



Ethical considerations for Real Estate Transactions

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Title Industry Regulation

The title industry is regulated by pretty much everyone!!

1. NJ State Statutes
2. Federal Legislation
 - A. RESPA
 - B. HUD
3. Case Law
 - ✓ NJ State Bar Association vs. NJ Association of Realtors, 1982
 - ✓ Opinion 26, 1995

Why all this regulation?

Common themes in State and Federal legislation:

1. Consumer Protection
2. Prevention of unscrupulous business dealings
3. Prevention of the unlawful practice of Law

NJ State Regulation

We are governed primarily by two statutes:

1. The Title Insurance Act of 1974, NJSA 17:46B-1 *et seq.*

- A. Applies to all **title insurance companies, ratings organizations and title insurance agents**,
- B. Contains requirements and prohibitions such as requires the use of approved forms, and the maintenance of reserves and financial requirements for title insurance companies, and the prohibition of paying unlawful commissions
- C. Also includes an express prohibition against the practice of law by title insurance companies and agents:

“No title insurance company and no title insurance agent shall engage in the practice of law or render legal services, legal advice or legal opinions.”

NJ State Regulation

2. **NJ Producers License Act 2001**, NJSA 17:22A-26 *et seq*

- A. Purpose is to govern the qualifications and procedures for the licensing of insurance producers
- B. Contains its own list of requirements and prohibitions:
- C. “no person shall solicit, negotiate or sell an insurance contract in New Jersey unless he or she is a licensed insurance producer.”

NJ Producers License Act

Applies to the following (unless they do not negotiate the coverage in any way):

1. salespersons
2. examiners or readers (but not searchers or abstractors)
3. title officers
4. title counsel or attorneys involved in underwriting
5. managerial staff (to the extent involved in underwriting)
6. settlement clerks / closers
7. any other person who solicits, negotiates, or sells a contract of insurance

The Unauthorized Practice of Law (UPL)



N.J.S.A. 2C:21-22 makes the Unauthorized Practice of Law a crime.

1.a. A person is guilty of a crime of the fourth degree if the person knowingly engages in the unauthorized practice of law.

1.b. A person is guilty of a crime of the third degree if the person knowingly engages in the unauthorized practice of law and:

- (1) Creates or reinforces a false impression that the person is licensed to engage in the practice of law; or
- (2) Derives a benefit; or
- (3) In fact causes injury to another.

The Unauthorized Practice of Law (UPL)



- The title agent, UW and closer must always be aware of their role in the process and be cognizant of the danger of engaging in the unauthorized practice of law (UPL).
- What constitutes UPL can be confusing and determining whether one's conduct crosses the line can be difficult.

What questions do you get? We all receive questions every day asking for assistance that really is legal advice.

If it feels like you are being asked to cross that line, RESIST!

Case law and then Opinion 26, has given us some guidance on the issue of what constitutes the unauthorized practice of law.

New Jersey State Bar Association v. Northern New Jersey Mortgage Assoc., 32 N.J. 430 (1960) and 34 N.J. 301 (1961)

A 1960 case between the State Bar Association and the Northern New Jersey Mortgage Associates – The state Bar wanted to stop Mortgage Associates and Abstract Title Company from doing activities thought by the State Bar to be the unauthorized practice of law. The title company:

Made mortgages directly named as mortgagee, placed mortgages for other lenders and issued title, and insured titles.

Drafted the notes and mortgages as necessary.

Maintained deed forms, corporate resolutions and satisfactions of mortgage, and would sometimes prepare these docs as a “courtesy”.

New Jersey State Bar Association v. Northern New Jersey Mortgage Assoc.,

The judge was not convinced that the title agent was practicing law. but the case went up on appeal and the NJ Supreme court agreed with the Bar Association and held that the title company was engaging in the practice of law.

A title company may not participate in the preparation of legal documents or taking other steps necessary to remove objections to title or to cure defects therein.

This concept still stands!

Cape May County Bar Association v. John Ludlam, 45 N.J. 121 (1965)

John Ludlam (“Ludlam”) searched and abstracted titles in Cape May Court House.

Ludlam was the sole proprietor of a “title searching and conveyancing business”. He admits drawing deeds, notes and mortgages but denies that such acts constitute the practice of law. He is not an attorney.

Ludlam asserted that the conveyancers profession was recognized under English common law as separate from the practice of law and that public policy in NJ recognizes the independent profession of conveyancing.

The Cape May Bar Association brought suit seeking to enjoin Ludlam’s activities.

Cape May County Bar Association v. John Ludlam

The NJ Supreme Court affirmed the lower court judgment enjoining Ludlam from drafting legal instruments and from carrying on a conveyance business.

The drafting of legal instruments was proscribed to all but licensed attorneys and Ludlam's performance of these services was the unauthorized practice of law.

Again, drafting instruments is to be done by attorneys!

*New Jersey State Bar Association v.
New Jersey Association of Realtor Boards,
186 N.J. Super. 391 (1982)*

A licensed real estate broker was charged with a disorderly persons offense of engaging in the unauthorized practice of law for preparing a contract of sale for a residential real estate transaction he negotiated, and for submitting the contract to the buyer and seller for signature, and of course, litigation followed.

New Jersey State Bar Association v. New Jersey Association of Realtor Boards

The litigation resulted in the entry of a consent judgment, which the NJ Supreme Court approved, on the following terms:

- Licensed realtors shall be permitted to prepare contracts of sale of residential one to four family homes or vacant one-family lots in transactions in which they may earn a commission or fee.
- Each such contract must contain a clause making the contract subject to review by an attorney for the buyer or seller within three business days.

New Jersey State Bar Association v. New Jersey Association of Realtor Boards

- If neither buyer or seller chose to have an attorney review the contract within the time permitted, the contract would be binding as written.
- The parties may agree in writing to extend the time for attorney review.
- These settlement terms also apply to residential leases for a term of one year or longer.
- Except as permitted by this settlement, the practice of preparing contracts or leases remains in the purview of licensed attorneys. If done by any persons not licensed attorneys, this would continue to be declared the unauthorized practice of law.

Opinion 26 139 NJ 323 (1995)

The Supreme Court reviewed an opinion issued by its own Committee on the UPL, which sought to stem the expansion of the South Jersey style closings, by prohibiting certain activities of the real estate broker and title agent.

1. The question presented: Whether brokers and title company officers who guide, control and handle all aspects of residential real estate transactions, where neither seller nor buyer are represented by counsel, are engaged in the unauthorized practice of law.
2. The Court said: “This power over the practice of law must be exercised in the public interest; ... it is not a power given to us in order to protect lawyers, but in order to protect the public, in this case, by preserving its right to proceed without counsel”.

Opinion 26 (cont.)

The following were noted in Opinion 26:

1. Closing without an attorney is not the unauthorized practice of law so long as the broker and the title officer conform to specific conditions and provide specific disclosures.
2. Disclosure language is intended to warn the consumer of the risks of proceeding without counsel.
3. The broker must advise the parties of their right to proceed with counsel and the title officer must insure that the disclosures were given, before conducting the settlement.

Opinion 26 (cont.)

4. After proper disclosures, a real estate broker may order a title search and abstract and attend to the ministerial functions of preparing to close.

5. A title company may clear standard title objections such as marital status issues and money liens paid at closing, but not issues such as easements, restrictions, covenants, or other serious legal objections.

6. Lawyers hired by the broker or title company may prepare deeds at the specific request of the party for whom the document is to be prepared.

Opinion 26 (cont.)

- The Court stated that “The record clearly shows that the South Jersey practice has been conducted without any demonstrable harm to sellers and buyers, that it apparently saves money, and that those who participate in it do so of their own free will, presumably with some knowledge of the risk” and
- Questions for the Settlement Agent:
 1. Have you been asked to prepare documents?
 2. What if a serious title objection arises at closing and the parties are not represented by Counsel?
 3. Has the Notice Requirement under Opinion 26 been met?

The Law requires real estate brokers to give you the following information before you sign this contract. It requires us to tell you that you must read all of it before you sign. The purpose is to help you in this purchase or sale.

- 2) You will not get any legal advice unless you have your own lawyer. Neither I nor anyone from the title company can give legal advice to either the buyer or the seller. If you do not hire a lawyer, no one will represent you in legal matters now or at the closing. Neither I nor the title company will represent you in those matters.

3) The contract is the most important part of the transaction. It determines your rights, risks, and obligations. Signing the contract is a big step. A lawyer would review the contract, help you to understand it, and to negotiate its terms.

4) The contract becomes final and binding unless your lawyer cancels it within the following three business days. If you do not have a lawyer, you cannot change or cancel the contract unless the other party agrees. Neither can the real estate broker nor the title insurance company change the contract.

5) Another important service of a lawyer is to order a survey, title report, or other important reports. The lawyer will review them and help to resolve any questions that may arise about the ownership and condition of the property. These reports and survey can cost you a lot of money. A lawyer will also prepare the documents needed to close title and represent you at the closing.

6) A buyer without a lawyer runs special risks. Only a lawyer can advise a buyer about what to do if problems arise concerning the purchase of this property. The problems may be about the seller's title, the size and shape of the property, or other matters that may affect the value of the property. If either the broker or the title company knows about the problems, they should tell you. But they may not recognize the problem, see it from your point of view, or know what to do. Ordinarily, the broker and the title company have an interest in seeing that the sale is completed, because only then do they usually receive their commissions. So, their interests may differ from yours.

7) Whether you retain a lawyer is up to you. It is your decision. The purpose of this notice is to make sure that you have the information needed to make your decision.

Opinion 26 Notice

1. Broker represents seller not buyer
2. You will not get any legal advice unless you have your own lawyer. Neither the realtor nor the title company will represent you in those matters.
3. The contract is the most important document. It determines your rights and obligations.
4. The contract becomes final unless your lawyer cancels it
5. Lawyer will order title and survey and will review these with you.
6. A buyer without a lawyer runs risks and only a lawyer can advise a buyer what to do.
7. Whether you retain a lawyer is up to you.

The Role of the Title Agent

“South Jersey” style closings

1. No attorney review or involvement;
2. Earnest money deposit funds are deposited with title agency;
3. Settlement often takes place at title agency office
4. Agent must comply with lender’s closing instructions;
5. Disbursements are made by title agency
6. Mark up title commitment;

Providing these settlement services is beyond the scope of title insurance and generate additional responsibilities and potential liability for the agent.

The Role of the Title Agent

Consideration must be given to the proper handling of the loan package where there is no attorney present.

- In that event, at what point does explanation of the closing documents become UPL? There are no clear answers.
- If a legal question or a legal issue arises at closing, it may be necessary to stop the closing so legal guidance can be obtained.

DANGER ZONE

**AGENT MUST COMPLY WITH
LENDER'S CLOSING
INSTRUCTIONS AND ALL REGS**

Failure to do so could trigger liability under CPL;
Regulatory compliance: TRID, FinCEN

**DISBURSEMENTS ARE
MADE BY TITLE COMPANY**

Disbursements are subject to Good Funds Law NJSA
17:46B-10.1 et seq – defines “good funds” as cash, wire
transfer or certified, cashier’s tellers or bank checks;

CLEAR TITLE EXCEPTIONS

Do not engage in the unlawful practice of law!
Do not prepare deeds, “conveyance documents”
Watch for scenarios where independent counsel is
needed. Tidelands, easements, restrictive covenants

The Role of the Title Agent

Ethical and Practical Considerations

1. Compliance with all of the regulatory guidelines
2. Staying abreast of changes in the regulatory landscape
3. The regulatory changes also mandated a heightened concern for consumer privacy and the use and maintenance of Non-Public Information (NPI).

Don't use home email addresses! Gmail, Hotmail, aol – are all public servers with limited security. Use company email servers!

All These Regulations >>> continuing trend of North Jersey lawyers using title companies as settlement agents. Think TRID

The Role of the Attorney

“Traditional North Jersey” style closings

1. Attorney involved from the start with Attorney Review process of the contract.
2. Earnest money deposit is deposited into attorney's trust account.
3. Settlement usually takes place at buyer's attorney's office
4. Closing funds from buyer and mortgage funds are deposited with attorney;
5. Attorney handles the closing, marks up the title commitment and must comply with lender's closing instructions;
6. Disbursements are made by attorney

DANGER ZONE

**ATTORNEY MUST COMPLY WITH
LENDER'S CLOSING
INSTRUCTIONS AND REGS**

Failure to do so could trigger liability under CPL;
Regulatory compliance: TRID, FinCEN
Increased Complexity with reporting requirements

**DISBURSEMENTS ARE
MADE BY ATTORNEY**

Good Funds Rule still applies;
Time consuming

CLEAR TITLE EXCEPTIONS

Attorneys are able to address and resolve any issues
that come up in the court of the contract or
settlement.

Progression of Reporting Requirements > Erosion of No. Jersey Style Closing



1965

Early caselaw
Barring conveyancing and forms

1982

Bd of REALTOR's decision
Allows realtors to draft contracts,
Creates Attorney Review period

2015

TRID

Extensive new requirements for timelines and reporting

1995

OPINION 26

Confirms South Jersey title and realtors are not engaging in the unauthorized practice of law

2026

FinCEN

Complexity of reporting requirements may eliminate North Jersey style closings all together.

Erosion of North Jersey style closings

The practical reality is the regulatory landscape has significantly eroded the “North Jersey” style of closing.

We are now seeing a hybrid mix, where attorneys are still involved in the contract review and are present for the parties in the event of an issue, but the settlement itself is handled by the title agency

RESPA - 1-4 Family Residential Real Estate

The Feds get involved too

1. Mandates pre-closing disclosures
2. Regulates abuses or perceived abuses by prohibiting kickbacks;
3. Prohibits the payment and receipt of fees for the referral of business when no actual services are rendered.

This prohibition applies to unearned fees or kickbacks as well as fee sharing or splitting.

Affiliated Business Arrangements

Section 8

1. Despite the many prohibitions set-forth in Section 8 of the RESPA law, Section 8 does permit the creation of Affiliated Business Arrangements as long as certain “safe harbor” provisions are met.
2. In the title insurance business, we see these arrangements most often as joint ventures between title agents and realtors, or mortgage lenders, or developers.

“Safe Harbor” Requirements

1. Disclosure must be given to the consumer describing the existence of the affiliated arrangement at or before the time the referral is made, in the form prescribed by the regulations.
2. The consumer must not be required to use any particular provider of settlement services (that is the consumer is not steered or required to use an affiliated entity providing settlement services), and
3. The only thing of value received from the arrangement is a return on the ownership interest (such as corporate dividends or LLC distributions as applicable, in accordance with owner’s percentage ownership interest).

Affiliated Business Arrangements

An Affiliated Business Arrangement Disclosure Statement form, as a separate document, must be executed by the consumer and kept in the agent's file.

This form be given to the consumer at or before the referral and the form be kept for 5 years.

Conflicts of interest:

Opinion 26 > to eliminate the potential conflicts of interest for realtors and title agents

Attorney agents – NJ does not have attorney agents, unlike many other jurisdictions. While there is no statute that precludes this practice, ethics opinions issued in NJ have deemed the practice of representing a party to a closing while simultaneously issuing a commitment/policy on that transaction to be a conflict of interest, effectively squashing any interest in pursuing such a venture.

Disclosure requirements – Controlled Business; Affiliated Business Arrangements > all designed to eliminate conflicts and protect consumers


Summary

From both an ethical and legal standpoint, the settlement agent must be aware of its obligations and prohibitions in the process.

- A settlement agent must not prepare settlement documents or give legal opinions regarding the effects or consequences associated with policy exceptions or coverage provisions.
- If such questions arise at any time during the settlement itself, the settlement agent must be prepared to adjourn the settlement to allow the parties to obtain legal counsel.



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THANK YOU FOR JOINING US

Please mark your calendars for our next N2K Hour:

December 9, 2025

Surveys

11:00 am