967).
124. Id. at 712, 713.
125. Id. at 711, 713. Statistics vary depending upon what items are included in the data.
126. Burlingame, Can This Marriage Be Saved?, 47 TITLE NEWS 75 (No. 1, 1968). These figures may be inflated and at best can be based on an educated guess.
of the practical alternatives presently available, and the competing needs of the parties. These are unexplored functional problems, and the lack of consistent, well-reasoned legal doctrine permits the courts to approach them realistically and without the embarrassment otherwise created by case law geared to arrangements no longer socially suitable. We are, therefore, relatively free to consider the institutional context in which the law will develop and the courses of action which this context should encourage.

III. THE INSTITUTIONAL CONTEXT

A. THE PROBLEMS OF PRESENT CONVEYANCING SYSTEMS

The exact details of land transfer vary from one locality to another. However, it has been suggested that under the impetus furnished by the growing national mortgage market, sufficiency stylized procedures are developing in the buying and selling of homes to permit one to speak of a “typical” transaction having certain characteristics, despite local variations in detail. In a “typical” transaction, the buyer and seller are brought together by a real estate broker. After the contract of sale is signed, one of two procedures is followed. The buyer may turn over to the broker the work of obtaining financing and closing the transaction. The broker then goes to a lending institution, which receives title assurance from its own house counsel, an “independent” attorney, or a title insurance company. The details of closing the loan are handled either by the broker, the lending institution, its attorney, a title insurance company or an escrow company. Under the other procedure the buyer approaches the lender directly. In either event, the buyer is not represented by counsel, and the entire process is carried out by laymen or by corporations acting through attorneys who are in fact their alter ego.

127. It is now being urged that institutional lenders should demand title insurance in the case of all mortgages, even if sale is not immediately contemplated, in order to preserve long-term liquidity. Schwartz, Title Insurance Liquifies “Frozen” Mortgage Assets, 46 Title News 15 (No. 9, 1967).

128. Payne, A Typical House Purchase Transaction in the United States, 30 Convey. (n.s.) 194 (1966); Payne, 101 Home Buyers, 16 Ala. L. Rev. 275 (1964). Professor Raushenbush has quite properly warned against the lack of hard data as to how American conveyancing is actually carried out. Raushenbush, Under the Microscope, 47 Title News 14 (No. 1, 1968). Until such data is available, if we are to move forward, we are forced to rely upon the best evidence at hand, even if some of it may be of an impressionistic nature.

129. This system is strongly reinforced by the insistence on the
Such an arrangement requires an entirely new phrasing of part of institutional lenders and title insurance companies that their attorneys do the major part of the work. In the Report of the Committee on Real Estate Contracts of the A.B.A. Section of Real Property, Probate & Trust Law, *Handling and Closing Real Estate Transactions*, 1 REAL PROP., PROB. & TRUST L.J. 463 (1966), it was reported that a questionnaire sent to life insurance companies indicated that 33 of the companies used their own attorney to close loans; 23 used title insurance company employees; 29 used a lender’s attorney; and only 5 used the borrower’s attorney. The report did not indicate the extent to which the procedure was demanded. Wis. Stat. Ann. § 235.088 (Supp. 1967) prohibits any bank, savings and loan association or other lender or lending agency from designating an attorney to represent the mortgagor’s interest “when the mortgagor has or desires a different attorney for that purpose.” See also Wisconsin Savings and Loan Commissioner Issues Warning to Savings and Loan Associations, 32 *Unauthorized Practice News* 96 (Spring, 1966). It should be noted that the statute does not literally forbid the lender from having its own attorney. While the statute has not been construed, the author is informed by Mr. John B. McCarthy, staff counsel for the State Bar of Wisconsin, that the committee hearing records indicate that no such prohibition was intended. As to who selects the attorney he reports a variety of practices in different parts of the state:

As a practical matter, we conclude that there is no uniform practice in this state. In some of the larger cities, such as Madison, Racine, Green Bay and others, the banks and savings and loan associations will accept the title opinions of nearly every member of the bar. (In those few instances in which they feel they cannot rely on such opinion, they will have their own lawyer reexamine the abstract without charge.) Naturally, this is the preferred practice in our estimation. In some communities, where the mortgage lenders insist on opinion of their own counsel, other lawyers in representing the purchaser will adjust their fees to credit the client for the amount paid as part of the loan fee for title opinion to the lender.

In a number of communities, and in the Milwaukee area, I believe unfortunately that the purchasers frequently have to rely on the lender’s attorney, rather than incur the additional financial burden of a separate attorney who will render a title opinion for the purchaser exclusively.

The above information pertains to the local lending institution practices. Our experience is that the large insurance companies loaning money on residential properties insist that their local counsel examine the abstract, and the buyers usually rely on such opinion.


The American home buyer, unlike his English counterpart, has not been educated to the need for two lawyers in a land transfer and, advisedly or not, is under the impression that if the title is good enough for the mortgagee it is good enough for him. The English practice of having two solicitors is no doubt in part the result of the enforced system of scale fees, whereby no savings results from having only one. Where a solicitor represents both parties to a land transfer he receives the full scale fee from each. This system has come under severe criticism, and the National Board for Prices and Incomes has recommended that in such cases the solicitor receive only 50 per cent in addition to what he would be paid for representing a single party. *Report No. 54, Remuneration of Solicitors*, Cmd. 3529 (1968).
the argument on the role of title insurance companies. Up to now commentators have attacked title insurance companies for unauthorized practice because they have used paid attorneys who do not represent the buyer. But the buyer gets no better treatment if the loan is handled by the "independent" lawyer of a bank, savings and loan association, or mortgage company. Thus, it is meaningless to attack the title companies without considering the institutional lenders. It must be recognized that the title companies play only a satellite role. Whether the legal work incidental to his purchase is carried out by such a title company or by the institutional lender is immaterial to the buyer.

To the cynic, a dispute between the bar and the insurance companies may appear to be merely an economic struggle between equally qualified contenders. But, when it is recognized that the overriding issue is whether corporate lenders should be allowed to dominate and direct conveyancing for their own exclusive benefit, a different face is placed on the matter, and the interest of the general public becomes obvious. The ultimate objective of the rules regarding unauthorized practice is to obtain maximum protection for laymen unacquainted with legal technicality. The existing system fails completely in this respect and should be assessed de novo.

Although the system may seem to have grown like Topsy, to say that it is the product of chance would be fallacious. A number of easily recognized forces have been decisive. To begin with, the conventional system of establishing title to land is indefensibly inefficient and has been steadily breaking down under its own weight. It has been a source of chronic frustration on the part of all laymen who have had to deal with it.

During approximately the last half-century the source of mortgage funds has drastically shifted from individual lenders to financial institutions. Concurrently, the prevalence of home mortgaging has greatly increased. As institutional lending has mushroomed, the paper work imposed on the lenders has also burgeoned, and the invention of mortgage insurance and the development of a national market have created a demand for a highly stylized transaction. Under these conditions lenders have manipulated procedures to fit their own needs insofar as is compatible with the law. In particular, they have demanded that the details of the mortgage transaction be handled by their own agents or by others sufficiently dependent on the lender to be willing to meet its requirements. The system that has resulted
is one which suits lenders but which has minimal advantage to
the home buyer.

B. ALTERNATIVE CONVEYANCING SYSTEMS

It can be argued that governmental intervention is not
needed, that both the courts and the legislatures should adopt a
policy of "wise and masterly inactivity," and that organic growth
should be permitted to proceed unimpeded. But, such a course
serves the needs of society very poorly. Careful consideration
should be given to the issue of what affirmative action can be
taken to make the process of acquiring title more compatible
with fairness to the purchaser.

1. Sanctioning Corporate Conveyancers

One possibility is that the courts accept de jure what is now
a de facto situation, and permit corporations to act as convey-
ancers. To do so would violate traditional canons against corpo-
rate practice of law but might be justified as a permissible excep-
tion on grounds of public policy. This form of conveyancing has
the support of the broker-mortgagor-title insurance company en-
tente and actually prevails in some parts of the country. Where
it has been used, no strong vocalized objections nor complaints of
inconvenience from the public have been heard. Nevertheless, it
is doubtful that most courts would sanction such an alternative if
made fully aware of all the facts. It is too much at war with the
whole spirit of the rules against unauthorized practice, creates
insoluble conflicts of interest for the attorney involved,\textsuperscript{130} gives
the home buyer an unwarranted sense of security, and encour-
gages the increase of costs. Furthermore, a corporate monopoly
of conveyancing might have even more serious indirect and gen-
eralized results than those occurring directly in single trans-
actions.

\textsuperscript{130} Tucker, \textit{Whom Does the Settlement Attorney Represent?}, 47
\textit{Title News} 8 (No. 3, 1968); \textit{Lawyers and Title Insurance}, 51 \textit{Judicature}
112 (1967). At least theoretically these difficulties can be avoided.
Lieberman, \textit{supra} note 96, at § 1.12. In the cases in which the furnishing
of complete title service has been enjoined, the conflict of interest im-
posed upon the attorney involved has been generally alluded to. \textit{See}
\textit{also} T. Smedley, \textit{Professional Responsibility Problems Relating to
Mortgage Transactions} (1966). Curiously enough, one of the most
forceful indictments of the "one lawyer" method of handling title
transactions has come from the American Land Title Association. \textit{State-
mament in Opposition to Action by the Board of Governors to Sponsor
a National Title Insurance Company} 8-9 (1967).
It is recognized among disinterested observers that radical and far-reaching reform of the entire conveyancing system is needed if we are to have fair, efficient, and moderately-priced land transfers. But if the lending institutions and the title insurance companies should succeed in obtaining a monopoly, the reform movement would be stultified. Lacking incentive for reform, the companies would be indifferent or hostile to it and laymen would possess none of the knowledge and expertise needed to recommend viable alternatives. The bar, having been deprived of this kind of practice, would lose both the interest and technical skill necessary to frame and effectuate the required measures.

Finally, the system of corporate conveyancing would further fortify the most unsatisfactory aspect of the land transfer system: out-dated public land records. Almost universally these records are maintained in such an antiquated form that they are, for practical purposes, unusable. As a consequence, the public has been forced to rely upon private sets of records kept by abstracters and local title insurance companies. The public, of course, pays the price for this unwarranted duplication—a price which in many instances is determined in a monopolistic setting. Because this indirect tax upon the land-buying public for the benefit of private individuals is intolerable, the heart of the modern reform movement is a complete renovation of the recording system. To legalize corporate conveyancing would be to destroy a major incentive for such reform.

If the courts should conclude that corporate conveyancing is compatible with the public interest, a number of innovations would be required. Lawyers cannot solicit and cannot compete with lay organizations which are free to do so.¹３¹ Once convey-

¹３¹ This has been universally admitted by the bar. See, e.g., Adler, Lawyers and Title Insurance Companies, 22 Unauthorized Practice News 13 (No. 3, 1956); Cedarquist, Lawyers Aiding Unauthorized Practice of Law, 28 Unauthorized Practice News 348 (1962-3); Clark, The Effect of Unauthorized Practice of Law upon the Ethics of the Legal Profession, 5 Law & Contemp. Probs. 97 (1938); Report of the A.B.A.'s Standing Committee on Unauthorized Practice of the Law, 84 A.B.A. Rep. 336, 590 (1959); 35 A.B.A. Rep. 199 (1960); 88 A.B.A. Rep. 243, (1963). The title companies particularly have been waging a vigorous advertising and promotional program. See, e.g., Report of the Public Relations Committee, 45 Title News 39 (No. 1, 1966); Report of the Chairman, Public Relations Committee, 44 Title News 72 (No. 1, 1965); Report of the Secretary and Director of Public Relations, 44 Title News, 88 (No. 1, 1965); 44 Title News, 74 (No. 1, 1965) (report regarding the appointment of Deane and Heller as the Association's public relations advisors); New Pamphlets Stimulate Public Educa-
ancing is recognized as a function of corporations, sufficient business to encourage individual lawyers to maintain the required expertise will no longer exist. When the bar can no longer carry out this kind of work, corporations privileged to act as conveyancers should be compelled to do so. In no other way could the public be assured of proper supervision of all title transactions. In return for this monopoly the corporations should accept public utility status\textsuperscript{132}—a status requiring that they adopt uniform accounting systems\textsuperscript{133} and submit to regulation as to policy cover-

\textsuperscript{132} Title insurance companies, like other insurance companies, are already subject to potential regulation. They are also subject to the antitrust laws and are not within the limitations of the McCarran Act, 15 U.S.C. §§ 1012, 1013 (1967). Currently they are undoubtedly violating antitrust laws by the unilateral fixings of rates and coverage. United States v. Southeastern Underwriters Ass'n, 322 U.S. 533 (1944); United States v. Chicago Title & Trust Co., 242 F. Supp. 55 (N.D. Ill. 1965); Calvin & Dirlam, Anti-Trust Regulation and the Insurance Industry: A Study in Polarity, 11 Antitrust Bull. 235 (1966). See generally Wiley, Pups, Plants and Package Policies, 6 Vill. L. Rev. 281 (1961); Note, Applications of Federal Antitrust Laws to the Insurance Industry, 46 Minn. L. Rev. 1088 (1962); Note, The Title Insurance Industry and Governmental Regulation, 53 Va. L. Rev. 1523 (1967). Even strong supporters of title insurance are beginning to advocate government control. Roberts, Title Insurance: State Regulation and the Public Perspective, 39 Ind. L.J. 1 (1963). The American Land Title Association has promulgated its own Model Title Insurance Code (1965), an effort to obtain favorable state regulation rather than more stringent federal control.

\textsuperscript{133} The title insurers have never adopted uniform accounting systems, a fact that has caused dissatisfaction in at least the powerful New York Insurance Department. Beal, There's No Accounting for Systems, 47 Title News 34 (No. 1, 1968). See also Gray, Title Insurance Companies in Examination of Insurance Companies 227, 237–47 (1954). George W. Alger, Report To His Excellency Herbert H. Lehman, Governor of the State of New York 52–54 (1934). Although no study has been made of the system of reporting used by the companies, it is known that in some states they file no reports at all and in others reports of the most sketchy form. The insurers themselves are presently engaged in an effort to standardize their various accounting systems. Julin, A Better Best Seller, 47 Title News 25 (No. 1, 1968). However, there is no evidence that any truly satisfactory system, properly allocating expenses to various categories of underwriting, loss, overhead, and the like is evolving. The lack of proper accounting is particularly marked in the case of companies carrying on mixed national and local operations. The major cost for a local company is that of maintaining its title plant, but no such cost is entailed in operating on a national basis. Where such dual operations are being carried out the company should be compelled to keep separate accounts relating to the
and rates. Obviously, under these circumstances lending institutions should be excluded from conveyancing, and the monopoly should be vested in regulated title companies. Lending institutions are not interested in land transfers in which they are not the mortgagees and have no desire to serve the general public in other types of transactions. Since conveyancing activities are peripheral to lending institutions, they could hardly be subjected to proper controls. Furthermore, if corporate conveyancers were compelled to serve all persons, it should be made economically possible for them to do so. Thus,

two forms of insurance, with an equitable allocation of general overhead expenses between the two.

134. In the case of most insurance, regulation of the policy form is designed primarily to prevent unwise underwriting practices which might threaten the solvency of the company. In the case of title insurance the main thrust will have to be directed toward obtaining adequate coverage. Note, The Title Insurance Industry and Governmental Regulation, supra note 133. It is now being contended that even to meet the demands of the national mortgage market the present LIC and ALTA standard mortgagee policies will have to be liberalized to provide blanket protection, without exception. Bacon, Revamping the Mortgage Market—The Title Company's Role, 47 TITLE NEWS 41 (No. 1, 1968).

135. Such regulation is already permitted in a few states. E.g., LA. REV. STAT. § 22:1406 (1959); N.Y. INS. LAW §§ 186, 440 (McKinney 1966); TEX. INS. CODE, art. 9.03 (1952).

Assuming adequate accounting is provided, three major problems will be faced in rate fixing. The experience of the Florida Lawyers Guaranty Fund indicates the present uniform national rate of $2.50 per thousand for mortgagee's and $3.50 per thousand for owner's coverage is too high. The Fund charges only about $1.80 for combined coverage, SCHEDULE OR ADDITIONAL CONTRIBUTIONS (1961); has a loss ratio of just over one per cent of premiums, Lawyers Invade Title Insurance Business, Business Week, Oct. 21, 1961, at 47; and earns profits of 50 per cent or more. Rush, Title Assurance—A Bar Responsibility, 38 Fla. B.J. 78 (1964); Yelen, Lawyers' Title Guaranty Fund: The Florida Experience, 51 A.B.A.J. 1070 (1965).

The second question is whether the additional 40 per cent premium for the owner's coverage is justified? The traditional wisdom is that it is, because of the longer duration of coverage. 5 TITLE INSURANCE COMPANIES (1963). This argument is disproved by the Florida experience, and by the fact that virtually all losses occur within the first few years of coverage, Dealy, One Man Looks at Public Regulation, 42 TITLE NEWS 5 (No. 3, 1963), and that all losses combined, somewhere in the two per cent range, Fiflis, supra note 102, at 442; Roberts, supra note 133, at 11, are so small as to be inconsequential.

The third question is whether all title insurance rates are too high? Sparse available information indicates that commercial title insurance company profits range from a little over four per cent to better than 35 per cent of gross income. 5 TITLE INSURANCE COMPANIES 18-19 (1963); Willatt, Title Insurance, BARRONS, Sept. 18, 1961, at 5; Lawyers Invade Title Insurance Business, supra. These returns are incompatible with public utility status and, until the companies produce adequate statistical data, regulatory bodies will be justified in setting rates de novo.
in small communities where the volume of land transfers is insufficient to support more than one institutional conveyancer, it would be unrealistic to permit an unregulated lender to drain off the most profitable work, leaving only the dregs to the regulated title company.

Another problem arises in the case of sparsely populated counties, where the volume of all property transfers is insufficient to support even a title company vested with a monopoly. Assuming that title companies will continue to establish multiple branches, as seems to be the trend today, such companies, in return for being permitted to establish more than one office, should be compelled to locate branches in every county seat within their respective areas of operations. The loss incurred in the smallest communities would be balanced out by profits made in large cities. The same principle applies in the case of other public utilities, such as railroads, which must support some unprofitable stations as return for their franchise privileges.

A principal reason for forcing public utility status on the title companies would be to insure adequate protection for the land buyer. The companies would be subjected to the same liability as attorneys; that is, they would be compelled to give advice as to the full range of the buyer's rights and obligations and would be liable in tort for any act of negligence in connection with the transfer transaction. Title insurance companies may already be under such an obligation when they assume control over transfers, but this liability should be clearly enunciated and accepted. Adoption of such a theory, where the title com-

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136. A basis for such liability has already been established. Valdez v. Taylor Auto. Co., 129 Cal. App. 2d 810, 278 P.2d 91 (1955); Kentucky State Bar Ass'n v. First Fed. Savings & Loan Ass'n, 342 S.W.2d 397 (Ky. 1961); Vogler v. Grossfield, 25 Unauthorized Practice News 194 (Mich. Cir. Ct. 1959); Renkert v. Title Guar. Trust Co., 102 Mo. App. 287, 76 S.W. 641 (1903); O'Shea v. First Fed. Savings & Loan Ass'n, 405 S.W.2d 180 (Tenn. 1966); Lieberman, supra note 96, at §§ 17.8-17.10; McMahon, Title Searches: Tort Liability in California, 7 Santa Clara Law. 257 (1967); Payne, 101 Home Buyers, 16 Ala. L. Rev. 273, 336 n.51 (1955). The theory of liability underlying these authorities is the classic tort concept that when one undertakes to act he must exercise due care. The same theory was applied even more sweepingly in an analogous California case where it was held that a building and loan association which ostensibly furnished financing only but which actually exercised supervision over construction could be held to liability for structural defects in a house. Burgess v. Conejo Valley Dev. Co., 61 Cal. Rptr. 333 (1967). The possibility of liability is beginning to be appreciated by real estate brokers. Bernstein, The Arizona Realtors and the 1962 Arizona Constitutional Amendment, 29 Unauthorized Practice News 169 (Summer, 1963); Garber, Don't Make A False Assumption, 46 Title News 2 (No. 5, 1967).
pany is acting for the buyer, seller and mortgagee, may create serious conflicts of interest. Unless the courts find that these conflicts present an insuperable obstacle to corporate conveyancing, the rule should be established that the primary loyalty extends to the buyer-mortgagor, the party most needing protection. To assist in policing title companies, it would be advantageous to adopt uniform closing rules, limiting fees and other charges and specifying the procedures to be followed. In addition, it should be mandatory that a mortgagor always receive the same assurances given the mortgagee, whether it be in the form of an attorney's opinion or a title insurance policy.

2. Prohibition of Unauthorized Practice

An alternative to a formally recognized system of corporate conveyancing would be strict enforcement of the common law prohibition against unauthorized practice. Title insurance companies would be barred from everything except pure insurance, and lending institutions would be forbidden to go beyond accepting or rejecting instruments offered by the borrower's attorney and title insurance policies issued by national companies. Such a system is undoubtedly ideal from a theoretical standpoint, but it presents practical difficulties which should not be minimized. In those areas where local title insurance companies currently monopolize the examination of titles, the bar no longer has the expertise required for the work. A breakdown of the land transfer system in such areas could be avoided only by a massive program of re-education of the bar as a prelude to regaining control of conveyancing.

Furthermore, competency in real estate

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137. Such rules are already occasionally used by bar associations. Committee on Real Estate Contracts, Constructions Contracts and Closings, 2 Real Prop., Prob. & Trust J. 325 (1967).

138. The standard title insurance policy issued in California already gives such protection.

139. The American Bar Association's Section of Real Property, Probate and Trust Law is notoriously oriented toward title insurance company interests. Its joint committee with representatives of the American Land Title Association has reported that in large metropolitan areas, where title insurance has been made available by the proprietary companies for many years, it would "be impractical, if not impossible, to change the practice at this time." R.P.P.T.L. Newsletter, 3 Real Prop., Prob. & Trust Law J. 62A, 62D (1968). Stanley Balback, who heads the American Bar Association's Special Committee on Lawyers' Title Guaranty Funds and whose bias is equally strong in the opposite direction, does not admit that such a change would be impractical or impossible, but concedes that a program of continuing legal education would be needed. Title Insurance and the Lawyer, 52 A.B.A.J. 65 (1966).
Matters is by no means insured by mere admission to the bar. Mortgage lenders are entitled to insist that the borrower employ an attorney who is capable of carrying out the work in a manner acceptable to the lender. A prerequisite to prohibiting mortgagees from using their own attorneys would be the establishment of an "approved attorney" system, such as that now used by national title insurance companies. Perhaps formal certification of competency similar to that under discussion by the American Bar Association for some years could be utilized.

Even if a qualified bar can be assured, the question remains whether the courts will be willing to make conveyancing, in fact as well as in theory, the monopoly of the bar by a simple return to the prior status quo. Corporate conveyancing came into existence largely because of legitimate dissatisfaction with the inefficiency of traditional land transfers. The bar has, up to now, taken no effective steps to remedy this inefficiency. The general nature of the reforms needed has been summarized as the creation of a usable system of land records, the shortening of the period of search, and the rapid purging of inconsequential formal errors from the records. These measures, if systematically adopted, would permit lawyers to handle land transactions with a speed and certainty that would meet the needs of the modern mortgage lender. They are practical and reasonable and the courts might well make their adoption a prerequisite to the suppression of unauthorized practice by corporations.

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140. It is admitted that a primary reason for the early spread of title insurance in large cities was that the system of public records had become so archaic as to make direct search by attorneys unprofitable. Roberts, Title Insurance, supra note 133.

141. The most "radical" measures taken so far in this country have been the marketable title acts. These acts cut off most interests in land which have not been re-recorded within a stated period of years. This period has been set at 40 years by the Model Marketable Title Act. L. Snies & S. Taylor, The Improvement of Conveyancing by Legislation 6 (1960). Neither this nor any existing legislation is actually effective in reducing the period of search to the period named. Payne, In search of Title (Part II), 14 Ala. L. Rev. 278 (1962). It may surprise American conveyancers to learn that in England, even where title is not registered, a chain of title extending back only 30 years has been declared marketable by statute and that the Law Commission is currently recommending that this period be reduced to 15 years. Transfer of Land. Interim Report on Root of Title to Freehold Land (1967). Hard-shelled American conveyancers will answer this by arguing the existence of "different conditions" in this country. The proper retort is that of course conditions are different in England: They have been made so because the English people long ago had the good sense to make wholesale changes in their land law to meet the needs of modern society.

142. In Wayne County Bar Ass'n v. Klein (Mich. Cir. Ct. 1934) in G.
3. **Limited Title Insurance**

A third solution of the unauthorized practice controversy is to permit local title insurance companies to issue policies based on their own examination but to allow them to perform no other functions in connection with land transfers. An accompanying provision might prevent the issuance of such policies except to attorneys engaged in independent practice. Such a limitation, if coupled with a rigid enforcement of the unauthorized practice ban against lenders, would at first glance appear to be a satisfactory compromise. The objection—not simply a selfish one—is that it excludes the attorney from the most profitable aspect of title work. Traditionally the price paid for title examination has probably been too high. At the same time fees for the ancillary services rendered by attorneys have been too low. But the two balanced out, and the public obtained adequate service at a reasonable price. This arrangement will be upset if the lawyer loses his fees for title examination but continues to perform ancillary services, and he would be forced either to charge larger fees or to abandon this segment of practice. In one case the public would suffer financially while in the other it would be deprived of needed services. There is evidence that in some large cities lawyers are able to make a profit by handling title closings, based on insurance policies issued by local companies.\(^4\) But to do so requires a sufficiently large volume of work to permit "assembly line" procedures. Such a volume of transactions can seldom be channeled into a single law office unless the attorneys involved represent one or more large lending institutions; but if this is allowed, the "solution" of the title insurance issue only intensifies the problem of unauthorized practice by lenders.

**IV. BELLING THE CAT**

Thus, several clearcut alternatives\(^4\) to the present unsatisfactory

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\(^{\text{Brand, Unauthorized Practice Decisions 253, 256 (1937), the court said: "Members of the bar must not be unmindful of the fact that when the law says that laymen cannot practice law, that we must see that the practice is properly conducted."}}\)

\(^{\text{The bar has generally considered the New Jersey Mortgage Associates cases a notable victory. The more thoughtful, however, will consider the conclusion of the Housing and Home Finance Agency that, insofar as the public was concerned, these decisions merely meant added cost and that a similar decision in the Quinlan and Tyson case will increase costs in Chicago. Loan Closing Costs, supra note 58, at 24-25, 36-38.}}\)

\(^{\text{143. See note 34 supra. See also Hennessey, Let's Quit Losing Money on Real Estate Closings, 6 Law Off. Ec. & Man. 175 (1965).}}\)

\(^{\text{144. In a compromise-oriented society it is refreshing to read the}}\)
factory system of conveyancing are available, each with certain advantages and disadvantages. However, these alternatives cannot be discussed without considering judicial and legislative programs necessary for their implementation. The adoption of any such program depends upon public officials, motivated not so much by legal theory and their sense of justice as by the pressures which interested parties exert on them. It is therefore necessary to consider each of the interested parties to the title transaction—his needs, his wants, what he gets, the extent of his acceptance of the status quo, and the potential assistance he may offer in support of any effort to obtain change. The interested parties are land buyers, sellers, brokers, mortgagees, title insurance companies, and the bar.

A. LAND BUYERS

It is easy to generalize with regard to the home buyer, but since individual buyers have different characteristics and act in dissimilar circumstances it is not so easy to justify the conclusion one reaches. It can be said with a degree of confidence that the home buyer is engaged in a highly technical transaction about which he is inexperienced; that he dislikes lawyers; and that he is therefore receptive to the suggestion that laymen carry out the entire transaction for him, particularly if some of the services are “free.” He wants complete security with a minimum of expense and bother. He needs, and in theory has a right to demand, a transaction meeting modern criteria of efficiency. As a minimum he should have formal protection and the advice and assistance of disinterested and technically qualified counsel. It is generally agreed that the most insistent problem facing American conveyancers today is how such aid can be afforded.\(^\text{145}\)

\(^{145}\) Comment of the late Albert Schweitzer:

Progress always consists in taking one or other of two alternatives, in abandoning the attempt to combine them. The pioneers of progress have therefore always to reckon with the law of mental inertia which manifests itself in the majority—who always go on believing that it is possible to combine that which can no longer be combined, and in fact claim it as a special merit that they, in contrast with the “onesided” writers, can do justice to the other side of the question.


Local custom will largely determine the nature and quality of the service the buyer will receive. At worst, after paying the entire cost, he will receive no advice or advice which is either false or directed toward protecting the interests of the other parties. He may receive no certificate of title, title insurance policy, or other formal protection. If he suffers loss he may

Transactions, Proc. ABA Sec. of Real Prop., Prob. & Trust Law 187 (Pt. II, 1964). For a detailed discussion of the need for representation of the parties by attorneys even in states where title insurance and escrow companies handle most of the conveyancing, see Lieberman, supra note 96, chs. 1-3.

Even the title insurance companies are becoming concerned over the lack of protection afforded mortgagors of homes. Scott, Homeowners, Too, Need Title Insurance, American Banker (April 30, 1967). The solution suggested by Scott is that an attempt be made to sell more owner coverage.

By coincidence, at the time of increasing concern over the elimination of the lawyer from the title transaction in the United States, in England there is a vocal public demand to reduce the role of the solicitor, or, at a minimum, to scale down conveyancing costs. B. Abel-Smith & R. Stevens, Lawyers and the Courts 385-86, 389-93 (1967); The Law Commission, Transfer of Land, Interim Report on Root of Title to Freehold Land (1967); Carter, Fight for Title, The Guardian (London) Feb. 28, 1967, at 8. The heated debate which has raged both in the press and in professional organizations has led to the appointment of two official investigating bodies. The National Board for Prices and Income has already submitted its report, recommending certain changes in the remuneration of solicitors. See note 129 supra. As this is written, no report has as yet been submitted by the Monopolies Commission, which has under study the question whether lay conveyancing should be permitted.

Our information as to the exact extent to which home buyers are represented by attorneys is extremely limited and estimates range considerably. In a study made of practices in one small southern city, it was found that personal representation was highly exceptional. Payne, supra note 128. Unterberger concludes that "the home buyer rarely finds it necessary to employ legal services." Comment, The Economic Dilemma of the American Lawyer, 1 Law Off. Ec. & Man. 40 (No. 2, 1950). In the article in The Wall Street Journal, Aug. 6, 1965, at 14, col. 1, it was said that Levitt & Sons reported that at their Bowie, Md., development fewer than five per cent of all buyers had their own lawyers. On the other hand, in New Jersey State Bar Ass'n v. Northern N.J. Mortgage Associates, 32 N.J. 430, 161 A.2d 257 (1960), the court pointed out that approximately 50 per cent of purchasers had no independent counsel and in 10 per cent the sellers were not represented. Note that failure to obtain prior representation for the parties is not a phenomenon confined to home purchasing transactions, but may also accompany the purchase of farms. C. Harris & N. Hines, Installment Land Contracts in Iowa 16 (1965).

There is great misunderstanding among home buyers, many of whom assume that title insurance issued in the name of the mortgagee also gives the mortgagor protection. Payne, supra note 128. In New Jersey and Maryland efforts to avoid this sort of misunderstanding have resulted in statutes requiring that the title company issuing a mortgage
have no redress. In the interim he will believe that he is getting full protection and adequate advice from those with whom he is dealing, who will be clothed with all the outward indicia of respectability and will usually be licensed by the state. Thus, his reliance is certainly understandable, even though it may be unjustified.

Only the most tentative answer can be given to the question whether the existing system has produced results sufficiently serious to cause concern. There is evidence that the title transaction is becoming more complex and more expensive, but whether nonrepresentation of home buyers is a factor in producing these results cannot be determined. Reports appear to indicate some gross inequities, but the individual home buyer is ignorant of what to expect and has no forum in which to air complaints of injustices. Thus, the extent to which he is being bilked cannot be determined with any degree of accuracy.

Admittedly, there is no widespread public dissatisfaction with the existing system. Nor does past experience indicate that articles in mass media “exposing” the system result in great public demand for reform. The difficulty is that the average homeowner goes through the buying process only once or twice in a lifetime, and, positing the threat of other immediate and pressing problems, he will not bestir himself about an injury long-since past or merely threatened in the remote future. Therefore, it can be assumed that any effective reform movement will originate, not in the general public and among home buyers, but from

Policy must notify the mortgagor of his right to obtain his own insurance. N.J. STAT. ANN. § 46: 10A-3 (1937); Report of the Committee on Title Acceptability and Standards, Proc. A.B.A. Sect. of Real Prop., Prob. & Trust Law 35 (Part II, 1962); see Md. Laws ch. 714 (1967). A less demanding requirement is that the policy itself shall contain a conspicuous notice on its face that only the mortgagee is covered. E.g., Wyo. Stat. § 26.1-462 (1957). Admittedly in certain areas buyer-mortgagors have been educated to the need for combined coverage. Johnstone & Horson, supra note 5, at 288, report that the Chicago Title & Trust Company contends that 90 per cent of their orders are for mortgagee-owner policies. In California the standard policy employed gives coverage to both the owner and mortgagee.

148. If there is a significant service to render . . . why are lawyers not more uniformly consulted in routine real property transactions? The answer lies partly in the illusion of security imparted by the presence of brokers and escrow officers in the transaction, partly in the reluctance of buyers and sellers to incur the expense of legal fees, and partly in the public ignorance of the need for legal services. Though this condition is far from new, the bar has done little to educate the public concerning the nature, costs and value of the services available from attorneys.

J. Lieberman, California Real Estate Transactions § 1.32 (1967).
specialized groups with peculiar interest and the capacity to make their views known.

It is pertinent that the purchaser of a home is not the only land buyer. Very powerful groups such as oil, mining and timber companies, as well as governmental units, are constantly engaged in acquiring real estate. All have an interest in reducing the cost, delay and uncertainty attendant upon their acquisitions. Unaware of the potential for reform, such groups have as yet taken no part in the debate as to what should be done, but the possibility of enlisting their support should be fully explored by proponents of change. Whether, if mobilized, they would support corporate conveyancing or lawyer-dominated conveyancing is again uncertain. They are not so much interested in protecting home buyers as in improving conveyancing generally. In enlisting their support, however, lawyers have one great advantage over their corporate competitors: The whole case for a lawyer monopoly of conveyancing must be built on radical reform of the land law and the methods by which titles are proved. Juxtaposed to this is the fact that the title companies have a vested interest in the deficiencies of the existing system. The lawyer reformer and those lay groups seeking more efficient conveyancing procedures are therefore natural allies who may become a dominant influence, if they can join forces.

B. Sellers

Another interested party, the seller, traditionally wanted or needed little from the title transaction that he did not already receive. He was interested primarily in maximizing the purchase price; matters such as nonrepresentation, insufficient protection of the parties, and the inefficiency of the transfer process were not of great concern to him. In any event, he has been another individual with no forum in which to voice his complaints. However, in recent years the character of sellers has shown a marked change and with these changes have come new wants and needs. A large number of sellers today are mass home builders who rely on credit and are eager to dispose of their product as expeditiously as possible. They deal with potential buyers who have small down payments and are frequently in a hurry to obtain occupancy. For these potential purchasers the cost and promptness of closings are sometimes determinative of whether a sale takes place. In attempting to meet the buyer's demands the builder is not concerned with whether they obtain proper representation and protection, but he is chronically frus-
trated by the delays and expenses of the whole transfer process. In an effort to stimulate sales he will often assume the burden of arranging financing and carrying the transaction to completion. He would undoubtedly support affirmative action with enthusiasm if he knew that reform was possible and practical. He is currently using corporate allies and is dependent upon corporations for financial assistance, but it is not clear which of the suggested alternatives would be most acceptable to him. It would appear that the builders' interests would best be served by the kind of reform favored by the enlightened lawyer.

C. Brokers

The position of the real estate broker is equivocal. In theory he is the agent of the seller, and on the basis of his own declarations, a "professional," governed by a code of ethics. In actuality, he is most frequently a hard-sell artist with no interest except that of earning a commission through a completed sale.

He does not merely lack an attorney but bitterly resents the appearance of one at any point in the transaction. He knows that "lawyers queer deals," are a menace to selling agents, and should be kept at as great a distance as possible. At the same time, he does not lack an attorney but bitterly resents the appearance of one at any point in the transaction. He knows that "lawyers queer deals," are a menace to selling agents, and should be kept at as great a distance as possible.

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150. The National Association of Real Estate Boards has a Code of Ethics which has been revised from time to time. Compare Code of Ethics adopted in 1924, in NELSON, THE ADMINISTRATION OF REAL ESTATE BOARDS 203 (1925) with N.A.R.B. INTERPRETATIONS OF THE CODE OF ETHICS (2d ed. 1964) (currently in effect). These codes of ethics may be looked upon with some degree of suspicion. Their primary purpose appears to be that of the usual trade association code to prevent what the proponents feel is "unfair competition." The provisions which can be termed truly ethical are generally hortatory in nature and sufficiently vague to include or exclude almost any actual practice. Finally, and most importantly, there seems to be little or no evidence that they are actually enforced and, in any event, they are not legally binding upon real estate brokers. For recognition of the much more stringent regulations applied to attorneys, see State ex rel. Bodner v. Florida Real Estate Comm'n, 99 So. 2d 582 (Fla. 1956).
151. That the real estate agent's interests may be hostile to even those of his client, the seller, has not escaped the courts. Hulse v. Criger, 363 Mo. 26, 247 S.W.2d 855 (1952).
152. This lies at the heart of the controversy as to whether brokers should be allowed to fill in form real estate sales contracts. The argument of the real estate agents, that they should be permitted to strike while the iron is hot and cannot wait until the buyer has obtained an attorney, is specious. The purchase of a home is a sufficiently important financial transaction that haste is not only to be avoided but should be actively prevented. However, most real estate brokers hold the conviction that as soon as a lawyer appears on the scene objections may be made which will interfere with closing the deal. LIEBERMAN,
time he knows that at some point an attorney will become involved, for mortgage financing is a nearly universal accompaniment of modern home purchases, and the mortgagor must be assured that the title of the mortgagor is sufficient to afford adequate security. To provide this assurance a lawyer will ordinarily be called upon to render an opinion. If the attorney represents the buyer, his entire loyalty will be to his client, and the broker can expect that he will make every objection which benefits his client’s interests. If, however, the attorney represents either the mortgagor or a title insurance company with whom the broker has regular, friendly and profitable relations, the danger of embarrassment and delay is minimized. The mortgagor needs a title sufficient only to protect its investment, and a title company can take business risks which would be unacceptable to a one-time buyer. Thus, it is in the interest of the broker to steer the buyer into the hands of the lender’s attorney or a title insurance company since neither would be expected to act in an “unfriendly” fashion.

While brokers probably have a bias in favor of corporate conveyancing, it is entirely possible that this bias could be eliminated by reforms in the conveyancing system. If lawyers would present the brokers with a program designed to reduce the present delays and frustrations, the breach between the two groups could be healed. Broker opposition to lawyer-dominated conveyancing may thereby be eliminated, and the powerful real estate lobby may even be enlisted on the side of the bar.

D. The Mortgagee

The mortgagee, concerned with the business of making loans on favorable terms, is indifferent to the buyer’s legal problems except insofar as the buyer’s title is sufficient to secure the loan and the mortgage security is properly executed and recorded.153


153. The Milwaukee Bar Association has seen fit to warn all lending institutions in the Milwaukee County area that the borrower will
Subject only to occasional restraint from a competitive market, the lender has no reason to minimize the cost of the transaction, since this cost will be borne entirely by the mortgagor.\textsuperscript{154} The institutional lender demands maximum security and will probably require title insurance for itself, but not for the buyer. Not only does title insurance increase the mortgagor's protection, but it is a prerequisite to sale of the mortgage in the national market.

Unless it is in some way affiliated with the title company, the lender is normally indifferent to whether the insurance company is local or national. But, lenders are increasingly insisting upon uniform, consistent, and prompt loan procedures.\textsuperscript{155} To obtain such service they are demanding that the entire mortgage transaction be handled either by their own paid staff, by a nominally independent attorney who does all of the lender's business and is for practical purposes its alter ego, or by a title insurance company.\textsuperscript{156}

Under these circumstances, the lending institutions do not appear to be promising allies in an attack upon a system they themselves have established. Here again, however, such an assumption may not be valid, because the task of establishing title

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receive insufficient protection if he relies on the institution's attorney: "Reputable lending institutions should encourage their customer to employ independent counsel." 26 Unauthorized Practice News 332 (Winter, 1960).

154. It has been suggested that builders in a competitive market can exercise strong pressure on lending institutions to keep down closing costs. Loan Closing Costs, supra note 58, at 39.

155. Although speed is generally not considered a primary objective in home buying transactions, gross delays by attorneys have in the past unquestionably alienated business men accustomed to prompt service. Speed of service is considered an inducement offered by the Chicago Title & Trust Company in its Cook County operations, Johnston & Hoessn, supra note 5, at 291, and the delay of lawyers in filling in merely routine forms was a primary reason for the Arkansas Supreme Court's reversal in Creekmore v. Izard, 236 Ark. 558, 367 S.W.2d 419 (1963), of its earlier decision in Arkansas Bar Ass'n v. Block, 230 Ark. 430, 323 S.W.2d 912 (1959). The indictments of "assembly line" methods of handling titles, found in such cases as In re Droker, 59 Wash. 2d 707, 370 P.2d 242 (1962) and San Antonio Bar Ass'n v. Guardian Abstract & Title Co., 156 Tex. 7, 291 S.W.2d 697 (1956) are justified in the context of the cases in which they were issued. However, the bar must be made to understand the impatience of laymen when abstracts are permitted to remain untouched on an attorney's desk for a matter of months, as has not been uncommon in the past.

156. On the other hand, as the Texas Supreme Court has pointed out, the institutional lender's argument that the transaction has become so complex that he cannot rely on outsiders simply fortifies the need for an independent attorney in the transactions. Hexter Title & Abstract Co. v. Grievance Comm., 142 Tex. 506, 179 S.W.2d 346 (1944).
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is not the primary business of the lender, but is undertaken simply to secure the mortgagee in its principal work of lending money. The delays and inconveniences of the present system cause habitual complaints from mortgagees. They use their own counsel or title insurance because they feel they are compelled to do so. If, however, they can be convinced that a general over-haul of the conveyancing system will ensure them the service they require while relieving them of much burdensome detail, their co-operation with the advocates of reform may be effectively mobilized. The most likely support in any such movement would come, if at all, from large trade organizations such as the Mortgage Bankers Association. But it must be remembered that while such groups represent their members, they do not control them, and active opposition to change could come from powerful individual lenders. 157

E. **National Title Insurance Companies**

The position of the national title companies creates certain ambivalences. They are not engaged in the unauthorized practice of law, except where they operate through abstract company agents. Their existence is threatened by the growth of local companies, suppression of which would permit the national companies to expand their business into areas from which they are now excluded. They also have a general interest in any improvement of the transfer system which would reduce title losses.

On the other hand, national title companies feel that it is desirable to further the general concept of title insurance and that an attack upon the local companies might impair the position of the entire title insurance enterprise. The difficulty of enlisting the support of such companies in an attack upon unauthorized practice is further magnified by the fact that the American Land Title Association embraces both segments of the industry and is dominated by the most energetic and intransigent of the lay conveyancing proponents. Since the strong conflicts of interest between the two types of insurers have been sedulously ignored, it is extremely doubtful whether an effective wedge could be driven between them. 158

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157. The author is indebted to Mr. Moses L. Goldbas of Utica, New York, for a file of proceedings of his local bar association's real estate committee, indicating that a proposal made by the committee to local lending institutions for an approved attorney system was summarily rejected by the latter.

158. The report of the president of the American Land Title Association regarding the lack of progress in even a tentative approachment
F. LOCAL TITLE INSURANCE COMPANIES

Local title companies will vigorously oppose any attempt to apply unauthorized practice principles to their activities. If they are forbidden to examine titles, their title plants will become valueless except for providing abstracts, and their most important source of revenue will be eliminated. The local title companies would also object to a system whereby they would be permitted to continue to examine and insure in return for their withdrawal from all ancillary activities. Even if such a compromise served the public interest, it would be unacceptable to the companies. It is true that their primary income comes from title examination, and ancillary services are often furnished at such low rates as to be an immaterial source of income.

between his organization and the American Bar Association is not encouraging to say the least. Nichols, 521,440 Minutes Ago, 46 TITLE NEWS 4 (No. 1, 1967). But see The National Conference of Lawyers and Titlemen Described as an Opportunity to Serve the Public Interest, 47 TITLE NEWS 10 (No. 4, 1968).

The American Bar Association has long been an advocate of the "conference" system for the purpose of resolving unauthorized practice disputes. However, its Standing Committee on Unauthorized Practice of Law has been careful to warn of the accompanying dangers:

They realize, too, that any compromise affecting the practice of law agreed to by the conference groups may well result by court interpretation in that segment of practice being forever lost to the bar. They are also well aware that if the bar sits idly by and apparently condones the practice of law by laymen in a field where for one reason or another the bar chooses not to litigate the issue, that the courts are prone to hold that the bar has forever lost that segment of practice because of such inaction.


Agreements between the bar associations and lay groups as to what does or does not constitute practice are influential upon the courts, but not binding. E.g., People v. Denver Clearing House Banks, 99 Colo. 50, 50 P.2d 468 (1936); State v. Indiana Real Estate Ass'n, 244 Ind. 214, 191 N.E.2d 711 (1952); Hulse v. Criger, 363 Mo. 26, 247 S.W.2d 855 (1952); State v. Dinger, 14 Wis. 2d 193, 109 N.W.2d 685 (1961).

The insurer is concerned only about its liability for monetary recompense; the assured wants the property and the ability to use it in the fashion contemplated. This point has been stressed by the English Law Commission in rejecting the suggestion that some form of title insurance (other than the government operated Land Registry) be employed in that country. TRANSFER OF LAND, supra note 141, at 7-8.

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The insurer is concerned only about its liability for monetary recompense; the assured wants the property and the ability to use it in the fashion contemplated. This point has been stressed by the English Law Commission in rejecting the suggestion that some form of title insurance (other than the government operated Land Registry) be employed in that country. TRANSFER OF LAND, supra note 141, at 7-8.

At this point generalizations are difficult because we lack adequate data and because what little information we have may be in conflict. For example, in Bar Ass'n v. Union Planter Title Guar. Co., 46 Tenn. App. 100, 328 S.W.2d 787 (1959), the Memphis title companies offered to waive all charges made for drafting instruments on the assumption that income derived from this source was insignificant. By contrast, Roberts points out that in New York City the companies make the largest part of their profit from ancillary services rather than from...
From this it might be assumed that the companies would be happy to turn over this part of their conveyancing work to the bar or any other group permitted to perform it. But for tactical reasons, totally apart from questions of economics, a large number of the companies feel compelled to offer a great deal more than insurance policies. In the first place, ancillary services, particularly if they are offered “free,” may attract business and retain customer good will. More importantly, the real objective of the title insurance industry is the complete elimination of the lawyer from the title transaction.\textsuperscript{101} The raison d’etre of the companies is the unsatisfactory character of traditional conveyancing; they currently feel that they are riding a wave of public insuring. \textit{Title Insurance, supra} note 132, at 16 n.47. Willatt, \textit{supra} note 135, at 5, reports that the Chicago Title & Trust Company derives 10 per cent of its income from escrow services, but indicates that as a general rule incidental sources of income are a minor matter to most title insurance companies.

101. In Florida and Colorado the true objective of the title companies has become more apparent as a result of life and death struggles between the commercial companies and lawyers’ title guaranty funds. In Florida, the companies first attempted to purchase existing abstract plants and then to refuse to issue any further abstracts. The Fund countered this move by organizing a subsidiary, the Lawyers Title Service, which assisted local groups of lawyers to organize their own abstract companies. The title insurance companies then shifted their ground and attempted to legitimate their activities and at the same time curb the Fund by legislation and administrative action. Carter, \textit{Proposed Legislation Further Regulating Title Insuring}, 39 FLA. B.J. 36 (1965). These efforts have been only partially successful and the commercial companies have induced the state insurance commissioner to issue an order fixing the so-called “national” rate as the “minimum risk rate premium” to be charged by all companies, including the Fund. \textit{TITLE INSURANCE RATE PROMULGATION ORDER} (March 7, 1967). The purpose of this order is to prevent the Fund from enjoying the advantage of the lower rate which it has been able to charge for insurance while at the same time making a profit. This order has been attacked in the courts by the Fund and, as this is written, the case has proceeded only to the point where certain procedural issues have been disposed of by a District Court of Appeals. Meritt v. Williams, 210 So. 2d 277 (Fla. 1968).

In Colorado a similar fight against a recently organized Fund is being carried out by the commercial insurers. In this case one of the companies is offering a 20 per cent discount on insurance premiums for the surrender of abstracts. \textit{Paralysis Creeps in Colorado, Newsletter}, A.B.A. SPECIAL COMM. ON LAWYERS’ TITLE GUAR. FUNDS (Apr. 4, 1964). The report concludes, “The effect of this situation is that within a comparatively short time this company will have a monopoly on title work.” In this case also the Fund is attempting to counter the company by establishing a lawyers’ cooperative abstract plant. Letter to Fund members, Aug. 25, 1967 and Jan. 10, 1968. The companies are now attempting to obtain legislation which will cripple the Fund. Action on the bill was blocked at the past session of the legislature but the issue is expected to be revived at the next session.
opinion and, to date, have shown limited interest in the protection of home buyers. They can therefore be expected to oppose any reform which is more than palliative.

G. The Bar

Logically, we should look to the bar to lead a judicial or legislative fight against unauthorized practice and in support of an improved conveyancing system. This logic does not necessarily reflect experience, however, for at least in some parts of the country it is inconsistent with institutional developments in title work. Where lending institutions have relied on their own lawyers, the rise of the highly stylized mortgage transaction has concentrated title practice in the hands of a few specialists. Most members of the bar, deprived of what was once the stock in trade of the entire profession, are now indifferent to land transfer problems and have turned their attention in other directions.

Meanwhile, the specialists are primarily loyal to their corporate clients, a sentiment which is reinforced by very large profits from volume practice. Complacency on the part of title specialists involves a certain myopia, however. To the farsighted person familiar with institutional growth it should be apparent that as the volume of mortgage business increases and as lending institutions are more and more accustomed to having their own man do the work, mortgagors will find it cheaper and more convenient to create internal legal departments than to hire outside counsel. Such a development has already occurred within many savings and loan associations and within some banks. If this trend continues, title practice among independent lawyers will disappear, at least in the larger communities.

Although the existence of title insurance companies is undoubtedly an accelerating force, the transition from the use of outside counsel to the formation of corporate legal departments could occur without reference to them. From this long-range standpoint, the interests of the title specialists and their clients, the corporate lenders, are fundamentally at odds. But the short-

162. The ambivalence created by the dual loyalty of lawyers to their clients and to their profession has received increasing comment in recent years and has been expressed with special force by Johnstone and Hopson. Johnstone, The Unauthorized Practice Controversy, A Struggle Among Power Groups, 4 U. KAN. L. REV. 1, 2-3, 43 (1955); Johnstone & Hopson, supra note 5, at 138-89. In this context one is reminded of the distinction attributed to Justice Brandeis, regarding the difference between having clients and being somebody's lawyer. M. Mayer, The Lawyers 4.
range advantages to the specialist are so great that it is virtually impossible to make them attentive to considerations of their ultimate welfare. Property lawyers, it must be remembered, are the most conservative branch of a basically conservative profession. They consider themselves a part of the Establishment and only with great difficulty can they be induced to enlist in the ranks of those seeking to stamp out unauthorized practice by the corporate entities which they represent. Individual lawyers admittedly have spearheaded past movements for reform, but these few enthusiasts have not been representative of the property bar.

Disinterest on the part of individual title practitioners is responsible for the failure of bar associations to take truly effective action. The organized bar must of necessity act

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163. Chief Justice Warren has said, "The legal fraternity is still living in the past. We have allowed the mainstream of progress to pass us by." Speech to ALI Annual Meeting, 3 TRIAL 48 (No. 4 June/July, 1967). And Cheatham has pointed out:

Successful lawyers are successful and effective under the system they know. It requires an uncommon effort to contemplate, much less support, a changed professional system, and old convictions give way very slowly before new evidence. A widely prevailing attitude toward new forms of legal services was well expressed in a report of a bar association committee on legal clinics:

"In considering this phase of the problem it is only fair to state that some members of the committee, as individuals, already entertain a view, founded upon sincere thought and full consideration, that movements of this type are in defiance of old traditions and concepts still held high in some quarters. That, accordingly, no amount of data could justify the creation of bureaus inasmuch as they are socially undesirable" (emphasis added).

E. CHEATHAM, A LAWYER WHEN NEEDED 64 (1963). In 1967, another bar committee reported:

Lawyers as a group are often insufferably stubborn in their resistance to change in the law. Individually a lawyer can be a liberal, even a radical, in seeking reform in the law. But once he is placed in a group, a fluid liberalism congeals into cold and chilling doubt as to the wisdom of leaving well charted ways, no matter how cumbersome, circuitous and outdated those ways may be.

Progress on Uniform Probate Code, 2 REAL PROP., PROB. & TRUST J. 271, 272 (1967).

The belief that the excessive conservatism of lawyers and their failures to consider the public interest in the face of their own immediate financial betterment may produce a long-range decline in the profession has been amply supported by the study of the English legal profession, B. ABEL-SMITH & R. STEVENS, supra note 145. As said in an anonymous comment on Beeching's Commission, "Judges and practitioners are too inclined to regard the public as grist to their mill; too few recognize that their sole justification is to provide a service, both personal and public." The Law Guardian 1 (No. 25, 1967).

164. The power of the bar associations is diluted, not only by the
through unauthorized practice committees, committees whose membership is drawn from the profession as a whole. Where specialized problems arise, such committees turn for advice to specialists in the particular field. But, for reasons already stated, the "learned property lawyers" are generally the men with the least inclination toward leading an attack on unauthorized practice. As a consequence, it has been extremely difficult to generate either the desire or the leadership necessary to achieve direct reform.

V. CONCLUSION

Thus, the fundamental issue in modern conveyancing is how home buyers can be assured adequate representation and protection. This issue transcends the mere question of whether title companies are illegally practicing law and presents a broader question for solution. The technical means of dealing with the issue present fewer difficulties than does the mobilization of sufficient political support. A review of the concerns of the various affected interest groups must necessarily have a sobering influence upon even the most enthusiastic reformers, and past experience also invites pessimism. Despite continuing support for changes in property law and practice from a small minority of lawyers, there has been no substantial improvement; up to now, alterations in practice have created more problems than they have solved. Although some needed measures have been defeated by active opposition, more commonly they have died as a result of simple indifference on the part of the bar and lay groups concerned with conveyancing. Nevertheless, experience should not result in debilitating discouragement. A potential and untapped source of support for reform has been suggested: lay groups having a direct and substantial interest in land transfers. These are groups having large political influence. Properly informed of legal possibilities and mobilized under the leadership of a few enlightened lawyers, it is entirely possible that they will provide the impetus necessary to achieve reform.

Future development of conveyancing procedures may de-
pend primarily upon timing. If necessary reforms can be instituted in the near future, the courts may be induced to rigidly enforce the conventional rules of unauthorized practice. Such enforcement will mean the restoration of the bar's traditional monopoly of conveyancing.\textsuperscript{167} If such reforms are not instituted, the courts will probably exempt conveyancing from the prohibition against corporate practice of law.

If corporate conveyancing is permitted, the courts should call upon legislatures to pass supporting statutes. If, on the other hand, the courts are willing to permit the organic growth of corporate conveyancing without reference to legislation, they should insist as an absolute minimum that such corporations assume all the traditional responsibilities of those engaged in conveyancing. In particular, corporate conveyancers should be liable for negligence and should furnish home purchasers with adequate title assurance.

If it is correct to assume that proper timing is of the essence and that decisive action based on a clear understanding of basic issues is required, the cases decided to date are not encouraging, for they have been directed toward detail and have left fundamentals untouched. In this respect they remind one of the ancient English doggerel, inspired by the enclosure acts:

\begin{quote}
The law locks up both man and woman
Who steals the goose from off the common;
But lets the greater felon loose,
Who steals the common from the goose.
\end{quote}

\textsuperscript{167} Johnstone & Hopson, \textsl{supra} note 5, at 192-94, are generally pessimistic in regarding the possibility of a rollback in the authorized practice controversy.