Case No. S03U1451

IN THE SUPREME COURT OF GEORGIA

ON REVIEW OF UPL ADVISORY OPINION No. 2003-2

BRIEF AMICI CURIAE OF THE UNITED STATES OF AMERICA AND THE FEDERAL TRADE COMMISSION

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INTRODUCTION

The State Bar of Georgia asks the Court to approve its Standing Committee on the Unlicensed Practice of Law ("Committee") Advisory Opinion No. UPL 2003-2 ("UPL 2003-2"), which declares that non-lawyers who perform real estate closings are engaged in the unlicensed prac

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however, were not supported by the record, which contains no demonstration that, in either Georgia or elsewhere, consumers have been inadequately protected in lay person real estate closings.

On April 22, 2003, the Committee issued UPL 2003-2 in which it concluded that "the preparation of deeds of conveyance on behalf of another . . . by anyone other than a duly licensed attorney constitutes the unlicensed practice of law." UPL 2003-2, p. 2, lines 64-66.[2] It further concluded 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."[3] UPL 2003-2, p. 3, lines 108-10. Finally, the Committee opined that "[r]efinance closings, second mortgages, home equity loans, [and] construction loans" are "subject to the same analysis" because, it believed, "the centerpiece of these transactions is the conveyance of real property." UPL 2003-2, pp. 3-4, lines 136-40.

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[2]UPL 2003-2 is attached to the State Bar's brief as Exhibit A. Citations in this brief to UPL 2003-2 will be "UPL 2003-2," and then the page and line numbers of Exhibit A.

[3]The Committee defined a "witness only closing" as a closing "in which an individual presides over the execution of deeds of conveyance and other closing documents, but purports to do so merely as a witness and notary, not as someone who is practicing law." UPL 2003-2, p. 2, lines 75-78.

ARGUMENT

When it issued UPL 2003-2, the Committee declined to consider the argument, made in several submissions (including those of the USDOJ and FTC), that requiring the services of Georgia lawyers for real estate closings would needlessly harm the public interest by increasing price and decreasing choice for consumers.[4] Indeed, the Committee correctly recognized that it was issuing "only an interpretation of the law," and that, in so doing, it was limited to consideration only of "'statute, court rule, and case law of the State of Georgia.'" UPL 2003-2, p. 1, lines 5, 27-28 (quoting Ga. Bar Rule 14-2.1(a)). The Committee therefore was unable to consider the key question of whether, assuming that the preparation and execution of a deed of conveyance is the practice of law, it would nonetheless serve the public interest if laypersons were permitted to engage in this activity in Georgia. This Court, however, may and should consider this fundamental question and recognize the larger public interest to be served. We respectfully submit that, as other states have concluded, the answer to that question lies in the balancing of the risks and benefits to consumers of allowing or disallowing lay real estate closings. We further respectfully submit that that balancing weighs heavily in favor of allowing laypersons to close real estate transactions in Georgia.

[4] *See* Tr. 26-30; Exh. P, T.

THE PUBLIC INTEREST WILL BE BEST SERVED BY PERMITTING COMPETITION BETWEEN LAY SETTLEMENT SERVICES AND ATTORNEYS

A. This Court Has The Authority To Determine Whether Lay Settlement Services Should Be Permitted In The Public Interest

"Only this Court has the inherent power to govern the practice of law in Georgia;" thus "Ga.L. 1931, p. 191, as amended . . . 'no longer controls the practice of law in Georgia.'" *Eckles v. Atlanta Technology Group, Inc.,* 267 Ga. 801, 804, 485 S.E.2d 22, 25 (1997) (quoting *Huber v. State,* 234 Ga. 357, 359, 216 S.E.2d 73, 75 (1975)). This exclusive power derives from the Court's "constitutional function, to regulate the practice of law in Georgia." *Huber,* 234 Ga. at 360, 216 S.E.2d at 75; *accord Eckles,* 267 Ga. at 808, 485 S.E.2d at 28 ("It is beyond dispute that the regulation of the practice of law in this state is a matter exclusively within this Court's inherent power"). And the "foremost" goal in this Court's regulation of the practice of law in Georgia is to insure "adherence to the public interest." *First Bank & Trust Co. v. Zagoria,* 250 Ga. 844, 845, 302 S.E.2d 674, 675 (1983).

Thus, in Georgia, as in other states, the prohibition on the unlicensed practice of law is designed to protect the public interest. *Lowe v. Presley,* 86 Ga. App. 328, 331-32, 71 S.E.2d 730, 733 (1952); *accord Frazee v. Citizens Fidelity*

Bank & Trust Co., 393 S.W.2d 778, 782 (Ky. 1964) ("The basic consideration in suits involving unauthorized practice of law is the public interest"); *Lowell Bar Ass'n v. Loeb*, 52 N.E.2d 27, 31 (Mass. 1943) ("The justification for excluding from the practice of law persons not admitted to the bar is to be found, not in the protection of the bar from competition, but in the protection of the public").

But as the Supreme Court of New Jersey recently explained when it rejected

A.2d 1344, 1345-46 (N.J. 1995) (emphasis added); *see also id.* at 1352 (ultimate question is "whether the public interest is disserved by permitting such conduct. The resolution of the question is determined by practical, not theoretical, considerations");[5] *Perkins v. CTX Mortgage Co.,* 969 P.2d 93, 99 (Wash. 1999) (resolution "depends on balancing the competing public interests of (1) protecting the public from the harm of the lay exercise of legal discretion and (2) promoting convenience and low cost"); *State Bar of New Mexico v. Guardian Abstract & Title Co.,* 575 P.2d 943, 948 (N.M. 1978) ("test must be applied in a common-sense way [to avoid] impractical and technical restrictions which have no reasonable justification"); *cf., Georgia Bar Ass'n v. Lawyers Title Ins. Corp.,* 222 Ga. 657, 663-64, 151 S.E.2d 718, 723 (1966) (Duckworth, C.J., concurring).

In determining how best to protect the public interest in this proceeding, therefore, this Court should balance the harm that would be caused by banning lay real estate settlements against the harm that might be caused by allowing them. If the Court finds that permitting lay people to prepare and facilitate the execution of a deed of conveyance is in the public's interest, then the Court, in the exercise of its exclusive supervisory authority over the practice of law in Georgia, should

[5]Thus, the State Bar is mistaken that the New Jersey Supreme Court "simply adopt[ed] the customary and traditional practice in the state." Br. 4-5.

reject UPL 2003-2. *See Eckles, supra.* As explained below, the requisite balancing strongly supports rejecting UPL 2003-2.

B. UPL 2003-2 Would Likely Hurt The Public By Causing Prices To Rise

Free and unfettered competition is the centerpiece of the American economy. As the United States Supreme Court has observed, "ultimately, competition will produce not only lower prices but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.'" *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (citation omitted); *accord FTC v. Superior Court Trial Lawyers Ass'n,* 493 U.S. 411, 423 (1990). Competition benefits not only consumers of traditional manufacturing industries, but also consumers of services offered by the learned professions. *See Goldfarb v. Virginia State Bar,* 421 U.S. 773, 787 (1975); *National Soc'y of Prof'l Eng'rs*, 435 U.S. at 689.

When nonlawyers compete with lawyers to provide services that do not require formal legal training,[6] consumers may consider several relevant factors in

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[6]Although the State Bar assumes that real estate closings always "requir[e] specialized legal skills and knowledge" (Br. 11), persuasive testimony to the contrary was given at the hearing. *See* Tr. 28, 152-53, 158-59; Exh. E at 1-2 (describing "the increasingly typical residential 'closing mill'" that exists in Georgia legal practice); Exh. I ("as a practical matter, the preparation of almost all conveyancing instruments is done by non lawyers"). That testimony is

selecting a service provider, including cost, convenience, and the degree of assurance that the necessary documents and commitments are sufficient. Today, in the majority of states, nonlawyers compete with lawyers to provide services related to the preparation and execution of a deed, including the examination and clearing of title, the answering of non-legal questions during the closing process, witnessing the signatures at closing, and the disbursement of funds. *See, e.g.,* Tr. 25, 130; *In re Opinion No. 26, supra*; Va. Code Ann. §§ 6.1-2.19 to 6.1-2.29 (Michie 1997); Michael Braunstein, *Structural Change and Inter-Professional*

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corroborated by the experience in the many states that permit lay closings. *See infra.*

[7]A closing attorney's compensation has two elements: a legal fee (Tr. 14, 98), and a commission from the title insurance company – of as much as 80 percent of the title insurance premium – as the insurance company's seller-agent. Tr. 24, 98-99, 115, 119. Some title companies, however, "work for the title insurance premium alone." Tr. 24-25, 27.

[8]Besides hurting consumers who are buying and selling homes and commercial properties, UPL 2003-2 would also harm those obtaining home equity loans or refinancing existing loans by preventing them from using the lender or other layperson as their closing agent, even when no conveyance of property is involved. Indeed, the final, albeit completely conclusory paragraph of UPL 2003-2, appears to have been written with that goal in mind. *See* note 12, *infra.*

Media General, *Residential Real Estate Closing Cost Survey*, September 1996 at 5. There is no reason to expect that Georgia's experience would not be similar. *See* Tr. 24-25, 27, 33-34.

Second, the Opinion, by prohibiting competition from lay providers, will likely increase the price of lawyers' settlement services, since the availability of alternative, lower-cost lay services will no longer be a threat. Consequently, even consumers who would otherwise choose an attorney over a lay agent will likely pay higher prices. Experience in New Jersey supports this prospect. In 1995, after a 16-day evidentiary hearing conducted by a special master, the New Jersey Supreme Court found that real estate closing legal fees were much lower in southern New Jersey, where lay settlements were commonplace, than in the northern part of the State where lawyers conducted almost all settlements.[9] This was true whether or not the South Jersey transaction included a lawyer. South Jersey buyers unrepresented by counsel paid no legal fees as part of closing costs, while unrepresented sellers paid about $90; South Jersey buyers represented by counsel throughout the entire transaction, including closing, paid on average $650,

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[9] In South Jersey, only about 40% of buyers and 35% of sellers were represented by counsel at closing, while in North Jersey 99.5% of buyers and 86% of sellers were represented by counsel. *In re Opinion No. 26*, 654 A.2d at 1349.

while sellers paid $350; North Jersey buyers represented by counsel paid on average $1,000, and sellers $750. *In re Opinion No. 26*, 654 A.2d at 1349.

Third, a ban on the preparation of deeds and the facilitation of their execution by anyone other than a licensed Georgia attorney could reduce competition from out-of-state service providers. In the real estate mortgage market, for example, lenders outside Georgia may compete by offering lower interest rates or more attractive loan packages than similar in-state institutions. These lenders may lack facilities in Georgia. They may hire out-of-state providers to prepare deeds and may contract with Georgia lay providers to facilitate the execution of those deeds.[10] A ban on competition from anyone other than a licensed Georgia attorney has the potential to impair this competition between lenders.

Fourth, a ban on lay competition could hurt consumers by denying them the right to choose a lay service provider that offers a combination of services or form of service that better meets individual consumer needs. For example, some lay closing services compete with attorneys on the basis of convenience to close loans at nontraditional times (such as evenings or weekends) and locations (such as the

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[10]For example, an out-of-state lender could hire a Georgia non-lawyer to examine title and clear the exceptions to that title.

consumer's home). Tr. 48-49. *See Perkins* 969 P.2d at 100 ("permitting mortgage lenders to prepare loan documents in the way the CTX does relieves borrowers of the cost and inconvenience of having attorneys prepare their loan documents"); *Guardian Abstract & Title,* 575 P.2d at 949 ("The uncontroverted evidence was that using lawyers for this simple operation considerably slowed the loan closings and cost the persons involved a great deal more money").

C. UPL 2003-2 Does Not Establish Any Actual Harm To Consumers From Lay Closings Nor Address Concerns About Consumer Protection

There are two additional flaws in UPL 2003-2. First, the opinion contains no factual finding or assessment of how lay services would actually hurt Georgia consumers, and there is no basis for predicting such harm here. Second, UPL 2003-2 fails in its ostensible purpose of protecting consumers who need legal advice because it does not require that an attorney representing the consumer actually be present at the closing.

1. As the State Bar recognizes, a ban on lay real estate closings will eliminate "the potential for up front cost savings at closings." Br. 13. But because the American economy rests on the value of free competition, a sweeping restriction on competition such as that contained in UPL 2003-2 should be justified by a credible showing of need for the restriction, and should be narrowly

drawn to minimize its anti-competitive impact. UPL 2003-2, as merely a technical interpretation, does not contain such a showing of need for its near-complete prohibition on lay closing service competition. Indeed, the record before the Committee fails to demonstrate any substantial consumer harm caused by lay closings. The record contains only attorneys' unsupported allegations that they "will spend the next ten years cleaning up the mess left behind by the non-attorney trying to do closings." Tr. 91; *accord* Exh. D (lay service providers' "documents . . . are often shoddy; the title examinations on which they are based are often poor"). The opinion, therefore, cites no statistics showing that lay settlements are problematic.[11]

In fact, the testimony before the Committee was that states that permit lay closings "have no higher loss ratios than does the state of Georgia. They have no more defalcations than the state of Georgia." Tr. 27; *accord* Tr. 25 (in states where lay closings are "almost exclusive": "The consumer's mortgages are protected. The conveyance documents are proper. The mortgage instruments are proper"); Tr. 139 (in other states, lay closings are "not a problem . . . . Title companies are doing a good job").

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[11]While one comment (Exh. L) describes an unfortunate title mishap from a lay closing, attorney closings in Georgia also result in title problems. *See* pp. 20-21, *infra*.

This testimony is corroborated by both courts and commentators that have concluded there is no significant risk of harm from non-attorney closings even when title is being transferred. *See Perkins* 969 P.2d at 100 ("[T]he risk of public harm is low. Indeed, the Perkinses have never alleged that their loan documents were deficiently drafted or that their legal rights were prejudiced in the least"); *In re Opinion No. 26*, 654 A.2d at 1346 ("The record fails to demonstrate that the public interest has been disserved by the South Jersey practice [of closing without counsel] over the many years it has been in existence"); *id*. at 1347 ("no proof of actual damage resulting from the South Jersey practice"); *Guardian Abstract & Title,* 575 P.2d at 945, 949 (in county where title companies handled approximately 90 percent of

Similarly, a recent study was conducted of five states that prohibit lay closings and five states that permit them, with the specific "goal" of determining "the threshold question . . . whether members of the public *suffer actual harm* from lay provision of real estate settlement services." Joyce Palomar, *The War Between Attorneys and Lay Conveyancers–Empirical Evidence Says "Cease Fire,"* 31 Conn. L. Rev. 423, 477 (1999) (emphasis added). That study found that "[t]4938 0 TD 0.003

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[12]Not all closings involve an actual purchase and sale. A substantial number involve home equity loans or the refinancing of existing loans where, because a related transaction has already gone through the closing process, legal questions and issues are less likely to arise. *See* Tr. 43. UPL 2003-2, however, treats these transactions the same as the original purchase/sale, ostensibly because "the

lawyer, regardless of whether another party to the transaction is represented by a lawyer. Thus, UPL 2003-2 completely fails to provide the consuming public the protection upon which its draconian measure of complete elimination of lay settlement services is based.

Moreover, even when an attorney conducts the closing, he or she cannot change most of the terms of the standard deed and note forms at the consumer's request, as a lawyer might change a contract in another setting. The record below shows that almost all mortgages involve standardized deed and note forms approved by Fannie Mae, Ginnie Mae, and Freddie Mac. These uniform forms are required for reselling the mortgage in the secondary market; the consumer cannot alter most of their terms, even on the advice of counsel. Tr. 28, 30-31 ("not one person here will testify that [with] a Fannie Mae deed to secure debt, they will have the authority to change it"); *accord* Palomar, 31 Conn. L. Rev. at 441-42 & nn. 64-72; Braunstein, 62 Mo. L. Rev. at 244, 249-50 & nn. 14, 41-44.

3. Finally, the State Bar's assertions in this Court that it seeks "protection not just to the parties involved in a particular real estate transaction, but to the entire real estate process" (Br. 12), and that only "the legal profession" is capable of providing that protection (Br. 15), are unpersuasive.

First, nowhere does the State Bar explain how "the entire real estate

process" differs from the sum of every "particular real estate transaction" and the needs and interests of the parties – especially the buyers' – therein. Nor does the State Bar explain what "the long-term risk to the entire conveyancing system" is (Br. 13), or how lay closings produce such a risk. *Compare* Tr. 151-52. And while the State Bar criticizes the many states that permit lay closings for "ignor[ing] the systemic risk to real estate conveyancing and focus[ing] only on the risk to specific consumers" (Br. 13-14), it identifies no state – and we are not aware of any – where that "risk" has materialized.[14]

Second, although the State Bar asserts that only the legal profession is capable of maintaining that integrity, including "the accuracy of the title records" (Br. 12-13), the record proves the opposite. Thus, several lawyers, including two former presidents of the Georgia Real Estate Closing Attorney Association ("GRECAA"), testified that in "one quarter to one-third of the closings" that they do, they "are actually doing title cleanup." Tr. 20, 90 ("I spend more than half of my time every day of the week clearing title problems"), *accord Tr.156;* Exh. J

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[14]For example, the Palomar study, *supra,* found no such state. And while the State Bar argues that, in allowing lay preparation of closing documents in *a case decided in 1940,* the Minnesota Supreme Court "never examined the systemic problems such lay closings *might* cause" (Br. 13) (emphasis added), apparently none occurred in the intervening 63 years.

(“In the 26 years I have been in a real estate practice in Georgia, I am aware that there has been a significant diminution in the quality of deeds and other instruments I find recorded”). The “most common” problem is that the lender who is paid off (*e.g.,* the seller’s mortgagee) fails to clear its lien on the property. Tr. 20-21, *accord* Tr. 156 (constitutes “85 percent of . . . title issues”). This occurs so often, however, because “*[t]he lawyer* in Georgia who did that closing . . . *was not legally responsible for clearing that title*.” Tr. 21 (emphasis added); *accord* Tr. 156 (“the day of the closing is the last time the lawyer even looks at it”). Thus, the State Bar is wrong that “lawyers have a personal stake in the real estate system in its entirety.” Br. 15. As one witness with 30 years of experience in Georgia real estate transactions stated: “What that tells me is if all these attorneys are spending so much of their time clearing title issues, these are title issues that were generated by attorneys . . . . [I]n my 30 years of experience in Georgia . . . [e]very title issue I have worked on clearing has been from a law firm.” Tr. 149-50.

Third, the State Bar is wrong that “[a] failure by the lawyer anywhere in this process may result in the lawyer’s being disbarred.” Br. 15. As noted above, a former GRECAA president testified that the closing lawyer has no legal responsibility for clearing a paid off lien. Tr. 21. Nor when the closing lawyer is the lender’s attorney does he or she have a legal responsibility to explain to the

buyer that a utility easement running under part of the house being purchased could result in future demolition of that section of the house. Indeed, such advice to the buyer might be contrary to the seller's interest. But if a buyer could not sell in the future because of such an encumbered title, or if his or her house were partially demolished because of such an easement, the record indicates that the closing attorney would not be responsible, even though that attorney was forced on the buyer in the name of maintaining "the integrity of the entire system of conveyancing." Br. 15. *See* Tr. 151-52 (explaining "potential for a financial loss by a purchaser, seller, or lender [even] if they close with a law firm").

Because UPL 2003-2 completely fails to provide consumers with any more protection than they would receive if lay closings were permitted, but denies them the benefits of lower prices and convenience, the public interest will best be served by rejecting UPL 2003-2.

D. Less Restrictive Measures Can Protect Georgia Consumers

Affirming UPL 2003-2 will deny Georgia consumers the benefits of competition from lay settlement providers. These costs should not be imposed without a convincing showing that lay closings not only injure Georgia consumers, but that less drastic measures cannot remedy any perceived problem. In fact, if Georgia consumers need protection, it can be provided through measures

that restrain competition less than a complete ban on lay settlements. *E.g.,* Tr. 120-21. For example, Virginia, confronted with similar issues in 1997, adopted the Consumer Real Estate Protection Act, *supra* p. 10. This statute permits consumers to choose lay settlement providers, which are now regulated by the State. Hence, Virginia consumers continue to have the benefits of competition, including lower-cost settlements.

Likewise, the New Jersey Supreme Court, in permitting lay settlements, has required written notice to consumers informing the buyer and seller that neither will receive any legal advice during the transaction unless they hire their own attorney, identifying risks inherent with buying or selling real estate without a lawyer's assistance, and notifying them that whether to hire a lawyer is totally within their discretion. *In re Opinion No. 26*, 654 A.2d at 1361-64; *cf. Turner v. Kentucky Bar Ass'n*, 980 S.W.2d 560, 563-64 (Ky. 1998) (establishing "qualifications" under which non-lawyers may serve as workers' compensation specialists). These measures permit consumers to make an informed choice about whether to hire an attorney, further assuring that the public is not disserved by the provision of lay closing services. *See* 654 A.2d at 1361.

CERTIFICATE OF SERVICE

I do hereby certify that today, July 28, 2003, I served by Federal Express overnight delivery, a true copy of the foregoing Brief Amici Curiae Of The United States Of America And The Federal Trade Commission, on the Petitioner, the State Bar of Georgia, and the Standi