

# Attorney State Breakdown

*SPECIAL REPORT*



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# EDITOR'S NOTE

## Spotting an attorney state can be complicated

Dear Readers,

Welcome to the Attorney State Breakdown special report. For as long as I've been editor of *The Legal Description*, I have known that certain states require an attorney to be part of the real estate transaction in some way. I've also noticed that many in the industry have some connection to the law, whether required or not.

I've always been curious about why that is, and this report explains the connection and shares insight into many attorney states. Our thanks to Trustlink for sponsoring the report and making it available to everyone.

As I talked to attorneys across the eastern seaboard and the country, I noticed all the nuances of these various states, and the different perspectives each had. Though there was much agreement on what constituted an attorney state, and the various types of attorney states, there were also a lot of states that weren't discussed by more than one person.

When first asked what constitutes an attorney state, everyone acknowledged it's a complicated answer. At least one attorney I spoke to said you could talk to five different attorneys and get five different definitions on what constitutes an attorney state.

The reason for this is that real estate is ultimately local, and every jurisdiction has its own regulations, practices and procedures. With that, I acknowledge that the lists of states provided in this report might not be complete, and that other jurisdictions might require attorney involvement in real estate transactions. People have differing perspectives on whether one state or another requires attorney involvement. These local differences are part of what makes this business so interesting.

With that, I hope this report helps you understand those nuances and how to navigate your business through them.

Until next time, stay legal.

Andrea Golby  
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# What constitutes an attorney state?

If you ask five people which states are attorney states, you will get five different answers. Sure, there will be similarities, but many variations.

If you ask what it means to be an attorney state, you get those same different answers. Why is that?

“A lot of it has to do with the fact that title insurance, as it grew up as an industry, was in many cases adjunct to real estate law practice,” said **Charles Cain**, EVP Agency, WFG National Title Insurance Co.

**Ruth Dillingham**, Dillingham Consulting LLC, agreed, noting that specifically in the 13 original colonies, perhaps 100 years ago, only attorneys did real estate settlements.

Cain noted that before the rise of the secondary market, title insurance was common for commercial transactions, and required for Federal Housing Administration (FHA) and Department of Veterans Affairs (VA) insured loans, but not for conventional lending.

“It wasn’t until the secondary market came into being that title insurance became something that was regularly obtained for conventional mortgage loans,” Cain said.

“That was because of the secondary market requirements of Fannie and Freddie, in particular. Those entities, Freddie in particular, have carve outs where attorney opinions are routinely or commonly or customarily obtained in lieu of title insurance.”

He noted that owners’ policies came to be in places long before loan policies, but these were adjunct to the practice of law.

“In a lot of states, title insurance became a requirement in part because of land record issues, issues of fraud,” Cain said.

States vary greatly in whether any specific aspect of closing is the practice of law.

“In some places, attorneys don’t do the closing, they just do the title work,” Cain said. “It is a mishmash. We have states where — either by case law, statute, regulation, state supreme court rule or bar association rule — they are considered attorney states. And those range from Massachusetts, which is often discussed, and that is based on case law. There, title agents per se don’t exist. It’s the attorneys who are the title agents.

“Other states it is by statute as to how it works,” he continued. “Connecticut has that. Then there are different functions and roles that come into play, especially in the Southern states. In Kentucky, where I’m in practice, there needs to be, pursuant to supreme court rule, there needs to be attorney supervision in the transaction. That does not mean an attorney has to physically be in the closing. It doesn’t mean the attorney works up documents themselves, personally, but there has to be attorney supervision in the office and an attorney needs to be available to answer legal questions.

“Then North Carolina, attorneys do the closing,” Cain said. “They essentially do virtually all the functions except the issuance of the title insurance itself, because in North Carolina, they are prohibited from issuing title insurance. Title insurance agencies in North Carolina simply issue title insurance.

“In a lot of states, the requirement has to do with the disbursement of funds,” he continued. “South Carolina, West Virginia, Delaware, there are rules, there are in some cases statutes, as far as what exactly is the requirement.

“We have some states where attorney’s abstracts are required,” Cain said. “In South Dakota, there has to be a role there or an attorney as to an abstract produced through an attorney’s office.”

**George Holler**, Holler Law Firm LLC, used document preparation as an example.

“The Missouri Supreme Court, (*In re First Escrow, Inc.*) in

making a decision about whether document preparation should be allowed by a title company, they did a survey of the law in the other states and came back and said, here is who allows this, and here's who allows that, so it gives it a nice big overview," he said.

"In that case, what they talked about is there are a lot of states that allow a title company to do document preparation, and then you have states that don't allow title companies to do any document preparation. So [there are] those two extremes, and then within that spectrum, you've got states that allow them to do certain documents, or they can only prepare documents if there is actual title insurance being issued. For example, in a HELOC where there is no insurance, but the title company is doing a property report and managing the signing and possibly the disbursement, you'll have states where they can't prepare the quit claim or title curative document that they otherwise might have been allowed to do."

### Attorney closing states

When it comes to what constitutes an attorney closing state, many will agree that these are the states that, by Supreme Court order, Bar opinion or legislation, require an attorney to supervise real estate transactions in state.

"Each state differs in the amount of supervision that they require, and that goes on a state-by-state basis," said **Edward McDonnell**, CEO, McDonnell Law Firm.

"In South Carolina the attorney has to be at the closing table with the borrower, whereas in North Carolina, the attorney can supervise a signing agent. However, all these states have been pretty implicit that no matter the form or fashion of the closing, the end consumer, the borrower, must feel that they have had proper communication and representation by the attorney in the transaction."

Holler agreed, noting that in states such as Massachusetts, Georgia, South Carolina, North Carolina and Connecticut, there are clear statutes or court of opinions that have the force of law that require attorneys to be more involved.

"I think an attorney state would be defined as any state

where an attorney is, by either law or practice, involved in a real estate transaction," said **Cynthia Blair**, partner, Blair Cato Pickren Casterline LLC.

"Now that does differ significantly as you go up and down the eastern seaboard and a little bit toward the West."

### Massachusetts

The Massachusetts Supreme Judicial Court (SJC) in 2011 clarified what portions of a real estate conveyance were considered the practice of law in a highly watched opinion, *The Real Estate Bar Association for Massachusetts Inc. v. National Real Estate Information Services (No. SJC-10744)*. (the "NREIS Case")

**Thomas Bhisitkul**, principal, Moriarty Troyer & Malloy LLC, had first-hand experience with this, being the co-chair of the Unauthorized Practice of Law Committee of the Massachusetts Real Estate Bar Association.

"In the NREIS case, the highest state court in Massachusetts, took on the fundamental

question of whether the conduct of a residential real estate closing constituted the practice of law in Massachusetts," he said. "The court made a very deep dive into the question and issued a very detailed decision. In that decision the court not only concluded that real estate closings do constitute the practice of law, and thus had to be conducted by Massachusetts real estate lawyers, but really drilled down into the details of the mechanics of a residential real estate closing and identified the specific aspects of real estate closings that constituted the practice of law and could only be performed by lawyers licensed in Massachusetts."

The Massachusetts SJC noted first that the closing is a critical step in the transfer of title and, thus, a lawyer is a necessary participant at the closing to direct the proper transfer of title and consideration and to document the transaction.

"Implicit in what we have just stated is our belief that the closing attorney must play a meaningful role in connection with the conveyancing transaction that the closing is intended to finalize," the court continued. "If the attorney's only function is to be present at the

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**Cynthia Blair,**  
Partner,  
Blair Cato Pickren Casterline //



closing, to hand legal documents that the attorney may never have seen before to the parties for signature, and to witness the signatures, there would be little need for attorney to be at the closing at all. We do not consider this to be the appropriate course to follow. Rather, precisely because important, substantive legal rights and interests are at issue in a closing, we consider a closing attorney's professional and ethical responsibilities to require actions not only at the closing, but before and after it as well."

According to the SJC, the first step of this process, investigation of the record at the registry of deeds and preparation of a title report or abstract, generally does not constitute the practice of law. The second step in this process, analyzing title abstracts and other records to render a legal opinion as to marketability of title, does constitute the practice of law in Massachusetts.

"In addition to marketability of title, a closing attorney has a duty to effectuate a valid transfer of the interests being conveyed at the closing," the court stated. "This includes not only the actual transfer of title in behalf of the attorney's client, but also the transfer of the consideration for the conveyance — typically mortgage loan proceeds in the case of the mortgage transactions at issue here. With respect to such loan proceeds, the duty derives in part from rules of professional conduct."

## Connecticut

Connecticut officially became an attorney closing state in 2019 when it passed SB 320. The bill was introduced by the Insurance and Real Estate Committee.

The law, which went into effect Oct. 1, 2019, states that "no person shall conduct a real estate closing unless such person has been admitted as an attorney in this state under the provisions of section 51-80 of the general statutes and has not been disqualified from the practice of law due to resignation, disbarment, being placed on inactive status or suspension."

The bill defines real estate closing as "a closing for:

- A mortgage loan transaction, other than a home equity line of credit transaction or any other loan transaction that does not involve the issuance of a lender's or mortgagee's policy of title insurance in connection with such transaction, to be secured by real property in this state, or
- Any transaction wherein consideration is paid by a party to such transaction to effectuate a change in the ownership of real property in this state."

Anyone who violates the provisions of the bill would have committed a violation of subdivision (8) of subsection (a) of section 51-88 of the general statutes and be subject to the penalties set forth in subsection (b) of section 51-88 of the general statutes.

The Real Estate Bar recently issued a white paper on the new law. The whitepaper can be found at [www.ctbar.org/members/sections-and-committees/news-detail/2020/04/07/white-paper-for-sb-320](http://www.ctbar.org/members/sections-and-committees/news-detail/2020/04/07/white-paper-for-sb-320).

## Delaware

The Delaware Supreme Court issued an order on May 31, 2000, in the case *In the Matter of Mid-Atlantic Settlement Services Inc.*, **Michael A. Perry**, **Ross J. Kellas**, and **Gregory Haynie**, affirming a decision by the Board on the Unauthorized Practice of Law.

The decision states that the board unanimously agreed that "those aspects that constitute the practice of law in the manner in which Mid-Atlantic conducted its real estate settlements are the following:

- Determining the proper legal description of the property (as set forth on the deed) to be included on Exhibit A to the mortgage;
- Explaining to the borrower(s) the terms of many legal documents, including the note, mortgage, Planned Unit Development Rider, the Truth-in-Lending Disclosure and the first payment letter.

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

It further found that the evidence showed that Mid-Atlantic's employees did not merely read each word of the legal document to the borrowers, but decided which portion of the document to explain to those borrowers. They held that by doing so, these employees were interpreting those documents, thereby exercising legal judgment.

The board stated that “the evidence in the case before the panel suggests requiring attorneys to conduct real estate settlements for purchases and refinancing of Delaware real estate loans is the simplest and most direct way to assure the integrity of the process and the public good. Indeed, the evidence in this case demonstrates that financial savings, together with the legal protections inherently available through both expertise and accountability of members of the Delaware Bar, would be visited upon borrowers as members of the public conducting, in many instances, the largest single transaction of their lives.”

## West Virginia

The West Virginia Bar Committee on Unauthorized Practice of Law has issued several advisory opinions on what aspects of a real estate transaction are considered the practice of law. Opinion No. 2003-01 first notes that the preparation of a written or oral report on property is the practice of law.

“Previously in Advisory Opinion 93-003, the committee made clear that a title search is the practice of law and that a lay person may not conduct such a search for another unless the under the direct control and supervision of an attorney,” the opinion states.

“The committee now further finds that it is the unlawful practice of law for a lay person to prepare any document or make an oral report that explains the legal status of title to real estate, the legal effect of anything found in the chain of title, or the legal effects of other matters found of record that could affect the marketability of title, unless under the direct control and supervision of an attorney. “

The Advisory Opinion then addressed whether the provision of a title search, exam or opinion by a title company is the unauthorized practice of law. It held that providing an opinion as to the legal significance of the presence or absence of matters of record and/or the condition of title is the practice of law and should be performed only by licensed attorneys.

“The committee is aware of certain business

organizations, whether incorporated or not, that hold themselves out as ‘title companies,’ and sell or provide title examinations, title searches, property reports or otherwise certify the quality or validity of title or render legal advice,” the opinion states. “When these business organizations provide a report that certifies the quality or validity of title or otherwise provide legal advice, this activity is the practice of law and may only be rendered by a licensed attorney.”

Under the opinion, lawyers may employ non-lawyer assistants in the representation of the attorney’s client as long as:

- The attorney retains a direct relationship with the client.
- The client understands that a non-lawyer will be conducting the title examination.
- The lawyer, based on the certification, training, experience of the searcher, reasonably supervises the searcher throughout;
- The lawyer remains solely responsible for the work-product, including all actions taken or not taken by the searcher to the same extent as if the search had been furnished entirely by the lawyer.

The advisory opinion then addressed whether a lay person conducting a real estate closing would be engaging in the unauthorized practice of law. It outlined 14 activities involved in a real estate closing, including reviewing title insurance opinions, preparing settlement statements, attending closing and escrowing and disbursing proceeds.

“While some ministerial and clerical functions occur as part of a real estate closing, i.e., preparation of the HUD settlement statements, simple execution of documents, and disbursement of proceeds, in general, legal principles are applied to the factual situation to determine if and how the

transaction should be concluded. For example, there is a determination that the lender can obtain a valid first lien; that the legal description of the land conforms to the survey; that the title insurance requirements have been met; that evidence of hazard insurance is sufficient; that easements and other restrictions have been noted and have not been violated or encroached upon; and

“

When these business organizations provide a report that certifies the quality or validity of title or otherwise provide legal advice, this activity is the practice of law and may only be rendered by a licensed attorney.

West Virginia Bar Committee on Unauthorized Practice of Law

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that legal instruments have been properly signed to constitute binding documents to achieve their legal purposes. Most importantly, however, it is inherent at the closing itself that buyers and sellers will have questions about the transaction and the documents, which answers necessarily go to their respective legal rights and obligations. Such answers are advising on legal matters. Thus, in West Virginia generally, real estate closings constitute the practice of law.”

## North Carolina

On Jan. 24, 2003, The North Carolina State Bar initially adopted Authorized Practice Advisory Opinion 2002-1 regarding the role of laypersons in the consummation of residential real estate transactions. The opinion was revised Jan. 26, 2012. The first question asked in the opinion was “may a non-lawyer handle a residential real estate closing for one or more of the parties to the transaction?”

The answer was no.

The opinion stated, “A person who is not licensed to practice law in North Carolina and is not working under the direct supervision of an active member of the State Bar may not perform functions or services that constitute the practice of law. Under the express language of N.C. Gen. Stat. §§ 84 2.1 and 84 4, a non-lawyer who is not working under the direct supervision of an active member of the State Bar would be engaged in the unauthorized practice of law if he or she performs any of the following functions for one or more of the parties to a residential real estate transaction: (i) preparing or aiding in preparation of deeds, deeds of trust, lien waivers or affidavits, or other legal documents; (ii) abstracting or passing upon titles; or (iii) advising or giving an opinion upon the legal rights or obligations of any person, firm, or corporation. Under the express language of N.C. Gen. Stat. § 84 4, it is unlawful for any person other than an active member of the State Bar to hold himself or herself out as competent or qualified to give legal advice or counsel or as furnishing any services that constitute the practice of law. Additionally, under N.C. Gen. Stat. § 84 5, a business entity, including a corporation or limited liability company, may not provide or offer to provide legal services or the services of attorneys to its customers even if the services are performed by licensed attorneys employed by the entity.”

The opinion then addressed whether a non-lawyer who is acting under the supervision of a lawyer present can identify the documents necessary to complete a

North Carolina residential real estate closing, direct the parties where to sign the documents, and ensure that the parties have properly executed the documents; and receive and disburse closing funds.

The answer was yes, as long as the non-lawyer does not engage in any of the activities addressed in the first question, they may present and identify the documents necessary to complete a residential real estate closing and receive and disburse closing funds.

“Although these limited duties may be performed by non-lawyers, this does not mean that the non-lawyer is handling the closing. Since, as described in issue 1 above, the closing is a collection of services, most of which involve the practice of law, a lawyer must provide the necessary legal services. And, since N.C. Gen. Stat. § 84 5 prohibits non-lawyers from arranging for or providing the lawyer or any legal services, non-lawyers may not advertise or represent to lenders, buyers/borrowers, or others in any manner that suggests that the non-lawyer will (i) handle the ‘closing;’ (ii) provide the legal services associated with a closing, such as providing title searches, title opinions, document preparation, or the services of a lawyer for the closing; or (iii) ‘represent’ any party to the closing. The lawyer must be selected by the party for whom the legal services will be provided,” the opinion states.

## South Carolina

South Carolina has defined five aspects of real estate closings as the practice of law, Blair noted.

“It’s not just that an attorney is somehow involved in some portion of the closing; we actually have to conduct or supervise the conduct of the transaction start to finish,” Blair, said. “We are probably the only true attorney state; although there are some who might dispute that.”

The South Carolina Supreme Court weighed in on whether non-attorneys performing closings constituted the practice of law in *State v. Buyers Service Co.* (292 S.C. 426 (1987) 357 S.E.2d 15). The case was heard Jan. 20, 1987.

The state brought the action, alleging Buyers Service engaged in the unauthorized practice of law by “(1) providing reports, opinions or certificates as to the status of titles to real estate and mortgage liens; (2) preparing documents affecting title to real property; (3) handling real estate closings; (4) recording legal documents at the courthouse; and (5) advertising to the public that it may

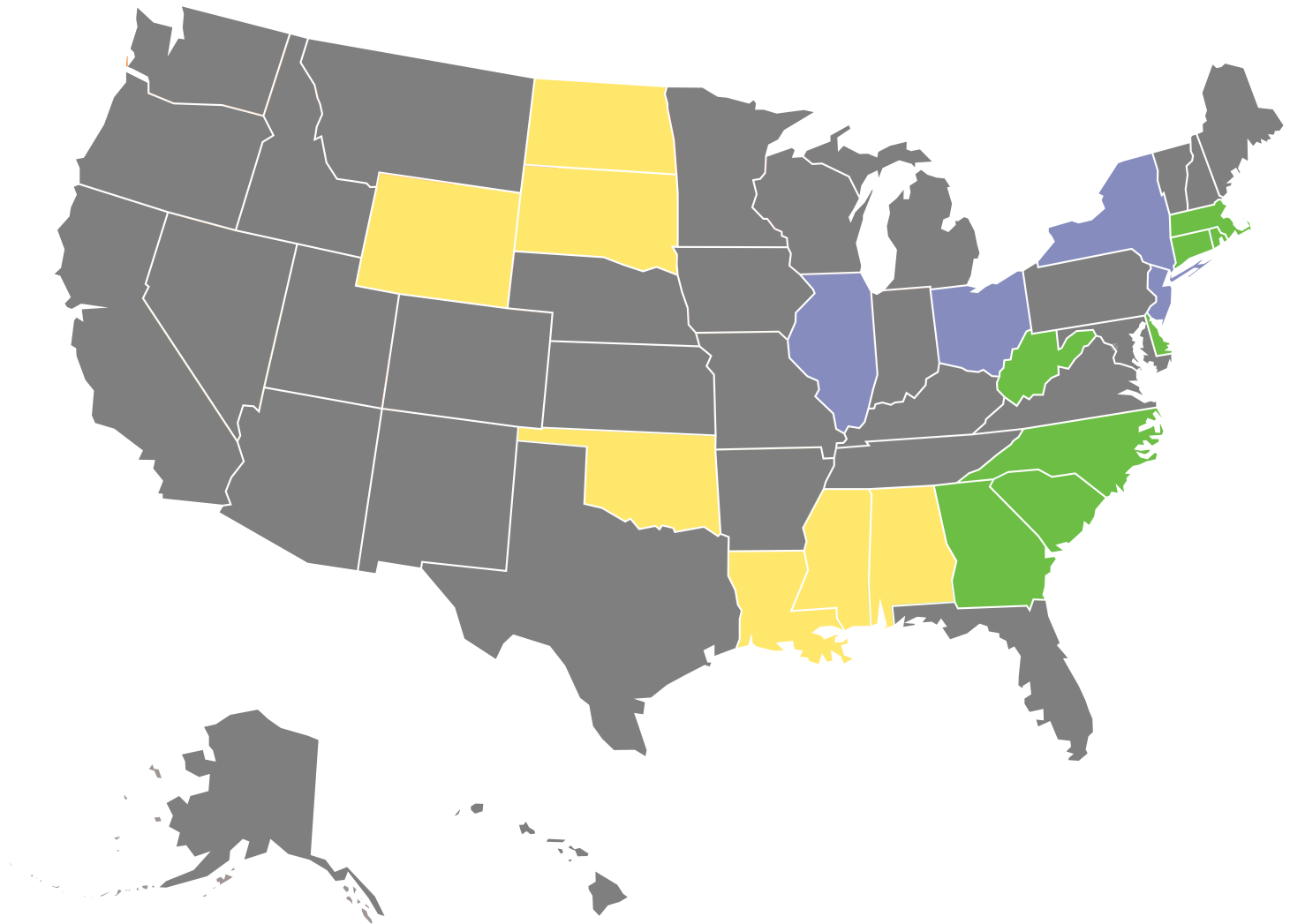




# Attorney closing states

Connecticut  
Delaware  
Georgia  
Massachusetts

North Carolina  
Rhode Island  
South Carolina  
West Virginia



## Attorney title opinion states

Alabama  
Louisiana  
Mississippi  
North Dakota  
Oklahoma  
South Dakota  
Wyoming



## Attorney by custom and practice

Illinois  
New Jersey  
New York  
Ohio

handle conveyancing and real estate closings.”

The court went through each service to determine whether it was the practice of law, beginning with the preparation of instruments.

“The reason preparation of instruments by lay persons must be held to constitute the unauthorized practice of law is not for the economic protection of the legal profession,” the court stated. “Rather, it is for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law.”

The fact that Buyers Service retained attorneys to review the closing documents did “not save its activities from constituting the unauthorized practice of law.” The same principles applied to the preparation of title abstracts.

It then turned to whether real estate closings themselves were the practice of law. The lower court had determined that Buyers Services was permitted to continue handling real estate closings as long as no legal advice was being given.

“We agree this approach, in theory, would protect the public from receiving improper legal advice,” the court stated. “However, there is in practice no way of assuring that lay persons conducting a closing will adhere to the restrictions. One handling a closing might easily be tempted to offer a few words of explanation, however innocent, rather than risk losing a fee for his or her employer.

“We are convinced that real estate and mortgage loan closings should be conducted only under the supervision of attorneys, who have the ability to furnish their clients legal advice should the need arise and fall under the regulatory rules of this court,” the court continued. “Again, protection of the public is of paramount concern.”

The court then addressed recording.

“We do not consider the physical transportation or mailing of documents to the courthouse to be the practice of law. However, when this step takes place as part of a real estate transfer, it falls under the definition of the practice of law as formulated by this court in *In re Duncan, supra*. It is an aspect of conveyancing and affects legal rights. The appropriate sequence of recording is critical in order to protect a purchaser’s title to property,” the court wrote.

## Georgia

Georgia Code Section 15-19-50 defines the practice of law. Among other things, the practice of law in Georgia includes:

- Conveyancing;
- The preparation of legal instruments of all kinds whereby a legal right is secured;
- The rendering of opinions as to the validity or invalidity of titles to real property; and
- The giving of any legal advice.

Section 15-19-52 permits title insurance companies to “prepare such papers as it thinks proper or necessary in connection with a title which it proposes to insure, in order, in its opinion, for it to be willing to insure the title, where no charge is made by it for the papers.”

Further, Section 15-19-53, states: “This article shall not prohibit a person, corporation, or voluntary association from examining the record of titles to real property, nor shall it prohibit a person, corporation, or voluntary association from preparing and issuing abstracts of title from such examination of records and certifying to the correctness of the same, nor from issuing policies of insurance on titles to real or personal property, nor from employing an attorney or attorneys in and about their own immediate affairs or in any litigation to which they are or may be a party. However, nothing contained in this Code section shall authorize any person, corporation, or voluntary association other than an attorney at law to express, render, or issue any legal opinion as to the status of the title to real or personal property.”

In 2003, the Georgia State Bar Standing Committee on the Unlicensed Practice of Law issued UPL Advisory Opinion No. 2003-2 finding that the preparation and execution of a deed of conveyance was the practice of law. The opinion was approved by the Georgia Supreme Court on Nov. 10, 2003.

The opinion states: “The committee finds that those who conduct witness only closings or otherwise facilitate the execution of deeds of conveyance on behalf of others are engaged in the practice of law. As noted above, ‘conveyancing’ is deemed to be the practice of law, and the very purpose of a deed is to effectuate a conveyance of real property. In reviewing the foregoing opinions of the Supreme Court of Georgia, the committee concludes that the execution of a deed of conveyance is so intimately interwoven with the other elements of the closing process so as to be inseparable from the closing as a whole. It is one of the entire series of events through which title to the land is conveyed from

one party to another party.’ To view the execution of a deed of conveyance as something separate and distinct from the other phases of the closing process — and thus as something other than the practice of law — would not only be forced and artificial, it would run counter to the opinions of the court. Such an interpretation would mean that a non-lawyer could lawfully preside over the execution of deeds of conveyance, yet an attorney who allowed an unsupervised paralegal to engage in precisely the same activity could be disbarred. An interpretation of Court opinions that leads to such an incongruous result cannot be proper. Rather, the view consistent with those opinions is that one who facilitates the execution of deeds of conveyance is practicing law.”

It further held that while refinance closings, second mortgages, home equity loans, construction loans and other secured real estate loan transactions may differ in certain particulars from purchase transactions, the centerpiece of these transactions is the conveyance of real property and, thus, the practice of law.

### **Attorney title opinion states**

The most commonly known “attorney states” are those where attorneys must conduct the transaction. In some other states, however, attorneys are required to certify title.

“Each one of these states is unique in its own respect as far as attorney [involvement],” said **Marx Sterbcow**, managing attorney, The Sterbcow Law Group LLC.

“Believe it or not, Louisiana is actually an attorney state in one respect, where an attorney has to certify the title before title insurance can be issued.”

Holler also listed Louisiana among the states that require an attorney title opinion.

“On the legal side, you have states that are as minimal as an attorney title opinion is all that is needed,” he said. “For example, Louisiana, North Dakota, Oklahoma, those are states where the title company can legally do everything, from issuing the policy to the disbursement to the signing, etc. However, they must have an opinion of title from a licensed attorney in those states.”

Among other things, Louisiana defines the practice of law as “Certifying or giving opinions, or rendering a title opinion as a basis of any title insurance report or title insurance policy as provided in R.S. 22:512(17), as it relates to title to immovable property or any interest therein or as to the rank or priority or validity of a lien, privilege or mortgage as well as the preparation of acts

of sale, mortgages, credit sales or any acts or other documents passing titles to or encumbering immovable property.”

Although state law does not prohibit someone “from preparing abstracts of title; or from insuring titles to property, movable or immovable, or an interest therein, or a privilege and encumbrance thereon,” it says “every title insurance contract relating to immovable property must be based upon the certification or opinion of a licensed Louisiana attorney authorized to engage in the practice of law.”

Alabama law similarly states: “Nothing in this section shall be construed to prohibit any person, firm, or corporation from attending to and caring for his, her, or its own business, claims, or demands, nor from preparing abstracts of title, certifying, guaranteeing, or insuring titles to property, real or personal, or an interest therein, or a lien or encumbrance thereon, but any such person, firm, or corporation engaged in preparing abstracts of title, certifying, guaranteeing, or insuring titles to real or personal property are prohibited from preparing or drawing or procuring or assisting in the drawing or preparation of deeds, conveyances, mortgages, and any paper, document, or instrument affecting or relating to secular rights, which acts are hereby defined to be an act of practicing law, unless such person, firm, or corporation shall have a proprietary interest in such property; however, any such person, firm, or corporation so engaged in preparing abstracts of title, certifying, guaranteeing, or insuring titles shall be permitted to prepare or draw or procure or assist in the drawing or preparation of simple affidavits or statements of fact to be used by such person, firm, or corporation in support of its title policies, to be retained in its files and not to be recorded.”

### **Attorney by custom and practice**

In other states, you might not realize that an attorney is not legally required to be part of a transaction because it is custom in that area for an attorney to be involved in the transaction.

“The first question is, what is an attorney state by law versus what is one by custom?” Holler said. “New York is a great example of that. In New York, there is no law that requires an attorney to be involved in a closing. However, by custom, certainly downstate — New York City and the counties around it — it is very common for attorneys to be involved.

“Illinois is another one,” Holler said. “Those are some



states where attorneys are heavily involved in the closing process, but they are not legally required. In other words, you could do everything you need to do without an attorney.”

“In moving around the country ... with people in the land conveyancing, what I notice is that each state and region does it differently and there are also different protocols within states,” said **Deborah Bailey**, Bailey Helms Legal LLC. “For example, you take New Jersey, it has a different protocol for the northern part of the state than it does for the southern part of the state. The northern part of the state, which is closer to New York, is an attorney-driven model, whereas the southern part of the state, is closer to Pennsylvania and that region is less of an attorney-driven model.”

“In Ohio, we have an awful lot of lay title agents, but a great number of them — especially when you get out of the county seats — are connected to law firms,” Cain said. “That’s because title insurance is sort of adjunct to the real estate law practice. It’s a real patchwork quilt as to the role of attorneys in title insurance.”

Cain also pointed out that in Chicago, it is the custom for attorneys to review and approve title work, but the type of model that exists in Chicago metro doesn’t exist anywhere else in Illinois except for the Chicago metro area.

## Changes for attorney states

Before the current global health crisis required people to stay home, and those in the real estate industry to get creative to ensure transactions closed, several of these attorney states required the attorney to be physically present with the borrower to complete the transaction. In the wake of stay-at-home orders, governors and secretaries of state in places where remote online notarization (RON) legislation had not already been passed have allowed remote or audio-visual notarizations to be done during the duration of their stay at home order.

These orders have been handed down in several attorney states, including Georgia, Connecticut and New York. The Massachusetts General Court introduced legislation to allow the same in the commonwealth.

McDonnell noted that attorneys could have the same ability to supervise online closings in the majority of instances.

“Those states that have made the decision to have an attorney in the process, do not have to change this approach with innovation,” Bailey said. “Innovation changes the way you practice and it changes when and how an attorney is involved in the process but it will not eliminate the attorney from the process.”

“An attorney’s role has been changing over time,” she continued. “Currently we assemble with great stacks of paper but that wasn’t always the norm. There was a time in the distant past when people were doing land conveyancing by physically transferring dirt in their hands among themselves out in the fields somewhere. What we have to understand is change is a constant part of life. What is entailed in land conveyancing if you are in an attorney state? What is the attorney’s role and are we truly adhering to the role?”

Bailey said RON is going to push the issue to the forefront since RON changes the closing process. She noted the attorney’s role will remain part of the process to protect the

“Those states that have made the decision to have an attorney in the process, do not have to change this approach with innovation. Innovation changes the way you practice and it changes when and how an attorney is involved in the process but it will not eliminate the attorney from the process.”

**Deborah Bailey,**  
Bailey Helms Legal LLC

consumer.

“RON gives the consumer the tool not to physically come to closing,” she said. “Eliminating physical presence changes the way we practice but it will not eliminate the need for an attorney in the process.”

“For example, in Georgia, the attorney assembles the parties around a physical closing table for a closing ceremony. The attorney verbally explains the various documents to the parties as part of the closing ceremony,” Bailey said. “Where RON may be employed, that same information still needs to get to the parties. How we are going to get that information to them if they are not at the table? Are we going to use technology and continue to verbally explain the documents to the parties or will we use electronic links for a summary of the documents, etc.?”

“Attorneys still need to protect the consumer and their client regardless of the technology employed.”

Bhisitkul also agreed, though had some reservations when discussing the issue before the present crisis occurred.

“On the one hand, the remote notarization in and of itself is not a violation of UPL,” he said. “If a lawyer conducting the closing is doing all the things they are supposed to be doing in a real estate closing and looking at the title and preparing the deed, and doing everything else substantively they are supposed to be doing and it happens that some of the documents are notarized remotely, then technically speaking, there is no violation of the unauthorized practice of law.

“Our concern is though that if these remote notarization statutes are adopted and it becomes more prevalent, it gives the wrongdoers a mechanism to evade taxes because now there is less people in the room. If there is another lawyer in the room, they can alert us that this is going on. If everything is being done electronically, remotely, there is more opportunity for out-of-state bad actors who are coming in and practicing law without a license to get away with it.”

The Georgia Supreme Court’s order, issued March 27, 2020, states: “The State Bar of Georgia has brought to the attention of the court that there may be some uncertainty among lawyers about the extent to which a lawyer, consistent with the Georgia Rules of Professional Conduct, may participate in and supervise the closing of a real estate transaction without being physically present at the closing and in close proximity to the parties to the transaction. To the extent that the Rules of Professional Conduct may require an attorney to be physically present at the closing of a real estate transaction and in close proximity to the parties to the transaction, in the light of the current circumstances and after consultation with the president of the State Bar, the court temporarily suspends any such requirement and orders that, so far as the Rules of Professional Conduct are concerned, a lawyer may participate in and supervise the closing of a real estate transaction by way of video conference.”

The order defines “video conference” as “a remote conference of persons in different locations that is facilitated by technology that enables each of the participants in the closing – the lawyer, the parties to the transaction, and any representatives of the parties – to see, hear, speak to and display documents of each of the other participants in real time.”

The bill notes that unless otherwise modified by the court, the order will remain in effect until the declaration by the chief justice of a statewide judicial

emergency is rescinded or expires by its own terms. The Massachusetts bill, introduced in the senate as SD 2882 and in the house as HD 4999, states, “A Massachusetts licensed attorney, or a paralegal under the direct supervision of a Massachusetts licensed attorney, who in either case is a duly appointed notary public in the Commonwealth, may perform an acknowledgement, affirmation, or other notarial act for an individual, who may be acting individually or in any representative capacity, with respect to one or more documents upon the request of the individual utilizing electronic video conferencing in real time.”

The acknowledgment, affirmation or other notarial act utilizing electronic video conferencing in real time would be valid and effective if the attorney or paralegal notary observes an individual’s execution of a document, provided both the notary and the individual are physically located within the Commonwealth.

The individual would have to promptly cause the executed documents to be delivered to the notary by delivery service, courier or other means, in accordance with the notary’s instructions. The individual would have to provide the notary with satisfactory evidence of identification, either with the executed documents or separately through electronic means; provided that a copy of the front and back of at least one current identification credential issued by a federal or state government agency bearing the photographic image of the individual’s face and signature would be deemed to be satisfactory evidence of identification.

After receiving the executed document, the notary and the individual would have to engage in a second video conference, during which the individual would have to verify to the notary that the document received by the notary is the same document executed during the first video conference. During the second video conference, the individual would have to make the acknowledgment, affirmation and/or other act of the notary, as appropriate as well as disclosure of and video viewing of all persons present in the room with the individual. The individual would have to swear or affirm under the penalties of perjury during each video conference that the individual is physically located within the Commonwealth.

If the individual is not a United States citizen, a valid passport or other government-issued identification credential evidencing the individual’s nationality or residence and which bears the photographic image of the individual’s face and signature would be acceptable.

The attorney or paralegal notary then would affix his or

her notary stamp and signature to the document that was delivered, whereupon the notarial act would be deemed completed. The written memorialization of the notarial act would have to include a recital indicating that the document was notarized remotely pursuant to the bill's provisions. The failure to include the recital would not affect the validity or recordability of the document.

The attorney or paralegal notary would have to record each video conference and retain the recording, along with the copy of the individual's identification credential, for a period of 10 years.

The document would be deemed a properly executed, acknowledged and notarized document for all legal purposes in the Commonwealth, including without limitation for recordation with the Registry of Deeds of any county, for filing as a valid will, and for filing or recording with any other state, local or federal agency, court, department or office.

"With respect to any such document recorded in the Registry of Deeds the affidavit need not be recorded, but shall be retained by the notary for a period of 10 years," the bill states. "Further with respect to any such document recorded in the Registry of Deeds, the fact that an individual is subsequently determined to have been physically located outside of the Commonwealth during any video conference shall not constitute grounds to set aside the title to real property acquired to an arm's length third-party mortgagee or purchaser for value."

The expiration, repeal or amendment of the bill would not affect validity of a notarial completed while the bill is in effect and performed in accordance with the terms thereof.

"Nothing in the bill affects any Massachusetts statute, regulation or other rule of law governing, authorizing or prohibiting the practice of law, including without limitation the requirement that the closing of a transaction involving a mortgage or other conveyance of title to real estate may only be conducted by an attorney duly admitted to practice law in the Commonwealth," the bill states.

Another issue that will impact the landscape in attorney states is new privacy laws and regulations.

"One of the big changes which is going to be a problem for the law firms is the privacy regulations, the NAIC model data privacy acts and what the states are

doing," Cain said. "South Carolina, Ohio and Michigan passed the same NAIC model act, New York has its requirements. It's just going to make it difficult for law offices [who do] five or eight transactions to be title agents, to be involved in the transaction. It's just going to cost them so much to do it. I think this is where we'll see a reduction of the number of vendors."

He noted that under the NAIC model act, entities with 20 or fewer transactions generally are exempt; however, lenders may still expect them to meet those requirements. If it turns out that you have an attorney that has three people in their office, they are not under the jurisdiction of the act, so they don't have to do these things, Cain said, but if they are doing a real estate transaction and they have a data breach and the privacy requirement is absent, it is going to be hard to explain in court that you didn't meet those requirements because you weren't required to. Then there is a question of whether the errors and omission's policy will cover the loss from the breach.

"I think that on a practical basis, while in attorney states we will continue to see, for at least the medium term, attorneys have similar roles or involvement," Cain continued. "I don't think we'll see huge changes, but I think what we will see is ... the technology cost, the data privacy restrictions and costs, we'll just see fewer attorneys."

## Out-of-state challenges

Many of the issues in attorney states can stem from out-of-state companies not understanding the rules of the road in those states.

Sterbcow noted that another recent South Carolina decision in *Quicken* was significant and that he's seen an increase in UPL cases involving closing firms.

"There is an uptick from what I have seen in some of the UPL issues involving a number of closing firms," he said. "I understand that South Carolina and North Carolina have been active recently, looking at certain larger title law firms or real estate law firms."

As discussed, one good example of what happens is illustrated in the Massachusetts case, *REBA v. NREIS*.

"Out-of-state settlement services companies have tried to do an end-run around by hiring lawyers to show up at the closing without knowing anything about the transaction, without preparing the deed or reviewing any of the documents or looking at the title or doing anything



other than showing up at the closing and notarizing the documents,” Bhisitkul said. “That way they can say they had an attorney at the closing who took an active role in the closing. And the SJC and the NREIS case said, ‘No, that is not sufficient. They have to play a meaningful role in the closing. They can’t just be there to notarize documents that they’ve never seen and they are not advising on.’ ”

REBA specifically alleged in that case that certain business activities of NREIS violated G.L. c. 221 §§ 46 and 46A and seeks declaratory and injunctive relief pursuant to G.L. c. 221 §§ 46B. The challenged activities include services NREIS provides in connection with Massachusetts mortgage transactions that REBA claims are integral components of real estate conveyancing. REBA also challenges NREIS’ issuance of real estate title insurance policies as a title insurance agent for underwriters.

The Massachusetts Bar Association, in arguments filed before the Massachusetts SJC, held that the entirety of act of conveyancing real property in the commonwealth was considered the practice of law under the state’s UPL statute.

“The object of conveyancing practice in Massachusetts is to secure rights in land in compliance with standards that the state imposes on the components of any land transaction,” the association stated. “To serve that purpose, a series of interconnected events occurs, starting, for example, when a potential buyer of land executes a document delivered to a potential seller offering to buy the seller’s property, and the seller accepts the offer. That document, at the threshold of a transaction, may itself create enforceable rights between the parties. That consequence may not be apparent to signatories who are not familiar with the state’s rules for determining when exchanges such as these create enforceable rights.”

Currently there are two cases before the Rhode Island Supreme Court, whereby the court’s unauthorized practice of law committee requests the court to rule whether real estate closings are considered the practice of law.

In the first of two cases, a complaint was filed by attorney **John Pagliarini Jr.** on Aug. 11, 2015, arguing that the notary who conducted the closing, **William Paplauskas** engaged in the unauthorized practice of law. The Rhode Island Supreme Court Unauthorized Practice of Law Committee conducted investigational hearings March 1 and May 9, 2017, and issued a committee report May 9

that year.

The case stems from a July 21, 2015, closing in which **Earl Pooler** and **Nina Szulewski-Pooler**, represented by Pagliarini and **Hailey Munns**, sold property in Tiverton, R.I., to **Vincent** and **Rebecca Majewski**. Prior to closing, the Majewskis’ lender hired ServiceLink to act as settlement agent for the transaction. ServiceLink then hired Paplauskas to conduct the closing as a notary public.

The closing was conducted at Pagliarini’s law office. Pagliarini was not in the conference room where the closing was conducted, but was in the office. Munns was in the room, but left to inform Pagliarini that Paplauskas was not an attorney and told not to return to the room. Paplauskas informed the Majewskis that he was not an attorney, but they continued with the closing. Paplauskas presented closing documents for the Majewskis to sign, identifying each document and asking them to review then and sign where applicable. He insisted at the hearing that he only gave an overview about the documents, and Majewski could not remember what Paplauskas explained during the closing. After the closing, Paplauskas mailed the executed closing documents, the cashier’s check and the deed to ServiceLink.

In its report, the committee noted that “serving as a notary public during a real estate closing to obtain signatures on closing documents does not itself constitute the practice of law. However, it is undisputed that Paplauskas’ involvement at the closing on July 21, 2015, went beyond that, and that he in fact conducted the real estate closing.

“The Supreme Court has said that the practice of law ‘embraces conveyancing’ and ‘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.’ Rhode Island Bar Association, *supra*, (quoting *In re Opinion of the Justices to the Senate (Mass.) 194 N. E. 313, 317 (1935)*). Yet, the committee’s research indicates that the Supreme Court has not squarely addressed whether the activities which are part of a real estate conveyance constitute the practice of law, and further, whether they must be performed by an attorney.”

The committee filed another report June 7, 2017, having received a complaint by attorney **Anthony Senerchia** on Jan. 19, 2017, alleging that **Daniel Balkun** and Balkun Title and Closing Inc. may have engaged in the unauthorized practice of law. The committee then held

investigational hearings Sept. 14, Sept. 26, Nov. 14 and Nov. 15, 2017. It found that Balkun began working in several law firms and title companies before opening Balkun Title & Closing Inc. on Jan. 20, 2016. He had held a title insurance agent's license since Feb. 25, 2016. The company employed attorney **Andrew Pelletier**, four paralegals and a bookkeeper. The company provided title insurance, title searches and examinations, and conducts closings for buyers and document preparation for sellers, including drafting deeds, residency affidavits and powers of attorney, if needed.

During the transaction that led to the complaint being filed, a real estate closing was scheduled for Dec. 2, 2016, to transfer property in Johnston, R.I., from **Ronald** and **Mary Cellucci** (mother and son) to Taylor Real Estate Investing LLC. Balkun Title was hired to prepare documents for the Celliccis, including a deed, residency affidavits and a power of attorney. These documents were prepared by a paralegal. Senerchia acted as the title agent, the settlement agent and conducted the closing. Prior to closing, Senerchia noted that because of questions regarding the chain of title, his paralegal had to contact Balkun Title and inquire whether Mary Cellucci's husband **Carmino** had passed away. A paralegal informed him that they been told he was alive. During the closing, Ronald Cellucci informed Senerchia that his father had passed years before. Senerchia stopped the closing and Senerchia advised Ronald Cellucci to obtain counsel to open a probate matter to address Carmino Cellucci's interest in the property. After the probate matter was completed, the closing was rescheduled.

The committee's report addressed another real estate transaction, as well as Balkun Title's social media activity. It noted that several posts made by Balkun Title or "liked" by Balkun Title or Balkun himself, seemed to hold the company as engaging in the practice of law.

The committee argued that performing title examinations constitutes the practice of law and found that having attorney Pelletier performing those examinations should not protect Balkun Title from the claim of unauthorized practice of law.

The committee made similar arguments regarding Balkun and Balkun Title's conducting of closings, provision of settlement services and the preparation of documents. It then went into details as to why the cited examples, including the social media posts, were the unauthorized practice of law.

"These exchanges show the way in which the services performed by Balkun Title, in at least some instances appear to the public, or even participants in a transaction, to be the practice of law," the committee stated.

"The most concerning social media activity observed by the committee was Balkun Title's Facebook post on its company page advertising its services, stating, unequivocally, 'Be sure to hire a title & closing attorney to secure the sale of your soon-to-be home.' Under questioning by the committee, Balkun testified that the post was authored by the outside marketing company without his review, and that he immediately took action to have that inaccurate reference to a lawyer removed."

The Rhode Island Supreme Court heard oral argument on both cases Dec. 5.

Because of a lack of clarity or enforceability of certain court decisions, sometimes it settles into custom and practice, Cain noted, saying those that are not quite sure what the ruling exactly is, they may be conservative and have more attorney involvement than may be required to ensure they are doing things correctly.

"In many of these jurisdictions, I'm very fond of pointing out a basic concept, generally with national customers," said **Steve Winkler**, chief underwriting counsel, WFG National Title Insurance Co. "When someone comes in and tries to create a different mousetrap in the attorney states, [I ask], 'Do you want to make law, or do you want to get your transaction closed?' And if they want to get their transactions closed, I say 'OK, well, follow the generally accepted rules, and when in these states, this is how you do business. We can have a discussion all you want about whether or not it is good public policy, but who cares?'"