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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT OF RHODE ISLAND

In re Daniel D. Balkun and Balkun Title & Closing, Inc.	:	**No. 2018-162-M.P. (UPLC 2017-1)**

SUPREME COURT
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AMICUS BRIEF OF PETER F. KILMARTIN, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND

From a Report of the Unauthorized Practice of Law Committee

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I. FACTS AND PROCEDURAL HISTORY

The matter of In re Daniel S. Balkun and Balkun Title & Closing, Inc., No. 2018-161-M.P., relates to an investigation by the Unauthorized Practice of Law Committee ("Committee") regarding whether Daniel S. Balkun ("Balkun") and Balkun Title & Closing, Inc. ("Balkun Title") engaged in the unauthorized practice of law by representing sellers and preparing certain documents in connection with real estate transactions. See In re Daniel S. Balkun and Balkun Title & Closing, Inc. Committee Report ("Balkun Committee Report"), p. 2, 5, 30. The investigation was prompted after the Committee received a complaint from Attorney Anthony A. Senerchia, who alleged that Balkun and Balkun Title may have engaged in the unauthorized practice of law.[1] Id. at 2. The Committee held an investigational hearing where it heard testimony from Balkun, Attorney Senerchia, Attorney Andrew Pelletier (an employee of Balkun Title), and a paralegal employed by Balkun Title. Id. at 2, 7. Following the investigational hearings and a review of the submitted exhibits, the Committee made the following findings of fact. Id. at 3.

Balkun is a non-attorney title insurance agent,[2] a notary, and the sole shareholder of Balkun Title, a corporation that provides real estate and title services. Id. at 3-5, 19. In addition to Balkun, Balkun Title employs Attorney Pelletier, four paralegals, and a

[1] Attorney Senerchia was also investigated by the Committee, after the attorney representing Balkun and Balkun Title, Attorney Robert A. D'Amico, filed a complaint against Attorney Senerchia's company, SouthCoast Title. That matter is discussed in greater detail in the Attorney General's amicus brief filed in In re SouthCoast Title and Escrow, Inc., SU-2018-163-M.P.

[2] Balkun received his title insurance agent's license from the Rhode Island Department of Business Regulation. See Balkun Committee Report, p. 5-6. His license, however, was subject to numerous conditions because Balkun had previously been convicted of a felony. Id. at 6.

bookkeeper. Id. at 7. Attorney Pelletier also maintains a private practice and has a title insurance agent's license. Id. at 9-10. In his role at Balkun Title, Attorney Pelletier reviews title abstracts, performs closings, drafts deeds, and answers legal questions from Balkun Title's staff and clients. Id. at 11. Attorney Pelletier and Balkun each testified that Attorney Pelletier's client is Balkun Title, however, Attorney Pelletier also indicated that he owes a duty to all other parties to the transaction, including the clients of Balkun Title. Id. at 10. Balkun Title's four paralegals conduct title searches and prepare various documents for use in transactions. Id. at 13. When the paralegals discover a potential legal issue, they discuss it with Attorney Pelletier, however, one paralegal who testified at the investigational hearing estimated that fifty percent of the files that she opens are closed without any review by Attorney Pelletier. Id. at 13

Balkun Title provides the following services to its clients: issuing title insurance; conducting title searches and examinations; conducting closings; acting as settlement agent and performing other settlement services; and preparing documents, including drafting deeds, residency affidavits, and powers of attorney. Id. at 13-20. With respect to title searches and examinations, Balkun Title engages an independent title examiner who conducts a title search by looking at the title records for any inconsistencies or defects in the title. Id. at 14. After the title search is complete, Attorney Pelletier examines the title for defects and if any are discovered, Attorney Pelletier tries to correct the defect. Id. at 15.

Balkun Title also performs real estate closings; approximately forty closings per month. Id. Balkun estimated that in his capacity as a notary public, he has conducted between seventy-five-to-eighty percent of the closings that Balkun Title performed in

Rhode Island. Id. When Balkun conducts a closing, he successively presents each of the necessary closing documents to the buyer, gives a brief explanation of the document, and then requests the buyer's signature. Id. at 16. Balkun testified that he would go to Attorney Pelletier if a legal question arose during a closing, however, he stated that he has never had to do so. Id. at 17. Following the closing, Balkun brings the executed closing documents to Balkun Title for the paralegals to review. Id. Then, the deed is recorded, the title insurance is issued, and the funds in escrow are disbursed to the sellers and other parties. Id.

With respect to the document preparation services that Balkun Title offers, Balkun Title's paralegals draft the documents using templates used in past transactions and input the seller's information from the purchase and sales agreement. Id. at 18. Typically, these documents are not reviewed by Attorney Pelletier. Id.

The Committee then examined whether the following services constituted the practice of law, and whether Balkun Title and its agents had engaged in the practice of law by performing said services: title searches and examinations, closings, settlement services, and drafting certain legal documents. Id. at 36. At the outset, the Committee addressed the argument raised by Balkun and Balkun Title that R.I. Gen. Laws § 11-27-16 and the Title Insurers Act, R.I. Gen. Laws §§ 27-2.6-1–21, authorized Balkun Title, as a title company, to perform the various challenged real estate services. Balkun Committee Report, p. 32. Specifically, Section 11-27-16 sets forth the practices that corporations and associations can perform, and provides that:

> "(a) Nothing in §§ 11-27-2 -- 11-27-11 or §§ 11-27-16 -- 11-27-18 shall be construed to limit or prevent:
>
> (1) Any corporation, or its officers or agents, lawfully

> engaged in the insuring of titles to real property from conducting its business, and the drawing of deeds, mortgages, and other legal instruments in or in connection with the conduct of the business of the corporation* * *." (Emphasis added).

Balkun and Balkun Title maintained that given Balkun's title insurance agent's license and Balkun Title's status as a title insurance business, Section 11-27-16 authorizes respondents to perform the services at issue.[3]

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[3] The Title Insurers Act defines a "title insurance agent" as:

> "an authorized person, other than a bona fide employee of the title insurer who, on behalf of the title insurer, performs the following acts, in conjunction with the issuance of a title insurance report or policy:
>
> (i) Determines insurability and issues title insurance reports or policies, or both, based upon the performance or review of a search or abstract of title; and
>
> (ii) Performs one or more of the following functions:
>
> (A) Collects or disburses premiums, escrow or security deposits or other funds;
>
> (B) Handles escrows, settlements or closings;
>
> (C) Solicits or negotiates title insurance business; or
>
> (D) Records closing documents." R.I. Gen. Laws § 27-2.6-3(17) (emphasis added).

The Title Insurers Act define a "title insurance business," in part, as:

> (i) Issuing as insurer or offering to issue as insurer, a title insurance policy;
>
> (ii) Transacting or proposing to transact by a title insurer any of the following activities when conducted or performed in contemplation of, or in conjunction with, the issuance of a title insurance policy:
>
> (A) Soliciting or negotiating the issuance of a title insurance policy;
>
> (B) Guaranteeing, warranting or otherwise insuring the correctness of title searches for all instruments affecting titles to real property, any interest in real property, cooperative units and proprietary leases and for all liens or charges affecting the same;

The Committee acknowledged that Section 11-27-16(a) "carve[s] out a broad exception for title insurers to 'conduct [their] business' and to draft legal documents." See Balkun Committee Report, p. 34 (quoting R.I. Gen. Laws § 11-27-16(a)). The Committee held, however, that Section 11-27-16(a) and the Title Insurers Act do not prevent this Honorable Court from nevertheless concluding that Balkun and Balkun Title had engaged in the unauthorized practice of law. Balkun Committee Report, p. 35-36. For support, the Committee cited In re Town of Little Compton, 37 A.3d 85, 92 (R.I. 2012), wherein this Court held that though the Legislature may promulgate statutes to assist this Court in regulating the practice of law, the Legislature "may not in and of itself grant the right to anyone to practice law save in accordance with standards enunciated by this [C]ourt." See Balkun Committee Report, p. 35 (quoting In re Town of Little Compton, 37 A.3d at 92) (internal quotation marks omitted).

The Committee then analyzed whether the services at issue—title searches and examinations, closings, settlement services, and drafting certain legal documents—constituted the practice of law. Balkun Committee Report, p. 36. The Committee found

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(C) Handling of escrows, settlements or closings;
(D) Executing title insurance policies;
(E) Effecting contracts of reinsurance.

(iii) Guaranteeing, warranting or insuring searches or examination of title to real property or any interest in real property;
(iv) Guaranteeing or warranting the status of title as to ownership of or liens on real property and personal property by any person other than the principals to the transaction; or
(v) Doing or proposing to do any business substantially equivalent to any of the activities listed in this subsection in a manner designed to evade the provisions of this chapter."
R.I. Gen. Laws § 27-2.6-3(18) (emphasis added).

Real Estate Bar Ass'n for Massachusetts, Inc. v. Nat'l Real Estate Info. Servs., 946 N.Ed.2d 665 (Mass. 2011), and Rhode Island Resource Recovery Corporation, CA No. PB 2010-5194 (R.I. Super. Ct., July 16, 2012), to be "particularly instructive" in determining whether the acts-in-question constitute the practice of law. Balkun Committee Report, p. 41.

In Real Estate Bar Ass'n for Massachusetts, the Massachusetts Supreme Judicial Court was similarly tasked with deciding whether certain real estate acts undertaken by National Real Estate Information Services, a multi-state real estate settlement services provider and a title insurance agency, constituted the unauthorized practice of law. Real Estate Bar Ass'n for Massachusetts, 946 N.Ed.2d at 671. With respect to closings, the Supreme Judicial Court explained that in Massachusetts it is "a matter of common and long-standing practice" for an attorney to "be involved in the closing or settlement of real property conveyances." Id. at 684. The Supreme Judicial Court described the reasoning:

> "The closing is * * * a critical step in the transfer of title and the creation of significant legal and real property rights. Because this is so, we believe that a lawyer is a necessary participant at the closing to direct the proper transfer of title and consideration and to document the transaction, thereby protecting the private legal interests at stake as well as the public interest in the continued integrity and reliability of the real property recording and registration systems." Id.

The Committee also referenced Rhode Island Resource Recovery Corporation v. Albert G. Brien and Associates, et al., CA No. PB 2010-5194 (R.I. Super. Ct., July 16, 2012), wherein a justice of the Rhode Island Superior Court examined whether certain actions undertaken by Pilgrim Title Insurance Company, a closing, title, and escrow company, owned and managed by two attorneys, constituted legal services. Id. at 4, 38. Therein, the trial justice

distinguished between the duties and obligations of a settlement agent as compared to those of a closing attorney:

> "[P]reparation of settlement statements and filling out settlement forms does not constitute the practice of law. * * * Disbursing funds during a closing procedure, in and of itself, does not qualify as the practice of law. * * * The duties of a settlement agent are similar to an escrow agent and are limited to disbursing funds as per the closing instructions and filing settlement statements. * * *
>
> Separate and apart from title insurance and settlement services, closing attorneys, in contrast, have a number of duties to the clients, including protecting the interest of their clients in the transaction, ensuring marketable title, and effectuating a valid conveyance." Id. at 36.

Guided by the above jurisprudence, the Committee determined that conducting a title examination constituted the practice of law "[g]iven that the precise function of a title examination is to determine the legal status of the title, along with the correlating legal consequences that status may have on the particular transaction * * *." Balkun Committee Report, p. 42. In contrast, the Committee described the title search as "the largely administrative function of compiling the documentation of all recorded acts pertaining to the subject property," during which the person "conducting a title search is typically limited to simply locating the relevant documents and assembling them for later examination and determination of insurability." Id. at 41. The Committee found the title examination that follows the title search to be "of a more legal nature." Id. at 42.

Having deemed conducting a title examination to be the practice of law, the Committee then examined the performance of such activities by Balkun Title and its agents. Id. at 43. The Committee held that Attorney Pelletier's performance of title examinations did not insulate Balkun Title from liability because, though he is an attorney,

he conducts title examinations on behalf of Balkun Title, which then receives payment for the title examination. Id. The Committee explained that "Attorney Pelletier may provide legal services to Balkun Title but he cannot provide legal services to the customers of Balkun Title" because "[w]hen Attorney Pelletier provides legal services to the customers of Balkun Title, Balkun Title, in essence, functions as a law firm." Id. at 10. Accordingly, the Committee found that Balkun Title engaged in the unauthorized practice of law by conducting title examinations for its clients. Id. at 43.

With respect to Balkun and Balkun Title's involvement in real estate closings, the Committee again referenced Real Estate Bar Ass'n for Massachusetts, 946 N.E.2d at 684, where the Massachusetts Supreme Judicial Court deemed conducting a real estate closing to be the practice of law. The Committee concurred and found that conducting a real estate closing constitutes the practice of law because a closing is "an important transaction with monumental legal consequences." Balkun Title Committee Report, p. 47. Having determined that performing a real estate closing constituted the practice of law, the Committee found that Balkun Title had engaged in the unauthorized practice of law by conducting closings, noting that "Balkun Title is not authorized to practice law in Rhode Island—it is a title insurance company organized as a close corporation—and the company does not operate within the professional obligations of lawyers." Id. at 49.

The Committee also analyzed each of Balkun Title's document preparation services, specifically the drafting of deeds, residency affidavits, and powers of attorney on behalf of sellers. Id. It determined that drafting a deed constitutes the practice of law due to "the innumerable ways in which the language and contents of a deed can affect the legal rights of parties to a real estate transaction * * *." Id. at 51-52. Turning to Balkun Title's

drafting of deeds, the Committee noted that paralegals drafted the deeds using templates from similar prior transactions, often without any review by Attorney Pelletier.[4] Id. at 52. The Committee found it concerning that "Balkun Title apparently determines the tenancy for a deed by copying the prior deed conveying the property to the current seller without any independent research and regard to whether the property rights have been affected in the interim." Id. Accordingly, the Committee found that Balkun Title engaged in the unauthorized practice of law by drafting deeds on behalf of sellers. Id.

The Committee also found that it is the practice of law to draft a residency affidavit, a form required by the Rhode Island Division of Taxation to certify whether the seller is a Rhode Island resident for tax purposes. Id. at 53. It reached this conclusion because the Committee found that drafting a residency affidavit involves "making a legal determination with regard to the seller's residency." Id. The Committee noted that at Balkun Title, the paralegals drafted the residency affidavits, and in doing so, the paralegals usually determined the seller's residency based on the seller's driver's license or the address listed in the purchase and sales agreement. Id. Sometimes Attorney Pelletier reviewed or drafted the residency affidavits, but even in these circumstances because Balkun Title is not a law firm, an attorney cannot provide legal services through such an entity. Id. at 54. Accordingly, the Committee again found that Balkun Title had engaged in the unauthorized practice of law by drafting residency affidavits on behalf of sellers in real estate transactions in Rhode Island. Id.

[4] The Committee noted that even if the deeds were drafted or reviewed by an attorney, Balkun Title nevertheless engaged in the unauthorized practice of law because "Balkun Title is a title insurance company, not a law firm, and to provide legal services through any such an entity is in contravention of Articles II and V of the Supreme Court Rules." Balkun Committee Report, p. 53.

The Committee also concluded that drafting a power of attorney constitutes the practice of law because of the important legal rights involved, namely, the transfer of the "decisional control" of one's legal rights to another person. Id. at 55. The Committee noted that, at Balkun Title, paralegals drafted the powers of attorney based on templates from past transactions. Id. The Committee found that Balkun Title engaged in the unauthorized practice of law by drafting powers of attorney on behalf of sellers in real estate transactions in Rhode Island. Id.

Though the Committee determined that Balkun and Balkun Title engaged in the unauthorized practice of law by conducting title examinations, conducting closings, and drafting certain real estate documents, it did not recommend the initiation of civil or criminal proceedings against the respondents.[5] Id. at 63. Instead, the Committee asked this Court to declare that the following acts are the practice of law that can only be performed by an attorney: conducting a title examination to determine the marketability of title; conducting a real estate closing; and drafting a deed, a residency affidavit, and a power of attorney on behalf of a party to a real estate transaction. Id. at 63-64.

The Committee issued its report to this Honorable Court pursuant to Rule 7(d) of the Committee's Rules on Procedure. Thereafter, this Supreme Court entered an order on June 18, 2018, wherein it invited amici briefs from interested parties, expressly inviting, inter alia, the Attorney General. See In re Daniel S. Balkun and Balkun Title & Closing, Inc. Order, dated June 18, 2018.

[5] The Committee did not deem the settlement services that respondents performed, including the recordation of deeds, issuance of title insurance policies, and disbursement of the funds, to constitute the practice of law. Balkun Committee Report, p. 50-51.

II. ISSUES PRESENTED

This Honorable Court invited amici curiae briefs in In re Daniel S. Balkun and Balkun Title & Closing, Inc. to address the following issues:

A. Whether the respondents in In re Daniel S. Balkun and Balkun Title & Closing, Inc. engaged in the unauthorized practice of law as the Committee had found.

B. Whether the following acts constitute the practice of law and can, therefore, only be performed by an attorney: (1) conducting a title examination to determine the marketability of title; (2) conducting a real estate closing; and (3) drafting documents on behalf of a party to a real estate transaction, including a deed, a residency affidavit, and a power of attorney.

III. LEGAL BACKGROUND

"It has long been the law of this state that the definition of the practice of law and the determination concerning who may practice law is exclusively within the province of this court * * *." In re Town of Little Compton, 37 A.3d at 88. Nevertheless, this Honorable Court has acknowledged the General Assembly's efforts to "codify a concept that is inherently difficult to define * * *." Id. at 91. Through the unauthorized practice of law statute, set forth in chapter 27 of title 11, the General Assembly has prohibited the unauthorized practice of law by individuals who are not admitted members of the Rhode Island bar. See R.I. Gen. Laws § 11-27-12. The statute defines the "practice of law" as follows:

> "[T]he doing of any act for another person usually done by attorneys at law in the course of their profession, and, without limiting the generality of the definitions in this section, includes the following:

> (1) The appearance or acting as the attorney, solicitor, or representative of another person before any court, referee, master, auditor, division, department, commission, board, judicial person, or body authorized or constituted by law to determine any question of law or fact or to exercise any judicial power, or the preparation of pleadings or other legal papers incident to any action or other proceeding of any kind before or to be brought before the court or other body;
>
> (2) The giving or tendering to another person for a consideration, direct or indirect, of any advice or counsel pertaining to a law question or a court action or judicial proceeding brought or to be brought;
>
> (3) The undertaking or acting as a representative or on behalf of another person to commence, settle, compromise, adjust, or dispose of any civil or criminal case or cause of action;
>
> (4) The preparation or drafting for another person of a will, codicil, corporation organization, amendment, or qualification papers, or any instrument which requires legal knowledge and capacity and is usually prepared by attorneys at law." R.I. Gen. Laws § 11-27-2.

Although the Legislature's definition of the practice of law may assist this Court "in its duty to regulate such activity," the General Assembly cannot unilaterally provide anyone the right to practice law because this Honorable Court possesses "the ultimate and exclusive authority to determine what does and does not constitute the practice of law within the state and to regulate those people qualified to engage in the practice." In re Town of Little Compton, 37 A.3d at 88, 92.

Most recently, in In re Town of Little Compton, this Honorable Court examined whether a non-attorney's representation of a union in a labor arbitration proceeding constituted the unauthorized practice of law. Id. at 88. Although this Court ultimately

declined to hold that the involvement of a non-attorney in a public grievance arbitration to be the unauthorized practice of law, it nevertheless engaged in a thorough analysis of the practice of law in Rhode Island and the factors to consider when determining whether an act qualifies as the practice of law. Id. at 92-95. Specifically, this Court considered policy arguments, such as the knowledge and qualifications of non-attorney union representatives in labor arbitrations, the time and financial impact on labor arbitrations should the Court deem it the practice of law, and the fact that "this Court and the General Assembly have permitted nonlawyer representation to occur in other settings." Id. at 92-93.

To balance the aforementioned policy considerations, this Court then examined the Committee's investigation and report wherein it determined that the respondent had engaged in the "practice of law" as defined in Section 11-27-2 by performing an act "usually done by attorneys at law in the course of their profession," including presenting arguments, examining witnesses, and submitting evidence during the arbitration proceeding. In re Town of Little Compton, 37 A.3d at 94. This Court held that "although the conduct involved in this case may be the practice of law pursuant to the language of § 11-27-2, because of the long-standing involvement of nonlawyer union employees at public grievance arbitrations, we will not limit this involvement at this time." Id. at 95.

IV. INTEREST OF AMICUS CURIAE

The Office of Attorney General's role and interest as amicus curiae in this matter is set forth in R.I. Gen. Laws § 11-27-19; this Office is responsible for the investigation and prosecution of all violations of the unauthorized practice of law. See R.I. Gen. Laws § 11-27-19. Additionally, as the main enforcement entity of Rhode Island's consumer protection laws under the Unfair Trade Practice and Consumer Protection Act, the Attorney

General has an interest in protecting the public from unfair and deceptive business practices.[6] See R.I. Gen. Laws § 6-13.1-5 (authorizing the Attorney General to investigate and enforce violations of the Unfair Trade Practice and Consumer Protection Act). While unauthorized practice of law complaints may not fall within the purview of chapter 13.1 of title 6, the Attorney General does generally view the two aforementioned interests as consistent with the Attorney General's purpose to protect Rhode Island consumers.

V. DISCUSSION

A. Conducting a Title Examination to Determine the Marketability of Title

At the outset, it bears emphasizing the difference between conducting a title search and a title examination to determine the marketability of title, as the precise issue presented by this Honorable Court is whether "conducting a title examination to determine the marketability of title after a title search has been performed" constitutes the practice of law. See In re Daniel S. Balkun and Balkun Title & Closing, Inc. Order, dated June 18, 2018. In Real Estate Bar Ass'n for Massachusetts, Inc., which the Committee deemed instructive when rendering its recommendation to this Honorable Court, the Massachusetts Supreme

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[6] Pursuant to the Unfair Trade Practice and Consumer Protection Act, "[u]nfair methods of competition and unfair or deceptive acts or practices" include, in pertinent part:

> "(xii) Engaging in any other conduct that similarly creates a likelihood of confusion or of misunderstanding;
>
> (xiii) Engaging in any act or practice that is unfair or deceptive to the consumer;
>
> (xiv) Using any other methods, acts, or practices that mislead or deceive members of the public in a material respect * * *." R.I. Gen. Laws § 6-13.1-1(6).

Judicial Court provided a clear and concise explanation of the two step-process employed to determine the marketability of title:

> "[T]he 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, and these activities are commonly performed by nonlawyers for real estate attorneys. 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." Real Estate Bar Ass'n for Massachusetts, Inc., 946 N.E.2d at 686.

The Massachusetts Supreme Judicial Court's explanation conforms with the description given by Balkun during the investigational hearings. Balkun testified that, first, an independent title examiner conducts a title search by looking at the title records. Balkun Committee Report, p. 14. After the title search, Attorney Pelletier of Balkun Title examines the title for defects and if any are discovered, he attempts to correct the defect. Id. at 15.

Mindful of this distinction, the Attorney General submits that conducting a title examination to determine the marketability of title qualifies as the practice of law. Helpful in arriving at this conclusion is Section 11-27-2, which defines the practice of law as "the doing of any act for another person usually done by attorneys at law in the course of their profession, and, without limiting the generality of the definitions in this section, includes the following * * *." Section 11-27-2 then lists acts that qualify as the practice of law, including "[t]he giving or tendering to another person for a consideration, direct or indirect, of any advice or counsel pertaining to a law question." R.I. Gen. Laws § 11-27-2(2). Guided by this definition, the Attorney General believes that making and providing advice concerning a legal determination regarding the status and marketability of title qualifies as

the practice of law as defined in Section 11-27-2 because it involves rendering an opinion on a question of law, namely whether there are any defects in the title and whether there is marketable title.

Further support for this conclusion can be found in jurisprudence from other jurisdictions that have similarly deemed it the practice of law to conduct a title examination to determine the title's marketability. In Real Estate Bar Ass'n for Massachusetts, Inc., discussed supra, the Massachusetts Supreme Judicial Court concluded that certain real estate acts undertaken by a multi-state real estate settlement services and title insurance provider, constituted the unauthorized practice of law.[7] Real Estate Bar Ass'n for Massachusetts, Inc., 946 N.Ed.2d at 671. Therein, the Supreme Judicial Court noted that providing clients opinions or advice about the marketability of title constituted the practice of law and must be performed by an attorney. Id. at 676-77. Many jurisdictions have similarly concluded that it is the practice of law to conduct a title examination and provide an opinion regarding the title's marketability.[8]

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[7] Unlike Rhode Island, there is no statutory definition for the practice of law in Massachusetts.

[8] See, e.g., State v. Buyers Serv. Co., 357 S.E.2d 15, 18-19 (S.C. 1987) (holding that "[t]he examination of titles requires expert legal knowledge and skill. For the protection of the public such activities, if conducted by lay persons, must be under the supervision of a licensed attorney"); Upton v. Mississippi Valley Title Ins. Co., 469 So.2d 548, 556 (Ala.1985) (concluding that it would have been the unauthorized practice of law for a title insurance company to render an opinion on title); The Fla. Bar v. McPhee, 195 So.2d 552, 554 (Fla. 1967) (enjoining a title insurance company from "[r]endering, orally or in writing, opinions concerning the status or marketability of title to real property in Florida"); State Bar of Ariz. v. Arizona Land Title & Tr. Co., 366 P.2d 1, 15 (Ariz. 1961) (holding that title companies could furnish abstracts of title and similar information reports, without expressing opinions as to the validity or legal effect of the title); Kentucky State Bar Ass'n v. First Fed. Sav. & Loan Ass'n of Covington, 342 S.W.2d 397, 398 (Ky. 1960) (concluding that only an attorney could furnish a title examination that includes "an analysis of recorded interests in land coupled with an opinion as to its legal status"); Beach

Here, the Committee determined that Balkun Title engaged in the unauthorized practice of law by conducting title examinations. Balkun Title Committee Report, p. 43. The Attorney General agrees. The findings of fact rendered by the Committee reveal that, following the title search, Attorney Pelletier, on behalf of Balkun Title, examined the title for defects, and if any defects were discovered, Attorney Pelletier attempted to remedy the defect. Id. at 15. Though Attorney Pelletier is a duly-licensed attorney, the Committee held that this did not insulate Balkun Title because the title examinations were performed on behalf of Balkun Title, a non-legal entity, which also received the payment for those services. See id. at 43; see also R.I. Gen. Laws § 11-27-3(a) ("any person, partnership, corporation, or association that receives any fee or any part of a fee for the services performed by an attorney at law shall be deemed to be practicing law contrary to the provisions of this chapter."). Accordingly, consistent with the majority of jurisdictions that have considered this precise issue, the Attorney General respectfully submits to this Honorable Court that it is the practice of law to perform a title examination to determine the marketability of title.

B. Conducting a Real Estate Closing

A real estate closing is "the final transaction between the buyer and seller, whereby the conveyancing documents are concluded and the money and property transferred."

Abstract & Guar. Co. v. Bar Ass'n of Ark., 326 S.W.2d 900, 903 (Ark. 1959) (concluding that "title examination and curative work, when done for another, constitutes the practice of law in its strictest sense and has long been considered as such"); Guardian Abstract & Title Co. v. San Antonio Bar Ass'n, 278 S.W.2d 613 (Tex. Civ. App. Austin 1955), judgment rev'd on other grounds, 291 S.W.2d 697 (1956) (affirming an injunction against a title insurance company that restrained it from giving advice and opinions on title instruments it prepared); Land Title Abstract & Tr. Co. v. Dworken, 193 N.E. 650, 652 (Ohio 1934) (concluding that rendering an opinion on the validity of title "whether in a so-called statement or certificate of title, falls within the realm of the practice of law").

BLACK'S LAW DICTIONARY (10th ed. 2014). The Massachusetts Supreme Judicial Court described a closing as "where all parties in a real property conveyancing transaction come together to transfer their interests, and where the legal documents prepared for the conveyance are executed, often including but not limited to the deed, the mortgage and the promissory note." Real Estate Bar Ass'n for Massachusetts, Inc, 946 N.E.2d at 684.

The Attorney General concludes that conducting a closing, under certain circumstances adduced below, can constitute the practice. As discussed above, Section 11-27-2 defines the practice of law as "the doing of any act for another person usually done by attorneys at law in the course of their profession * * *." The list of enumerated acts set forth in Section 11-27-2 includes "[t]he giving or tendering to another person for a consideration, direct or indirect, of any advice or counsel pertaining to a law question or a court action or judicial proceeding brought or to be brought * * *." R.I. Gen. Laws § 11-27-2(2). Based on this definition, the Attorney General submits that conducting a real estate closing by itself may not constitute the practice of law, however, it would constitute the unauthorized practice of law for a non-attorney to furnish legal advice, opinions, or answers to legal questions that may arise at the closing. Such a rule would require great care since a non-attorney real estate closing may veer into the practice of law upon the asking of a particular question.

In addition to the General Laws on the unauthorized practice of law, there are other legal provisions that may assist this Court in determining whether conducting a closing constitutes the practice of law. Provisional Order Number 18 to Rule 5.3 of the Rhode Island Supreme Court Rules of Professional Conduct, which addresses the use of legal assistants by members of the Rhode Island Bar, provides, in part:

> "A legal assistant may perform the following functions, together with other related duties, to assist lawyers in their representation of clients: attend client conferences; correspond with and obtain information from clients; draft legal documents; assist at closings and similar meetings between parties and lawyers; witness execution of documents * * *." Provisional Order No. 18, 454 A.2d 1222, 1222 (R.I. 1983) (mem.) (emphasis added).

The provisional order from this Honorable Court expressly states that a legal assistant—a non-attorney—can "assist at closing * * * between parties and lawyers," but does not expressly allow for the legal assistant to conduct the closing. Id. The language of the provisional order is evidence that a closing must be conducted by an attorney and as such, even if the participation of the legal assistants during a closing was permissible, if the legal assistants are employed by a non-legal entity, this would constitute the unauthorized practice of law. And, as the Committee appropriately found, "Balkun Title is not authorized to practice law in Rhode Island * * *." Balkun Committee Report, p. 49.

Also pertinent to the determination of whether a closing constitutes the practice of law is the Title Insurers Act, R.I. Gen. Laws § 27-2.6-1–21. The Title Insurers Act provides that a "'[t]itle insurance agent' * * * performs the following acts, in conjunction with the issuance of a title insurance report or policy: * * * Handles escrows, settlements or closings * * *." R.I. Gen. Laws § 27-2.6-3(17) (emphasis added). The Act further provides that a "'[t]itle insurance business' or 'business of title insurance' means * * * [t]ransacting or proposing to transact by a title insurer any of the following activities when conducted or performed in contemplation of, or in conjunction with, the issuance of a title insurance policy: * * * Handling of escrows, settlements or closings * * *." R.I. Gen. Laws § 27-2.6-3(18). As these provisions demonstrate, the Legislature contemplated that title companies, like Balkun Title, and title insurance agents, like Balkun and Attorney Pelletier,

could perform closings on behalf of their non-legal entities. Although these provisions seem to authorize closings by non-attorney title agents, this Honorable Court is not bound by these statutes because "the definition of the practice of law and the determination concerning who may practice law is exclusively within the province of this court * * *." In re Town of Little Compton, 37 A.3d at 91 (quoting Unauthorized Practice of Law Comm. v. State, Dep't of Workers' Comp., 543 A.2d 662, 664 (R.I. 1988)).

Amid the complex landscape surrounding the performance of closings in Rhode Island, reference to other jurisdictions' examination of this topic may prove helpful.[9] The Massachusetts Supreme Judicial Court noted that it is "a matter of common and long-standing practice" in Massachusetts for an attorney to be involved in the closing. Real

[9] Other jurisdictions have held that a real estate closing must be conducted by an attorney. See, e.g., Formal Advisory Opinion No. 04-1, 626 S.E.2d 480, 481 (Ga. 2006) ("The closing of a real estate transaction in this [s]tate constitutes the practice of law, and, if performed by someone other than a duly-licensed Georgia attorney, results in the prohibited unlicensed practice of law."); State v. Buyers Serv. Co., 357 S.E.2d 15, 19 (S.C. 1987) (concluding 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").

Some jurisdictions allow a non-attorney to conduct a closing, but impose conditions, such as barring the non-attorney from giving legal advice or drafting documents. See, e.g., Countrywide Home Loans, Inc. v. Kentucky Bar Ass'n, 113 S.W.3d 105, 121 (Ky. 2003) (holding that a non-attorney can conduct a real estate closing, but the non-attorney cannot answer any legal questions or give legal advice); In re Opinion No. 26 of Committee on Unauthorized Practice of Law, 654 A.2d 1344, 1361-62 (N.J. 1995) (concluding that a non-attorney can conduct a residential real estate closing under the condition that the non-attorney provides a notice informing the parties to the transaction that the non-attorney is neither allowed nor qualified to give any legal advice); Coffee Cty. Abstract & Title Co. v. State ex rel. Norwood, 445 So.2d 852, 856 (Ala. 1983) (holding that title company's agent who conducted a closing engaged in the unauthorized practice of law because he gave legal advice during the course of the closing); The Fla. Bar v. Columbia Title of Fla., 197 So. 2d 3, 4 (Fla. 1967) (concluding that president of title company engaged in the unauthorized practice of law by preparing documents for a closing and attending and participating in the closing).

Estate Bar Ass'n for Massachusetts, 946 N.E.2d at 684. The Supreme Judicial Court described the reason for this:

> "The closing is * * * a critical step in the transfer of title and the creation of significant legal and real property rights. Because this is so, we believe that a lawyer is a necessary participant at the closing to direct the proper transfer of title and consideration and to document the transaction, thereby protecting the private legal interests at stake as well as the public interest in the continued integrity and reliability of the real property recording and registration systems." Id.

The Supreme Judicial Court in Real Estate Bar Ass'n for Massachusetts relied heavily on the custom and practice of attorneys conducting closings in Massachusetts. Id. (citing Lowell Bar Ass'n v. Loeb, 52 N.E.2d 27, 34 (Mass. 1943) (holding that "practices of the community have an important bearing on the scope of the practice of law")).

Here, no evidence has been presented or discovered relating to a similar custom and practice in Rhode Island. To the contrary, the evidence presented in the Committee's report reveals that closings conducted by a non-lawyer notary, like Balkun, are a common practice in Rhode Island. See Balkun Committee Report, p. 15. Of course, this common practice is not dispositive of the issue of whether an activity constitutes the practice of law. See In re Town of Little Compton, 37 A.3d at 92 (noting that "[a]lthough the use of nonlawyer representation in labor arbitrations is commonplace in Rhode Island, this factor alone does not provide the necessary basis for this Court to authorize this practice").

Considering the foregoing, the Attorney General respectfully submits that in some scenarios, a closing may constitute the practice of law, and under other circumstances, a closing may not constitute the practice of law. Specifically, if the non-attorney conducting the closing solely hands documents to a buyer or seller, without further elaboration on the documents' significance, such a transaction would seemingly not qualify as the practice of

law. However, should a non-attorney conducting a closing describe the legal terms or legal consequences of the closing documents or answer legal questions about the closing documents, the Attorney General believes that such would be "[t]he giving or tendering to another person for a consideration, direct or indirect, of any advice or counsel pertaining to a law question or a court action or judicial proceeding brought or to be brought * * *." R.I. Gen. Laws § 11-27-2(2). Because a non-attorney closing (as described by the Attorney General above) can transform into the giving or tendering of legal advice nearly instantaneously and without warning, if this Court determines that non-attorneys may conduct real estate closings, the non-attorney closing agent must be transparent and forthcoming with the parties involved in the real estate transaction that he or she is not an attorney and is unqualified or authorized to answer any legal questions. See In re Opinion No. 26 of Committee on Unauthorized Practice of Law, 654 A.2d 1344, 1345 (N.J. 1995) (holding a non-attorney can conduct a residential real estate closing under the condition that the non-attorney provides a notice informing the parties to the transaction "of the true interests of the broker and title officer * * * and of the risks of not having their own attorney * * *").

C. Drafting Documents

Whether drafting a deed, a residency affidavit, and/or a power of attorney constitutes the practice of law, again, requires reference to Section 11-27-2, which defines the practice of law, in relevant part, as "[t]he preparation or drafting for another person of a will, codicil, corporation organization, amendment, or qualification papers, or any instrument which requires legal knowledge and capacity and is usually prepared by attorneys at law." R.I. Gen. Laws § 11-27-2(4). Thus, when determining whether the

drafting of a deed, a residency affidavit, or a power of attorney constitutes the practice of law, a key consideration should be whether the preparation of such instrument demands "legal knowledge and capacity" and whether these documents are "usually prepared by attorneys at law." See id.

In addition to Section 11-27-2, Provisional Order Number 18, discussed supra, is also instructive. The provisional order addresses the use of legal assistants by members of the Rhode Island Bar and provides, in part:

> "A legal assistant may perform the following functions, together with other related duties, to assist lawyers in their representation of clients: * * * draft legal documents * * *. Legal documents, including, but not limited to, contracts, deeds, leases, mortgages, wills, trusts, probate forms, pleadings, pension plans and tax returns, shall be reviewed by a lawyer before being submitted to a client or another party." Provisional Order No. 18, 454 A.2d 1222, 1222 (R.I. 1983) (mem.) (emphasis added).

This provisional order addresses the acts at issue in the instant matter; Balkun Title's paralegals drafted deeds, residency affidavits, and powers of attorney for sellers using templates used in past transactions and inputted the seller's information from the purchase and sales agreement. Balkun Committee Report, p. 18. Typically, the documents were not reviewed by an attorney. Id. Regardless, it is worth reiterating that Provisional Order Number 18 addresses the use of legal assistants by members of the Rhode Island bar—here, the legal assistants were used by a non-legal entity, and as the Committee appropriately found, "Balkun Title is not authorized to practice law in Rhode Island * * *." Balkun Committee Report, p. 49.

1. Drafting a Deed

Many jurisdictions deem drafting a deed to constitute the practice of law. For instance, Massachusetts has held as such "[b]ecause deeds pertaining to real property directly affect significant legal rights and obligations * * *." Real Estate Bar Ass'n for Massachusetts, Inc., 946 N.E.2d at 678. See also Ohio State Bar Assn. v. Dalton, 924 N.E.2d 821, 824-25 (Ohio 2010) (concluding that a title company and title agent engaged in unauthorized practice of law by drafting deeds); People ex rel. Illinois State Bar Ass'n v. Schafer, 87 N.E.2d 773, 777-78 (Ill. 1949) (holding that real estate broker who prepared deeds, notes, and mortgages engaged in the unauthorized practice of law); State v. Buyers Serv. Co., 357 S.E.2d 15, 17-18 (S.C. 1987) (holding that title company's preparation of deeds, mortgages, notes, and other legal instruments related to mortgage loans and transfers of real property constitute the practice of law); The Fla. Bar v. Columbia Title of Fla., 197 So.2d 3, 4 (Fla. 1967) (concluding title company's president engaged in the unauthorized practice of law by drafting documents for a closing); State Bar of Ariz. v. Arizona Land Title & Tr. Co., 366 P.2d 1, 12-13 (Ariz. 1961) (holding that a title company's preparation of "deeds, mortgages, releases, or other instruments affecting the obligations or rights between parties other than the title company * * * would constitute the unauthorized practice of law"); Com. v. Jones & Robins, 41 S.E.2d 720, 727 (Va. 1947) (concluding that "the preparation of deeds, deeds of trust, mortgages and deeds of release by real estate brokers constitutes the illegal practice of law"); Howton v. Morrow, 106 S.W.2d 81, 82 (Ky. 1937) (holding that the practice of law "includes giving advice and preparing wills, contracts, deeds, mortgages, and other instruments of a legal nature").

When determining whether drafting a deed or other real estate instrument constitutes the practice of law, some jurisdictions consider whether the drafter solely filled in blanks on a form that was prepared by an attorney. In these jurisdictions, this act, without more, is not considered to be the practice of law. See, e.g., State Bar v. Guardian Abstract & Title Co., 575 P.2d 943, 949 (N.M. 1978) (holding that it is not the practice of law to fill in blanks in legal instruments, "where the forms have been drafted by attorneys and where filling in the blanks requires only the use of common knowledge regarding the information to be inserted," but it is the practice of law "when the filling in of the blanks affects substantial legal rights, and if the reasonable protection of such rights requires legal skill and knowledge greater than that possessed by the average citizen"); In re Matthews, 79 P.2d 535, 537-38 (Idaho 1938) (concluding that for preparation of instruments to qualify as the practice of law, there must be "something more than the mere filling in of blank forms"). But see Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 214 N.E.2d 771, 775 (Ill. 1966) (concluding that drafting real estate instruments is the practice of law and "the fact that standardized forms are usually employed" does not change that classification because "[m]any aspects of law practice are conducted through the use of forms, and not all of the matters handled require extensive investigation of the law").

In this respect, Section 11-27-2 defines the practice of law, in relevant part, as "[t]he preparation or drafting for another person of a will, codicil, corporation organization, amendment, or qualification papers, or any instrument which requires legal knowledge and capacity and is usually prepared by attorneys at law." R.I. Gen. Laws § 11-27-2(4). Although a deed is not one of the enumerated documents listed in Section 11-27-2(4), the preparation of a deed demands "legal knowledge and capacity." Indeed, the consequences

of an improperly prepared deed are too great to be left to a non-attorney. The Committee, similarly, determined that drafting a deed constitutes the practice of law because of "the innumerable ways in which the language and contents of a deed can affect the legal rights of parties to a real estate transaction * * *." Balkun Committee Report, p. 51-52. The Attorney General, therefore respectfully submits to this Honorable Court that drafting a deed constitutes the practice of law.

2. Drafting a Residency Affidavit

A residency affidavit is a document furnished by the seller to the buyer to comply with the tax requirements relating to the sale of real property by non-Rhode Island residents.[10] See R.I. Gen. Laws § 44-30-71.3(c). The Rhode Island Division of Taxation supplies a "Seller's Residency Affidavit" form, which instructs the buyer that "this residency affidavit must be completed by the seller and made part of all closings when any Rhode Island realty and associated tangible property are sold." Without the benefit of finding case law from other jurisdictions on residency affidavits and the practice of law, reference to Section 11-27-2 is appropriate.

Section 11-27-2(4) defines the practice of law as, inter alia, "[t]he preparation or drafting for another person of a will, codicil, corporation organization, amendment, or qualification papers, or any instrument which requires legal knowledge and capacity and

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[10] Rhode Island General Laws § 44-30-71.3 provides, in pertinent part, that:

> "In a sale of real property and associated tangible personal property owned by a nonresident, the buyer shall deduct and withhold on the payments an amount equal to six percent (6%) of the total payment to nonresident individuals, estates, partnerships or trusts, and nine percent (9%) of the total payment to nonresident corporations." Section 44-30-71.3(a).

is usually prepared by attorneys at law." The Attorney General can envision scenarios where drafting a residency affidavit may require "legal knowledge and capacity" to determine the seller's residency. For example, completion of the "Seller's Residency Affidavit" form requires an analysis of whether the seller is a resident corporation, a resident individual, estate, or trust, as defined in Rhode Island's tax laws. Though this analysis may be simple for real estate transactions involving a seller who owns one residence in Rhode Island, there may be circumstances where determining residency may be more complex for transactions involving a seller who is a multi-state corporation. Of course, there may also be scenarios where completion of the residency affidavit requires little more than filling in the blanks on the "Seller's Residency Affidavit" form, which the Attorney General believes would not qualify as the practice of law. See Real Estate Bar Ass'n for Massachusetts, Inc., 946 N.E.2d at 679 ("Filling out standard government forms for others is not necessarily the practice of law."). Accordingly, the Attorney General respectfully proposes to this Court that the determination of whether drafting a residency affidavit qualifies as the practice of law may depend on the factual circumstances of each case.

3. Drafting a Power of Attorney

A power of attorney is "[a]n instrument granting someone authority to act as agent or attorney-in-fact for the grantor." BLACK'S LAW DICTIONARY (10th ed. 2014). Looking again to the relevant unauthorized practice of law provisions for guidance, Section 11-27-2 defines the practice of law, in part, as "[t]he preparation or drafting for another person of a will, codicil, corporation organization, amendment, or qualification papers, or any instrument which requires legal knowledge and capacity and is usually prepared by

attorneys at law." R.I. Gen. Laws § 11-27-2(4). The Attorney General submits that drafting a power of attorney qualifies as the practice of law because it requires advising on whether the client should obtain a power of attorney, the legal consequences of such an appointment, to whom he or she should appoint the power of attorney, the type of power of attorney to execute, and any other legal question relating to the legal instrument.

In further support of this recommendation, the Attorney General references jurisprudence from various other jurisdictions that have similarly deemed the drafting of a power of attorney to constitute the practice of law. See, e.g., Franklin v. Chavis, 640 S.E.2d 873, 876 (S.C. 2007) (holding that nonlawyer engaged in the unauthorized practice of law in drafting a power of attorney because "[t]he document itself confers wide-ranging legal rights and would clearly require legal advice in its preparation"); State ex rel. Indiana State Bar Ass'n v. Northouse, 848 N.E.2d 668, 675 (Ind. 2006) (concluding that non-attorney engaged in unauthorized practice of law by drafting testamentary documents, including a power of attorney); Dayton Bar Assn. v. Addison, 837 N.E.2d 367, 369 (Ohio 2005) (noting that the Ohio courts "have consistently held that giving legal advice and preparing wills, trusts, powers of attorney, and deeds constitute the unauthorized practice of law"); In re Mid-Am. Living Tr. Assocs., Inc., 927 S.W.2d 855, 871 (Mo. 1996) (prohibiting trust marketing company and its non-attorney agents from preparing or assisting in the preparation of trusts, wills, and powers of attorney without the direct supervision of an independent licensed attorney selected by and representing those individuals); In re Baker, 85 A.2d 505, 514 (N.J. 1951) (holding that the drafting of a power of attorney constitutes the practice of law). Given the foregoing authority from other jurisdictions and the legal

significance of executing such a document, the Attorney General submits that drafting a power of attorney constitutes the practice of law.

Having concluded that the drafting of a deed and the drafting of a power of attorney constitute the practice of law, the Attorney General asserts that Balkun Title and its agents engaged in the unauthorized practice of law by drafting such documents. With respect to the drafting of residency affidavits, the Committee found that Balkun Title paralegals drafted the residency affidavits and determined the seller's residency based on the seller's driver's license or the address listed in the purchase and sales agreement. Balkun Committee Report, p. 53. Without more information regarding the complexity of the residency determinations at issue, the Attorney General is unable to opine on whether the drafting of residency affidavits by Balkun Title's agents constitutes the practice of law.

VI. CONCLUSION

The Attorney General respectfully submits this amicus curiae brief to assist this Honorable Court in determining whether the following acts constitute the practice of law: conducting a title examination to determine the marketability of title, conducting a closing, and drafting certain documents, including a deed, a residency affidavit, and a power of attorney.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 15th day of November, 2018, a copy of the foregoing document was mailed, via regular first-class mail, postage prepaid, to the following attorneys of record:

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