North Carolina Real Property Ethics Handbook

The following is a compilation of selected ethics opinions (CPR, RPC, FEO's) which are relevant to the real property practice and which have been grouped according to subject matter for convenient reference by the practicing attorney.

Please note that the material contained herein is dated and subject to ongoing review by the Ethics Committee of the State Bar. Consult your *North Carolina State Bar Journal* regularly in order to keep informed of modifications or additions. You may also access the North Carolina State Bar website under https://www.ncbar.com/menu/ethics.asp

North Carolina Real Property Ethics Handbook
Table of Contents

KEY CODES

CPR	Code of Professional Responsibility
RPC	Rules of Professional Conduct
FEO	Formal Ethics Opinion
DR	Disciplinary Rule
N.C. Gen. Stat.	North Carolina General Statute

13 FEO 5	Disclosure of Confidential Information to Lawyer Serving as Foreclosure Trustee
13 FEO 14	Representation of Parties to a Commercial Real Estate Loan Closing
14 FEO 2	Dual Representation of Trustee and Secured Creditor in Contested Foreclosure
15 FEO 2	Preparing Waiver of Right to Notice of Foreclosure for Unrepresented Borrower

Disbursement of Loan Proceeds

CPR 358	Disbursement of Uncollected Funds
RPC 44	Attorney's Obligation to Follow Closing Instructions
RPC 78	Conditional Delivery of Trust Account Checks
RPC 86	Disbursement Incident to Real Property Closings
RPC 191 (Rev.)	Disbursement Upon Deposit of Funds Provisionally Credited to Trust Account
RPC 232 (Rev.)	Disbursement Upon Deposit of Mortgage Company Check Pursuant to an Agreement Purporting to Make Check Certified
99 FEO 9	Lawyer's Obligation to Disburse Closing Funds

Escrow/Trust Accounts

CPR 372	Escheat of Trust Funds
RPC 47	Trust Accounting for Small Sums
RPC 66	Disposition of Escrowed Funds
RPC 89	Escheat of Trust Funds
98 FEO 11	The Lawyer as Escrow Agent
01 FEO 14	Using CD-ROM Digital Check Images for Trust Account Records
01 FEO 4	Supervision of Paralegal Closing a Residential Real Estate Refinancing
06 FEO 8	Disbursement of Trust Funds
08 FEO 13	Audit of Real Estate Trust Account by Title Insurer
2011 FEO 7	Using Online Banking to Manage a Trust Account
13 FEO 13	Disbursement Against Funds Credited to Trust Account by ACH and EFT
15 FEO 6	Lawyer's Professional Responsibility When Third Party Steals Funds from Trust Account

Foreclosures

CPR 325	Representation of Subsidiary Trustee by Lender's House Counsel
RPC 64	Former Trustee's Representation of Purchaser Against Former Debtor
RPC 82	The Lawyer as Trustee
RPC 90	Trustee for a Deed of Trust
04 FEO 3	Common Representation of Lender and Trustee on a Deed of Trust
06 FEO 3	Representation in Purchase of Foreclosed Property
06 FEO 5	County Tax Attorney Purchasing Property at Tax Foreclosure Sale
08 FEO 11	Representation of Beneficiary on Other Matters While Serving as Foreclosure Trustee

Lenders

CPR 105	(Employment of Lender Personnel by Closing Attorney)
CPR108	(Lender Requiring Certification By Only One Attorney)
RPC 41	Lender Preparation of Closing Documents
RPC 40	Lender Preparation of Closing Documents

Lender Directed Title Insurance

CPR 342	Lender Directed Title Insurance
CPR 369	Lender Directed Title Insurance

Nonlawyer Support

RPC 29	Purchase and Use of Title Abstracts

RPC 216	Using the Services of an Independent Title Abstractor
99 FEO 6	Ownership of Title Agency
99 FEO 13	Supervision of Paralegal Closing a Residential Real Estate Transaction
APAO 2002-1	On the Role of Laypersons in the Consummation of Residential Real Estate
06 FEO 11	Preparation of Legal Documents at the Request of Another
09 FEO 2	Responding to Unauthorized Practice of Law in Preparation of a Deed
11 FEO 6	Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property

Attorney/Underwriter Affiliation

RPC 185	Ownership of Stock in Title Insurance Agency
99 FEO 6	Ownership of Title Agency
09 FEO 14	Placing Client's Title Insurance in Agency in Which Lawyer's Spouse Has an Ownership Interest
11 FEO 4	Participation in Referral Arrangement

Tacking

RPC 99	Title Insurance Tacking
09 FEO 17	Tacking as Question of Standard of Care

Obtaining Canceled Documents

99 FEO 5	Obtaining Canceled Deed of Trust Following Residential Real Estate Closing

Approved Attorney Lists

CPR 104

Adopted April 15, 1977

Inquiry:
What may a Young Lawyers Association ethically do about getting on a lending institution's approved list of attorneys for title searches?

Opinion:
Lawyers, whether or not young and whether or not associated in an association, may ethically request a lending institution or a title insurance company, agency or agent to review their qualifications and place them on their approved list of attorneys for title searches.

RPC 57
PARTICIPATION AS AN APPROVED ATTORNEY

Adopted October 20, 1989

Opinion rules that a lawyer may agree to be on a list of attorneys approved to handle all of a lender's title work.

Inquiry:
Out-of-state Lender wishes to make home mortgage loans available to North Carolina borrowers. Lender wishes to require borrowers to use one of three "approved" North Carolina attorneys to do all the title work on closings on Lender's loans. May a North Carolina attorney agree to be one of these three approved attorneys?

Opinion:
An attorney may ethically request lenders and title insurance companies to place him on an approved attorney list. *See also* CPR 104. The attorney may not, however, give any special remuneration to the Lender in return for placing his name on the list. No opinion is expressed as to the legality of the limitation of the number of attorneys on the list.

Attorney Title Notes

RPC 169
PROVIDING CLIENT WITH COPIES OF DOCUMENTS FROM THE FILE

Adopted January 14, 1994

Opinion rules that a lawyer is not required to provide a former client with copies of title notes and may charge a former client for copies of documents from the client's file under certain circumstances.

Inquiry #1:
Attorney represented Ex-client on a number of real estate transactions prior to the termination of the employment. Attorney provided Ex-client with the original documents or copies of most of the pertinent documents at the time of the closing for each real estate transaction. All of the real estate transactions Attorney handled for Ex-client were completed and Attorney no longer represents Ex-client. Ex-client has asked Attorney to provide him with copies of the documents in his closed real estate files. Attorney has provided Ex-client with copies of deeds, maps, title opinions, title insurance policies, correspondence and all of the significant information regarding the purchases and the loans for Ex-client's respective properties. He has not provided Ex-client with copies of his title notes. Attorney considers his title notes to be work product which often involves using base title notes for subdivisions or title notes from other files as well as the conveyance list files maintained by Attorney's law firm. Is Attorney ethically required to provide Ex-client with a copy of the title notes for the properties?
Opinion #1:
No. Although Rule 2.8(a)(2) requires a lawyer to deliver to a former client "all papers . . . to which the client is entitled," the comment to the rule notes that "[t]he lawyer's personal notes . . .need not be released." *See also* CPR 3.

Inquiry #2:

If Attorney does not condition the delivery of the copies to Ex-client on the payment of his bill for prior legal services, may Attorney charge Ex-client for the copies he delivers to Ex-client of documents which Attorney had already provided to Ex-client at the time of the closings?

Opinion #2:
Yes. When Attorney delivered the original documents to Ex-client at the time of the closings for the real estate transactions, he fulfilled the requirements of Rule 2.8(a)(2). If Attorney kept copies of these original documents, Attorney may charge Ex-client for any additional copies which Attorney makes for Ex-client but Attorney may not condition the delivery of these copies to Ex-Client on the payment of his bill for legal services. If Attorney retained in his office files any original documents from Ex-client's real estate transactions, Attorney must bear the cost of making copies for Ex-client until such time as he delivers the original documents to Ex-client.

RPC 227
RELEASE OF TITLE NOTES TO FORMER CLIENT

April 3, 1997

Opinion rules that a former residential real estate client is not entitled to the lawyer's title notes or abstracts regardless of whether such information is stored in the client's file. However, a lawyer formerly associated with a firm may be entitled to examine the title notes made by the lawyer to provide further representation to the same client.

Inquiry #1:
Attorney A is a real estate lawyer with Law Firm X. Two years ago, Attorney A represented Client 1 in the closing of the purchase of a house and lot. Client 1 recently requested her real estate file from the firm. What documents does Law Firm X have to give to Client 1?

Opinion #1:
Rule 2.8(a)(2) requires a lawyer who has withdrawn from the representation of a client to deliver to the client "all papers and property to which the client is entitled." RPC 178 cites CPR 3 for the proposition that:

A lawyer must provide a former client with originals or copies of anything in the file which would be helpful to the new lawyer except "the discharged lawyer's notes made for his own future reference and study and similar things not representing a completed work product."

See also CPR 3, CPR 315, CPR 322, CPR 328, and Rule 2.8(a)(2).

After a residential real estate transaction is completed, the client is entitled to originals or copies of the documents which were generated solely in connection with the client's closing, including the following: the deed to the property, plats, title opinion, title insurance policy, all closing documents, all documents prepared for the lender and other third parties, correspondence, memoranda regarding the client's transaction only, and documents referenced in the client's deed or title opinion. The client is not entitled to the lawyer's title notes, abstracts, or copies of documents not prepared solely for the client's transaction regardless of whether such information is stored in the client's file.

Inquiry #2:
Are the title notes, the title opinion, copies of deeds, and other similar documents in the file considered "work product" which Law Firm X can refuse to return to Client 1 or her designated attorney?

Opinion #2:
See opinion #1 above.

Inquiry #3:
While a shareholder in Law Firm X, Attorney B was retained by Client 2 to represent her in the refinancing of her home. Attorney B supervised his paralegal in performing a title search, prepared a title opinion, obtained title insurance, prepared closing documents, and otherwise represented Client 2 in refinancing her home. Attorney B subsequently resigned from Law Firm X and opened his own practice. Client 2 has retained Attorney B to assist her in another refinancing of her home. In accordance with Attorney B's advice, Client 2 requested her original refinance file from Law Firm X. Law Firm X refused to release the file to Client 2, contending that all of the title notes and other information contained in the file, other than the actual title policy, are the "work product" of Law Firm X and Client 2 is not entitled to receive the originals or copies of this material.

Attorney B's representation of Client 2 on the new refinancing would be facilitated by the receipt of the title notes from the prior refinancing. May Law Firm X refuse to provide Client 2's file, or a copy of the materials contained therein, to Client 2 or her attorney?

Opinion #3:
No. See opinion #1 above. If a lawyer who was formerly associated with a law firm asks the law firm for the file of a client the lawyer represented while he was a member of the firm and the use of the lawyer's title notes will assist the lawyer in providing further representation to the same client, in addition to giving the lawyer the originals or copies of the documents noted in opinion #1 above, the law firm must give the lawyer access to the title notes made by the lawyer (or by a paralegal of the firm acting at the lawyer's direction) during the previous representation of the client while the lawyer was still a member of the law firm. This opinion is subject to the file maintenance and destruction guidelines in RPC 209.

Inquiry #4:
Is the response to inquiry #3 affected by the fact that a paralegal employed by Law Firm X performed the actual title search?

Opinion #4:
No.

Inquiry #5:
Other clients of Attorney B when he was a member of Law Firm X have asked Law Firm X to forward their files, or copies thereof, to Attorney B. May Law Firm X refuse to send the files, or copies of the files, to Attorney B?

Opinion #5:
No. See opinion #3 above.

Brokers

CPR 103

Adopted April 15, 1977

Inquiry:
A realtor's spouse is a lawyer. When the realtor makes a sale of real estate, the realtor requests the purchaser to use the realtor's spouse for title examination and/or loan closing. Is it ethical for the lawyer-spouse to accept employment under these circumstances?

Opinion:
Normally, it is not unethical for a lawyer to accept employment as a result of recommendation of his spouse. If the purchaser requests the realtor to recommend a lawyer for title examination and/or loan closing, the lawyer-spouse may ethically accept employment. If, however, the realtor, without being requested by the purchaser, officiously requests the purchaser to use the realtor's spouse, the lawyer-spouse may not ethically accept employment. The special relationship between spouses compels the inference that the lawyer-spouse knows that the realtor-spouse is requesting his employment and amounts in effect to a request by the lawyer-spouse that the realtor-spouse request the purchaser to employ him. DR 2-103 (D).

CPR 307
LAW PRACTICE AND REAL ESTATE BROKERAGE

Adopted October 14, 1981

Inquiry:
Attorney A has an active real estate broker's license. Attorney A wishes to sell real estate for XYZ Real Estate Sales and Development Company. A is neither a stockholder nor an owner of XYZ. He wishes to locate his office in the Company's office. From this office he wishes to practice law, including real property law, and collect fees for this work as well as sell real estate.

1. May Attorney A practice law from his office in the Company's office? If so, should he utilize XYZ's telephone line for his law office and real estate sales business, the telephone line being answered "XYZ" by the receptionist? Alternatively, should he use XYZ's telephone line and number only for his real estate sales business and have a separate telephone line with a different number answered "Law Offices of Attorney A" for his legal practice?

Opinion:
Attorney A may practice law and sell real estate from the same office. CPR 266.* However, if he is practicing law as a private practitioner separate from any employment with XYZ Company, he should not have a single telephone line answered "XYZ" for both his real estate sales business and his legal practice. Instead, he should have a separate telephone line with a different number for his legal practice.

2. May his XYZ stationery and business card indicate
that he is an attorney or has a J.D.? May his legal stationery and business cards indicate that he is a realtor?

Opinion:
Yes. Dr 2-102(E) specifically authorizes a lawyer engaged both in the practice of law and another profession to so indicate on his letterhead, office sign and professional card.

3. May Attorney A list and sell property and also conduct the title search, certify title, conduct the closing and execute other functions necessary to the consummation of a real estate transaction?

Opinion:
No. Attorney A may not provide both real estate sales services and legal services to the same persons unless there is no relationship between the legal services rendered and real estate sales services. *See* CPR's 241*, 249*; *see also* DR 2-102 (E), DR 5-101 (A).

4. May Attorney A list the property, another salesman in either the same or a different XYZ branch office sell the property, and Attorney A then perform the necessary legal services to consummate the real estate transaction?

Opinion:
No.

5. If the property is listed by another XYZ salesman either in the same or a different XYZ branch office, may Attorney A sell the property and also conduct the title search, certify title, conduct the closing and execute other functions necessary to the consummation of the real estate transaction?

Opinion:
No.

6. If Attorney A neither lists nor sells the property, but another XYZ salesman lists and sells the property, may Attorney A conduct the title search, certify title to necessary institutions, conduct the closing and execute other functions necessary to the consummation of the real estate transaction?

Opinion:
No. While Attorney A has not directly participated in this transaction in his capacity as a real estate salesman, nevertheless it appears that his business as a real estate salesman would be functioning as a feeder to his legal practice if he provides the necessary legal services in real estate transactions handled through the same real estates sales company for which he is a salesman.

7. If the property is listed and sold by a salesman not employed by XYZ Company, may A conduct the title search, certify title to necessary institutions, conduct the closing and execute other functions necessary to the consummation of the real estate transaction?

Opinion:
Yes, provided that no conflict not revealed by the stated facts exists.

8. If the property is listed by a salesman for a company other than
A's company, but sold by A, may A perform the necessary legal services for consummation of the real estate transaction?

Opinion:
No.

9. If the property is listed by a salesman for a company other than A's company and is sold by and XYZ salesman in A's or another branch, may A perform the necessary legal services for consummation of the real estate transaction?

Opinion:
No.

10. If the property is listed by A and sold by a salesman in another real estate company, may A conduct the title search, certify title to the necessary institutions, conduct the closing and execute other functions necessary to the consummation of the real estate transaction?

Opinion:
No.

11. Does it make any difference in the answers to the questions above if A has or has not joined the Board of Realtors?

Opinion:
No.

**This opinion is not reprinted in this Handbook.*

CPR 330
LAWYERS AS REAL ESTATE BROKER

Adopted April 8, 1983

Inquiry:
Abel & Cain, who are lawyers in a law firm, wish also to engage in the active business of real estate brokerage. The proposed name of the firm would be Abel & Cain Real Estate Co. The firm would employ licensed real estate brokers as well as offer the active participation of Abel & Cain.

May Abel & Cain ethically do the following:
1. Include on the letterhead of the Realty Co. the designation
of the principals, Abel & Cain, as Attorneys at Law?
2. Prepare legal documentation for real estate transactions as
a part of their participation in the real estate brokerage business?
3. Include legal services to be performed by the attorneys,
Abel & Cain, as part of their real estate brokerage fees?
4. Form a real estate brokerage service, advertise and sell
their services both as attorneys and as a real estate broker in competition with existing real estate firms with the price of their services for real estate brokerage services or legal services to be fixed by the free market?

Opinion:
1. Yes. The letterhead of the Realty Co. may indicate that
Abel & Cain are licensed attorneys. *See* DR 2-102(E) and CPR 307.
2. Since an individual or business entity may represent itself
in legal proceedings and transactions, Attorneys Abel & Cain may prepare such legal documentation as the Realty Co. may do for its own purposes. Standards for representing conflicting interests that may be applicable to Real Estate Brokers will not set the standard for attorneys who may be both Real Estate Brokers and attorneys.
3. No. Legal fees should be identified as to the client and the
legal services performed. This is necessary to police activities of attorneys to determine whether or not conflicting interests are being represented.
4. Law firm Abel & Cain and Realty Co. Abel & Cain may
not jointly advertise a package plan that will include both brokerage commissions and legal fees combined. However, each firm may separately advertise the services to be performed by each and the commissions or fees for each service.

RPC 49
REAL ESTATE BROKERAGE OWNED BY LAWYERS

January 13, 1989

Opinion rules that attorneys that own stock in a real estate company may refer clients to the company if such would be in the client's best interest and there is full disclosure, and that such attorneys may not close transactions brokered by the real estate firm.

Inquiry #1:
A is the president and majority stockholder of XYZ Realty, Inc., a commercial real estate firm. B, C and D are attorneys who are minority shareholders in XYZ, but who are not involved in management of the company.

May B, C and D refer their legal clients to XYZ Realty, Inc., provided they disclose their status as shareholders in XYZ?

Opinion #1:
Yes, provided that in addition to disclosing their status as shareholders, Lawyers B, C and D reasonably believe that dealing with XYZ Realty would be in the best interests of their clients. Rule 5.1 (b) (1) and (2).

Inquiry #2:
May B, C and D's law firm close a real estate transaction brokered by XYZ Realty, Inc.?

Opinion #2:
No. B, C and D's personal interest in having their realty firm receive its commission could conflict with client's desire to close only when his or her best interest would be served by so doing. This conflict could materially impair the judgment and loyalty of B, C and D and other members of their firm. In such situations the risk to the client is so great that no lawyer can reasonably proceed, regardless of whether the client wishes to consent. Rule 5.1 (b) and Rule 5.11 (a).

RPC 88

EMPLOYMENT OF A SECRETARY WHO IS ALSO A REAL ESTATE BROKER

July 13, 1990

Opinion rules that a lawyer may close a real estate transaction brokered by a real estate firm which employs the attorney's secretary as a part-time real estate broker.

Inquiry:
May Attorney X close a real property transaction brokered by a real estate firm which employs the attorney's secretary as a part-time real estate broker?

Opinion:
Yes. In the situation described in the inquiry, the lawyer would be obliged to consider whether the exercise of his independent, professional judgment on behalf of his clients, the lender and the broker, would be "materially impaired" by his desire to advance his secretary's interests or his desire to encourage future referrals. Rule 5.1(b). If upon analysis it appears that the attorney's judgment might be so compromised, perhaps because the secretary is a valued friend who stands to gain a valuable commission upon the completion of the transaction, the conflict of interest would be disqualifying unless the lawyer reasonably believed that his representation of his clients would not be adversely affected and both clients consented to the lawyer's participation after a full disclosure of all risks involved.

It would, of course, be extremely improper for an attorney in this situation to attempt to encourage referrals from the real estate firm by offering financial incentives to his secretary. Rule 2.2(c).

RPC 188

January 13, 1995
[Editor's Note: This opinion was originally published as RPC 188 (Revised).]
Receipt of Commission by Relative of Closing Lawyer
Opinion rules that a lawyer may close a real estate transaction brokered by the lawyer's spouse with the consent of the parties to the transaction.

Inquiry #1:

Lawyer practices law with XYZ Law Firm. His wife, W, is a real estate agent with Real Estate Agency located in a neighboring city. From time to time, members of XYZ Law Firm have been asked to represent one of the parties to a real estate transaction brokered by W or another realtor with Real Estate Agency and from which W or another realtor with Real Estate Agency will receive a commission. If all parties to the closing are made aware of the marital relationship between Lawyer and W, may Lawyer represent any party to a real estate transaction brokered by W?

Opinion #1:
Yes. There is no conflict of interest if a lawyer represents only the seller in a real estate transaction brokered by his wife because the interest of the seller and the real estate broker are the same: both want to ensure that the transaction is consummated promptly. With regard to his representation of the buyer and/or the lender, who are, respectively, interested in assuring that the buyer gets the property he bargained for and the loan to the buyer is properly documented and secured, Lawyer must first consider whether the exercise of his independent, professional judgment on behalf of his client (or clients) will be "materially impaired" by his desire to advance the interests of his spouse who will receive a valuable commission only if the transaction goes forward. Rule 5.1(B); *see also* RPC 88. If Lawyer reasonably believes his judgment will not be adversely affected by his relationship with his wife and all clients consent to Lawyer's participation after full disclosure of this relationship and the risks involved, Lawyer may proceed with the representation. On the other hand, if Lawyer concludes that his judgment on behalf of the buyer and/or the lender will be adversely affected by his desire to financially benefit his wife, it would be a disqualifying conflict of interest.

Inquiry #2:
Are the other lawyers in XYZ Law Firm disqualified from representing a party to a real estate transaction brokered by W?

Opinion #2:
No, if Lawyer could reasonably conclude that his judgment on behalf of the client would not be adversely affected under the circumstances and the client consents after full disclosure, then no conflict would be imputed to the other lawyers in XYZ Law Firm. *See* Rule 5.1(B) and Rule 5.11(A).

Inquiry #3:
May Lawyer represent the parties to a real estate closing if the transaction was brokered by a real estate agent affiliated with Real Estate Agency other than W?

Opinion #3:
Yes. See opinion #1 above. If Lawyer concludes that his independent professional judgment on behalf of the buyer or lender might be affected by the desire to benefit Real Estate Agency, with whom W is affiliated, or her fellow real estate agent at Real Estate Agency, it would be a disqualifying conflict of interest.

Inquiry #4:
Real Estate Developer has been a client of XYZ Law Firm for several years and insists that the deeds for lots in the subdivision it is developing be prepared by a member of XYZ Law Firm in order to ensure accuracy and uniformity. If W brokers a transaction for a lot in one of Developer's subdivision, may Lawyer or another lawyer with XYZ Law Firm prepare the deed and sale papers for Developer?

Opinion #4:
Yes. See opinion #1 above.

Inquiry #5:
In a real estate transaction under contract, but not closed, W acted as realtor for the seller. Before closing, legal problems relating to the land arose which required additional legal services beyond those usually required for a standard real estate closing. May Lawyer or another lawyer with XYZ Law Firm represent the seller on this matter?

Opinion #5:
Yes. See opinion #1 above.
Inquiry #6:
W is also a paralegal and she sometimes assists her husband by performing his clerical work at her desk at the offices of Real Estate Agency. Lawyer represents Client on her claim for damages arising out of a traffic collision with another car. Ms. S, the driver/owner of the other automobile involved in the accident, works as a real estate agent with W at Real Estate Agency. Lawyer has not discussed Client's claim with Ms. S and is negotiating only with the insurance carrier. Lawyer advised Client that Ms. S works with W and offered the names of other lawyers in the area if Client chose to get a different lawyer. Does Lawyer need to do anything else to avoid a conflict of interest?

Opinion #6:
Yes. Although Lawyer could reasonably conclude that his representation of Client will not be impaired by the relationship between Ms. S and his wife, he has a duty to ensure that the confidential information of Client is not accidentally revealed to Ms. S. *See* Rule 4(B)(1). If W is working on any of the documents that relate to Client's claim at her desk in the offices of Real Estate Agency, there is a substantial risk that confidential information of Client may be revealed to Ms. S.

RPC 201

January 13, 1995
Combining Law Practice and Work as Realtor
Opinion explores the circumstances under which a lawyer who is also a real estate salesperson may close real estate transactions brokered by the real estate company with which he is affiliated.

Inquiry #1:
Attorney A has an active real estate license and is a real estate salesman for Real Estate Company. Attorney A's office is located inside the offices of Real Estate Company. From his office, Attorney A operates his law practice and sells real estate. There is no signage on the office door for Real Estate Company or on the exterior of the building that indicates that Attorney A operates a separate law practice from within the offices of Real Estate Company. The same telephone number is used for Real Estate Company and Attorney A's law practice.

Attorney A does not separately advertise his services as a lawyer. He does advertise and hold himself out as a lawyer in Real Estate Company's television and print advertisements. Real Estate Company advertises itself as providing "full service," which includes real estate closing services. Most of Attorney A's legal business comes from referrals from Real Estate Company, and Real Estate Company recommends that its customers use Attorney A to close their real estate transactions.

May Attorney A receive a real estate sales commission on a real estate transaction for which he provided legal services to any party involved in the transaction other than Real Estate Company?

Opinion #1:

No. Rule 5.1(B) requires a lawyer to decline to represent a client if the representation of the client may be materially limited by the lawyer's own interest. If Attorney A would realize a valuable commission from the closing of a real estate transaction, it is likely that Attorney A's judgment on behalf of the buyer, seller, or lender will be materially limited. CPR 307 specifically holds that a lawyer may not certify title to property he has listed or sold. *See also* RPC 49.

Inquiry #2:
May Attorney A close real estate transactions brokered by Real Estate Company if he did not list or sell the property and he will not earn a commission from the transaction?

Opinion #2:
Yes, provided Attorney A reasonably concludes that the exercise of his independent, professional judgment on behalf of his clients will not be "materially impaired" by his desire to advance the interests of Real Estate Company or his desire to encourage future referrals. Rule 5.1(B). A lawyer is not prohibited by the Rules of Professional Conduct from utilizing the same office for both the practice of law and for conducting another business. However, in analyzing his ability to exercise his independent, professional judgment on behalf of his clients, Attorney A must consider whether the location of his law practice within the confines of the offices of Real Estate Company will affect his professional judgment because of the close physical proximity of realtors who are referring legal business to him. If the location of his office will affect his professional judgment, Attorney A must either decline to represent the parties to real estate transactions brokered by Real Estate Company or he must relocate his law practice to separate offices. If Attorney A concludes that he can manage the potential conflict of interest, the clients must also consent to the potential conflict after full disclosure of Attorney A's affiliation with Real Estate Company. *See* Rule 5.1(B).

[Apart from the potential conflict of interest posed by this inquiry, the Ethics Committee has serious concerns about Attorney A's ability to fulfill his duty of confidentiality while he is practicing law within the confines of the offices of the real estate company with which he is affiliated.]

Inquiry #3:
May Attorney A waive his legal fee for services rendered in closing a real estate transaction in exchange for the real estate commission he earned as the agent responsible for the sale of the real property?

Opinion #3:
No. See opinion #1 above.

Inquiry #4:
May Attorney A receive a real estate commission in lieu of a legal fee for closing a real estate transaction if Attorney A shares the commission with other realtors with Real Estate Company or other unrelated real estate companies?

Opinion #4:
No. See opinion #1 above.

Inquiry #5:
May Attorney A perform legal services in connection with real estate closings for clients referred to him by Real Estate Company if Attorney A did not list or sell the property involved in the transaction?

Opinion #5:
Yes. This is the same inquiry as inquiry #2 above. See opinion #2 above.

Inquiry #6:
Is Attorney A required to disclose to all clients referred by Real Estate Company that he is a real estate agent for Real Estate Company and paid commissions by Real Estate Company?

Opinion #6:
Yes. See opinion #2 above.

Inquiry #7:
May Attorney A provide legal services to customers of Real Estate Company if Attorney A fully discloses his relationship to Real Estate Company?

Opinion #7:
Yes, see opinion #2 above. Attorney A may only provide legal services to customers of Real Estate Company who are referred to him by Real Estate Company, but he may not share his legal fees with Real Estate Company nor may he pay Real Estate Company anything for recommending his service. *See* Rule 2.3(C), which prohibits a lawyer from giving anything of value to someone for recommending his services, and Rule 3.2, which prohibits the sharing of legal fees with nonlawyers. Moreover, if Attorney A is employed by Real Estate Company as in-house counsel and, as such, is providing legal services to the customer of Real Estate Company, it would be a violation of N.C.Gen. Stat. § 84-5 which forbids corporations to engage in the practice of law.

Inquiry #8:
Is Real Estate Company engaged in the unauthorized practice of law under the foregoing facts?

Opinion #8:
The determination of whether a nonlawyer is engaged in the unauthorized practice of law is outside of the authority of the Ethics Committee.

Inquiry #9:
Is Attorney A assisting Real Estate Company in the unauthorized practice of law under the foregoing facts?

Opinion #9:
If Attorney A is employed by Real Estate Company as in-house counsel and, in this capacity, he is providing legal services to the customers of Real Estate Company, it would be a violation of N.C. Gen. Stat. § 84-5, which prohibits a corporation from engaging in the practice of law. Such conduct would constitute aiding the unauthorized practice of law in violation of Rule 3.1(A).

Inquiry #10:
May a lawyer for a title insurance company issue a title insurance policy based upon Attorney A's certification of title if Attorney A is providing legal services to customers of Real Estate Company as an employee or in-house counsel for Real Estate Company?

Opinion #10:
If an attorney for a title insurance company knows that Attorney A is providing legal services to customers of Real Estate Company in violation of N.C. Gen. Stat. § 84-5, which prohibits a corporation from engaging in the practice of law, the attorney for the title insurance company may not aid in this practice. Rule 3.1(a).

Inquiry #11:
May Attorney A practice law from his office in Real Estate Company's office and use the same telephone number as Real Estate Company?

Opinion #11:

Yes, if the office receptionist and the office signage clearly indicate that Attorney A's legal practice is separate and distinct from the real estate business operated by Real Estate Company. Rule 2.1(A).

Inquiry #12:
May Attorney A or Attorney A's name appear in Real Estate Company's television and print ads, including brochures identifying Attorney A as a lawyer as well as a real estate salesman?
Opinion #12:
Yes, if the advertisements do not include false or misleading communications about Lawyer A or Lawyer A's services in violation of Rule 2.1 and do not imply that legal services will be provided by a corporation in violation of N.C. Gen. Stat. § 84-5.

Inquiry #13:
May Attorney A include business cards identifying him as a lawyer in sales promotion packets sent by Real Estate Company to customers whether the packets are solicited or unsolicited by the customers?

Opinion #13:
Yes, see opinion #12 above.

Inquiry #14:
May Attorney A be employed as in-house counsel for Real Estate Company and also close real estate transactions referred to him by Real Estate Company?

Opinion #14:
No. See opinion #7 above.

RPC 113

July 12, 1991

Legal Advice Concerning Lien Rights
Opinion rules that a lawyer may disclose information concerning advice given to a client at a closing in regard to the significance of the client's lien affidavit.
Inquiry #1:
A lender (Mortgagee) loaned money to an owner (Owner). The note evidencing the loan was to be secured by a first lien deed of trust on certain real property that had been owned by the Owner for some period of time prior to the closing of the loan. An attorney (Attorney) represented both the Owner and the Mortgagee at the closing of the loan. The Mortgagee required, and instructed the Attorney, that, as a condition to the closing of the loan, a mortgagee's title insurance policy be obtained by the Attorney with respect to Mortgagee's first lien deed of trust. The title insurance company, as a condition to issuing the title insurance policy, required the usual owner's affidavit with respect to mechanics' lien.
During the course of the closing of the loan, the Owner executed the usual owner's affidavit running in favor of the title insurance company in which the Owner "certified" that no third parties had any rights to any "mechanics' lien" on the real property.
Subsequent developments indicate that, in fact, at least one third party had "mechanics' lien" rights which, because of the relation back to the commencement of the work on the Owner's real property, may be superior to the lien of the deed of trust in favor of the Mortgagee.
Litigation has now been commenced against the Mortgagee and the Owner by the contractor who claims a mechanics' lien superior to the rights of the Mortgagee in the subject real property. The Mortgagee and the title insurance company have employed counsel (Counsel), other than Attorney, and the Owner has advised Counsel that the Owner did not realize that he was signing an affidavit certifying that there were no mechanics' lien rights superior to that of the deed of trust. Counsel for the Mortgagee and title insurance company has inquired of Attorney what Attorney told the Owner about the affidavit before it was executed by the Owner.
Based on the foregoing:
Can Attorney advise Counsel as to the nature and extent of his conversation to Owner at the closing with respect to the affidavit?
Opinion #1:
Yes. Rule 4(c)(5).
Inquiry #2:
Can Attorney advise Counsel as to the nature and extent of Owner's conversation to Attorney at closing with respect to the affidavit?
Opinion #2:
Yes. See the answer to question #1.
Inquiry #3:
Would the answers to 1 and 2 be any different if Attorney was asked the questions in a deposition taken in connection with the litigation?
Opinion #3:
No.

98 Formal Ethics Opinion 8

April 16, 1998

Participation in a Witness Closing
Opinion rules that a lawyer may not participate in a closing or sign a preliminary title opinion if, after reasonable inquiry, the lawyer believes that the title abstract or opinion was prepared by a non-lawyer without supervision by a licensed North Carolina lawyer.

Inquiry #1:
Lender is located in another state but provides home loans to North Carolina residents. Lender asks Attorney, a licensed North Carolina lawyer, to close a loan for certain borrowers. Lender indicates that the following services will be required from Attorney: (1) oversight of the execution of the loan documents; (2) acknowledgment by an appropriate witness of the signatures of the borrowers on the documents; (3) recordation of Lender's deed of trust; (4) copying the loan documents without review; and (5) disbursement of the loan proceeds. Lender procures title insurance from an out-of-state title insurance company which issues title insurance binders in reliance upon the notes of a title abstractor. Attorney suspects that the title search was done by a non-lawyer who was not supervised by a North Carolina lawyer.
This type of closing is sometimes called a "witness closing." May Attorney participate in the closing?
Opinion #1:
No. Rule 5.5(b) provides, "[a] lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." N.C. Gen. Stat. §84-2.1 defines "practice [of] law" as, among other things, "abstracting or passing upon titles." Attorney must make a reasonable inquiry concerning the preparation of the title search and/or the title opinion. If Attorney believes, after making this reasonable inquiry, that a non-lawyer abstracted the title and/or gave a title opinion on the property without the proper supervision of a licensed North Carolina attorney and this unauthorized practice will be furthered by Attorney's participation in the closing under the conditions prescribed by Lender, she may not participate in the closing. However, Attorney may participate in the closing if Attorney's reasonable inquiry indicates that the statute was not violated.
Inquiry #2:
What duty does Attorney have to the borrowers?
Opinion #2:
If Attorney's representation is not prohibited by Rule 5.5(b), Attorney's duty to the borrowers is to ensure that her limited role in the closing is well understood and the borrowers agree to this limited role. *See* Rule 1.2(c). If she represents the borrowers, as well as Lender, she must competently represent their interests even if the objectives of her representation are limited. *See* Rule 1.1. Competent representation may include disclosure of any concerns that she may have about the preparation of the title opinion and the risks of relying upon the opinion. If Attorney does not represent the borrowers, they must be so advised and told that they should obtain separate legal counsel. *See* RPC 210. Attorney may represent the borrowers and Lender if she can do so impartially and without compromising the interests of any client. *Id*.
Inquiry #3:
What duty does Attorney have to Lender?
Opinion #3:
If Attorney's representation is not prohibited by Rule 5.5(b), Attorney must competently represent the interests of Lender. See Rule 1.1. Competent representation may include disclosure of any concerns that she may have about the preparation of the title opinion and the risks of relying upon the opinion.
Inquiry #4:
Title Insurance Company is located in another state but wants to write policies in North Carolina. Title Insurance Company contracts with a paralegal who is an independent contractor to search titles in North Carolina. Title Insurance Company asks Attorney to sign a preliminary opinion based upon the paralegal's abstract of title and/or preliminary opinion. Attorney has not reviewed the paralegal's title notes and did not supervise the paralegal's title research. May Attorney sign the preliminary opinion?
Opinion #4:
No, a lawyer has a duty to supervise any non-lawyer who assists her regardless of whether the non-lawyer is an employee of the lawyer, an independent contractor, or employed by another. Rule 5.3 and RPC 216. Execution of a preliminary title opinion that was prepared by an unsupervised non-lawyer is assisting the unauthorized practice of law in violation of Rule 5.5(b).

2000 Formal Ethics Opinion 8

January 18, 2001

Lawyer as Notary Public

Opinion rules that a lawyer acting as a notary must follow the law when acknowledging a signature on a document.

Inquiry #1:

Prior to 1999, Attorney H represented the co-executors of the SL Estate. During the administration of the SL Estate, Attorney H failed to repair a deed to convey certain real property located in South Carolina to a trust that was created by SL. In October 1999, this oversight was detected and Attorney H agreed to reopen the estate. On October 28, 1999, the co-executors delivered to Attorney H's office the original petition requesting the estate to be reopened. The co-executors had signed the petition but neglected to have their signatures notarized. Thereafter, Attorney H notarized the petition himself, although he had not witnessed either of the co-executors sign the document and neither had acknowledged his signature on the petition to Attorney H. Attorney H was familiar with both co-executors' signatures, however, and the co-executors did in fact sign the petition.

Gen. Stat. §10A-3(1) provides that "acknowledgment" of a signature on a document is "a notorial act in which a notary certifies that a signer, whose identity is personally known to the notary or proven on the basis of satisfactory evidence, has admitted, in the notary's presence, having signed a document voluntarily." It is believed that this provision of Chapter 10A is widely ignored. Did Attorney H's conduct violate the Revised Rules of Professional Conduct?

Opinion #1:

Yes, compliance with the law is the most basic requirement of professional responsibility. Although convenience and "common practice" might suggest shortcuts are appropriate, a lawyer serving as a notary must comply with the legal requirements for proper acknowledgment of a document. *See* Rule 8.4(a) and (d).

Inquiry #2:

Would the answer to inquiry #1 be different if Attorney H merely directed an employee to notarize the document instead of doing it himself?

Opinion #2:

No. See Rule 8.4(a) prohibiting a lawyer from violating the Revised Rules of Professional Conduct through the acts of another.

2001 Formal Ethics Opinion 8

October 19, 2001

Lawyer's Presence at Residential Real Estate Closing

Opinion rules that competent practice requires the physical presence of the lawyer at a residential real estate closing conference.

Inquiry:

In 99 Formal Ethics Opinion 13, the Ethics Committee of the North Carolina State Bar ruled that a lawyer may not permit a paralegal to close a residential real estate transaction but the paralegal may oversee the execution of closing documents outside the presence of the lawyer. May a lawyer close a residential real estate transaction without being physically present in the closing conference room if the lawyer remains in contact with the client and the lawyer's paralegal by telephone and is available, by phone, to answer the client's questions and to instruct and supervise the paralegal?

Opinion:

No. The lawyer must be physically present at the closing conference and may not be present through a surrogate such as a paralegal. See 99 Formal Ethics Opinion 13. This opinion establishes a bright line and removes any ambiguity about the requirements of 99 Formal Ethics Opinion 13.

2001 Formal Ethics Opinion 12

October 19, 2001

Affixing Excess Tax Stamps on a Recorded Deed

Opinion rules that a closing lawyer may not counsel or assist a client to affix excess excise tax stamps on an instrument for registration with the register of deeds.

Inquiry #1:

The excise tax stamps affixed to a recorded instrument of conveyance or deed are based upon the sales price for the property reported to the register of deeds. See GS §105-228.32. Therefore, the purchase price for real property can be calculated from the tax stamps on the deed. Appraisers, developers, real estate agents, and lenders rely upon the tax stamps to evaluate the purchase price of real property. If excess tax stamps are affixed to a deed, the higher value reflected by the tax stamps may deceive third parties. For example, a developer sells a lot to a buyer for a certain purchase price but gives the buyer a credit at closing. The lawyer closing the transaction obtains tax stamps for the deed based upon the higher price recited in the purchase agreement even though the actual consideration paid by the buyer is less. To encourage sales of other lots in the development at inflated prices, the developer claims that he sold the lot for the inflated price reflected in the tax stamps.

May a lawyer who closes a real estate transaction have the register of deeds affix more tax stamps to the deed than are warranted by the actual consideration paid for the property?

Opinion #1:

It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Rule 8.4(c). Members of the public regularly rely upon the information about the price of real property that can be derived from tax stamps on recorded instruments. Therefore, a lawyer may not counsel or help a client to put excess tax stamps on an instrument when it is recorded with the register of deeds because such conduct involves dishonesty and misrepresentation. See also Rule 1.2(d) (prohibiting a lawyer from counseling a client to engage in conduct that the lawyer knows is fraudulent).

Inquiry #2:

May a lawyer draft for a client a purchase agreement for real property wherein the purchase price recited in the written agreement is greater than the actual consideration the parties have orally agreed will be exchanged at closing?

Opinion #2:

No. See opinion #1**.**

2002 Formal Ethics Opinion 9

January 24, 2003

Delegation to Nonlawyer Assistant of Certain Tasks Associated with a Residential Real Estate Transaction

Opinion rules that a nonlawyer assistant supervised by a lawyer may identify to the client who is a party to such a transaction the documents to be executed with respect to the transaction, direct the client as to the correct place on each document to sign, and handle the disbursement of proceeds for a residential real estate transaction, even though the supervising lawyer is not physically present.

Introduction:

The North Carolina State Bar was asked to reconsider Formal Ethics Opinions 2001-4 and 2001-8. These opinions, together with Formal Ethics Opinion 99-13, rule that competent legal practice requires the physical presence of the lawyer at the closing

conference for both a purchase and a refinancing of residential real estate.

This opinion is issued after full consideration and investigation of the issues raised by the entities requesting the review. The opinion supersedes Formal Ethics Opinions 99-13, 2001-4, and 2001-8 to the extent that they are inconsistent with the conclusions expressed herein.

Inquiry:

In connection with a residential real estate transaction, a lawyer is retained to ensure that the documents are properly executed and that the loan and sale proceeds are properly distributed, in addition to other services, if any, that the lawyer is retained to provide. May the lawyer assign to a nonlawyer assistant the tasks of presiding over the execution of the documents and the disbursement of the closing proceeds necessary to complete the transaction?

Opinion:

Yes. The lawyer may delegate the direction of the execution of the documents and disbursement of the closing proceeds to a nonlawyer who is supervised by the lawyer provided, however, the nonlawyer does not give legal advice to the parties.

As is the case with any task that a lawyer delegates to a nonlawyer, competent practice requires that the lawyer determine that delegation is appropriate after having evaluated the complexity of the transaction, the degree of difficulty of the particular task, the training and ability of the nonlawyer, the client's sophistication and expectations, and the course of dealings with the client. Rule 1.1 and Rule 5.3.

When and how to communicate with clients in connection with the execution of the closing documents and the disbursement of the proceeds are decisions that should be within the sound legal discretion of the individual lawyer.1 Therefore, the requirement of the physical presence of the lawyer at the execution of the documents, as promulgated in Formal Ethics Opinions 99-13, 2001-4, and 2001-8, is hereby withdrawn. A nonlawyer supervised by the lawyer may oversee the execution of the closing documents and the disbursement of the proceeds even though the lawyer is not physically present. Moreover, the execution of the documents and the disbursement of the proceeds may be accomplished by mail, by e-mail, by other electronic means, or by some other procedure that would not require the lawyer and the parties to be physically present at one place and time. Whatever procedure is chosen for the execution of the documents, the lawyer must provide competent representation and adequate supervision of any nonlawyer providing assistance. Rule 1.1, Rule 5.3, and Rule 5.5.

In considering this matter, the State Bar received strong evidence that it is in the best interest of the consumer (the borrower) for the lawyer to be physically present at the execution of the documents.2 This ethics opinion should not be interpreted as implying that the State Bar disagrees with that evidence.

Endnotes

1. It is already common for lawyers, exercising their sound legal discretion, to delegate to their nonlawyer assistants certain other tasks in connection with a residential real estate transaction, such as the search of the public records and the recording of documents.

2. Transcript of the investigatory meeting of the Special Committee on Real Estate Closings, June 7, 2002. The transcript of the evidence received at the meeting is available from the North Carolina State Bar upon request.

Authorized Practice Advisory Opinion 2002-1

January 24, 2003

2005 Formal Ethics Opinion 11

INTERIM ACCOUNT FOR COSTS ASSOCIATED WITH REAL ESTATE CLOSINGS

Adopted January 20, 2006

Opinion examines the requirements for an interim account used to pay the costs for real estate closings and also rules that the actual costs may be marked up by the lawyer provided there is full disclosure and the overcharges are not clearly excessive.

Inquiry #1:

ABC Law Firm limits its practice to residential real estate sale and refinance transactions. On a monthly basis, it processes a high volume of such transactions involving real estate in both the county where its office is located and in contiguous counties.

RPC 44 and North Carolina's Good Funds Settlement Act, Chapter 45A of the North Carolina General Statutes, prohibit disbursement of funds from a lawyer's trust account prior to recording if the lender so requires. Lenders' instructions often require the recording of documents prior to disbursement of loan proceeds.

A number of the lenders providing financing to ABC's clients require the closing lawyer to estimate the settlement charges and disbursements, including courier and recording costs, prior to the issuance of the final loan package. Once the loan package is issued, the closing lawyer is not permitted to deviate from the figures specified in the loan package because the lenders are subject to scrutiny, and potential liability, for deviations between their "good faith estimate" of closing costs and the actual closing costs. Not infrequently, however, the actual costs for recording and overnight mail/couriers exceed the initial estimates.

ABC Law Firm has adopted the following procedure to address the above-described situation:

1. ABC established with its depository bank a depository account called the "Recording Account;"

2. ABC prepares for each real estate client, each of whom reviews and signs prior to closing, a closing affidavit making various disclosures, including the following:

> *I/we hereby acknowledge and agree that certain charges on my HUD-1 Settlement Statement, including but not limited to overnight/courier and recording fees, may not reflect the actual costs and in fact may be more than the actual costs to the settlement agent. The additional amount(s) may vary and are to help cover the administrative aspects of handling the particular item or service. I/we hereby consent to and accept the above-referenced up-charges.*

3. ABC marks up the estimated overnight/courier fees and recording fees it provides to lenders by anywhere from $2.00 to $15.00, and reflects the marked-up amount on the HUD-1 Settlement Statement on line 1201 denominated as "Recording Fees."

4. When the transaction closes, the amount reflected on the HUD-1 Settlement Statement as "Recording Fees" is transferred from ABC's trust account to ABC's Recording Account, and disbursements to recording offices and for reimbursement for overnight/courier fees are made from the Recording Account.

5. All amounts reflected on the HUD-1 Settlement Statement which are payable to ABC, including the Recording Fees, are reported by ABC as business income, and all disbursements from the Recording Account for overnight/courier fees and recording charges are reported as business expenses.

6. ABC considers all funds in the Recording Account to be funds of ABC, and from time to time, surplus funds are drawn from the Recording Account and transferred to the firm's Operating Account, or if necessary, funds are transferred from the Operating Account to the Recording Account.

After a closing but before the recording of the documents, may ABC transfer the amount for Recording Fees, as reflected on the HUD-1, from the law firm trust account to the Recording Account and write a check to the Register

of Deeds (and courier/overnight service) against those funds to tender to the Register of Deeds when the documents are recorded?

Opinion #1:

No, unless the Recording Account is maintained as a lawyer's trust account in accordance with Rule 1.15-1 to Rule 1.15-3 of the Rules of Professional Conduct. Although the transaction has closed, the funds to cover costs of the closing, including recording and overnight/courier fees, remain client funds until disbursed and must be segregated from the lawyer's funds and be deposited and disbursed in accordance with the trust accounting rules.

As a trust account, the funds in the Recording Account would be client funds and not the funds of ABC. Funds could not be transferred from the Recording Account to the firm's operating account unless earned by the firm or payable to the firm as reimbursement for costs advanced.

Inquiry #2:

ABC does not want the Recording Account to be a trust account. Therefore, ABC deposits its own money into the Recording Account. Checks for the recording and overnight/courier fees for a closing are written from this account. At closing, the line item for these closing costs on the HUD-1 reflects payment to the law firm to reimburse the firm for advancing these costs. After the closing and the recording of the documents, ABC deposits the check to the firm from the closing into the Recording Account to reimburse the firm for advancing the funds to cover these costs. Does this procedure comply with the trust accounting rules?

Opinion #2:

Yes. Because the Recording Account contains only the funds of the law firm, it does not have to be maintained as a lawyer's trust account.

Inquiry #3:

ABC would like to avoid advancing the funds of the law firm to cover the recording and courier/overnight fees. If the closing lawyer tenders a firm trust account check, written against the loan proceeds on deposit in the trust account, to the Register of Deeds at the time that the documents are recorded, has the lawyer complied with the lender's requirement that documents be recorded before the loan proceeds are disbursed?

Opinion #3:

Yes.

Inquiry #4:

The Fourth Circuit in *Boulware v. Crosland Mortgage*, 291 F.3d 261 (4th Cir. 2002), the Seventh Circuit in *Krzalic v. Republic Title Company*, 314 F.3d 875 (7th Cir. 2002), and the Eighth Circuit in *Haug v. Bank of America*, 317 F.3d 832 (8th Cir. 2003) have all ruled that "up charges," or markup, by mortgage lenders and settlement agents for recording fees and other expenses of settlement is not a violation of the Federal Real Estate Settlement Procedures Act.

If there is disclosure to its clients as set forth in Inquiry #1 above, may ABC inflate its estimate of the costs for recording and overnight/couriers fees that will be incurred in closing a transaction and, if the actual costs prove to be less than the estimated costs, retain the overcharges?

Opinion #4:

Yes, provided this practice is not prohibited by law, the disclosure is made to the lender as well as the seller, the overcharges are not clearly excessive in violation of Rule 1.5(a), and the clients are not misled, in violation of Rule 8.4(c), about the fact that the overcharges will be kept by the law firm as profit.

On the Role of Laypersons in the Consummation of Residential Real Estate Transactions

The North Carolina State Bar has been requested to interpret the North Carolina unauthorized practice of law statutes (N.C. Gen. Stat. §§84-2.1 to 84-5) as they apply to residential real estate transactions. The State Bar issues the following authorized practice of law advisory opinion pursuant to N.C. Gen. Stat. §84-37(f) after careful consideration and investigation. This opinion supersedes any prior opinions and decisions of any standing committee of the State Bar interpreting the unauthorized practice of law statutes to the extent those opinions and decisions are inconsistent with the conclusions expressed herein.

Issue 1:

May a nonlawyer handle a residential real estate closing for one or more of the parties to the transaction?

Opinion 1:

No. Residential real estate transactions typically involve several phases, including the following: abstraction of titles; application for title insurance policies, including title insurance policies that may incorporate tailored coverage; preparation of legal documents, such as deeds (in the case of a purchase transaction) and deeds of trust; explanation of documents implicating parties' legal rights, obligations, and options; resolution of possible clouds on title and issues concerning the legal rights of parties to the transaction; execution and acknowledgement of documents in compliance with legal mandates; recordation and cancellation of documents in accordance with North Carolina law; and disbursement of proceeds after legally-recognized funds are available. These and other functions are sometimes called, collectively, the "closing" of the residential real estate transaction. As detailed below, the North Carolina General Assembly has determined specifically that only persons who are licensed to practice law in the state may handle many of these functions.1

A person who is not licensed to practice law in North Carolina and is not working under the direct supervision of an active member of the State Bar may not perform functions or services that constitute the practice of law.2 For example, under the express language of N.C. Gen. Stat. §§ 84-2.1 and 84-4, a non-lawyer who is not working under the direct supervision of an active member of the State Bar would be engaged in the unauthorized practice of law if he or she performs any of the following functions for one or more of the parties to a residential real estate transaction: preparation or aiding in preparation of deeds, deeds of trust, or other legal documents; abstracting or passing upon titles; advising or giving an opinion upon the legal rights or obligations of any person, firm, or corporation; or holding himself or herself out as competent or qualified to give legal advice or counsel or as furnishing any services that constitute the practice of law.

Accordingly, a non-lawyer is engaged in the unauthorized practice of law if he or she performs any of the following functions in connection with a residential real estate closing (identified only as examples):

1. Abstracts or provides an opinion on title to real property;

2. Explains the legal status of title to real estate, the legal effect of anything found in the chain of title, or the legal effect of an item reported as an exception in a title insurance commitment except as necessary to underwrite a policy of insurance and except that a licensed title insurer, agency, or agent may explain an underwriting decision to an insured or prospective insured, including providing the reason for such decision;

3. Explains or gives advice about the rights or responsibilities of parties concerning matters disclosed by a land survey under circumstances that require the exercise of legal judgment or that have implications with respect to a party's legal rights or obligations;

4. Provides a legal opinion or advice in response to inquiries by any of the parties regarding legal rights or obligations of any person, firm, or corporation, including but not limited to the rights and obligations created by a promissory note, the effect of a

pre-payment penalty, the rights of parties under a right of rescission, and the rights of a lender under a deed of trust;

5. Advises or instructs a party to the transaction with respect to alternative ways for taking title to the property or the legal consequences of taking title in a particular manner;

6. Drafts a legal document for a party to the transaction or assists a party in the completion of a legal document, or selects or assists a party in selecting a form legal document among several forms having different legal implications;

7. Explains or recommends a course of action to a party to the transaction under circumstances that require the exercise of legal judgment or that have implications with respect to the party's legal rights or obligations;

8. Attempts to settle or resolve a dispute between the parties to the transaction that will have implications with respect to their respective legal rights or obligations.

The foregoing list of examples of functions that constitute the practice of law is not exclusive, but reflects a range of responsibilities and duties that involve the following: the exercise of legal judgment; the preparation of legal documents such as deeds, deeds of trust, and title opinions; the explanation or interpretation of legal documents in circumstances that require the exercise of legal judgment; the provision of legal advice or opinions; and the performance of other services that constitute the practice of law.

Issue 2:

May a nonlawyer who is not acting under the supervision of a lawyer licensed in North Carolina (1) present and identify the documents necessary to complete a North Carolina residential real estate closing, direct the parties where to sign the documents, and ensure that the parties have properly executed the documents; and (2) receive and disburse the closing funds?

Opinion 2:

Yes. So long as a nonlawyer does not engage in any of the activities referenced in Opinion 1, or in other activities that likewise constitute the practice of law, a nonlawyer may: (1) present and identify the documents necessary to complete a North Carolina residential real estate closing, direct the parties where to sign the documents, and ensure that the parties have properly executed the documents; or (2) receive and disburse the closing funds.

Notwithstanding this opinion, evidence considered by the State Bar with respect to this advisory opinion indicates that, at the time documents are presented to the parties for execution, a lawyer who is present may identify or be asked about important issues affecting the legal rights or obligations of the parties. A lawyer may provide important legal guidance about such issues, but a nonlawyer is not permitted to do so. Moreover, a consumer's retention of a licensed North Carolina lawyer provides financial protection to the consumer. The North Carolina Rules of Professional Conduct require a lawyer to properly handle all fiduciary funds, including residential real estate closing proceeds. In the event a lawyer mishandles the closing proceeds, the lawyer is subject to professional discipline, and the State Bar Client Security Fund may provide financial assistance for a person injured by the lawyer's improper application of funds. On the whole, the evidence considered by the State Bar indicates that it is in the best interest of a consumer to be represented by a lawyer with respect to all aspects of a residential real estate transaction.

The evidence the State Bar has considered suggests, however, that performing administrative or ministerial activities in connection with the execution of residential real estate closing documents and the receipt and disbursement of the closing proceeds does not necessarily require the exercise of legal judgment or the giving of legal advice or opinions. Indeed, the execution of closing documents and the disbursement of closing proceeds may be accomplished-and often have been accomplished-by mail, by e-mail, or by other electronic means, or by some other procedure that would not involve the lawyer and the parties being physically present at one place and time. The State Bar therefore concludes that it should not be presumed that performing the task of overseeing the execution of residential real estate closing documents and receiving and disbursing closing proceeds necessarily involves giving legal advice or opinions or otherwise engaging in activities that constitute the practice of law.

Nonlawyers who undertake such responsibilities, and those who retain their services, should also be aware that (1) the North

Carolina State Bar retains oversight authority concerning complaints about activities that constitute the unauthorized practice of law; and (2) the North Carolina criminal justice system may prosecute instances of the unauthorized practice of law. In addition, non-lawyers and consumers should bear in mind that other governmental authorities such as the Federal Trade Commission, the North Carolina Attorney General, district attorneys, and the banking commissioner, have jurisdiction over unfair trade practices and violations of requirements regarding lending practices.

Endnotes

1. Except as permitted under *State v. Pledger* , 257 N.C. 634, 127 S.E.2d 337 (1962), which allows a party having a "primary interest" in a transaction to prepare deeds of trust and other documents to effectuate the transaction.

2. The State Bar notes that the North Carolina General Assembly and Supreme Court are the entities that have the power to make the ultimate determination whether an activity constitutes the practice of law.

2008 Formal Ethics Opinion 7

July 18, 2008

Lawyer's Obligation to Record or to Disburse Closing Funds

Editor's note: This opinion expands upon 99 Formal Ethics Opinion 9. To the extent that this opinion differs from 99 FEO 9, that opinion is overruled.

Opinion rules that a closing lawyer shall not record and disburse when a seller has delivered the deed to the lawyer but the buyer instructs the lawyer to take no further action to close the transaction.

Inquiry #1:

Attorney represented Small Corporation on the purchase of a residential lot from Development Company. After the closing conference, Attorney deposited the check for the purchase price in his trust account and recorded the deed at the register of deeds. When he returned from the courthouse, he received a telephone call from an official with Small Corporation who stated that Small Corporation did not want to purchase the lot anymore because company officials had just learned that a house with a basement could not be built on the lot. The corporate official instructed Attorney not to disburse any of the closing funds although the deed was already recorded and title vested in Small Corporation. Development Company, the seller, demanded the sale proceed. What should Attorney do?

Opinion #1:

Normally, a client's decision not to proceed with a transaction must be honored by the lawyer and, if necessary, the lawyer must restore the *status quo ante* by returning documents, property, or funds to the appropriate parties to the transaction. Comment [1] to Rule 1.2 of the Rules of Professional Conduct states, "[t]he client has ultimate authority to determine the purposes to be served by legal representation within the limits imposed by law and the lawyer's professional obligations." However, a closing lawyer must also comply with the conditions placed upon the delivery of the deed by the seller absent fraud. If the seller delivered the executed deed to the lawyer upon the condition that the deed would only be recorded if the purchase price was paid, the lawyer has fiduciary responsibilities to the seller even if the seller is not the lawyer's client. *See, e.g.*, RPC 44 (conditional delivery of loan proceeds). Because title has passed to the buyer, the lawyer must satisfy the conditions of the transfer of the property by disbursing the sale proceeds. The lawyer must notify the buyer and the buyer can then take appropriate legal action to seek to have the sale rescinded. This opinion is applicable to closings on property used or developed for residential purposes.

Inquiry #2:

May Attorney represent Small Corporation in the subsequent action for rescission?

Opinion #2:

No. Rule 3.7(a) prohibits a lawyer from serving as a witness and an advocate in a trial proceeding. Moreover, Attorney's testimony may be detrimental to the interests of Small Corporation. If so, Attorney is also be barred from the representation because of the conflict of interest. Rule 3.7(b).

Inquiry #3:

Would the answer to Inquiry #1 be different if the buyer had instructed the lawyer not to disburse the sales proceeds after the closing conference, but before the deed was recorded?

Opinion #3:

Yes. Unless the real estate contract provides otherwise, or it is otherwise agreed between the parties, closing is presumed to be complete at the date and time of recording. If closing is not complete, upon receiving the buyer's instruction not to close, the lawyer should return the funds to lender and buyer, return the deed to seller, and retain the other closing documents in his file. The lawyer should hold any escrowed funds he received representing the earnest money deposit made at the time of the offer to purchase. If the earnest money was not initially deposited with the lawyer at the time of the offer to purchase, the lawyer shall have the right to return the deposit to the escrow account of the person, firm, or company that initially received the deposit.

Inquiry #4:

Assume that Attorney represents Development Company, the seller of the property. After the closing conference, but prior to recording the deed, Attorney received a telephone call from the seller asking the lawyer not to record the deed. What should attorney do?

Opinion #4

See Opinion # 3.

Conflicts of Interest

CPR 100

Adopted April 15, 1977

Over a period of several years, a number of inquiries have been made to the Council centering around the role of the lawyer in the usual residential loan transaction. This opinion is intended to deal with these basic questions and has the effect of revoking all previous ethics opinions inconsistent with it.

For the purposes of this opinion, in the usual residential loan transaction, it is assumed that the basic terms of the loan (amount, security, interest rate, installments, and maturity, but not necessarily all of the provisions contained in a deed of trust or mortgage) have been agreed upon between the borrower and the lender and that the lawyer has no obligation to bargain for either party. It is not material whether the lawyer is engaged by the borrower or by the lender, or, if he is engaged by both, who engaged him first. It is recognized, of course, that each principal to the transaction has the right to separate counsel if he so desires. It is assumed that the borrower pays the lawyer's fee.

In the usual residential loan transaction:
1. A lawyer may ethically represent both the borrower and the lender.
2. If the lawyer intends not to represent both the borrower and the lender, he shall give timely notice to the one he intends not to represent of this fact, so that the one not represented may secure separate and timely representation.
3. If he does not give such notice, he shall be deemed to represent both the borrower and the lender.
4. If he represents only the borrower, he may nevertheless ethically provide title and lien priority assurances required by the lender as a condition of the loan.

5. He shall clearly state to his client(s), whether the borrower or the lender, or both, whom he represents and the general scope of his representation.
6. If he does not represent both principals, and the one he does not represent retains another lawyer to represent him, both lawyers should fully cooperate with each other in serving the interests of their respective clients and in closing the loan promptly.
7. If the lawyer represents both the borrower and the lender, he may be ethically barred from representing either one (without the consent of the other) if a controversy arises between the borrower and the lender before or during the loan closing or, if a controversy arises between the borrower and the lender relating to the loan, even after the closing.

The seller is frequently involved in the usual residential loan transaction, and the lawyer representing the borrower and the lender (or either), whether or not a loan is involved, may be called upon to prepare a deed from the seller. It is assumed that the basic terms of the sale transaction have been agreed upon between the

seller and the buyer and that the lawyer has no obligation to bargain for either.

It is not unethical for a lawyer representing the borrower and the lender (or either) in the usual residential loan transaction to prepare a deed from the seller to the buyer, collect the purchase price for the seller, or draft other documents (such as a second deed of trust and note secured thereby) as may be necessary to complete the transaction between the seller and the buyer in accordance with their agreement, and charge the seller therefor.

A lender frequently requires title insurance. It is not unethical for the lawyer representing the borrower, the lender, and the seller (or one or more of them) to provide the title insurer with an opinion on title sufficient to issue a mortgagee title insurance policy, the premium for which is normally paid by the borrower. Bearing in mind that a buyer-borrower is usually inexperienced in the purchase of real estate and the securing of loans thereon, any lawyer involved in the transaction, even though not representing the borrower, should be alert to inform the borrower of the availability of an owner's title insurance policy which is usually available to the borrower up to the amount of the loan at little or no expense to the borrower, and assist the borrower in obtaining an owner's title insurance policy.

A lawyer having a continuing professional relationship with any party to the usual residential transaction, whether the seller, the lender, or the borrower, should be particularly alert to determine in his own mind whether or not there is any obstacle to his loyal representation of other parties to the transaction, and if he finds there is, or if there is any doubt in his mind about it, he should promptly decline to represent any other party to the transaction. In any event, the lawyer shall clearly state to his client(s), whether the seller, the lender, the borrower, or one or more of them, whom he represents and the general scope of his representation.

CPR 184

Adopted July 14, 1978

Inquiry:
May an attorney ethically write brokers in the area in which he practices to advise them of his rates for home loan closings and title searches?

Opinion:
No. DR 2-103 (C) prohibits a lawyer from requesting a person or organization to recommend or promote the use of his services except as authorized in DR 2-101. By distributing his rates for home loan closings and title searches to area brokers, an attorney is in effect asking them to recommend or promote the use of his services as prohibited by DR 2-103 (C). However, it is not unethical for an attorney to furnish information as to his fee and rates in response to a specific request for such information.

CPR 236

Adopted April 13, 1979

CPR's 102, 124, 196 and 198 were issued upon inquiries as to the propriety of a lawyer issuing a title opinion in a real estate sale or loan transaction when the lawyer or any member of the firm has a beneficial interest in the transaction. CPR's 102, 124, 196, and 198 appear to hold that such a practice was not improper.

These opinions have been questioned and as a result reconsidered and the following opinion issued in lieu thereof: It is unethical for a lawyer to certify title or issue a title opinion on real property in a sale or loan transaction in which the issuing lawyer or any member of the firm has a beneficial interest except in those transactions in which his beneficial interest consists of an equity ownership in a publicly held corporation, a savings and loan association, or a credit union.

CPR's 102,* 124,* 196* and 198* are expressly repealed.

**This opinion is not reprinted in this Handbook*.

CPR 246

Adopted July 13, 1979

Inquiry:
Attorney C is an attorney in private practice, Mr. A. Mr. B and Attorney C have formed the XYZ corporations, a closed, for profit business for the purpose of renovating and constructing homes. Attorney C is one of two vice-presidents and is also Corporate Secretary of XYZ Corporation. Mr. A, Mr. B and Attorney C each own 1/3 of the stock of XYZ Corporation.

1. In the buying and selling of property in the name of XYZ Corporation, where all parties in the transactions are informed of Attorney C's relationship with XYZ Corporation, may Attorney C ethically prepare and sign all legal documents of the corporation, including making title examinations and obtaining title insurance on land purchased and bought by the corporation, preparing all deeds and deeds of trust for the corporation, and signing all deeds and trusts as Corporate Secretary of the corporation?

Opinion:
Attorney C may not certify title or issue a title opinion on real property bought or sold by XYZ Corporation to third parties. *See* CPR 236. However, Attorney C may examine and certify titles on real property bought and sold by the XYZ Corporation for the use of the corporation only.

2. XYZ Corporation is newly formed and has a post office box number. Mr. A operates a home renovating and construction business out of his home. As part of the pre-incorporation agreement, the XYZ Corporation will purchase Mr. A's business from him as soon as it acquires an office space and secretary for the Corporation. In the interim, Attorney C would like to have a separate telephone line into his office for inquiries concerning the XYZ Corporation. When calls come in on that separate line, he proposes to have his secretary answer that line "XYZ Corporation" and to have the corporation pay her a small fee for answering the line. May Attorney C ethically do so?

Opinion:
Yes. As long as the line for XYZ Corporation is a separate line with a different number and is answered "XYZ Corporation," Attorney C may ethically allow the line to be connected to his law office. Also, there is no ethical problem for Attorney C in having his secretary also work for XYZ Corporation to the extent of answering the separate telephone line and receiving a small fee for doing so.

3. May Attorney C ethically permit the XYZ Corporation to print his law office telephone number on business cards which would also have the Corporation's name, its post office box address, and Attorney C's name with the titles Vice President and Corporate Secretary?

Opinion:
Attorney C should not allow his regular law office telephone number to be printed on the business cards of XYZ Corporation. He may ethically permit his name and the titles of his positions in XYZ Corporation to be printed on the Corporation's business cards. He may also ethically permit a separate telephone number which is answered in his law office to be listed on the Corporation's business cards. While Attorney C may ethically permit the Corporation's business card to list a separate telephone which is answered in his law office as "XYZ Corporation," he must keep his business activities separate in appearance form his legal practice and therefore cannot permit the Corporation's business cards to list his law office telephone number. The answers to all three questions in the inquiry assume that the telephone line for XYZ Corporation and that the XYZ Corporation is not an active business operated out of Attorney C's office. Attorney C is ethically required to keep business activities separate from his legal practice. *See* CPR 139*.

**This opinion is not reprinted in this Handbook*

CPR 247

Adopted July 13, 1979

Inquiry:
Attorney A is married to B, who is employed as a realtor for a large corporation which builds residential and commercial buildings, B is one of four agents for the sale of the corporation's residential property. B receives a percentage of the purchase price for any residential property sold by her as her commission for the sale. The corporation selects an attorney to perform the title search, obtain the title insurance, and perform the loan closing. If the purchaser does not want to use the attorney selected by the corporation, the purchaser may select any other attorney he wishes provided the purchaser pays for the attorney. The corporation desires to retain Attorney A to handle all the corporation's real estate transactions, which consists primarily of title searches, obtaining title insurance, and performing loan closings on the sale of residential property.

1. Can the attorney ethically accept this employment?

Opinion:
Yes. Attorney A may be employed by the corporation to perform its legal work. The fact that B, Attorney A's spouse, is also employed by the corporation does not prevent him from accepting the employment. As long as the corporation is not requiring that the purchaser employ Attorney A or regularly recommending Attorney A to purchasers with Attorney A's knowledge, there is no reason he cannot represent the corporation.

2. Can Attorney A ethically perform the title search, obtain the title insurance and handle the loan closings for the residential property of the corporation sold by B, Attorney A's wife?

Opinion:
Yes. An attorney is barred from performing title searches and handling loan closing for property sold by his or her realtor-spouse only if the employment is the result of regular or officious recommendations by the spouse that the attorney be employed to perform the title search and handle the loan closing. *See* CPR 103.

CPR 254

January 18, 1980

If a lawyer owns real property which he is selling or has a beneficial interest in a corporation, partnership or other entity which is selling real property, it is unethical for him or a member of his law firm to certify title or issue a title opinion in connection with the sales transaction.

If a lawyer is purchasing real property or has a beneficial interest in a corporation, partnership or other entity which is purchasing real property or obtaining a loan on real property, then either he or a member of his law firm may certify title or issue a title opinion in connection with the purchase or loan at the request of, or for the benefit of, an institutional lender, a title insurance company or the purchasing entity, if the attorney fully discloses his beneficial interest to all parties to whom he is certifying the title.

For purposes of this opinion, "member of a law firm" includes either a partner or associates therein. Having a 'beneficial interest" includes ownership as an individual or cotenant, but does not include equity ownership in a publicly held corporation, savings and loan association or credit union.

This opinion is a modification of CPR 236 and CPR 246.

CPR 275

Adopted October 15, 1980

Inquiry:
Attorney B is a one-third shareholder in Corporation X. Corporation X acted as mortgage broker in arranging financing for a real estate transaction. The lender, seller, and purchaser are all unrelated third parties. Corporation X will receive a commission for acting as mortgage broker but has no other interest in the transaction.

May Attorney A, a member of the same professional corporation as Attorney B, ethically certify title on the real property for which Corporation X arranged the financing?

Opinion:
Yes.

CPR 302

CERTIFICATION OF TITLE OF LAND OWNED BY ATTORNEY

Adopted October 14, 1981

Inquiry:
Attorney A is a partner in law firm ABCD. Attorney A is also a one-third owner of a parcel of property which has been subdivided into single family residential lots. At the time the property was purchased, Attorney A certified title to a lending institution and to a title insurance company, with all parties being fully aware of Attorney A's interest in the real property. Said real property is now covered by a title insurance policy. If a person purchases a lot in said subdivision and in conjunction with said purchase obtains a loan from a lending institution which requires that the purchaser obtain title insurance, can Attorney A, with full discloser to purchaser and lender, represent the purchaser in the transaction? Attorney A would not certify title to the purchaser or lender, but only to the title insurance company which in turn would issue a title insurance policy to the lender and purchaser. Thus, the risk of a conflict of interest would be borne by the title insurance company rather than

by the purchaser or lender. If a purchaser or his lender did not request or require title insurance, then Attorney A would not undertake to represent him. In light of CPR's 254 and 275, is it ethical for Attorney A or any member of his law firm to represent the purchaser in the above situation?

Opinion:
No. CPR 254 expressly states that a lawyer who owns real property which he is selling cannot ethically certify title or issue a title opinion in connection with the sales transaction. Neither can any member of his law firm. CPR 275 is not a modification of CPR 254. In CPR 275, a lawyer with an interest in a corporation acting as mortgage broker was held to be permitted ethically to certify title on the real property for which the corporation arranged the financing. In that instance, the corporation in which the lawyer held an interest did not itself have any beneficial interest in the property being transferred. The sole interest of the corporation was to receive a commission for acting as mortgage broker. In this instance, Attorney A clearly has a beneficial interest in the property being transferred and, under CPR 254, cannot certify title. Under no circumstances could Attorney A, who is one-third owner of the property being sold, represent the purchaser of the property for any purposes.

RPC 83

January 12, 1990
Rendering a Title Opinion Upon Property In Which the Lawyer Has a Beneficial Interest
Opinion rules that the significance of an attorney's personal interest in property determines whether he or she has a conflict of interest sufficient to disqualify him or her from rendering a title opinion concerning that property.

Inquiry:
Attorney A is a member of Law Firm ABC. Attorney A's wife, who is not an attorney, wishes to purchase 2.5 percent of the common stock of Corporation Z. Corporation Z is the general partner of a North Carolina limited partner which is engaged in development and sales of residential real estate.

CPR 254 provides that no member of a law firm may render a title opinion in a sales transaction if a member of the law firm has a beneficial interest in the selling entity.

If Attorney A's wife acquires stock in Corporation Z, will Attorney A be deemed to have acquired a "beneficial interest" in Corporation Z within the meaning of CPR 254, such that no member of Attorney A's firm may render title opinions in transactions in which Corporation Z's limited partner is the seller?

Opinion:
CPR 254 held that an attorney who owns a "beneficial interest" in an entity which was selling property could not certify title to the property sold. The opinion extended the disqualification to the attorney's partners and associates as well. The opinion went on to hold, however, that ownership of shares of a publicly held corporation did not constitute a beneficial interest for purposes of the disqualification rule.

CPR 254 was based on Disciplinary Rule 5-101(a) of the Code of Professional Responsibility. The Code has since been supplanted by the Rules of Professional Conduct. Rule 5.1(b) now governs. Rule 5.1(b) disqualifies a lawyer from acting in the face of a personal conflict of interest when his or her representation might be materially limited, unless 1) the attorney reasonably believes the representation will not be adversely affected and 2) the client consents after full disclosure.

Although CPR 254 appears to disqualify a lawyer with any beneficial interest in the selling entity, the exception for stockholders of publicly held corporations implies that disqualification is really a function of the significance to the attorney of his or her personal interest and the affect of the transaction on that interest. If the attorney or a close relative would realize considerable personal gain from the transaction, it is likely that his judgment would, in the words of Rule 5.1(b), be materially limited. Under such circumstances, a reasonable lawyer probably would be unable to conclude that the conflict could be successfully managed and would be disqualified, regardless of whether the entity requesting the title opinion would consent. By the same token, the judgment of a lawyer whose personal interest is insignificant would probably not be materially limited. In such a case, the lawyer could reasonably believe that the conflict would not adversely affect the representation and could proceed if the client (the entity to whom the opinion is being rendered) consents.

In the facts stated, it appears that Attorney A's wife owns only a small portion of the outstanding stock of Corporation Z, although the dollar value of the stock is not stated. Moreover, it appears that Corporation Z is a partner of the selling entity, but is not itself the owner of the entity selling the land. This being the case, it appears that there is little likelihood that the investment of Attorney A's wife would sway the judgment of Attorney A. Consequently, Attorney A could reasonably believe that his representation of the selling partner would not be adversely affected by his wife's interests. If in addition, he or she actually believes that to be the case and the client consents after full disclosure, there would need be no disqualification of the lawyer or other members of the lawyer's firm. To the extent that it differs from this opinion, CPR 254 is superseded.

RPC 121

October 18, 1991

Legal Opinion for Nonclient
Opinion rules that a borrower's lawyer may render a legal opinion to the lender.
Inquiry:
Lawyer A represents a borrower in negotiating a loan from a bank. The bank has a policy of requiring that counsel for its borrower render to it (the bank) a legal opinion that the loan in question and the terms of the loan do not violate any laws, including, without limitation, any usury laws or similar laws relating to the charging of interest.
May Lawyer A ethically render such an opinion to the bank?
Opinion:
Yes, Lawyer A may ethically render an opinion to the bank with the borrower's consent. The rendering of an opinion to the bank does not give rise to an attorney/client relationship between Lawyer A and the bank. Lawyer A is still representing the borrower only. Rule 5.1(a).
This opinion supersedes RPC 101.

RPC 248

April 4, 1997

Mortgage Brokerage Owned by Lawyers
Opinion rules that a lawyer who owns stock in a mortgage brokerage corporation may not act as the settlement agent for a loan brokered by the corporation. Nor may the other lawyers in the firm certify title or act as settlement agent for the closing.
Inquiry #1:
Attorneys A and B are shareholders in Corporation X, a mortgage brokerage. May Attorney C, a member of Attorney A and Attorney B's law firm but not a shareholder in Corporation X, certify title and/or act as settlement agent for a closing in which the mortgage was brokered by Corporation X?
Opinion#1:
No. Attorney A and Attorney B may not certify title or act as settlement agent because Attorney A and Attorney B's personal interest in seeing that Corporation X receives its fee or commission for placing the loan could conflict with the client-borrower's desire to close only when it is in his or her best interest to do so. *See* RPC 49 and RPC 188. The conflict of interest

of Attorney A and Attorney B is imputed to Attorney C, and he is also disqualified from certifying the title and/or acting as a settlement agent for the closing. *See* Rule 5.11(a).

Inquiry #2:

May Attorney A and Attorney B act as "mere settlement agents" of a loan brokered by Corporation X if another lawyer, who is not a shareholder in Corporation X, certifies title and there is full disclosure as well as a waiver of any conflict of interests by the borrower?

Opinion #2:

No. The conflict between Attorney A and Attorney B's personal interests and the interests of the borrower may materially impair the judgment of Attorneys A and B. The risk to the client-borrower is so great that no lawyer should proceed, regardless of whether the client desires to consent. *See* RPC 49, Rule 5.1(b), and Rule 5.11(a).

RPC 210

April 4, 1997

Editor's Note: RPC 210 and RPC 211, companion opinions on representation in residential real estate closings, were adopted by the council of the State Bar on January 12, 1996. On April 12, 1996, the council withdrew the opinions following substantial negative comment from real estate practitioners who indicated that the opinions might eliminate the economic efficiencies inherent in one-lawyer residential real estate closings. A substitute opinion for RPC 210 was proposed and subsequently adopted on April 4, 1997.

Representation of Multiple Parties to the Closing of a Residential Real Estate Transaction

Opinion examines the circumstances in which it is acceptable for a lawyer to represent the buyer, the seller, and the lender in the closing of a residential real estate transaction.

Introduction:

This opinion clarifies the conditions under which a closing lawyer may engage in common representation of the multiple parties to the closing of a residential real estate transaction. To the extent that a prior ethics opinion is inconsistent with this opinion, the prior opinion is withdrawn.

Inquiry #1:

In the usual residential real estate transaction, the contract to purchase is entered into by the buyer and seller prior to the engagement of a lawyer to close the transaction. May the closing lawyer represent both the buyer and the seller to close the transaction?

Opinion #1:

Rule 5.1(a) prohibits the representation of a client if the representation is directly adverse to the representation of another client unless there will be no adverse effect on the interests of both clients and the clients consent. At first blush, it may appear that the interests of the buyer and the seller of residential real estate are adverse. Nevertheless, after the terms of the sale are resolved, the buyer and the seller of residential real estate have a common objective: the transfer of the ownership of the property in conformity with the terms of the contract or agreement. In paragraph [10] of the comment to Rule 5.1, "Conflicts of Interest," it is observed that "a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interests even though there is some difference of interests among them." If the interests of the buyer and seller of residential property are generally aligned and the lawyer determines that he or she can manage the potential conflict of interest between the parties, a lawyer may represent both the buyer and the seller in closing a residential real estate transaction with the consent of the parties. Rule 5.1(a).

A lawyer may reasonably believe that the common representation of multiple parties to a residential real estate closing will not be adverse to the interests of any one client if the parties have already agreed to the basic terms of the transaction and the lawyer's role is limited to rendering an opinion on title, memorializing the transaction, and disbursing the proceeds. Before reaching this conclusion, however, the lawyer must determine whether there is any obstacle to the loyal representation of both parties. The lawyer should proceed with the common representation only if the lawyer is able to reach the following conclusions: he or she will be able to act impartially; there is little likelihood that an actual conflict will arise out of the common representation; and, should a conflict arise, the potential prejudice to the parties will be minimal. *See*, *e.g.*, ABA Model Rule of Professional Conduct 2.2, "Intermediary."

If the closing lawyer reasonably believes that the common representation can be managed in the best interests of both the buyer and the seller, he must obtain the consent of each of the parties after full disclosure of the risks of common representation. Rule

5.1(a). Full disclosure should include an explanation of the scope of the lawyer's representation. The lawyer should advise each party of the right to separate counsel. The disclosure should also include an explanation that if a conflict develops, the lawyer must withdraw from the representation of all parties and may not continue to represent any of the clients in the transaction. Rule 2.8(b). Although it is a better practice to put such disclosures in writing, the Rules of Professional Conduct do not require written disclosures.

If common representation is appropriate, the representation of the seller may include preparing the deed, collecting the purchase price, and drafting the documents necessary to complete the transaction in accordance with the agreement between the buyer and the seller. The lawyer may charge the seller for this representation. CPR 100.

Inquiry #2:

The buyer and the lender usually agree to the basic terms of the mortgage loan (amount, security, interest rate, installment, and maturity) prior to the engagement of the closing lawyer. In this situation, may the closing lawyer represent both the lender and the buyer?

Opinion #2:

Yes, if the interests of the buyer and lender are generally aligned and the lawyer determines that the potential conflict of interest can be managed. Rule 5.1(a). As stated above, before concluding that the common representation will not be adverse to the interests of any one client, the lawyer must determine three things: he or she will be able to act impartially; there is little likelihood that an actual conflict will arise out of the common representation; and, should a conflict arise, the potential prejudice to the parties will be minimal.

Although full disclosure to the lender of the risks of common representation is recommended, if the lawyer reasonably believes that the lender understands the closing lawyer's role because the lender is a knowledgeable and experienced participant in residential real estate transactions, the lawyer does not have to make a full disclosure to the lender regarding the common representation as required in opinion #1 above.

Inquiry #3:

If the closing lawyer does not intend to represent all of the parties to the transaction, does the lawyer have any responsibility to the party or parties he or she does not intend to represent?

Opinion #3:

Yes. By custom, the lender and the buyer are usually represented by the same lawyer. Therefore, if the lawyer does not intend to represent both the buyer and the lender, the lawyer must give timely notice to the party that the lawyer does not intend to represent, so that this party may secure separate representation. CPR 100. If the lawyer does not give such notice, the lawyer will be deemed to represent both the buyer and the lender. CPR 100. If the lawyer represents only the buyer, the lawyer may nevertheless ethically provide title and lien priority assurances required by the lender as a condition of the loan. CPR 100. If the party that the lawyer is not representing obtains separate counsel, both lawyers should fully cooperate with each other in serving the interests of their respective clients and in closing the transaction promptly.

It is not generally assumed that the buyer's lawyer will represent the seller. Therefore, if the closing lawyer does not intend to prepare the deed or perform other legal services for the seller, the lawyer does not have to give notice to the seller. *But see Cornelius v. Helms*, 120 N.C. App. 172,461 S.E.2d 338 (1995), *disc. rev. denied*, 342 N.C. 653,467 S.E.2d 709 (1996), for related negligence issues.

Inquiry #4:

May a lawyer who is representing the buyer, the lender, and the seller (or any one or more of them) provide the title insurer with an opinion on title sufficient to issue a mortgagee title insurance policy, the premium for which is normally paid by the buyer?

Opinion #4:

Yes. CPR 100.

Inquiry #5:

If a lawyer is representing more than one party to a residential real estate closing, what should the lawyer do if a conflict develops between the clients before, during, or after the closing?

Opinion#5:

If a conflict or controversy relating to the transaction arises between any of the parties being represented by the closing lawyer, the lawyer must withdraw from the representation of all of the clients and is ethically barred from representing any of the clients in the transaction or any dispute arising out of the transaction. Rule 5.1(a).

97 Formal Ethics Opinion 8

January 16, 1998

Representation of Developer and Buyer in Closing of a Residential Real Estate Transaction

Opinion examines the circumstances in which it is acceptable for the lawyer who regularly represents a real estate developer to represent the buyer and the developer in the closing of a residential real estate transaction.

Introduction:

This opinion supplements RPC 210 (April 4, 1997), an opinion on common representation in a typical residential real estate closing. This opinion addresses the issues that arise in common representation when the closing lawyer regularly represents a seller who is in the business of real estate development. The lawyer's financial interest in retaining the seller's business may present special problems. This opinion explains the conditions that must be met before a closing lawyer may proceed with common representation.

Inquiry #1:

Seller is in the business of buying residential lots and tracts of land, improving the lots and/or subdividing the land for residential or condominium development, and selling the improved lots and land. Seller frequently uses the services of Attorney to provide legal representation on various aspects of Seller's real estate transactions including, but not limited to, performing the base title work, preparing restrictive covenants, and drafting construction contracts.

Buyer entered into a contract with Seller to purchase a residential lot and house built by Seller. The contract was negotiated and executed without the involvement of Attorney. Seller wants Attorney to close the transaction. If Attorney closes the transaction, Attorney will provide legal services to Buyer including providing an opinion as to title and preparing the loan documents. May Attorney close the transaction and represent both Seller and Buyer?

Opinion #1:

Yes, provided Attorney reasonably believes that the common representation will not be adverse to the interests of either client, there is full disclosure of Attorney's prior representation of Seller, and Buyer consents to the common representation. *See* RPC 210 and Rule 2.2 of the Revised Rules of Professional Conduct.

In RPC 210, it is observed that:

[i]f the interests of the buyer and seller of residential property are generally aligned and the lawyer determines that he or she can manage the potential conflict of interest between the parties, the lawyer may represent both the buyer and the seller in closing a residential real estate transaction with the consent of the parties.

Before concluding that common representation is permitted, the lawyer must consider "whether there is any obstacle to the loyal representation of both parties." RPC 210. Where a lawyer has a long-standing professional relationship with a seller and a financial interest in continuing to represent the seller, the lawyer must carefully and thoughtfully evaluate whether he or she will be able to act impartially in closing the transaction. The lawyer may proceed with the common representation only if the lawyer reasonably believes that his or her loyalty to the seller will not interfere with the lawyer's responsibilities to the buyer. Rule 2.2(a)(3). Also, the lawyer may not proceed with the common representation unless he or she reasonably believes that there is little likelihood that an actual conflict will arise out of the common representation and, should a conflict arise, the potential prejudice to the parties will be minimal. RPC 210 and Rule 2.2(a)(2).

If the lawyer reasonably believes the common representation can be managed, the lawyer must make full disclosure of the advantages and risks of common representation and obtain the consent of both parties before proceeding with the representation. Revised Rule 2.2(a)(1). This disclosure should include informing the seller that, in closing the transaction, the lawyer has equal responsibility to the buyer and, regardless of the prior representation of the seller, the lawyer cannot prefer the interests of the seller over the interests of the buyer. With regard to the buyer, the lawyer must fully disclose the lawyer's prior and existing professional relationship with the seller. This disclosure should include a general explanation of the extent of the lawyer's prior and current representation of the seller and a specific explanation of the lawyer's legal work, if any, on the property that is the subject of the transaction. The latter should include the disclosure of all legal work relating to the development of a subdivision if relevant.

Full disclosure to the seller and to the buyer must also include an explanation of the scope of the lawyer's representation. *See* RPC 210. In addition, the lawyer should explain that if a conflict develops between the seller and the buyer, the lawyer must withdraw from the representation of all parties and may not continue to represent any of the clients in the transaction. RPC 210 and Rule 2.2(c). For example, the lawyer may not take a position of advocacy for one party or the other with regard to the completion of the construction of the house, the escrow of funds for the completion of the construction, problems with title to the property, and enforcement of the warranty on new construction. Areas of potential conflict should be outlined for both parties prior to obtaining their separate consents to the common representation.

The disclosure required must be made prior to the closing of the transaction. The Revised Rules of Professional Conduct do not require the consents to be in writing. However, obtaining written consents is the better practice.

If common representation is permitted under the conditions outlined above, Attorney may perform legal services for both parties as necessary to close the transaction including offering an opinion as to title to the buyer. Either party may be charged for the lawyer's services as appropriate. *See* Rule 1.5.

Inquiry #2:

Would the answer to inquiry #1 be different if Attorney drafted the model purchase contract that Seller uses to market the lots and houses in the subdivision but Attorney did not participate in the final negotiation of any of the specific provisions of the purchase contract between Seller and Buyer?

Opinion #2:

No, Attorney may still close the transaction and represent both Buyer and Seller provided he can satisfy the conditions on common representation set forth in opinion #1 above.

Inquiry #3:

May Attorney engage in common representation of Buyer and Seller if Attorney memorialized the purchase agreement between Buyer and Seller by completing the written purchase contract without participating in the negotiation of any of its specific terms?

Opinion #3:

Yes, Attorney may represent both Buyer and Seller if he can satisfy the conditions on common representation set forth in opinion #1 above.

Inquiry #4:

The house and lot that Buyer has contracted to purchase from Seller are located in a subdivision that is being developed by Seller. As a result of his representation of Seller on matters relating to the development of the subdivision, Attorney is aware that Seller is having financial difficulties and may be unable to complete the promised amenities in the subdivision, including a swimming pool and tennis courts. Seller has instructed Attorney not to disclose this information. May Attorney represent both Seller and Buyer to close the transaction?

Opinion #4:

No. Rule 1.7(c) provides that:

[a] lawyer shall have a continuing obligation to evaluate all situations involving potentially conflicting interests and shall withdraw from representation of any party he or she cannot adequately represent or represent without using the confidential information or secrets of another client or former client except as Rule 1.6 allows.

Rule 1.6(a) defines confidential client information as information learned during the course of representation of a client the disclosure of which would be detrimental to the interests of the client. The information regarding Seller's potential inability to complete the amenities in the subdivision is confidential information of Seller that Attorney may not disclose unless Seller consents. *See* Rule 1.6(c). However, to represent Buyer adequately, Attorney should disclose this information. In this situation, Attorney cannot reasonably conclude that his responsibilities to Seller will not interfere with his responsibilities to Buyer. *See* opinion #1 above. Attorney may not, therefore, accept the common representation.

Inquiry #5:

Completion of the amenities for the subdivision are not in question. However, Attorney prepared the base title for the subdivision and he is aware that there are some close questions on title to the lot under contract to Buyer. Although these matters may be insignificant, Attorney would normally disclose this information to Buyer. Seller has instructed Attorney not to disclose the information to Buyer. May Attorney represent Buyer and Seller to close the transaction?

Opinion #5:

No, unless Seller consents to the disclosure of the information. *See* opinion #2 above and Rule 1.6(c).

Inquiry #6:

Attorney analyzed his relationship with Seller and determined that he can impartially represent both Seller and Buyer in closing the sale of the house and lot to Buyer. Buyer and the lender chosen by Buyer have agreed to the basic terms of the mortgage loan (amount, security, interest rate, installment, and maturity) prior to the engagement of Attorney to close the transaction. May Attorney represent both the lender and Buyer, as well as Seller?

Opinion #6:

Yes. *See* RPC 210.

Inquiry #7:

Seller believes that it will result in savings of time and money if Attorney closes all of the sales in the subdivision. Seller would like to offer financial incentives to potential buyers to encourage them to use the closing services of Attorney. In particular, Seller would like to offer to pay all legal fees to close the transaction if the buyer agrees that Attorney will handle the closing. Seller asks Attorney if Attorney will close all sales for a pre-agreed fee. Seller also asks Attorney if Seller may include a provision in the contract to purchase in which Seller agrees to pay the legal fees if the buyer agrees that Attorney will close the transaction. May Attorney agree to participate in this arrangement?

Opinion #7:
Yes, if Attorney reasonably believes that the common representation can be handled impartially and the proper disclosure of the professional relationship between Seller and Attorney is made prior to the execution of the contract by the buyer. *See* Opinion #1 above.

99 Formal Ethics Opinion 8

October 22, 1999

Escrow Agreement Containing Waiver of Future Conflict
Opinion rules that a lawyer may represent all parties in a residential real estate closing and subsequently represent only one party in an escrow dispute provided the lawyer insures that the conditions for waiver of an objection to a possible future conflict of interest set forth in RPC 168 are satisfied.
Inquiry #1:
The fiduciary relationship that arises when a lawyer serves as an escrow agent is analyzed in 98 Formal Ethics Opinion 11. The opinion rules that a lawyer who represents the buyer in a residential real estate closing may serve as the escrow agent for funds for certain repairs to the house. If a dispute subsequently arises relative to the completion of the repairs and the right to receive the escrow, the lawyer may resign as escrow agent and represent the buyer in the dispute.
Assume that at the time the escrow is established, the buyer and the seller draft an escrow agreement. The agreement provides that in the event of a dispute over the disbursement of the escrow, the funds will be disbursed to another person who will act as escrow agent and the lawyer will represent the buyer in the escrow dispute. Does this arrangement violate the Revised Rules of Professional Conduct?
Opinion #1:
No, provided the funds are given to another individual who will serve as escrow agent. As noted in 98 Formal Ethics Opinion 11, the responsibilities of a lawyer acting as an escrow agent arise primarily from the lawyer's fiduciary relationship to both the obligor and obligee and not from a client-lawyer relationship. An escrow agent must be impartial to both the obligor and the obligee. If a dispute arises, the lawyer may not advocate for one of the parties until he resigns as escrow agent. The agreement contemplated in this inquiry satisfies this condition.
Inquiry #2:
The closing lawyer represents the buyer, the seller, and the lender in the closing after satisfying the conditions for multiple representation set forth in RPC 210. As in the preceding inquiry, the buyer and the seller enter into an agreement that appoints the closing lawyer escrow agent. The escrow agreement also provides that, in the event of a dispute, the funds will be given to another escrow agent and the closing lawyer will represent the buyer in the escrow dispute. May a lawyer participate in an arrangement in which one of the lawyer's clients agrees in advance to waive any objection to a possible future conflict of interest?
Opinion #2:
Yes, provided the conditions on waiver of a future conflict of interest set forth in RPC 168 are satisfied.

2004 Formal Ethics Opinion 3

April 23, 2004

Common Representation of Lender and Trustee on a Deed of Trust

Opinion rules that a lawyer may represent both the lender and the trustee on a deed of trust in a dispute with the borrower if the conditions on common representation can be satisfied.

Inquiry:

Mr. Doe is the trustee on a deed of trust securing a loan from Lender to Borrower. Lender notified Mr. Doe that Borrower was in default and asked Mr. Doe to initiate a foreclosure proceeding. Soon after the foreclosure was commenced, Borrower filed a lawsuit naming Lender as the defendant and alleging unfair debt collection practices. Mr. Doe is also named as a party to the

proceeding in order to enjoin the foreclosure proceeding. Lender asks Attorney A to represent it in the lawsuit and would like Attorney A to also represent Mr. Doe. Mr. Doe wants to be represented by Attorney A.

May Attorney A represent both Lender and Mr. Doe in his capacity as trustee on the deed of trust?

Opinion:

A lawyer may not engage in common representation of multiple clients if the common representation involves a concurrent conflict of interest. Rule 1.7(a). A concurrent conflict of interest exists whenever the representation of one client will be materially limited by the lawyer's responsibilities to another client. Rule 1.7(a)(2). However, a lawyer may proceed with the representation, despite the concurrent conflict, if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client and the representation is not prohibited by law, does not involve the assertion of a claim by one client against another in the same proceeding, and each affected client gives informed consent. Rule 1.7(b).

Comment [29] to Rule 1.7 provides additional guidance on when common representation is appropriate. It observes, "because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained."

Attorney A may proceed with the common representation of Lender and Mr. Doe if she concludes that she can maintain her impartiality as between the clients and the other conditions of Rule 1.7(b) are satisfied. In making this determination, she must remember that the trustee's role in a foreclosure is a neutral role. If Attorney A cannot represent both clients in a manner that will preserve Mr. Doe's neutrality (as trustee), then she cannot satisfy the condition requiring her to provide both clients with competent and diligent representation.

The situation described in this inquiry must be distinguished from the limitations placed upon a lawyer who is actually serving as the trustee on a deed of trust. There are a number of ethics opinions that hold that a lawyer who serves as a trustee must be neutral as between the interests of the lender and the interests of the borrower and may not, therefore, represent either party individually while initiating a foreclosure proceeding. *See* RPC 46, RPC 82, and RPC 90. Since Attorney A is providing legal representation to the trustee but is not herself serving in that neutral role, common representation with the lender is not prohibited if the conditions of Rule 1.7(b) can be satisfied.5

Disbursement of Loan Proceeds

CPR 358

DISBURSEMENT OF UNCOLLECTED FUNDS

July 11, 1984
INQUIRY:
Attorney A, licensed and practicing in North Carolina, does a substantial amount of real estate practice. Recently, Attorney A has noticed a growing practice among residential mortgage lenders to deliver closing packages with the loan proceeds evidenced by drafts drawn on California or other west coast banks. The instructions from the lender normally state that the draft is not to be deposited in the attorney's trust account until the closing has taken place. On the other hand, the bank in which the attorney maintains his trust account uniformly places a "ten-day hold" on drafts drawn on west coast banks.

In the normal residential real estate transaction, disbursements are expected from Attorney A's trust account the day of closing in order to (1) pay and satisfy the existing mortgage(s) and (2) provide the seller with the wherewithal to acquire a new or substitute home. If Attorney A deposits the lender's draft on the day of the closing and makes disbursements at the same time, he is using the "float" in his firm trust account to cover the checks during the "ten-day hold" period. Attorney A is concerned that the "float" in the trust account belongs to other clients and is bothered by using it to cover the funds until the west coast draft clears.

Can Attorney A ethically close a transaction in advance of collecting the lender's draft drawn on a west coast bank?

OPINION:

No, not by using the "float" in the trust account, representing funds of other clients, to cover the draft until it is collected. Attorney A is required by DR 9-102 to protect the funds of clients in his safekeeping. He must promptly pay or deliver those funds as requested by a client when a client is entitled to receive them. DR 9-102(B)(4). Should the draft from the west coast lender not clear, Attorney A might not be able to pay or deliver those funds promptly upon a request from one of the other clients. Although it may not be common, it is certainly possible that such a draft might not clear, whether because of a "stop payment" order by the lender, litigation tying up the funds of the lender, or the insolvency of the lender. This risk certainly should not be borne by other clients, but that is exactly what is happening when the "float" is used to cover the disbursements until the lender's draft clears. This opinion does not prevent an attorney from making disbursements based on the deposit of a check which the bank provisionally credits to the account without any "hold" period. Barring exceptional circumstances, it is ethical to make disbursements from funds provisionally credited to the attorney's trust account.

RPC 44
ATTORNEY'S OBLIGATION TO FOLLOW CLOSING INSTRUCTIONS

July 15, 1988

Opinion rules that a closing attorney must follow the lender's closing instruction that closing documents be recorded prior to disbursement.

Inquiry:
Attorney closes loans for a number of real estate clients. After all documents are signed, but before recording, Attorney gives the real estate agent the commission check and the check for the sellers' proceeds. Attorney then records the necessary documents.

Attorney has been given closing instructions from the lender which require recording before disbursement. Attorney has actually signed a statement to the lender that he will follow the lender's instructions. Attorney is on the approved attorneys' list for a number of title insurance companies who have issued insured closing letters to lenders whose loans attorney closes. The insured closing letter ensures that the attorney will comply with the lender's closing instructions. If a defect in title is discovered by attorney in his title update after disbursement, then the title insurance is liable for that defect. That, in turn, puts attorney's professional liability policy at risk.

Both the realtor and seller have demanded that he disburse funds immediately rather than waiting until later in the day after going to the courthouse to update the title record. The realtor has further stated that the attorney would lose his business unless the funds are disbursed immediately because such is the prevailing practice in the community.

May attorney ethically ignore the lender's closing instruction as well as his commitment to the lender to follow those instructions? Has attorney violated any ethical requirements in disregarding the potential liability that would be imposed upon the title insurance company and/or his professional liability carrier if a defect is discovered after disbursement?

Opinion:
No. The attorney may not ethically ignore the lender's instruction that recordation must precede disbursement. CPR 100 made it clear that any attorney involved in the closing of an ordinary residential real property transaction represents both the borrower and the lender in the absence of clear notice to all concerned that such is not the case. Rule 10.2(E) requires a lawyer holding client funds in trust to deliver those funds to interested third persons as directed by the client. In the situation described in the inquiry, it is clear that the attorney, having received funds in trust from his client, the lender, is obliged to disburse those funds at a time which is consistent with the lender's instructions. Moreover, it is fair to say that any lawyer receiving client funds with the present knowledge that he or she does not intend to comply with the instructions for the handling of those funds, would violate Rule 1.2(c) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

It should also be noted that the disbursement of loan proceeds before the title is updated and the Deed and Deed of Trust are recorded could be prejudicial, not only to the lender as a client of the attorney, but also to other interested parties of the transaction to whom the lawyer may owe fiduciary duties, such as the title insurer and his own liability insurance carrier. Such conduct, at least insofar as the client is concerned, could be viewed as prejudicial to the client and thus a violation of Rule 7.1(a)(3).

RPC 78
CONDITIONAL DELIVERY OF TRUST ACCOUNT CHECKS

October 20, 1989

Opinion rules that a closing attorney cannot make conditional delivery of trust account checks to real estate agent before depositing loan proceeds against which checks were to be drawn.

Inquiry:
Attorney closes loans for a number of real estate clients. After all documents are signed, but before recording, Attorney gives the real estate agent the commission check and the check for the Sellers' proceeds, with specific instructions that real estate agent is to hold both checks in trust until notified that the closing documents have been recorded and all closing proceeds have been deposited in Attorney's trust account. Attorney then records the necessary documents and deposits all closing proceeds in his trust account.

Attorney has been given closing instructions from the lender which require recording before disbursement. Attorney has actually signed a statement to the lender that he will follow the lender's instructions. Attorney is on the approved attorneys' list for a number of title insurance companies who have issued insured closing letters to lenders whose loans Attorney closes. The insured closing letter ensures that Attorney will comply with the lender's closing instructions. Attorney does not deposit any funds, including lender's loan proceeds, until after title update and recording. If a defect in title is discovered by Attorney in his title update after "disbursement," he will not record and will notify the real estate agent to return the checks.

1. May Attorney ethically tender to real estate agent, in trust, the commission and seller's proceeds checks with instructions that the realtor, as agent for attorney, hold such checks until the attorney has recorded the closing documents, deposited the closing proceeds in his trust account, and notified the realtor that he may disburse the checks which real estate agent is holding in trust?

2. Has Attorney violated any ethical requirements in disregarding the potential liability that would be imposed upon the title insurance company and/or his professional liability carrier if a defect is discovered after disbursement?

Opinion:
This is a variation of the inquiry addressed in RPC 44, concerning the obligation of the closing attorney to follow the instructions of his client, the lender, to record documents before disbursing loan proceeds.

No. The attorney may not ethically deliver trust account checks to the real estate agent, even if such delivery is made "in trust" or "conditionally," until the attorney has recorded the closing documents and deposited the closing proceeds in his trust account.

Arguably, the conditional delivery of the trust account checks would not violate the lender's instructions, because the Attorney is, in fact, recording before depositing and disbursing the lender's funds. Those funds have not been "disbursed." *See* RPC 44.

However, by delivering to the real estate agent checks drawn on the trust account when the account has either (i) no funds or (ii) trust funds belonging to others, the Attorney violates Rules 10.1 and 10.2. Under those rules, funds deposited in a trust account are funds received by the Attorney as a fiduciary, which must be held and disbursed only for the benefit of those entitled to them, in accordance with appropriate instructions. Accordingly, Attorney cannot violate or delegate his fiduciary duty by putting into the hands of an unrelated third-party a check, regular on its face, drawn on a trust account containing only the funds of others. Similarly, Attorney cannot ethically deliver checks drawn on an account with insufficient funds, in violation of the law and the implicit requirement imposed by Rule 10.2(F).
2. Because of the answer to question 1, it appears unnecessary to answer question 2. Reference is made to the RPC 44. As a general matter, the ultimate liability created under a title insurance policy or professional liability insurance policy will be irrelevant to a determination of the ethical issues, which must be judged independently of legal liability and insurability.

RPC 86

April 13, 1990

Editor's Note: See RPC 191 for additional guidance on disbursing against provisional credit.

Disbursements Incident to Real Property Closings

Opinion discusses disbursement against uncollected funds, accounting for earnest money paid outside closing and representation of the seller.

Inquiry #1:

Must the closing attorney collect earnest money held in the trust accounts of real estate agents or other attorneys in the form of certified funds?

Opinion #1:

No. While it is certainly the better practice for the closing attorney to issue trust account checks only against collected funds, CPR 358 recognized that under certain circumstances such checks may be drawn against funds which though uncollected have been provisionally credited to the attorney's trust account by the financial institution in which the trust account is maintained. A closing attorney should disburse against provisionally credited funds only when he or she reasonably believes that the underlying deposited instrument is virtually certain to be honored when presented for collection. In addition, an attorney should take care not to disburse against uncollected funds in situations where the attorney's assets or credit would be insufficient to fund the trust account checks in the event that a provisionally credited item is dishonored.

Inquiry #2:

Must the closing attorney request that all earnest money be entrusted to him or her prior to closing?

Opinion #2:

Again it would appear that the better practice, which would involve the closing attorney's receipt and disbursement of all funds involved in the transaction, is not absolutely compelled by the Rules of Professional Conduct. An attorney does have an absolute obligation under Rule 10.2(E) to follow his client's instructions relative to the money which is entrusted to him or her. If, as was the case in RPC 44, the lender conditions the disbursement of loan proceeds upon some clearly specified event, such as the deposit in the attorney's trust account of all earnest money, the attorney would be obliged to honor that instruction and to insist upon the entrustment prior to proceeding further with the closing. If, however, the closing attorney receives no such instruction, it is conceivable that a closing could be accomplished in which some funds pertaining to the transaction are never received or disbursed by the closing attorney. In such situations the attorney should certainly take care to advise the client that he or she cannot guarantee the appropriate handling of all the money and in particular should identify for the client the risk that the party holding the earnest money might disburse prior to the attorney's updating the title and recording the deed and deed of trust.

Inquiry #3:

And in relation to the above, if the closing attorney does not require that all earnest money come in at closing, is he or she making potentially false certifications on the HUD Settlement Statement if it shows the earnest money as a credit against the payment of commissions or sales proceeds?

Opinion #3:

An attorney must, of course, be scrupulous in documenting his or her handling of trust funds (Rule 10.2(d)). If an attorney does not handle all funds incident to a real estate transaction which he or she is closing, it would certainly be prudent to carefully qualify any statements appearing on the settlement statement relative to the attorney's responsibility for the discharge of certain obligations and the quality of the attorney's knowledge relative to matters set forth only upon information and belief. As a practical matter, the attorney should obtain receipts from any persons or entities to whom payments have been made outside of closing if such are to be reflected upon the closing statement.

Inquiry #4:

Can the closing attorney retained by the buyer charge the seller a fee for doing the closing and handling certain matters for the seller that are not included in deed preparation? For example, after agreeing to handle a closing for Buyer A, the closing attorney pays off the seller's loan and must spend several hours retrieving the "paid and satisfied" note and deed of trust from seller's former bank in order to clear the title and have title insurance issued on behalf of Buyer A. Can the closing attorney charge a "closing fee?" If the answer to this question is yes, what kind of notification to or agreement with seller (and buyer) would be required?

Opinion #4:

In the typical residential transaction, it would not be inappropriate for the closing attorney who has been employed by the buyer to negotiate with the seller for the payment of a fee by the seller for legal services rendered on behalf of the seller incident to the closing. Any such contracts for legal services should be executed only where the provisions of Rule 5.1(a) can be satisfied relative to potential conflicts of interest and must be negotiated well in advance of closing.

RPC 191

October 20, 1995

Revised January 24, 1997
Editor's Note: RPC 191 originally became a formal opinion of the State Bar on October 20, 1995. The opinion sets forth the duty of a closing lawyer to disburse from the trust account only in reliance upon the deposit of specified negotiable instruments which have a low risk of noncollectibility. On June 21, 1996, the North Carolina General Assembly ratified the Good Funds Settlement Act, G.S. Chapter 45A, which became effective October 1, 1996. The act sets forth the duty of a settlement agent for a residential real estate closing to disburse settlement proceeds from a trust or escrow account only in reliance upon the deposit of specified negotiable instruments. There was some inconsistency between the list of negotiable instruments against which disbursement was permitted in the Act and a similar list in RPC 191. To correct this, RPC 191was revised to reference the list of acceptable negotiable instruments found in the Act.

Disbursements Upon Deposit of Funds Provisionally Credited to Trust Account

Opinion rules that a lawyer may make disbursements from his or her trust account in reliance upon the deposit of funds provisionally credited to the account if the funds are deposited in the form of cash, wired funds, or by specified instruments which, although they are not irrevocably credited to the account upon deposit, are generally regarded as reliable.

Introduction:

In the wake of the financial failure of an out-of-state mortgage lender, the State Bar received numerous requests to reexamine prior ethics opinions CPR 358 and RPC 86 which permitted a lawyer to issue trust account checks against funds which, although uncollected, were provisionally credited to the lawyer's trust account by the financial institution with which the trust account was maintained. RPC 86 cautioned that the closing lawyer should disburse against provisionally credited funds only when the lawyer reasonably believed that the underlying deposited instrument was virtually certain to be honored when presented for collection. Nevertheless, lawyers did accept, deposit, and disburse against the residential loan proceeds checks of the out-of-state mortgage lender that failed. Some of these checks were ultimately dishonored and charged back against the trust accounts of the closing lawyers. In the meantime, some trust account checks issued for the closings were presented for collection and paid, resulting in the use of funds deposited by other clients to pay the closing checks presented for payment.

Inquiry:

In the typical residential real estate closing, the lending institution that finances the purchase of the property delivers the loan proceeds to the closing lawyer in the form of a check drawn upon a financial institution which may or may not be located in North Carolina. Loan proceeds are seldom delivered to the closing lawyer in the form of wired funds. Similarly, the real estate agent sometimes delivers the earnest money to the closing lawyer in the form of a check drawn on his or her trust account and the buyer sometimes delivers a personal check to the closing lawyer to cover the difference between the loan amount and the buyer's obligations. May a closing lawyer deposit such checks in his or her trust account and, if the depository bank will provisionally credit the lawyer's trust account, immediately disburse against the items before they have been collected?

Opinion:

Yes, but only upon the conditions set forth in this opinion.

A lawyer (1) may disburse funds from a trust account only in reliance upon the deposit of a financial instrument specified in the Good Funds Settlement Act, G.S. Chap. 45A (the Act), which became effective on October 1, 1996, and the securing of provisional credit for the deposited item, and (2) as an affirmative duty, must immediately act to protect the property of the lawyer's other clients by personally paying the amount of any failed deposit or securing or arranging payment from other sources upon learning that a deposited instrument has been dishonored. It shall be unethical for a lawyer to disburse funds from a trust account in reliance upon the deposit of a financial instrument that is not specified in the Act, regardless of whether the item is ultimately honored or dishonored.

In reliance on CPR 358 and RPC 86, many closing lawyers deposit the checks from the lender, the real estate agent, and the buyer into their trust accounts, receive provisional credit for the items from the depository bank and immediately disburse funds from their trust accounts in accordance with the schedule of receipts and disbursements prepared for the closing. There is typically some delay, generally three to four days but in some instances as much as fifteen days, between the time of the deposit of the checks of the lender, the buyer, and the real estate agent into the lawyer's trust account and the time when the funds are irrevocably credited to the lawyer's trust account by the depository institution. Because of the time lag between the deposit and the collection of the checks, the closing lawyer runs the risk that a check may be ultimately dishonored and charged

back against the trust account of the closing lawyer, resulting in the use of the funds of other clients on deposit in the trust account to satisfy the disbursement checks from the closing.

A lawyer who receives funds that belong to a client assumes the responsibilities of a fiduciary to safeguard those funds and to preserve the identity of the funds by depositing the funds into a designated trust account. Rule 10.1 of the Rules of Professional Conduct. It is a lawyer's fiduciary obligation to ensure that the funds of a particular client are used only to satisfy the obligations of that client and are not used to satisfy the claims of the lawyer's creditors. Rule 10.1 and comment. Furthermore, Rule 10.2 of the Rules of Professional Conduct requires a lawyer to maintain complete records of all funds or other property of a client received by the lawyer and to render to the client appropriate accountings of the receipt and disbursement of any of the client's funds or property held by the lawyer. Rule 10.2(e) recognizes a lawyer's obligation to pay promptly or deliver to the client, or to a third person as directed by the client, the funds in the possession of the lawyer to which the client is entitled. Strictly interpreted, these rules would appear to require a lawyer not to disburse upon items deposited in his or her trust account until the depository bank has irrevocably credited the items to the account.

Requiring a closing lawyer to postpone disbursement until all items have been credited to the lawyer's trust account would result in inconvenience, delay, and could have an adverse effect on the economy. Nevertheless, there is some risk that certain instruments, such as ordinary commercial checks, may be uncollectible in any given transaction. Conversely, there are financial instruments that are generally regarded as extremely reliable. In fact, other state bars that have considered the issue have held that there are certain financial instruments for which the risk of noncollectibility is so slight as to make it unnecessary to prohibit a closing lawyer from disbursing immediately against such items before they are collected. *See* Virginia State Bar Legal Ethics Opinion 183 and Rule 5-1.1(g) of the Rules Regulating the Florida Bar. Similarly, the North Carolina Good Funds Settlement Act permits a "settlement agent," or person responsible for conducting the settlement and disbursement of the proceeds for a residential real estate closing, to disburse against uncollected funds but only if the deposited instrument is in one of the forms specified in the Act.

Notwithstanding the fact that some of the forms of funds designated in the Act are not irrevocably credited to the lawyer's trust account at the time of deposit, the risk of noncollectibility is so slight that a lawyer's disbursement of funds from a trust account in reliance upon the deposit into the account of provisionally credited funds in these forms shall not be considered unethical. However, a closing lawyer should never disburse against any provisionally credited funds unless he or she reasonably believes that the underlying deposited instrument is virtually certain to be honored when presented for collection. A lawyer may immediately disburse against collected funds, such as cash or wired funds, and may immediately make disbursements from his or her trust account in reliance upon provisional credit extended by the depository institution for funds deposited into the trust account in one or more of the forms set forth in G.S. §45A-4.

The disbursement of funds from a trust account by a lawyer in reliance upon provisional credit extended upon the deposit of an item into the trust account which does not take one of the forms prescribed in the Act constitutes professional misconduct, regardless of whether the item is ultimately honored or dishonored. However, a lawyer who disburses in reliance upon provisional credit extended upon the deposit of an item prescribed in the Act shall not be guilty of professional misconduct if that lawyer, upon learning that the item has been dishonored, immediately acts to protect the property of the lawyer's other clients by personally paying the amount of any failed deposit or securing or arranging payment from sources available to the lawyer other than trust account funds of other clients. An attorney should take care not to disburse against uncollected funds in situations where the attorney's assets or credit would be insufficient to fund the trust account checks in the event that a provisionally credited item is dishonored.

To the extent that CPR 358 and RPC 86 are inconsistent with this opinion, they are overruled. However, there are provisions in both opinions that remain operative. Specifically, the provision of CPR 358 that prohibits a lawyer from disbursing against the " in the trust account during the time lag between the deposit of the checks of the lender, the buyer, and the real estate agent and the time when these items are irrevocably credited to the account unless provisional credit for the items is extended by the depository institution remains in effect. If provisional credit is not extended by the depository institution, the disbursing lawyer is using the funds of other clients to cover the closing disbursements until the deposited items are collected in violation of Rule 10.1.

It should be emphasized that this opinion shall apply to any disbursements from the trust account against items which are not irrevocably credited to the account upon deposit, whether such disbursements are for the purpose of closing a real estate transaction or for the purpose of concluding some other transaction or matter.

RPC 232

October 17, 1996

Editor's Note: Opinion was originally adopted as RPC 232 (Revised). See RPC 191, as amended, for additional guidance.

Disbursement Upon Deposit of Mortgage Company Check Pursuant to an Agreement Purporting to Make Check Certified

Opinion concerns disbursements from a trust account in reliance upon the deposit of a mortgage company's check issued pursuant to an agreement with a mortgage company and the company's institutional lender purporting to render the check "certified" as that term is defined in the UCC.

Inquiry:

On October 20, 1995, RPC 191 was adopted by the Council of the North Carolina State Bar. The opinion allows a lawyer to make disbursements from his or her trust account in reliance upon the deposit of funds provisionally credited to the account provided the funds are deposited in the trust account in certain specified forms including certified checks.

Several mortgage companies and financial institutions making mortgage loans, (the "mortgage companies") have prepared a form agreement called the "Immediately Available Funds Procedure Agreement" (the "Agreement") which contains a procedure that mortgage companies believe will render certain mortgage loan proceeds checks "certified checks" as defined in the Uniform Commercial Code ("UCC"). If so, the mortgage companies contend that a lawyer closing a residential real estate transaction may make disbursements from his or her trust account immediately upon the deposit of such a mortgage loan proceeds check provisionally credited to the trust account.

The Agreement will be executed by the closing lawyer ("Attorney"), the mortgage company ("Financial Institution") for a particular borrower ("Borrower"), and an institutional lender legally authorized to make loans and receive deposits ("Federally-Insured Lender"). (All defined terms used herein are from the Agreement.) The procedure called for by the Agreement and some (but not all) of the terms of the Agreement are described below.

The Financial Institution shall transmit mortgage documents (promissory note, deed of trust, etc.) and closing instructions to Attorney to close the loan to Borrower. Prior to the scheduled closing of the loan, Financial Institution shall deliver a check ("Net Proceeds Check") drawn by Financial Institution on Federally-Insured Lender and payable jointly to Attorney and Borrower. After the mortgage documents are executed, but before closing the loan, Attorney will contact a duly authorized employee of Federally-Insured Lender ("Employee Contact"). Attorney will provide certain information to Employee Contact including the amount of the mortgage loan, that the mortgage documents have been executed by Borrower, and the amount of the Net Proceeds Check and any account number thereon. Upon providing this information to Employee contact, Attorney "shall be deemed to have made the same warranties to Federally-Insured Lender as if Attorney had obtained an acceptance as to the Net Proceeds Check from Federally-Insured Lender pursuant to Section 3-417 of the UCC." Federally-Insured Lender, through its Employee Contact, then issues Attorney a transaction code for manual notation by Attorney on the face of the Net Proceeds Check. The agreement provides that the issuance of the transaction code constitutes

(a) notice from Federally-Insured Lender to Attorney pursuant to Section 9-305 of the Uniform Commercial Code as in effect in the state that Federally-Insured Lender has a security interest in the mortgage documents; and

(b) the warranty by and unconditional agreement of Federally-Insured Lender with Attorney that

i) Federally-Insured Lender shall pay the Net Proceeds Check upon presentment without reference to amounts on deposit in any account.

ii) such notation, when made on the face of the Net Proceeds Check, constitutes an acceptance or certification of the Net Proceeds Check by Federally-Insured Lender pursuant to Sections 3-409, 3-410, and/or 3-411 of the Uniform Commercial Code as in effect in the state.

iii) Federally-Insured Lender undertakes the same obligations with respect to Net Proceeds Check as if certified or accepted in writing by Federally-Insured Lender.

iv) funds represented by the Net Proceeds Check are not subject to offset by Federally-Insured Lender.

The Agreement also states that

no provision in this Agreement...shall be construed to expand the rights of Federally-Insured Lender to dishonor the Net Proceeds Check beyond those rights which Federally-Insured Lender has, by law, to dishonor any ordinary certified check which is not subject to this or any other special agreement. Likewise, no such provision shall limit Attorney's rights to collect on the Net Proceeds Check to less than that provided by law to a holder of an ordinary certified check which is not subject to this or any other special agreement.

The Federally-Insured Lender agrees that the transaction code will have the same effect as the Federally-Insured Lender's signature pursuant to Section 3-401 of the Uniform Commercial Code as in effect in the state, and the issuance of the transaction code shall evidence Federally-Insured Lender's "then-present acceptance or certification of a particular Net Proceeds Check."

The Agreement also contains representations of Financial Institution "to induce Attorney and Federally-Insured Lender to enter into this agreement." These include an agreement by Financial Institution not to issue a stop payment order or other direction with respect to the Net Proceeds Check after the transaction code is issued for the check; an agreement that Financial Institution shall remain liable on the Net Proceeds Check as drawer for payment to Attorney or any other holder of the Net Proceeds Check, even though a transaction code is issued on the check by Federally-Insured Lender; a recognition of an absolute and unconditional obligation by Financial Institution to repay Federally-Insured Lender on any check for which Federally-Insured Lender has issued a transaction code; and an indemnification agreement with Federally-Insured Lender. May a lawyer follow the procedure in the Agreement, deposit in his or her trust account a Net Proceeds Check, with the transaction code issued by the Federally-Insured Lender noted on the face of the check, and upon receiving provisional credit for the check from the lawyer's depository institution, immediately disburse against the provisionally credited funds?

Opinion:

See Good Funds Settlement Act, G.S. §45A-1 *et seq*. (effective October 1, 1996).

99 Formal Ethics Opinion 9

October 22, 1999

Lawyer's Obligation to Disburse Closing Funds

Opinion rules that a lawyer who represents the buyer in a real estate closing, and subsequently records the deed, may not withhold the funds for the purchase price from the seller upon the buyer's post-closing instruction.

Inquiry #1:

Attorney represented Small Corporation on the purchase of a lot from Development Company. After the closing, Attorney deposited the check for the purchase price in his trust account and recorded the deed at the register of deeds. When he returned from the courthouse, he received a telephone call from an official with Small Corporation who stated that Small Corporation did not want to purchase the lot anymore because company officials had just learned that a house with a basement could not be built on the lot. The corporate official instructed Attorney not to disburse any of the closing funds although the deed was already recorded and title vested in Small Corporation. Development Company, the seller, demanded the sale proceeds. What should Attorney do?

Opinion #1:

Comment [1] to Rule 1.2 of the Revised Rules of Professional Conduct states, "[t]he client has ultimate authority to determine the purposes to be served by legal representation within the limits imposed by law and the lawyer's professional obligations." Normally, a client's decision not to proceed with a transaction must be honored by the lawyer and, if necessary, the lawyer must restore the *status quo ante* by returning documents, property, or funds to the appropriate parties to the transaction. However, once a closing lawyer records the deed to property, the lawyer must comply with the conditions placed on the delivery of the deed by the seller. If the seller delivered the executed deed to the lawyer upon the condition that the deed would only be recorded if the purchase price was paid, the lawyer has fiduciary responsibilities to the seller even if the seller is not the lawyer's client. *See, e.g.*, RPC 44 (conditional delivery of loan proceeds). If title has passed to the buyer, the lawyer must satisfy the conditions of the transfer of the property by disbursing the sale proceeds. The buyer must take appropriate legal action to have the sale rescinded.

Inquiry #2:

May Attorney represent Small Corporation in the subsequent action for rescission?

Opinion #2:

No. Rule 3.7(a) prohibits a lawyer from serving as a witness and an advocate in a trial proceeding. Moreover, Attorney's testimony may be detrimental to the interests of Small Corporation. If so, Attorney is also be barred from the representation because of the conflict of interest. Rule 3.7(b).

2013 Formal Ethics Opinion 4

July 19, 2013

Representation in Purchase of Foreclosed Property

Opinion examines the ethical duties of a lawyer representing both the buyer and the seller on the purchase of a foreclosure property and the lawyer's duties when the representation is limited to the seller.

Editor's note: This opinion supplements and clarifies 2006 FEO 3.

Inquiry #1:

Bank A foreclosed its deed of trust on real property and was the highest bidder at the sale. Bank A listed the property for sale. Buyer entered into a contract to purchase the property.

An addendum to the Offer to Purchase and Contract ("Contract") signed by the parties states that the closing shall be held in Seller's lawyer's office by a date certain and that Seller, Bank A, "shall only pay those closing costs and fees associated with the transfer of the Property that local custom or practice clearly allocates to Seller ... and the Buyer shall pay all remaining fees and costs." Bank B is providing financing for the transaction.

Seller chose Law Firm X to close the residential real estate transaction. Law Firm X did not participate in the foreclosure of the property prior to the sale; however, Law Firm X regularly does closings for properties sold by Bank A.

Law Firm X proposes to send Buyer a letter advising Buyer that it has been chosen as settlement agent and advising Buyer that it will be representing both parties in the transaction. Law Firm X will charge Buyer $425 for the closing.

May Lawyer at Law Firm X participate in the joint representation of Buyer and Seller as contemplated by the Contract?

Opinion #1:

If a lawyer is named as the closing agent for a residential real estate transaction pursuant to an agreement such as the one set out above, the lawyer has a duty to ensure that he can comply with Rule 1.7 prior to accepting joint representation of the buyer and seller. When contemplating joint representation, a lawyer must consider whether the interests of the parties will be adequately protected if they are permitted to give their informed consent to the representation, and whether an independent lawyer would advise the parties to consent to the conflict of interest. Representation is prohibited if the lawyer cannot reasonably conclude that he will be able to provide competent and diligent representation to all clients. See Rule 1.7, cmt. [15]. As stated in comment [29] to Rule 1.7, the representation of multiple clients "is improper when it is unlikely that impartiality can be maintained."

The Ethics Committee has previously concluded that, under certain circumstances, it may be acceptable for a lawyer to represent the borrower, the lender, and the seller in the closing of a residential real estate transaction. See, e.g. CPR 100, RPC 210. Joint representation may be permissible in a residential real estate closing because, in the usual transaction, the contract to purchase is entered into by the buyer and seller prior to the engagement of a lawyer. Therefore, the lawyer has no obligation to bargain for either party. Similarly, the buyer and the lender have agreed to the basic terms of the mortgage loan prior to the engagement of the closing lawyer. However, in CPR 100, the Ethics Committee specifically stated that:

[a] lawyer having a continuing professional relationship with any party to the usual residential transaction, whether the seller, the lender, or the borrower, should be particularly alert to determine in his own mind whether or not there is any obstacle to his loyal representation of other parties to the transaction, and if he finds that there is, or if there is any doubt in his mind about it, he should promptly decline to represent any other party to the transaction.

In addition to the above determination, Rule 1.7 requires that the lawyer obtain any affected client's informed consent to the joint representation and to confirm that consent in writing. Rule 1.7.

Comment [6] to Rule 1.0 (Terminology) provides that, to obtain "informed consent," a lawyer must "make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision." Comment [6] clarifies that, ordinarily, this will require: (1) communication that includes a disclosure of the facts and circumstances giving rise to the situation; (2) any explanation reasonably necessary to inform the individual of the material advantages and disadvantages of the proposed course of conduct; and (3) a discussion of the individual's options and alternatives.

To obtain Buyer's "informed" consent in the instant scenario, Lawyer must: (1) explain the proposed scope of the lawyer's representation; (2) disclose Lawyer's prior relationship with Seller; (3) explain the advantages and risks of common representation; and (4) discuss the options/alternatives Buyer has under the Contract, such as hiring his own lawyer at his own expense. See Rule 1.0, 97 FEO 8, 2006 FEO 3.

If the above requirements are met, Lawyer may proceed with the common representation. If Lawyer subsequently determines that he can no longer exercise his independent professional judgment on behalf of both clients, he must withdraw from the representation of both clients.

If Lawyer determines at the outset that the common representation will be adverse to the interests of either Buyer or Seller, or that his judgment will be impaired by loyalty to Seller, Lawyer may not represent both parties. Similarly, if Buyer does not consent to the joint representation, Lawyer may not represent both parties.

Inquiry #2:

Buyer notifies Lawyer at Law Firm X that he wants to have his own lawyer represent him at the closing. Therefore, Law Firm X intends to limit its representation to Seller. To clarify its role in the transaction, Lawyer sends Buyer an Independently Represented Buyer Acknowledgement to sign agreeing that, although Law Firm X was providing services necessary and incidental to effectuating a settlement of the transaction, including providing an opinion of title for the Buyer's policy to the title insurance company chosen by and affiliated with Bank A, there will be no attorney-client relationship between Law Firm X and Buyer. Law Firm X informs Buyer that the charge for the closing will be reduced to $325.

May Law Firm X limit its representation to Seller and charge Buyer $325 for closing the real estate transaction?

Opinion #2:

Upon notice that Buyer wants to have his own lawyer represent him at the closing, Lawyer must first determine whether Buyer desires Law Firm X to continue to represent his interests in conjunction with his own lawyer. If Buyer desires Law Firm X to continue to represent his interests in the closing, then Law Firm X may continue to advise Buyer and the firm would not be required to adjust its fee.

If Buyer does not consent to the joint representation, Lawyer may limit his representation to Seller in the absence of a conflict of interest. Under the circumstances, it is incumbent upon Lawyer to clarify its role to Buyer. 2006 FEO 3 specifically holds that a lawyer may represent only the seller's interests in a transaction and provide services as a title and closing agent, as required by the contract of sale. There must, however, be certain robust and thorough disclosures to the buyer.

Pursuant to 2006 FEO 3, Lawyer must "fully disclose to Buyer that Seller is his sole client, he does not represent the interests of Buyer, the closing documents will be prepared consistent with the specifications in the contract to purchase and, in the absence of such specifications, he will prepare the documents in a manner that will protect the interests of his client, Seller, and, therefore, Buyer may wish to obtain his own lawyer." 2006 FEO 3.

If Lawyer limits his representation to Seller, Lawyer may not perform any legal services for Buyer. At the conclusion of the representation, Lawyer needs to consider the factors set out in Rule 1.5(a) and determine whether the fee of $325 is clearly excessive for the services performed for Seller.

Whether the contract to purchase the property requires Buyer to pay Lawyer's fee for representation of Seller is a legal question outside the purview of the Ethics Committee. However, a lawyer may be paid by a third party, including an opposing party, provided the lawyer complies with Rule 1.8(f) and the fee is not illegal or clearly excessive in violation of Rule 1.5(a). See RPC 196.

Similarly, Buyer's authority to renegotiate the terms of the Contract pertaining to the selection of the closing lawyer, and/or the payment of the closing costs and fees associated with the closing, are outside the purview of the Ethics Committee.

Inquiry #3:

May Lawyer provide an opinion of title to the title insurance company for Buyer's title insurance policy under the circumstances described in Inquiry #2?

Opinion #3:

In representing Seller, Law Firm X may provide an opinion on title to the title insurer sufficient and necessary to satisfy the requirements of the Contract and facilitate completion of the transaction on behalf of Seller. See CPR 100, RPC 210, 2006 FEO 3.

CPR 100 and RPC 210 provide that a lawyer who is representing the buyer, the lender, and the seller (or any one or more of them) may provide the title insurer with an opinion on title sufficient to issue a mortgagee title insurance policy, when the premium is paid by the buyer. CPR 100 further recommends that, because a buyer-borrower is usually inexperienced in the purchase of real estate and the securing of loans thereon, "any lawyer involved in the transaction, even though not representing the borrower, should be alert to inform the borrower of the availability of an owner's title insurance policy which is usually available to the borrower up to the amount of the loan at little or no expense to the borrower, and assist the borrower in obtaining an owner's title insurance policy."

2013 Formal Ethics Opinion 5

July 19, 2013

Disclosure of Confidential Information to Lawyer Serving as Foreclosure Trustee

Opinion rules that a lawyer/trustee must explain his role in a foreclosure proceeding to any unrepresented party that is an unsophisticated consumer of legal services; if he fails to do so and that party discloses material confidential information, the lawyer may not represent the other party in a subsequent, related adversarial proceeding unless there is informed consent.

Inquiry:

Lender requests that Lawyer's Firm serve as the substitute trustee under a note and deed of trust to commence foreclosure proceedings based on an alleged event of default. Borrower under the note and deed of trust is a limited liability company. While Firm is acting as substitute trustee, Borrower's member-manager meets with Lawyer and explains to Lawyer why he believes Borrower is not in default. Borrower is a small business and its member-manager is inexperienced in matters requiring legal representation.

During the meeting with the member-manager, Lawyer did not explain the role of the trustee or the trustee's relationship to the borrower and lender in a foreclosure. The member-manager informed Lawyer that Borrower's theory is that the note required the subject property to be cleaned and cleared, and Borrower does not believe this condition was met. Borrower's member-manager shows Lawyer pictures and other documents supporting Borrower's theory of the case during this meeting.

The foreclosure proceeding is subsequently dismissed and superior court litigation between Borrower and Lender ensues. A new substitute trustee is appointed under the deed of trust. The primary issue in the lawsuit is the same issue Lawyer and the member-manager of Borrower discussed at their meeting while Firm was substitute trustee, i.e. whether Lender fulfilled its obligations under the note to clean and clear the property.

Now that Firm is no longer the substitute trustee, may Lawyer represent Lender in the lawsuit?

Opinion:

RPC 90 provides that a lawyer who as trustee initiated a foreclosure proceeding may resign as trustee after the foreclosure is contested and act as lender's counsel. The opinion notes that former service as a trustee does not disqualify a lawyer from subsequently assuming a partisan role in regard to foreclosure under a deed of trust or related litigation. See also RPC 64 (lawyer who served as trustee may after foreclosure sue the former debtor on behalf of the purchaser).

The facts of RPC 90 contemplate that the trustee resigns "when it becomes apparent that the foreclosure will be contested." In the instant matter, it appears that Lawyer continued to participate as trustee in the foreclosure after he knew that it was contested. Lawyer met with the member-manager of Borrower and discussed Borrower's theory as to the issue of default. Lawyer obtained information from the member-manager specifically related to the issue in controversy.

The responsibilities and limitations of a lawyer acting as trustee on a deed of trust arise primarily from the lawyer's fiduciary duties as trustee as opposed to any client-lawyer relationship. RPC 82. As a fiduciary, a lawyer/trustee has a duty to act impartially as between the parties and to ensure that the foreclosure is prosecuted in accordance with the law and the terms of the deed of trust. See RPC 82. However, the trustee's role may be unclear to an unsophisticated consumer of legal services who is unrepresented in the foreclosure. This may lead this party to make uncounseled disclosures to the lawyer/trustee on the erroneous assumption that the lawyer represents the party and has a duty of confidentiality to the party. Therefore, it is the lawyer/trustee's duty to explain the following to any party to a foreclosure that is unrepresented by counsel and inexperienced in the employment of lawyers or the mechanics of a foreclosure proceeding:

• the trustee's role is to ensure that the correct procedures are impartially followed in the prosecution of the foreclosure proceeding;

• the trustee does not represent either the lender or the borrower; and

• communications made by the lender or the borrower to the trustee will not be held in confidence and may be used or disclosed in subsequent actions between the lender and the borrower.

Lawyer failed to explain these limitations on the trustee's role to the member-manager of the LLC, which was unrepresented and apparently inexperienced in the mechanics of a foreclosure proceeding. The member-manager reasonably assumed that the disclosures he made to Lawyer would be held in confidence. Because Lawyer, in his fiduciary capacity, encouraged or allowed Borrower to confide in him without explaining the trustee's role or warning Borrower that the information could be disclosed or used, Lawyer may not subsequently represent Lender in a subsequent substantially related matter if the information Lawyer received from Borrower is material to the matter. Such a practice would constitute conduct that is prejudicial to the administration of justice. See Rule 8.4(d). However, Borrower's informed consent, confirmed in writing, would permit Lawyer to proceed with the representation. See Rule 1.7(b).

A lawyer/trustee may represent a lender against a borrower in a subsequent proceeding if the lawyer resigns as trustee upon recognizing that the foreclosure will be contested and the lawyer has not received information that may be used to the disadvantage of Borrower in the subsequent matter.

2013 Formal Ethics Opinion 14
January 23, 2015

Representation of Parties to a Commercial Real Estate Loan Closing

Opinion rules that common representation in a commercial real estate loan closing is, in most instances, a "nonconsentable" conflict meaning that a lawyer may not ask the borrower and the lender to consent to common representation.

Background:

In the standard closing of a commercial loan secured by real property (a "commercial loan closing"), the borrower and the lender have separate legal counsel. The borrower's lawyer traditionally handles most aspects of the closing including the preparation of the settlement statement as well as the collection of funds, the payoffs, and the disbursements. The borrower understands that its lawyer represents its interests alone. Unlike a residential real estate closing in which the lender's documents can rarely be modified once entered into by the borrower/buyer, it is common in a commercial loan closing for the borrower's lawyer to be actively involved in negotiating provisions of the commitment letter that establishes the basic terms of the mortgage, and to also negotiate specific revisions to the loan documents to address material matters such as default, disbursement of insurance proceeds, permitted transfers, and indemnification.

A large regional bank recently changed its commercial loan closing policies to require all lawyers who close commercial loans with the bank to be employed by law firms that are "authorized" by the bank to close its loans. These lawyers are designated as "Bank's Counsel." Bank's Counsel is asked by the bank to handle the entire closing including the title search, title certification, and the holding and disbursing of the closing funds.

Lawyers who traditionally represent the borrower in a commercial loan closing are concerned about this policy for a number of reasons including the following:

- Having closing funds delivered to the lender's lawyer instead of the borrower's lawyer subjects the borrower to responsibility for the funds without the benefit of its own legal counsel's guidance, protection, and assistance;

- Once the loan funds are committed to the borrower by the lender, they become the responsibility of the borrower. When there is separate, independent representation of the borrower, the protections of malpractice insurance and the closing protection letter are available to the borrower.

- The borrower's recourses may be limited if closing funds are mishandled and the borrower suffers a loss in connection with Bank's Counsel's preparation of the closing statement and disbursement of the loan proceeds. However, when the borrower's lawyer performs the escrow and closing functions, the lender gets an insured closing letter and a legal opinion relative to authority and enforceability from the borrower's lawyer and has protection.

- Having the lender's lawyer perform the property and business due diligence functions may result in the disclosure of confidential information relative to the borrower's property or its business interests that would not be disclosed if the borrower's lawyer performed these functions.

- Unless the borrower is sophisticated and instructs its lawyer to be actively involved, the borrower's lawyer may be placed in the role of "outsider" or passive observer, which may limit the quality and scope of the representation that

> the borrower receives. It will also invite, notwithstanding disclosure, the perception that the lender's lawyer is looking out for the interests of all of the parties.

Inquiry #1:

May a lawyer represent both the borrower and the lender for the closing of a commercial loan secured by real property? If so, is informed consent of both the borrower and the lender required, and what information must be disclosed to obtain informed consent?

Opinion #1:
In most instances, a lawyer may not represent both the borrower and the lender for the closing of a commercial loan even with consent.

Rule 1.7 prohibits the representation of a client if the representation involves a concurrent conflict of interest unless certain conditions are met. A concurrent conflict of interest exists if the representation of one client will be directly adverse to another client or the representation of one client may be materially limited by the lawyer's responsibilities to another client. Rule 1.7(a). The closing of a commercial loan secured by real estate is an "arm's length" business transaction in which large sums of money are at stake, the documentation is complex, and the opportunities to negotiate on behalf of each party are numerous. As observed in the comment to Rule 1.7:

> Even where there is no direct adverseness, a conflict of interest exists if a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client may be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent a seller of commercial real estate, a real estate developer, and a commercial lender is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself preclude the representation or require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Rule 1.7, cmt. [8].

Rule 1.7(b) allows a lawyer to proceed with a representation burdened with a concurrent conflict of interest, but only if the lawyer determines that the representation of all of the affected clients will be competent and diligent and each affected client gives informed consent. In other words, the lawyer must decide whether the conflict is "consentable." Rule 1.7, cmt. [2]. If the lawyer's exercise of independent professional judgment on behalf of any client will be compromised, the conflict is not consentable. As noted in the comment to Rule 1.7:

> [S]ome conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent...Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest...[R]epresentation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.

Rule 1.7, cmt.[14]-[15]. Although deleted from the comment to Rule 1.7 when the Rules of Professional Conduct were comprehensively revised in 2003, the following is an excellent test for determining whether a conflict is "consentable": "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." Rule 1.7, cmt. [5] (2002).

In RPC 210, the Ethics Committee held that a lawyer may represent the seller, borrower/buyer, and lender in a residential real estate closing with the informed consent of all of the parties. Even so, the opinion includes the following cautionary language:

> A lawyer may reasonably believe that the common representation of multiple parties to a residential real estate closing will not be adverse to the interests of any one client if the parties have already agreed to the basic terms of the transaction and the lawyer's role is limited to rendering an opinion on title, memorializing the transaction, and disbursing the proceeds. Before reaching this conclusion, however, the lawyer must determine whether there is any obstacle to the loyal representation of both parties. The lawyer should proceed with the common representation only if the lawyer is able to reach the following conclusions: he or she will be able to act impartially; there is little likelihood that an actual conflict will arise out of the common representation; and, should a conflict arise, the potential prejudice to the parties will be minimal.

A commercial loan closing is substantially different from a residential closing in which there is little opportunity to negotiate on behalf of the borrower/buyer once the purchase contract and loan commitment letter are signed. In a commercial loan closing, there are numerous opportunities for a lawyer to negotiate on behalf of the parties, so impartiality is rarely possible. There are also numerous opportunities for an actual conflict to arise between the borrower and the lender and, if a conflict does arise, the prejudice to the parties would be substantial. Therefore, common representation in a commercial loan closing is, in most instances, a "nonconsentable" conflict, meaning that a lawyer may not ask the borrower and the lender to consent to common representation. *Restatement (Third) of The Law Governing Lawyers,* §122, Comment g(iv), cites decisions in which the court denied the possibility of client consent as a matter of law in certain categories of cases. These decisions include *Baldasarre v. Butler*, 625 A. 2d 458 (N.J. 1993), in which the Supreme Court of New Jersey observed:

> This case graphically demonstrates the conflicts that arise when an attorney, even with both clients' consent, undertakes the representation of the buyer and the seller in a complex commercial real estate transaction. The disastrous consequences of [the lawyer's] dual representation convinces us that a new bright-line rule prohibiting dual representation is necessary in commercial real estate transactions where large sums of money are at stake, where contracts contain complex contingencies, or where options are numerous. The potential for conflict in that type of complex real estate transaction is too great to permit even consensual dual representation of buyer and seller. Therefore, we hold that an attorney may not represent both the buyer and seller in a complex commercial real estate transaction even if both give their informed consent.

635 A. 2d at 467. *See also* Fla. Bar. Prof'l Ethics Comm., Op. 97-2 (1997)(lawyer may not represent both buyer and seller in closing of sale of business where material terms of contract have not been agreed to or discussed by parties).

In summary, dual representation of the borrower and the lender for the closing of a commercial real estate loan is a nonconsentable conflict of interest unless the following conditions can be satisfied: (1) the contractual terms have been finally negotiated prior to the commencement of the representation; (2) there are no material contingencies to be resolved; (3) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (4) it is unlikely that a difference in interests will eventuate and, if it does, it will not materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that should be pursued on behalf of a client; (5) the lawyer reasonably concludes that he will be able to act impartially in the representation of both parties; (6) the lawyer explains to both parties that his role is limited to executing the tasks necessary to close the loan and that this

limitation prohibits him from advocating for the specific interests of either party; (7) the lawyer discloses that he must withdraw from the representation of both parties if a conflict arises; and (8) after the foregoing full disclosure, both parties give informed consent confirmed in writing.

Regardless of the above conditions allowing common representation of the borrower and lender, consent may never be sought to represent the lender, the borrower, and the seller of real property if the seller will provide secondary financing for the transaction and accept a secondary deed of trust. In this situation, the risks to the interests of the seller are too great to permit a lawyer to seek consent to common representation.

Inquiry #2:

The bank intends for Bank's Counsel to represent only the bank (lender) but to handle all aspects of the closing.

May a lawyer represent only the lender but handle all aspects of a commercial loan closing including the title search, title certification, marshalling the necessary documents, and holding and disbursing of the closing funds? If so, what information must be disclosed by Bank's Counsel to the borrower relative to the role of Bank's Counsel?

Opinion #2:

Yes, a lawyer may be the lead lawyer for the closing ("the closing lawyer") provided the lawyer represents only one party—either the lender or the borrower. Because the title work and other due diligence are for the benefit of the lender, there is no prohibition on the lender's lawyer performing these tasks. *See* 2004 FEO 10 (because buyer is the intended beneficiary of the deed although not a signatory, buyer's lawyer may prepare deed without creating a lawyer-client relationship with seller). However, if the closing lawyer represents the lender, certain conditions must be satisfied.

In 2006 FEO 3, the Ethics Committee considered whether a lawyer may represent a lender on the closing of the sale to a third party of property acquired by the lender as result of foreclosure by execution of the power of sale in the deed of trust on the property. The opinion holds (among other things) that a lawyer may serve as the closing lawyer and limit his representation to the lender/seller if there is disclosure to the buyer:

> Attorney A must fully disclose to Buyer that [the lender/seller] is his sole client, he does not represent the interests of Buyer, the closing documents will be prepared consistent with the specifications in the contract to purchase, and, in the absence of such specifications, he will prepare the documents in a manner that will protect the interests of his client, [the lender/seller], and, therefore, Buyer may wish to obtain his own lawyer. *See, e.g.,* RPC 40 (disclosure must be far enough in advance of the closing that the buyer can procure his own counsel), RPC 210, 04 FEO 10, and Rule 4.3(a). Because of the strong potential for Buyer to be misled, the disclosure must be thorough and robust.

Consistent with the holding in 2006 FEO 3, in a commercial loan closing, the lender's lawyer may serve as the closing lawyer provided the borrower is informed that the closing lawyer will not represent its interests and will interpret loan documents in the light that is most favorable to the lender; the borrower is given a reasonable opportunity to retain its own counsel and is not mislead as to its right to do so; the lawyers for both parties advise their clients about the risks and benefits of a having the lender's lawyer serve as the closing lawyer; and the borrower's lawyer is allowed to observe and participate in the transaction to the extent necessary to protect the borrower's interests.

This opinion cannot address all of the concerns expressed in the Background section above relative to the additional risks to the borrower if the lawyer for the closing is the lender's lawyer. However, if the closing funds are deposited to and disbursed from the trust account of the lender's lawyer in accordance with the requirements of the trust accounting rule, Rule 1.15, the funds should not be at risk. To the extent that there are other risks to the interests of the borrower, the borrower's lawyer must analyze those risks and advise the borrower about steps that may be taken to minimize the risks including negotiating with the lender's lawyer for aspects of the closing to be handled by the borrower's lawyer.

2014 Formal Ethics Opinion 2
April 25, 2014

Dual Representation of Trustee and Secured Creditor in Contested Foreclosure

Opinion rules that a lawyer may not represent both the trustee and the secured creditor in a contested foreclosure proceeding.

Inquiry:

A law firm has entered into a contract with an independent corporation to serve as substitute trustee in any foreclosure proceeding initiated by the law firm. No member of the law firm, or anyone related to any member of the law firm, has any affiliation with or financial interest in the corporation.

May the law firm represent the corporation serving as the trustee in a contested foreclosure proceeding, while also representing the secured creditor in the proceeding?

Opinion:

No. As noted in NC Gen. Stat. §45-21.16(c), a trustee on a deed of trust is "a neutral party and, while holding that position in the foreclosure proceeding, may not advocate for the secured creditor or for the debtor in the foreclosure proceeding." Because of the conflict between the neutral, fiduciary role of trustee and the role of an advocate for one of the parties to a contested foreclosure, a number of ethics opinions hold that a lawyer serving as a trustee in a contested foreclosure proceeding may not represent the secured creditor or the debtor in the proceeding. 2008 FEO 11 (listing opinions).

By extension, a lawyer representing the trustee in a contested foreclosure proceeding is also prohibited from representing the secured creditor or the debtor in the proceeding. This is because the lawyer must advise the trustee on maintaining a neutral role, and this representation would be materially limited by the advocacy required to represent either the secured creditor or the debtor. In fact, 2008 FEO 11 specifically prohibits the simultaneous representation in a contested foreclosure proceeding of the secured creditor and a corporate trustee specifically created by the lawyer's firm to serve in this capacity. 2008 FEO 11, Opinion #5.

The Ethics Committee has recognized a limited exception to the prohibition on representation of the secured creditor by a lawyer for the trustee in a contested foreclosure proceeding. This exception permits joint representation of both the trustee and the secured creditor, but not in the contested foreclosure itself. In 2004 FEO 3, a lawyer proposed to represent both the secured creditor and the trustee in an unfair debt collection action filed by the borrower against the secured creditor and the trustee. To enjoin the pending foreclosure proceeding, the trustee was named as a party-defendant in the action. The opinion holds that the lawyer may represent both the secured creditor and the trustee as codefendants in this separate, tangential lawsuit brought by the borrower if the lawyer determines that his representation will not be impaired, and both the secured creditor and the trustee give informed consent. 2004 FEO 3 (applying a conflict of interest analysis under Rule 1.7).

2015 Formal Ethics Opinion 2
April 17, 2015

Preparing Waiver of Right to Notice of Foreclosure for Unrepresented Borrower

Opinion rules that when the original debt is $100,000 or more, a lawyer for a lender may prepare and provide to an unrepresented borrower, owner, or guarantor a waiver of the right to notice of foreclosure and the right to a foreclosure hearing pursuant to N.C.G.S. § 45-21.16(f) if the lawyer explains the lawyer's role and does not give legal advice to any unrepresented person. However, a lawyer may not prepare such a waiver if the waiver is a part of a loan modification package for a mortgage secured by the borrower's primary residence.

Inquiry #1:

N.C. Gen. Stat. §45-21.16(f) provides that in a nonjudicial power of sale foreclosure, any person entitled to notice of the foreclosure (including owners, borrowers, and guarantors) (the "Notice Parties") "may waive after default the right to notice and hearing by written instrument signed and duly acknowledged by such party." The statute provides that in foreclosures where the original debt was less than $100,000, only the clerk may send the waiver form to the Notice Parties and the form can only be sent "after service of the notice of hearing." In foreclosures where the original debt is $100,000 or more, the statute does not specify how the waiver form shall be provided to the Notice Parties or who can draft the waiver form.

It is common practice for lenders dealing with defaulted loans in excess of $100,000 to require Notice Parties to execute a N.C. Gen. Stat. §45-21.16(f) waiver in connection with a forbearance, modification, or reinstatement agreement.

The filing of a foreclosure notice of hearing does not require a Notice Party to file an answer or to attend the foreclosure hearing. See N.C.G.S. §45-21.16(c)(7)(a) (requiring foreclosure notice to inform debtor that "failure to attend the hearing will not affect the debtor's right to pay the indebtedness...or to attend the actual sale, should the debtor elect to do so.") The execution of a N.C. Gen. Stat. §45-21.16(f) waiver "waives" the right to receive notice of the foreclosure hearing and the right to require a foreclosure hearing to be held. The clerk is still required to receive evidence and make the findings required by N.C.G.S. § 45-21.16(d), but can do so based upon affidavits from the lender without holding a formal hearing.

May a lawyer who represents the lender on a debt of $100,000 or more draft a N.C. Gen. Stat. §45-21.16(f) waiver form and provide the waiver form to unrepresented Notice Parties for execution?

Opinion #1:

Yes, provided the lawyer complies with the requirements of N.C. Gen. Stat. §45-21.16 and with Rule 4.3 (Dealing with Unrepresented Persons). However, in the consumer context, when the property subject to foreclosure is the borrower's primary residence, compliance with Rule 4.3 prohibits a lawyer from drafting the waiver form for inclusion in a loan modification package for execution by the unrepresented borrower.

In dealing on behalf of a client with a person who is not represented by counsel, Rule 4.3(a) states that a lawyer shall not give legal advice to the person, other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client. In addition, paragraph (b) of the rule prohibits the lawyer from stating or implying that the lawyer is disinterested and requires the lawyer to make reasonable efforts to correct any misunderstanding that the unrepresented person may have in this regard.

The Ethics Committee has previously considered whether a lawyer may prepare documents for execution by an unrepresented person. 2004 FEO 10 rules that the lawyer for the buyer in a residential real estate closing may prepare a deed as an accommodation to the needs of her client, the buyer, provided the lawyer makes the disclosures required by Rule 4.3 and does not give legal advice to the seller other than the advice to obtain legal counsel. Similarly, 2009 FEO 12 holds that a lawyer may prepare an affidavit and confession of judgment for an unrepresented adverse party as long as the lawyer explains who he represents and does not give the unrepresented party legal advice. Accord RPC 165.

However, other opinions have held that a lawyer may not prepare an answer or an acceptance of service and waiver form for an unrepresented opposing party. See CPR 121, CPR 296, RPC 165. 2002 FEO 6 explains the rationale for these prior opinions as follows:

The committee has consistently held, however, that a lawyer representing the plaintiff may not send a form answer to the defendant that admits the allegations of the divorce complaint nor may the lawyer send the defendant an "acceptance of service and waiver" form waiving the defendant's right to answer the complaint. CPR 121, CPR 125, CPR 296. The basis for these opinions is the prohibition on giving legal advice to a person who is not represented by counsel.

Except as noted below, the waiver form contemplated by the current inquiry is like a deed or a confession of judgment: it is prepared to accommodate the needs of the lawyer's client and usually prepared in conjunction with negotiations between the lender and the borrower relative to avoiding the consequences of a default by execution of a forbearance, modification, or

reinstatement agreement. A foreclosure notice of hearing does not require a Notice Party to take any action prior to a foreclosure hearing or to attend the hearing. After execution of a waiver form, the borrower may still pay the indebtedness or attend the foreclosure sale. Therefore, except as noted below, preparing a N.C. Gen. Stat. §45-21.16(f) waiver form for unrepresented Notice Parties is not tantamount to giving legal advice to an unrepresented person and the lender's lawyer may draft the waiver and give it to unrepresented Notice Parties if the lawyer does not undertake to advise the unrepresented Notice Parties concerning the meaning or significance of the waiver form or state or imply that the lawyer is disinterested.

There is an exception to this holding in the consumer context. When the property subject to foreclosure is the borrower's primary residence, compliance with Rule 4.3 prohibits a lawyer from drafting a waiver form for inclusion in a loan modification package for execution by the unrepresented borrower. In this context, preparation of the waiver form is tantamount to giving legal advice to an unrepresented person because the waiver prospectively eliminates a significant right or interest of the unrepresented person—the borrower's right to notice of foreclosure upon default on the new or modified loan—and there is a substantial risk that an unsophisticated, distressed borrower will not understand this. See Proposed 2015 FEO 1.

Inquiry #2:

Does it make a difference if the waiver is executed in conjunction with other lender prepared documents, such as a forbearance agreement, modification agreement, or reinstatement agreement?

Opinion #2:

Subject to the limitation noted in the last paragraph of Opinion #1 on drafting a waiver form for inclusion in a loan modification package for a loan secured by the unrepresented borrower's primary residence, this does not make a difference. Comment [2] to Rule 4.3 clarifies that Rule 4.3 does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party, the lawyer may inform the unrepresented person of the terms on which the lawyer's client will enter into an agreement or settle a matter and may prepare documents that require the unrepresented person's signature. In dealing with unrepresented Notice Parties, however, the lender's lawyer must fully disclose that the lawyer represents the interests of the lender and will draft the documents consistent with the interests of the lender. The lawyer may not give any legal advice to the Notice Parties except the advice to obtain legal counsel. Rule 4.3.

Escrow/Trust Accounts

CPR 372

ESCHEAT OF TRUST FUNDS

Adopted July 25, 1985

Opinion rules that attorney may pay abandoned trust funds into the escheat fund.

Inquiry:
Law Firm XYZ closed a real property transaction on January 22, 1979. At the time of the closing, the property was encumbered by a mortgage naming W as beneficiary. A payoff for the promissory note secured by the deed of trust was obtained in an amount slightly in excess of $4,000.00. Law Firm XYZ determined that W was deceased and that his widow lived in California. Law Firm XYZ sought to deliver the payoff monies to the trustee on the deed of trust, who refused to accept them. There then followed a lengthy series of letters and telephone calls with W's widow in California in an unsuccessful effort to learn the names and addresses of W's heirs in order to deliver the money.

In addition to the money owed to W's heirs, Law Firm XYZ also has other small sums in its trust account in the names of many different parties, and also undeliverable. Law Firm XYZ has been informed that these are "escheat" funds, but is unsure how

to “escheat” them. What may Law Firm XYZ ethically do in order to transfer this money, if appropriate, to the responsible party?

Opinion:
Law Firm XYZ may, when the statutory requirements have been met, pay abandoned trust money to the Escheat Fund administered by the Treasurer under F.S. 116B-27. Law Firm XYZ and other attorneys holding escheat funds should be careful to comply with all provisions of Chapter 116B in transmitting the funds to the Escheat Fund.

RPC 47

October 28, 1988

Trust Accounting for Small Sums

Opinion rules that an attorney who receives from his or her client a small sum of money which is to be used to pay the cost of recording a deed must deposit that money in a trust account.

Inquiry:

Attorney A is employed to draft a deed for Client B who wishes to give a parcel of real property to a relative. It is contemplated that Attorney A will, in addition to drawing the deed, preside over its execution and see that it is properly recorded. Client B is expected to pay a relatively small legal fee along with the cost of recordation at the time the deed is executed. For reasons of cost and convenience, Attorney A would like to ask his client for a single check representing the fee and the cost of recordation and would prefer to deposit that check in his general office account. From that account a single check would be written to the Register of Deeds for the cost of recordation.

Would the procedure described above violate the Rules of Professional Conduct? If so, is there any professionally responsible way of handling such transactions which would not involve an intermediate deposit in the trust account and the necessity of writing multiple checks?

Opinion:

Rules 10.1(a) and (c) quite clearly require a lawyer to deposit into his or her trust account all funds received as a fiduciary. This obligation is not in any way diminished when the sum involved is small. Strict segregation of client funds from the personal funds of the lawyer is always necessary to preclude confusion as to the identity of the funds and to ensure that trust funds are not subject to the claims of the lawyer's creditors or to those of his or her estate.

It should be noted that Rule 10.1(c) further provides that funds received from the client by the lawyer as reimbursement for expenses properly advanced by the lawyer on behalf of the client need not be deposited in the lawyer's trust account. A lawyer handling such transactions could therefore advance funds from his or her general account to pay the cost of recordation and could accept from the client a single check for the legal fee and the advanced expenses and the check could then be deposited directly and finally into the lawyer's general office account.

RPC 66

July 14, 1989

Disposition of Escrowed Funds

Opinion rules that an attorney serving as an escrow agent may not disburse in a manner not contemplated by the escrow agreement unless all parties agree.

Inquiry:

Purchaser entered into a residential construction contract on March 27, 1985 with builder. When the transaction was closed on July 25, 1986, $1000 was placed in escrow with the closing attorney to be held until a list of items was corrected and then disbursed to the builder.

The builder has failed to correct the items although many requests have been made by the purchaser. From time to time the attorney has urged the builder to resolve the problems with the purchaser but no action has been taken.

The attorney has maintained an escrow account earning interest in the name of the purchaser and the purchaser has now requested that the attorney disburse the escrow account and interest to the purchaser in exchange for an indemnification from the purchaser to the attorney.

After the passage of three years' time on July 25, 1989, and after ninety (90) days' notice to both parties, the attorney would like to transfer the escrow account to the purchaser and assume any civil liability, provided the transfer can be made without violating any ethical standard.

Can the attorney ethically disburse the escrowed funds to the purchaser under such circumstances?

Opinion:

No. Funds received by a lawyer acting as an escrow agent must be maintained in accordance with the trust accounting provisions of Rules 10.1 and 10.2 of the Rules of Professional Conduct. A lawyer/escrow agent stands in a fiduciary relationship with all parties to the escrow and is obligated to treat each as a client with respect to the funds held in trust. Disbursement of escrowed funds is governed in the first instance by the terms of the escrow agreement which should inform the lawyer as to which "client" is entitled to receive payment and when and in what amounts such payment ought to be made.

Rule 10.2 (E). If unforeseen circumstances arise for which no provision was made in the escrow agreement, such as those described in the inquiry, the disposition of the escrowed funds must be agreed upon by the parties or made the subject of a legally binding order prior to the lawyer's release of the escrowed funds. The lawyer may not, in concert with only one of the parties to the escrow agreement, determine that the funds will be disbursed to that party without the consent of the other interested party.

RPC 89

January 17, 1991

Editor's Note: This opinion was originally published as RPC 89 (Revised).

Escheat of Trust Funds

Opinion rules that trust funds must be held at least five years after the last occurrence of certain prescribed events before they may be deemed abandoned.

Inquiry:

Where a lawyer receives money in trust from a client who subsequently disappears and cannot thereafter be located by the lawyer upon due inquiry, how long must the lawyer retain the deposited funds in his or her trust account before deeming the money abandoned and paying the money into the escheat fund pursuant to the provisions of Rule 10.2(H) of the Rules of Professional Conduct and G.S. §116 (b)-18?

Opinion:

Rule 10.2(H) requires that property held in trust for an owner whose identity is known but who cannot be located must be deemed abandoned and paid to the state treasurer in compliance with the requirements of Chapter 116(b) of the General Statutes if, during the five-year period immediately preceding, the fund's principal has not increased, the owner has not accepted payment of principal or income, the owner has not corresponded in writing and the owner has not otherwise indicated an interest in the account as evidenced by a memorandum or other record on file with the lawyer. If any of the four events enumerated above have occurred during the five-year period immediately preceding, no abandonment will be deemed to have occurred and the client's funds must continue in the lawyer's trust. By the same token, whenever any of the four enumerated events occurs, a new five-year period begins to run during which the lawyer is obligated to maintain the property in trust and after which the property must be deemed abandoned, if none of the four enumerated events has occurred in the meantime. See also G.S. §116B-13.5, concerning voluntary early delivery of funds.

98 Formal Ethics Opinion 11

July 16, 1998

The Lawyer as Escrow Agent

Opinion rules that the fiduciary relationship that arises when a lawyer serves as an escrow agent demands that the lawyer be impartial to both the obligor and the obligee and, therefore, the lawyer may not act as advocate for either party against the other. Once the fiduciary duties of the escrow agent terminate, the lawyer may take a position adverse to the obligor or the obligee provided the lawyer is not otherwise disqualified.

Inquiry #1:

Attorney A closed the sale of residential property by Seller to Buyer. Before closing, Attorney A notified Seller that he represented only the interests of Buyer. At the time of closing, it became apparent that there were certain repairs that still needed to be done to the house. Seller and Buyer agreed to place $2,000 of the purchase price in escrow until the repairs were completed by Seller at which time the money would be released to Seller. Attorney A agreed to act as escrow agent. The escrow agreement was not memorialized in writing. Seller made some repairs to the house and has demanded that Attorney A release the money to him. Buyer contends that the repairs were shoddy and incomplete and has instructed Attorney A not to release the money. What can Attorney A do?

Opinion #1:

Like the role of a lawyer serving as a trustee under a deed of trust, the responsibilities of and limitations on a lawyer acting as an escrow agent arise primarily from the lawyer's fiduciary relationship in serving as an escrow agent as opposed to any client-lawyer relationship. *See*, e.g., RPC 82 and Rule 1.15-1(b)(3) of the Revised Rules of Professional Conduct. The fiduciary relationship demands that the escrow agent be impartial to both the obligor and the obligee under the escrow agreement. Therefore, the lawyer/escrow agent may not act as an advocate for either party against the other in any dispute regarding the release of the escrowed funds. The lawyer must carry out the terms of the escrow agreement with regard to the release the escrowed funds upon the happening of the agreed contingency or the performance of the agreed condition. If the lawyer/escrow agent cannot determine whether the contingency has occurred or there has been performance—either because the terms of the escrow agreement are too vague or the parties have a factual dispute—he may not release the funds until both parties consent or there is a court order directing that the funds be released. RPC 66.

In the present situation, Attorney A must be impartial in carrying out the terms of the escrow agreement. If he is unable to determine that the condition for release of the funds has been met, he may not release the funds to either Buyer or Seller until they have reached an agreement between themselves or until there is a court order instructing Attorney A to release the funds to one party or the other. As long as he serves as escrow agent, Attorney A must be impartial and he may not be an advocate for Buyer even though Buyer was formerly his client.

Inquiry #2:

May Attorney A resign as escrow agent, turn the funds over to a third party, and represent Buyer in his dispute with Seller over the release of the escrowed funds?

Opinion #2:

Yes. Former service as an escrow agent does not disqualify a lawyer from assuming the role of advocate for one party in a dispute over escrowed funds. *Cf.* RPC 82 (former service as trustee under deed of trust does not disqualify a lawyer from assuming partisan role in foreclosure proceeding). Of course, in the present inquiry, because of his prior representation of Buyer at closing, Attorney A may only assume the role of advocate for Buyer. See Rule 1.7.

2001 Formal Ethics Opinion 14

January 18, 2002

Using CD-ROM Digital Check Images for Trust Account Records

Opinion rules that retaining a CD-ROM with digital images of trust account checks that is provided by the depository bank satisfies record-keeping requirements for trust accounts.

Inquiry:

Rule 1.15-3(a)(2) of the Revised Rules of Professional Conduct provides that a lawyer must keep minimum records for a trust account that include either original canceled checks or "printed digital images thereof furnished by the bank." C Banks, Inc. currently provides to its customers a CD-ROM that contains digital images of the fronts and backs of checks. Once downloaded to a computer, the check images can be viewed on a computer monitor and printed. There are protections against recording on or tampering with the digital images on the CD-ROM. If tampering or counterfeiting of the digital images is suspected, the images or printed copies thereof can be compared to the original check images retained by C Banks, Inc. C Banks, Inc. can provide the canceled checks to lawyers but prefers to provide the CD-ROM.

Some lawyers with trust accounts at C Banks are concerned that the CD-ROM does not satisfy Rule 1.15-3(a)(2). If a lawyer receives only the CD-ROM, is the lawyer in compliance with the record keeping requirements of Rule 1.15-3(a)(2)?

Opinion:

The CD-ROM satisfies the record keeping requirements of Rule 1.15-3(a)(2) because digital images of the checks can be retrieved from the CD-ROM and printed when necessary. (The CD-ROM also satisfies the minimum records requirements for dedicated trust accounts and fiduciary accounts set forth in Rule 1.15-3(b)(2).) See also G.S. §66-322(e) and G.S. §66-323.

Foreclosures

CPR 325
REPRESENTATION OF SUBSIDIARY TRUSTEE BY LENDER'S HOUSE COUNSEL

Adopted April 8, 1983

Inquiry:
Attorney A is a full-time employee of S & L Savings and Loan Association. S & L is in the business of making home mortgage loans which are secured by deeds of trust. S & L has a wholly-owned subsidiary (S Corp.) serve as trustee on all its deeds of trust. S & L would like to avoid paying fees to outside attorneys for foreclosure work. May Attorney A render foreclosure services for S Corp.? If so, does it matter whether the foreclosure is contested? May Attorney A represent both S Corp., the trustee, and S & L throughout the foreclosure proceeding so long as the proceedings are not contested in any way? If so, may Attorney A bill S Corp., the trustee, for services rendered in foreclosure proceedings?

Opinion:
No, Attorney A may not render foreclosure services for S Corp. under the circumstances. House counsel may generally represent a subsidiary in any matter in which the subsidiary could represent itself. However, an attorney employed by the lender cannot represent the trustee on a deed of trust securing loans made by the attorney's employer since the trustee should be separate or independent from the lender. Of course, Attorney A may represent S & L throughout the foreclosure proceedings regardless of whether or not those foreclosure proceedings are contested in any way.

RPC 64

July 14, 1989

Former Trustee's Representation of Purchaser Against Former Debtor
Opinion rules that a lawyer who served as a trustee may after foreclosure sue the former debtor on behalf of the purchaser.
Inquiry:
Attorney is the named trustee of a deed of trust granted by Debtor to secure a debt to Lender. Attorney commences a foreclosure proceeding and conducts a sale at which Bidder enters the high bid. The amount of the bid is sufficient to produce a surplus after satisfying all liens known to Attorney. At the end of the upset period, Bidder timely tenders the amount of the bid, which Attorney deposits in his trust account and from which Attorney promptly satisfies all known liens and expenses of the foreclosure. Later, Attorney records a special warranty deed to Bidder. In the interim, Debtor has wrongfully caused removal of improvements affixed to the subject property, whereupon Bidder asks Attorney to represent Bidder against Debtor. Under these circumstances, if Attorney deposits the surplus with the Clerk, may Attorney then ethically represent Bidder in a tort claim against Debtor (for replevin or damages from conversion) or in a proceeding pursuant to G.S. §45-21.32 to assert a claim for part of the surplus held by the Clerk?
Opinion:
Yes. Since an attorney serving as trustee pursuant to the terms of a deed of trust does not represent the grantor/debtor as an attorney, such an attorney may, after foreclosing, represent the interests of an entity adverse to the grantor/debtor in a cause of action related to the foreclosure without violating Rule 5.1(d).

RPC 82

January 12, 1990

The Lawyer as Trustee
The State Bar has received an increasing number of inquiries related to the role of an attorney serving as trustee under a deed of trust. In an effort to clarify the responsibilities of the lawyer-trustee, the Ethics Committee has reviewed CPRs 94, 107, 166, 201, 218, 220, 297, 303, 305 and RPCs 46 and 3.
The responsibilities and limitations of the lawyer acting as trustee arise primarily from the lawyer's fiduciary relationship in serving as trustee as opposed to any attorney-client relationship. That fiduciary relationship demands that the trustee be impartial to both the trustor and the beneficiary and, therefore, the trustee may not act as advocate for either against the other. On the other hand, once the fiduciary duties of the trustee terminate, the lawyer may take a position adverse to the trustor or beneficiary so long as the lawyer is not otherwise disqualified.
Inquiry #1:
Attorney X is appointed as substitute trustee on a deed of trust. The grantor/borrower defaults and the bank proceeds to foreclose. At the foreclosure sale, the subject tract of land sells for less than the amount owed. The bank wants to sue for the deficiency. Can Attorney X serve as the attorney for the bank in the deficiency proceeding against the grantor/borrower? Can Attorney X serve as attorney for the bank in an action for waste?
Opinion #1:
Yes. It has long been recognized that former service as a trustee does not disqualify a lawyer from assuming a partisan role in regard to foreclosure under a deed of trust. CPR 220. It is therefore not inappropriate for the former trustee to act as an advocate for the lender in a subsequent suit to recover a deficiency or to recover damages for waste.
Inquiry #2:
If foreclosure proceedings have been instituted against a debtor who files for bankruptcy prior to completion of the foreclosure, may Attorney A, who serves as Substitute Trustee in the foreclosure, dismiss the foreclosure proceeding and subsequently file a motion in the Bankruptcy Court to set aside the automatic stay?
Opinion #2:
No. *See* CPR 94. So long as the attorney serves as trustee, he may not represent one party against the other in an adversarial proceeding arising from or connected with the deed of trust.

Inquiry #3:
Corporation X serves as Substitute Trustee in a foreclosure proceeding. Attorney A owns stock in Corporation X. If foreclosure proceedings have been instituted against a debtor who files for bankruptcy prior to completion of the foreclosure, may Attorney A file a motion in Bankruptcy Court to set aside the automatic stay on behalf of Corporation X?
Opinion #3:
Yes, unless Corporation X is controlled by or is the alter ego of Attorney A.
Inquiry #4:
Attorney A serves regularly as Agent as that term is used in Chapter 45 of the North Carolina General Statutes for Attorney B who serves as substitute trustee. Attorney A is basically a paper handler for Attorney B. Attorney A's responsibilities are to determine that service has been achieved before the hearing, to verify the filing of an order after hearing, to post sale notices and to conduct the sale on behalf of the substitute trustee. Attorney A also determines whether any upset bids are filed and files the final report of sale. Attorney A prepares no paperwork, does not deal with any lender and makes no decisions as to the adequacy of service or other matters.
Under these circumstances may Attorney A bid for herself at a foreclosure sale or may someone from her law firm or a family member of Attorney A bid on their own behalf? Secondly, in the event of a bankruptcy filing, may Attorney A move the bankruptcy court to lift the automatic stay and participate as an advocate for the lender in the bankruptcy matter.
Opinion #4:
Attorney A, acting as agent for the substitute trustee, is subject to the same restrictions as the substitute trustee. Therefore, Attorney A may not bid at the foreclosure sale on Attorney A's own behalf and a member of Attorney A's law firm would similarly be restricted from bidding. A family member of A would not necessarily be prohibited from bidding at the foreclosure sale on his or her own behalf but could not bid on behalf of A.
Attorney A also could not file a motion to lift the automatic stay in the bankruptcy proceeding so long as Attorney A continued to act as agent for the substitute trustee and, similarly, Attorney A could not act as advocate for a lender in the bankruptcy proceeding.
Inquiry #5:
Attorney A, acting as trustee, has instituted a foreclosure action. Attorney A knows the property being foreclosed is worth more than the highest bid received at the foreclosure sale. May Attorney A call a friend to upset the bid causing a resale?
Opinion #5:
If Attorney A, by calling his friend, is acting on his own behalf in filing an upset bid, the conduct inquired of is not permitted. If, on the other hand, Attorney A is simply notifying a potential buyer of the situation, then such conduct is not prohibited.
Inquiry #6:
"A" borrowed funds from Federal Land Bank, secured by a deed of trust. "A" subsequently borrows funds from lender secured by a second deed of trust. The lender substitutes a trustee and institutes foreclosure. Prior to completion of foreclosure "N" purchases the note and deed of trust. "N" contends this was done at request of "A". "A" does not pay and "N" substitutes "T" (attorney) as Trustee. "T", the substitute trustee (attorney), at the request of "N" writes a demand letter.
"T" did not represent "N" or "A" when the note was purchased, and did not represent either party in the original loan.
The deed of trust provides for Trustee's fees. The note provides for up to fifteen (15%) percent attorney's fees.
"A" responds by letter that "N" owed him money; that this purchase was to offset the debt due by "N" to "A", and made threats to expose "N" as a drug dealer, among other charges. "T" prepares notice of hearing, after title search, and serves 60 day notice on "A" and U. S. Attorney and Attorney General.
1. May "T" proceed with notice of hearing and Trustee's sale?
2. Must "T" advise "N" to seek counsel at this time?
3. May "T" wait until the foreclosure hearing to ascertain whether a legal dispute arises?
4. If a third substitute trustee must be named, can that person be a spouse or family member of "N"; a spouse or family member of "T"; an employee of either?
5. Can "T" elect to serve as either trustee or attorney?
6. Does "T" represent "N" before the Clerk in seeking foreclosure?
7. Could "T" represent "N" on appeal, if he has not responded?
8. Does "T" represent "N" when the Notice of Hearing is filed or a hearing held?
9. May "T" charge a fee for legal services under note authorizing fees?
10. May "T" charge Trustee's fees if settlement is reached?
11. May both be charged?
Opinion #6:

1. Yes. "T's" duties as trustee obligate him to prepare and serve a Notice of Hearing upon request of the beneficiary and to hold a sale if authorized by the Clerk of Court after hearing. "T" may not, however, assume an adversarial role to trustor or beneficiary if there is a dispute concerning the foreclosure.
2. Under the facts stated, "T" should notify "N" that it appears that the foreclosure will be contested by "A" and, if so, "T" will not be able to represent "N" as attorney.
3. Yes.
4. Whether a third substitute trustee could be a spouse or a family member of "N" or an employee of "N" raises no question concerning legal ethics and therefore is not an appropriate subject for consideration by the Ethics Committee of the North Carolina State Bar. A spouse or family member or employee of "T" could serve as a third substitute trustee but, under such circumstance "T" could not serve as attorney for "N" or "A."
5. Yes.
6. If the foreclosure is disputed "T" would be deemed to represent "N" in seeking foreclosure before the Clerk of Court and therefore could not serve as trustee and attorney for "N".
7. No. So long as "T" continues as trustee, he may not take an adversarial position against either "N" or "A" in any matter arising from the foreclosure.
8. "T" does not represent "N" as an attorney. when the notice of hearing is filed as the filing of that notice is a responsibility of "T" as trustee. At a foreclosure hearing, in the event the foreclosure is disputed, "T", serving as trustee, may not participate in requesting the Clerk to authorize foreclosure.
9. No. So long as "T" serves as trustee, he may not act as attorney for either of the parties to the deed of trust and therefore may not charge either party fees for legal services.
10. The question of whether "T" may charge trustee fees if settlement is reached is a question of law and does not appear to involve legal ethics. This committee is not the appropriate forum for determining questions of law.
11. *See* opinion 10 above.

RPC 90

October 17, 1990

Trustee for a Deed of Trust
Opinion rules that a lawyer who has as trustee initiated a foreclosure proceeding may resign as trustee after the foreclosure is contested and act as lender's counsel.
Inquiry #1:
Can a trustee who has initiated a foreclosure proceeding resign after it has become contested and then act as the lender's counsel in the foreclosure?
Opinion #1:
Yes. It has long been recognized that former service as a trustee does not disqualify a lawyer from assuming a partisan role in regard to foreclosure under a deed of trust. CPR 220, RPC 82. This is true whether the attorney resigns as trustee prior to the initiation of foreclosure proceedings or after the initiation of such proceedings when it becomes apparent that the foreclosure will be contested.
Inquiry #2:
Where foreclosure is pending and the borrower files bankruptcy, can the trustee under the deed of trust resign as trustee and thereafter represent the lender in the bankruptcy proceeding and the foreclosure proceeding?
Opinion #2:
Yes. Just as a lawyer may resign as trustee and undertake the representation of the lender in a contested foreclosure proceeding, so also may a lawyer resign as trustee and undertake the representation of the lender in seeking to have an automatic stay lifted in a related bankruptcy proceeding.
Inquiry #3:
Where the lender believes the borrower is in default but no foreclosure proceedings have been instituted, may an attorney serving as trustee in a deed of trust represent the lender in an amicable modification or loan workout agreement? Does such representation of the lender preclude the attorney from thereafter initiating foreclosure proceedings as trustee?
Opinion #3:
No, a lawyer serving as trustee may not simultaneously participate in the negotiation of a loan modification or workout agreement as attorney for the lender. RPC 82. An attorney serving as trustee may, however, draft and preside over the

execution of documents evidencing a modification or workout agreement negotiated between the lender and borrower. Under such circumstances, the trustee would not be representing the interests of either and would be engaged in no partisan activity in conflict with the obligation to be impartial. It is possible that a lawyer who resigns as trustee to perform some partisan service for the lender, such as the negotiation of a modification agreement, may thereafter be reappointed as trustee and initiate foreclosure proceedings.

Proposed 2004 Formal Ethics Opinion 3

Common Representation of Lender and Trustee on a Deed of Trust

Proposed opinion rules that a lawyer may represent both the lender and the trustee on a deed of trust in a dispute with the borrower if the conditions on common representation can be satisfied.

Inquiry:

Mr. Doe is the trustee on a deed of trust securing a loan from Lender to Borrower. Lender notified Mr. Doe that Borrower was in default and asked Mr. Doe to initiate a foreclosure proceeding. Soon after the foreclosure was commenced, Borrower filed a lawsuit naming Lender as the defendant and alleging unfair debt collection practices. Mr. Doe is also named as a party to the proceeding in order to enjoin the foreclosure proceeding. Lender asks Attorney A to represent it in the lawsuit and would like Attorney A to also represent Mr. Doe. Mr. Doe wants to be represented by Attorney A.

May Attorney A represent both Lender and Mr. Doe in his capacity as trustee on the deed of trust?

Opinion:

A lawyer may not engage in common representation of multiple clients if the common representation involves a concurrent conflict of interest. Rule 1.7(a). A concurrent conflict of interest exists whenever the representation of one client will be materially limited by the lawyer's responsibilities to another client. Rule 1.7(a)(2). However, a lawyer may proceed with the representation, despite the concurrent conflict, if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client and the representation is not prohibited by law, does not involve the assertion of a claim by one client against another in the same proceeding, and each affected client gives informed consent. Rule 1.7(b).

Comment [29] to Rule 1.7 provides additional guidance on when common representation is appropriate. It observes, "because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained."

Attorney A may proceed with the common representation of Lender and Mr. Doe if she concludes that she can maintain her impartiality as between the clients and the other conditions of Rule 1.7(b) are satisfied. In making this determination, she must remember that the trustee's role in a foreclosure is a neutral role. If Attorney A cannot represent both clients in a manner that will preserve Mr. Doe's neutrality (as trustee), then she cannot satisfy the condition requiring her to provide both clients with competent and diligent representation.

The situation described in this inquiry must be distinguished from the limitations placed upon a lawyer who is actually serving as the trustee on a deed of trust. There are a number of ethics opinions that hold that a lawyer who serves as a trustee must be neutral as between the interests of the lender and the interests of the borrower and may not, therefore, represent either party individually while initiating a foreclosure proceeding. *See* RPC 46, RPC 82, and RPC 90. Since Attorney A is providing legal representation to the trustee but is not herself serving in that neutral role, common representation with the lender is not prohibited if the conditions of Rule 1.7(b) can be satisfied.5

2010 Formal Ethics Opinion 8
July 23, 2010

Consultation with Lawyer as Prospective Mediator

Opinion rules that a lawyer who consults with both parties to a dispute relative to the lawyer's prospective service as a mediator may not subsequently represent one of the parties to the dispute.

Inquiry:

Lawyer consulted with Husband on two occasions about separating from Wife. During both meetings, only questions about mediating the marital dissolution were discussed.

Wife attended the third consultation with Lawyer. At the meeting, Lawyer disclosed the prior two meetings with Husband. He also advised Wife that he would remain "neutral" during the meeting with her; would not give either party legal advice; and would only discuss the mediation process. Wife informed Lawyer that she was represented by her own lawyer. Lawyer told Wife that he was willing to serve as the mediator for the marital dispute/dissolution if her lawyer advised her to agree. Lawyer also told Wife that he had discussed his potential roles as either advocate or mediator with Husband in the prior meetings and that, for the present, Husband chose to keep Lawyer "neutral."

At their request, Lawyer subsequently sent a separation checklist to both Husband and Wife. The checklist gives information about the issues a separation agreement should address. It does not provide substantive advice.

Wife consulted with her lawyer and decided not to pursue mediation. Husband would now like to employ Lawyer as his advocate in the equitable distribution action filed by Wife. May Lawyer represent Husband in the equitable distribution action?

Opinion:

No. If Lawyer was acting in the role of a mediator when he consulted with Wife, Rule 1.12(a), *Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral*, prohibits him from representing anyone in connection with a matter in which he participated personally and substantially as a mediator unless all of the parties to the proceeding give informed consent confirmed in writing. Although the mediation never occurred, Lawyer still held himself out to be a neutral and had substantive discussions with Wife about the mediation process. Therefore, he participated substantially in the mediation process and, to protect the integrity of the neutral role of mediators, he is disqualified from representing Husband without the consent of Wife.

2009 Formal Ethics Opinion 8
January 21, 2011

Service as Commissioner after Representing Party to Partition Proceeding

Opinion provides guidelines for a lawyer for a party to a partition proceeding and rules that the lawyer may subsequently serve as a commissioner for the sale but not as one of the commissioners for the partitioning of the property.

Inquiry #1:

Attorney is retained by a person with an interest in property to represent him in a proceeding to partition the property pursuant to Chapter 46 of the North Carolina General Statutes. N.C. Gen. Stat. §46-6 authorizes the court to appoint a disinterested person to represent any person interested in the property whose name is unknown and who fails to appear in the proceeding. May Attorney represent the existing client and also agree to be appointed to represent any unknown person with interest in the property?

Opinion #1:

No. There is a potential conflict between the interests of the existing client and the interests of the unknown person(s). One of the critical issues in a partition proceeding is whether the property should be sold or partitioned. *See, e.g.*, N.C. Gen. Stat. §46-22(c)(party seeking sale has burden of proving, by a preponderance of the evidence, that actual partition cannot be made without substantial injury to the interested parties). If Attorney has an existing client with a specific interest in the proceeding, Attorney cannot be disinterested as required by N.C. Gen. Stat. §46-6 or exercise independent professional judgment as required by the Rules of Professional Conduct when evaluating and representing the interests of the unknown person(s). The potential conflict cannot be resolved by consent because the unknown person(s) is unavailable to consent. Rule 1.7.

Inquiry #2:

At the conclusion of the proceeding, the clerk of court orders the public sale of the property and, pursuant to N.C. Gen. Stat. §§1-399.4 and 46-28, appoints Attorney as the commissioner for the sale.1

May Attorney serve as the commissioner and collect a commission from the public sale?

Opinion #2:

Yes, provided Attorney concludes that he can serve fairly and impartially and, further provided, Attorney terminates his representation of any person with an interest in the property.

The role of the commissioner is a neutral one with fiduciary responsibilities to all of the owners of the property. However, a commissioner conducting a public sale has limited discretion because he must follow the specific procedural requirements for judicial sales set forth in Chapter 1, Article 29A of the General Statutes. Attorney may, therefore, serve as commissioner for the sale upon determining that he can fulfill the role impartially, without bias for or against any of the parties to the partition proceeding, and upon terminating his representation of any person with an interest in the property. In the similar situation of a lawyer serving as a trustee on a deed of trust in foreclosure, the ethics opinions also allow the lawyer to relinquish the representation of the lender or the debtor to serve in the impartial fiduciary role of trustee for the foreclosure. *See* RPC 46, RPC 82, RPC 90.

N.C. Gen. Stat. §46-28.1 permits any party to a partition proceeding to file a petition for revocation of the order confirming the sale provided the petition is filed within 15 days and is based upon grounds that are specified in the statute. Therefore, the client's legal needs may not end with the entry of the order of sale and the appointment of a commissioner. Anticipating that a client might desire additional legal representation after the sale, at the beginning of the representation the lawyer must notify the client of the lawyer's intention to seek to withdraw from the representation upon the entry of an order of sale in order to be appointed by the clerk as commissioner. *See* Rule 1.4. After the entry of the order of sale and before seeking the permission of the clerk to withdraw from the representation to serve as the commissioner for the sale, the lawyer must obtain the client's informed consent, confirmed in writing, to withdraw from the representation to serve as commissioner. *See* Rule 1.16.

At the beginning of the representation, if Attorney does not intend to serve as a commissioner for the sale, he does not have to communicate with the client about potential service as a commissioner. If the circumstances change and Attorney subsequently decides to seek the appointment, failure to notify the client at the beginning of the representation will not prohibit Attorney from subsequently asking for the client's informed consent to withdraw to serve as a commissioner.

Inquiry #3:

At the conclusion of the proceeding, the clerk of court orders a private sale of the property pursuant to N.C. Gen. Stat. §§46-28 and 1-339.33. May Attorney be designated as the person authorized to make the private sale pursuant to N.C. Gen. Stat. §1-339.33(1)?

Opinion #3:

Yes, subject to the conditions set forth in Opinion #2.

Inquiry #4:

If Attorney is appointed the commissioner for a public sale or the person authorized to make the private sale, may Attorney purchase the property at the sale?

Opinion #4:

No. As the appointed commissioner or the person appointed to conduct the private sale, Attorney has a duty to oversee the sale of the property in a fair and impartial manner. Advancing a personal interest by bidding on or making an offer on the property violates this duty. *See* 2006 FEO 5 (county tax lawyer who is appointed commissioner may not bid at tax foreclosure sale).

Inquiry #5:

At the conclusion of the proceeding, the clerk of court orders the public sale of the property but appoints another person as commissioner for the sale. May Attorney bid at the sale on his own behalf?

Opinion #5:

No. This would be a conflict of interest between the lawyer's self-interest in purchasing the property at the lowest price and the client's interest in selling the property for the highest price. Rule 1.7(a)(2). However, Attorney may bid on the property if he is doing so on behalf of the client.

Inquiry #6:

At the conclusion of the proceeding, the clerk of court orders the partition of the property. May Attorney agree to be appointed as one of the three commissioners responsible for dividing the property?

Opinion #6:

No. A commissioner for a partitioning must exercise discretion in determining how to divide the property, thus directly affecting the interests of the various parties to the proceeding. Moreover, there remain opportunities for Attorney to advocate

for his client's interests in the event the commissioners seek input from the parties or in the event of an appeal. Attorney cannot, therefore, serve as an impartial commissioner. Rule 1.7(a).

Inquiry #7:

Assume that Attorney formerly represented one or more of the parties in a separate but related partition proceeding (i.e., a prior proceeding involving the same property that did not result in partition or sale), but does not represent any of the parties to the current proceeding.

May Attorney serve as one of the commissioners to conduct the sale or to partition the property?

Opinion #7:

Yes, provided Attorney determines that he can act impartially. *See* Opinion #1 and Rule 1.7.

Inquiry #8:

Assume that Attorney formerly represented one or more of the parties in a separate but related partition proceeding (i.e., a prior proceeding involving the same property that did not result in partition or sale), but does not represent any of the parties to the current proceeding.

May Attorney serve as the court-appointed lawyer for any "unknown owner" pursuant to N.C. Gen. Stat. §46-6?

Opinion #8:

Yes, with the informed consent, confirmed in writing, of Attorney's former client(s). Rule 1.9(a) prohibits a lawyer who has formerly represented a client in a matter from representing a new client in the same or a substantially related matter if the interests of the new client are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Inquiry #9:

Assume that Attorney formerly represented one or more of the parties in a separate but related partition proceeding (i.e., a prior proceeding involving the same property that did not result in partition or sale), but does not represent any of the parties to the current proceeding.

May Attorney purchase the property at the sale?

Opinion #9:

Yes, unless Attorney received confidential information from a former client relative to the property that Attorney could use to the former client's disadvantage when bidding on the property. Rule 1.9(c)(1).

If a lawyer no longer represents a former client, the lawyer's only duties to the former client are to avoid adverse representations of others in the same or a substantially related matter and to avoid using confidential client information to the disadvantage of the former client. Although the partition sale may be substantially related to the prior partition proceeding, a

lawyer who is purchasing for his own interest is not engaged in the representation of an adverse party and, therefore, the prohibition on representations adverse to a former client in Rule 1.9(a) is inapplicable. However, the prohibition on using the confidential information of a former client to the disadvantage of the former client would apply unless, as Rule 1.9(c)(1) permits, the information has become generally known.

Endnote

1. Although the procedure for judicial sales of property set forth in Chapter 1, Article 29A, of the General Statutes provides for the appointment of only one commissioner, it is still the custom in some judicial districts for the clerk of court to appoint three commissioners. The conditions on service as a commissioner for the public sale of property set forth in this opinion apply equally to a lawyer who is appointed by the clerk to serve on a panel of commissioners.

2009 Formal Ethics Opinion 11

July 23, 2010

Representing Debtor in Bankruptcy When Lender is Current Client

Opinion rules that a lawyer may undertake the representation of a debtor in a Chapter 13 bankruptcy, although the lender is lawyer's current client, if the lawyer reasonably believes that he will be able to provide competent and diligent representation to both clients and both clients give informed consent.

Inquiry #1:

Lawyer regularly represents Lender in various matters. Lawyer is approached by Client to represent Client in an individual Chapter 13 bankruptcy. Lender has made a loan to Client. To secure the repayment of the loan, Lender holds a first priority deed of trust on Client's residence, a first priority deed of trust on Client's commercial building, and a first priority lien on Client's vehicle. Lawyer currently represents Lender in other matters, but not with regard to the indebtedness of Client to Lender.

As the lawyer for Client in the Chapter 13 bankruptcy, Lawyer will be responsible for reviewing documentation to determine whether Lender and other secured creditors have valid and enforceable security interests in or liens on Client's property. May Lawyer undertake the representation of Client in the Chapter 13 bankruptcy if Lender and Client consent?

Opinion #1:

Lawyer may undertake the representation of Client if Lawyer reasonably believes that he will be able to provide competent and diligent representation to Client in the bankruptcy action, while adequately protecting Lender's interests in those actions or matters where Lawyer represents Lender. Both Client and Lender must give their informed consent to the representation, confirmed in writing.

Because Lawyer currently represents Lender, Lawyer has a concurrent conflict of interest in representing Client in a bankruptcy action in which Lender is a creditor. *See* Rule 1.7(a). Comment [6] to Rule 1.7 provides that "absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated." Consent is necessary because the client as to whom the representation is adverse may feel betrayed, and the resulting damage to the client-lawyer relationship could impair the lawyer's ability to represent the client effectively. On the other hand, the client on whose behalf the adverse representation is undertaken may fear that the lawyer will pursue that client's case less effectively out of deference to the other client.

For client consent to cure the conflict, the lawyer must have a reasonable basis for believing that he will be able to provide competent and diligent representation to both clients. It is improper to represent one client asserting a claim against another in the same litigation, even with informed consent. *See* Rule 1.7, cmt. [17]. Also, if a specific rule, statute, or decision forbids dual representation in the particular context, client consent is irrelevant. *See* Rule 1.7, cmt. [16]. Outside these situations, the lawyer must evaluate objectively whether he will be able to provide competent representation to both clients. The lawyer should consider whether a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances.

In the instant scenario, the interests of the lender and the debtor are adverse. Lender would benefit if Lawyer determines that Lender's deeds of trust and liens are valid and enforceable. Conversely, Debtor would benefit from an opposite finding. However, Lawyer would only be representing the debtor in this particular action. If Lawyer concludes that he would be able to provide competent and diligent representation to Client in the bankruptcy action, while adequately protecting Lender's interests in those actions or matters where Lawyer represents Lender, Lawyer may seek the clients' informed consent to the bankruptcy representation. If Lawyer cannot reasonably conclude that the interests of both clients would be adequately protected if he represents Client in the bankruptcy action, Lawyer must decline the representation. *See* Rule 1.7(b).

Pursuant to Rule 1.0(f), "informed consent" denotes the "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation appropriate to the circumstances." A lawyer must provide enough information for his client to make an informed decision, such as why the interests are adverse, how the representation may be affected, what risks are involved, and what other options are available. The information should be conveyed to each client in a manner consistent with the clients' level of sophistication. When a lawyer is seeking consent from an unsophisticated individual client, more disclosure and explanation will be required. The client's mere knowledge of the existence of the lawyer's other representation will not constitute sufficient disclosure.

Inquiry #2:

Lawyer regularly represents Lender in various matters. Lender has made a loan to Client. To secure the repayment of the loan, Lender holds a first priority deed of trust on Client's residence, a first priority deed of trust on Client's commercial building, and a first priority lien on Client's vehicle. Lawyer currently represents Lender in other matters, but not with regard to the indebtedness of Client to Lender.

Lawyer is approached by Client to represent Client in an individual Chapter 13 bankruptcy. The loan from Lender to Client has matured and Client wants to extend the maturity date of the loan. May Lawyer represent Client in negotiations with Lender?

Opinion #2:

Yes. *See* Opinion #1.

Inquiry #3:
May Lawyer represent Client as to the extension of the maturity date of the loan if Client and Lender reach an agreement for an extension without Lawyer's involvement? If so, may Lawyer file a motion seeking bankruptcy court approval of a refinancing agreement between Client and Lender in order to extend the maturity date of the loan, and then represent Client at the hearing on the motion?

Opinion #3:

Yes. *See* Opinion #1.

2006 Formal Ethics Opinion 3

January 23, 2009

Representation in Purchase of Foreclosed Property

Opinion rules that a lawyer who represented the trustee or served as the trustee in a foreclosure proceeding at which the lender acquired the subject property may represent all parties on the closing of the sale of the property by the lender provided the lawyer concludes that his judgment will not be impaired by loyalty to the lender and there is full disclosure and informed consent.

Inquiry #1:

Seller (a financial institution) acquires property as a result of the foreclosure by execution of the power of sale contained in a deed of trust securing its own note or a note that it was servicing. Buyer entered into a contract with Seller to buy the property that was repossessed via foreclosure.

Attorney A regularly handles foreclosure proceedings for Seller either serving as the trustee or as the lawyer for the trustee (both roles are referred to herein as the “foreclosure lawyer"). In the current proceeding Attorney A served as the foreclosure lawyer.

Buyer would like Attorney A to close the sale. May Attorney A represent both Buyer and Seller on the closing of the transaction, including examining title and giving an opinion as to title to Buyer or on behalf of Buyer?

Opinion #1:

Yes, provided there is full disclosure to Buyer of all potential risks and Buyer gives informed consent. Multiple representation of parties to a real estate closing is allowed in RPC 210 and in 97 FEO 8. The latter opinion holds that a lawyer who regularly represents a real estate developer may represent the buyer and the developer in the closing of residential real estate. Rule 1.7 permits multiple representation notwithstanding the existence of a concurrent conflict of interest if the lawyer concludes that he or she can provide competent and diligent representation to each affected client and the clients give informed consent which is confirmed in writing.

If Attorney A's relationship with Seller is such that Attorney A's personal financial interests in preserving and protecting his relationship with Seller impairs his independent professional judgment, ability to provide competent and diligent representation to Buyer, and/or his ability to be objective and impartial when making disclosures necessary to obtain informed consent, then Attorney A may not seek the informed consent of Buyer and may not represent Buyer in the closing.

If Attorney A concludes that, under the circumstances, he can still exercise independent professional judgment on behalf of all of the parties to the closing, he may seek the informed consent of Buyer. Obtaining the informed consent of the buyer in this situation means that the buyer must be advised of the potential risks to a purchaser of property that was previously foreclosed including the distinctions between marketable and insurable title and between a non-warranty and a warranty deed. The buyer must also be advised of his potential liability for homeowners' association dues. Most importantly, the lawyer must disclose his prior participation in the foreclosure and explain that the lawyer must examine his own work on the foreclosure to certify title to the property.

Attorney A may represent all of the parties to the closing even if Buyer procures financing to purchase the property (including financing provided by Seller). Attorney A must be able fully to explain, without objection from the lender/seller the loan documents, setting forth the terms of repayment (and potentially including a balloon payment and/or prepayment penalty), and the status of title including any material exceptions between the lender's and owner's title insurance policies.

If Buyer consents to the representation, Attorney A may proceed unless and until it becomes apparent that he cannot manage the potential conflict between the interests of the lender/seller and the buyer. If the lawyer determines that he can no longer exercise his independent professional judgment on behalf of both clients, he must withdraw from the representation of both clients.

Inquiry #2:

Under the facts of Inquiry #1, the contract signed by Buyer provides that Seller will select the title and closing agent. However, the contract specifies that the buyer is also entitled to legal representation at the buyer's own expense. Seller names Attorney A as the "title/closing agent" for the sale to Buyer. While serving in the capacity of "title/closing agent", Attorney A proposes to provide legal representation to both Buyer and Seller with the consent of both parties. May Attorney A represent both Buyer and Seller on the closing of the transaction, including examining title and giving an opinion as to title to Buyer?

Opinion #2:

No. Although 97 FEO 8 allows a lawyer to represent both the developer and the buyer of a house in a subdivision with the informed consent of the buyer, the purchase of foreclosed property presents special risks to a purchaser that are not present in the purchase of a subdivision property. The purchaser of foreclosed property requires legal representation that is completely unimpaired by even the potential of a conflict of interest. The fact that Attorney is named in the contract as the title/closing agent indicates that there is a close business and professional relationship between Attorney A and Seller. It is apparent that, under these circumstances, it is in Attorney A's personal financial interest to preserve and protect his relationship with Seller. This self-interest will impair Attorney A's independent professional judgment and his ability to be objective and impartial when making the disclosures necessary to obtain informed consent from Buyer. Therefore, Attorney A may not seek the informed consent of Buyer and may not represent Buyer in the closing.

Inquiry #3:

Under the facts of Inquiry #2, Attorney B regularly represents Seller on various matters but did not represent the trustee on the foreclosure of the subject property and did not act as trustee. May Attorney B represent both Buyer and Seller on the closing of the transaction, including examining title and giving an opinion as to title to Buyer?

Opinion #3:

Yes, subject to fulfilling the conditions on common representation set forth in opinion #1.

Inquiry #4:

Under the facts of Inquiry #2, Attorney A intends to represent only the interests of Seller and does not intend to represent Buyer in closing the transaction. May Attorney A limit his representation in this manner?

Opinion #4:

Yes, Attorney A may limit his representation to Seller. However, if he does so, in light of the provisions of the purchase contract, it is possible that Buyer will be misled about Attorney A's role. Therefore, Attorney A must fully disclose to Buyer that Seller is his sole client, he does not represent the interests of Buyer, the closing documents will be prepared consistent with the specifications in the contract to purchase and, in the absence of such specifications, he will prepare the documents in a manner that will protect the interests of his client, Seller, and, therefore, Buyer may wish to obtain his own lawyer. *See, e.g.,* RPC 40 (disclosure must be far enough in advance of the closing that the buyer can procure his own counsel), RPC 210, 04 FEO 10, and Rule 4.3(a). Because of the strong potential for Buyer to be misled, the disclosure must be thorough and robust.

Inquiry #5:

Under the facts of Inquiry #4, if Attorney A limits his representation to Seller, but closes the transaction, does he have any duty to disclose or discuss any of the following with Buyer: defects of title; the difference between insurable title and marketable title; the exceptions contained in the title policy and the need for exception documents at closing; and the terms of the sales contract?

Opinion #5:

If Attorney A explicitly limits his representation to Seller, he cannot give any legal advice to Buyer except the advice to secure counsel. Rule 4.3(a). In light of the significant issues involved for Buyer, Attorney A should advise Buyer to obtain his own lawyer.

Inquiry #6:

Under the facts of Inquiry #4, Attorney A closes the transaction. The contract required the buyer to pay the closing agent's "customary closing fee," therefore, Buyer pays a fee to Attorney A as the title/closing agent. Subsequently, a defect of title caused by Seller is discovered. May Attorney A be held liable to Buyer for malpractice?

Opinion #6:

This is a legal question that is outside the purview of the Ethics Committee.

Inquiry #7:

Under the facts of Inquiry #1, the contract to buy the property signed by Buyer contains the following conditions: Seller will select the title and closing agent; Seller will pay the title examination fee and the premium for the owner's title insurance policy; Buyer will pay the title/closing agent's "customary closing fee"; and all closing transactions will be held at the title/closing agent's office. The contract specifies that the buyer is entitled to legal representation at the buyer's own expense. Seller names Attorney A as the "title/closing agent" for the sale to Buyer.

May Attorney A represent both Buyer and Seller on the closing of the transaction, including examining title and giving an opinion as to title to Buyer?

Inquiry #7:

No, see Opinion #2 above.

Inquiry # 8:

Under the facts of Inquiries #2, 3 and 4, Buyer asks Attorney Y to represent him on the closing of the purchase of the property. Buyer wants Attorney Y to examine the title to the property, give his opinion as to title, and act as Buyer's agent at the closing.

Attorney A insists that the contract requires Buyer to accept him as the closing agent for the transaction even if he only represents Seller. May Attorney A refuse to allow Attorney Y to participate in the closing as Buyer's lawyer?

Opinion #8:

No. Clients are entitled to legal counsel of their choice. *See, e.g.,* RPC 48. A lawyer may not participate in any scheme or contract that states or implies that a party to the transaction does not have the right to obtain independent legal counsel to represent his interests. Drafting such a provision for a client or agreeing to provide representation pursuant to such a provision is unethical because the provision will chill the buyer's right to independent legal counsel even if the enforceability of the provision is doubtful.

Attorney A may, by the terms of the purchase agreement, be the designated closing agent for the sale. However, if Buyer hires a lawyer to represent his interests by examining and giving him an opinion on title and participating in the closing on his behalf, the other lawyer may not interfere with this representation. *See, e.g.,* Rule 4.2. In addition, Attorney A must comply with the prohibition in Rule 4.2(a) on direct communications with a represented person without the consent of the lawyer for the represented person. Any funds that are delivered by Buyer to Attorney A are held by Attorney A in a fiduciary capacity for Buyer and must be disbursed in accordance with and upon fulfillment of the conditions of the contract. See Rule 1.15-2(a). If Buyer chooses to obtain his own lawyer, Attorney A may not interfere with Buyer's representation by his chosen lawyer or needlessly complicate the ability of that lawyer to represent Buyer. Both lawyers shall endeavor to insure that closing responsibilities are completed expeditiously and in compliance with RPC 191 and the Good Funds Settlement Act (if applicable). Specifically, both lawyers shall endeavor expeditiously to provide and review draft documents, to resolve title issues subject to the terms of the contract, to deliver the executed documents, to update title, and to disburse the closing funds.

Inquiry #9:

Under the facts of Inquiries #2, 3, and 4, Attorney A agrees that Attorney Y will represent Buyer's interests at the closing. However, Attorney A claims that he is still entitled to a fee from Buyer because the terms of the contract.

May the legal fee for Attorney A's representation of Seller be charged to Buyer?

Opinion #9:

Whether the contract to purchase the property requires Buyer to pay Attorney A's fee for representation of Seller is a legal question outside the purview of the Ethics Committee. However, a lawyer may be paid by a third party, including an opposing party, provided the lawyer complies with Rule 1.8(f) and the fee is not illegal or clearly excessive in violation of Rule 1.5(a). *See* RPC 196. Attorney A's time and labor relative to the closing may be reduced because of the legal services performed by Attorney Y on behalf of Buyer. If so, this fact should be taken into account in determining whether the "customary fee" for closing the transaction is excessive and an appropriate reduction in the fee should be made. Rule 1.5(a). Because Buyer is represented by Attorney Y, Attorney A may not charge or collect any money for representing Buyer.

Inquiry #10:

A real estate agent prepared the purchase contract. It alters the usual closing arrangements, waives many "normal" rights of a buyer, and favors the seller by allowing the seller to terminate the contract for any reason and return the deposit without further liability. Is the real estate agent engaged in the unauthorized practice of law when preparing the contract? Does it matter whether the real estate agent is a buyer's agent, a seller's agent, or a dual agent? Does it matter whether the seller and the buyer have different real estate agents? Is consumer protection legislation needed?

Opinion #10:

These questions do not relate to the professional responsibilities of lawyers and cannot be answered by the Ethics Committee.

2006 Formal Ethics Opinion 5

April 21, 2006

County Tax Attorney Purchasing Property at Tax Foreclosure Sale

Opinion rules that the county tax attorney may not bid at a tax foreclosure sale of real property.

Inquiry #1:

Attorney A is the tax attorney for the county. If the county's tax collector is unsuccessful in collecting taxes, the case is referred to Attorney A for legal action. Ordinarily, Attorney A sends a demand letter to the delinquent taxpayer. If the demand letter does not result in payment, Attorney A files a foreclosure action. If service of the lawsuit does not result in the payment of taxes, the presiding judge appoints Attorney A as the commissioner to foreclose upon the real property to satisfy the taxes due.

Attorney A then follows all statutory procedures for a foreclosure action. The county always "bids in" the property for the amount of back taxes owed plus the costs that have accrued.

On at least one occasion, a property owner contacted Attorney A after receiving the demand letter and offered to sell her property directly to Attorney A to satisfy her tax liability. Attorney A agreed to purchase the property directly from the property owner. On another occasion, Attorney A instructed his paralegal to attend the public auction and submit a bid in excess of the amount bid by the county if no one else bid on the property. The paralegal submitted the only other bid and later transferred the real property to Attorney A for the amount bid at auction. May Attorney A, who is the appointed commissioner, submit a bid on her own account at a tax foreclosure sale she is conducting?

Opinion #1:

No. As the appointed commissioner, Attorney A has a duty to oversee the sale of the foreclosed property in a fair and impartial manner. Advancing a personal interest by bidding on the foreclosed property violates this duty. G.S. §105-374; *Hinson v. Morgan*, 225 N.C. 740, 36 S.E. 2d 266 (1945); Rule 8.4(d); *see also* RPC 24 and RPC 82.

Inquiry #2:

If Attorney A may not submit a bid, may she have an agent or employee bid on her behalf?

Opinion #2:

No. Attorney A must insure that the conduct of her employee is compatible with her own professional obligations. Rule 5.3(b)(c).

Inquiry #3:

May Attorney A agree to purchase property from a delinquent taxpayer who offers to sell her property to Attorney A prior to the initiation of a formal tax foreclosure proceeding?

Opinion #3:

No, Attorney A may not purchase property directly from a delinquent taxpayer unless she has a reasonable belief that her personal interest in the property will not adversely affect the representation of the county, the transaction is fair, and she has obtained the informed consent of the county, confirmed in writing. Rule 1.7 and Rule 1.8(b). The duty to disclose and obtain the consent of the county arises as soon as the lawyer decides to act in her own interest by offering to purchase the property in written or oral communications with the taxpayer.

If Attorney A obtains the consent of the county, she must also follow the disclosure requirements in Rule 4.3 when dealing with unrepresented taxpayers. Specifically, she may not state or imply that she is disinterested and she must make reasonable efforts to correct any misunderstandings in this regard. She must also refrain from giving legal advice to unrepresented taxpayers other than the advice to secure counsel.

2008 Formal Ethics Opinion 11

January 15, 2010

Representation of Beneficiary on Other Matters While Serving as Foreclosure Trustee

Opinion rules that a lawyer may serve as the trustee in a foreclosure proceeding while simultaneously representing the beneficiary of the deed of trust on unrelated matters and that the other lawyers in the firm may also continue to represent the beneficiary on unrelated matters.

Inquiry #1:

Attorney A is employed by Law Firm. The lawyers of the firm routinely represent various bank clients including Bank Z. Bank Z is one of the firm's largest clients and all of the lawyers in the firm perform some work for the bank.

Attorney A has been asked to serve as the substitute trustee for the foreclosure of a deed of trust securing a loan (the Loan) made by Bank Z to the grantor (the Borrower) of the deed of trust. Bank Z is the named beneficiary of the deed of trust. The lawyers at the firm did not represent Bank Z on the negotiation or securitization of the Loan. The lawyers have not previously represented the Borrower.

Attorney A and the other lawyers in Law Firm want to continue to represent Bank Z on unrelated legal matters throughout the course of the foreclosure proceeding. Bank Z does not object. Borrower has not been notified that Attorney A and the other lawyers of the firm represent Bank Z on other unrelated matters.

May Attorney A continue to represent Bank Z on matters unrelated to the Loan and serve as substitute trustee for the foreclosure?

Opinion #1:

Attorney A may serve as trustee and continue to represent the bank on other matters because it is unlikely that his impartiality as trustee will be impaired by his duty of loyalty to and advocacy for the bank on other unrelated matters. Even when the proceeding is contested, Attorney A may serve as trustee and continue to represent the bank on other matters.

There are a number of ethics opinions that hold that a lawyer serving as trustee in a contested foreclosure proceeding may not act as the advocate for the beneficiary or the grantor in an adversarial proceeding arising from or connected with the deed of trust because the trustee is a fiduciary and, when exercising his discretion in the foreclosure, must play an impartial role relative to both parties. RPC 3, RPC 64, RPC 82, RPC 90, 04 Formal Ethics Opinion 3. *See also* N.C. Gen. Stat. A745-21.16(c)(7)b (notice to the debtor must contain a statement that a trustee is "a neutral party and, while holding that position in the foreclosure proceeding, may not advocate for the secured creditor or for the debtor in the foreclosure proceeding"). None of the ethics opinions, however, consider whether a lawyer is disqualified from serving as trustee if he continues to represent the lender on unrelated legal matters.

RPC 3, which rules that a lawyer may serve as a foreclosure trustee after representing the beneficiary of the deed of trust in the negotiation of the loan, explains the basis for prohibiting the lawyer from acting as an advocate in a contested foreclosure proceeding in the following passage:

[T]he Trustee owes a duty of impartiality to both parties which is inconsistent with representing one of the parties in a contested proceeding...Generally, when an attorney is required to withdraw from representation or from a fiduciary role, it is either because of concerns [for the] confidences of the client under Rule 4 [now Rule 1.6] and its predecessors or because of conflicts of interest under Rule 5.1 [now Rule 1.7] or its predecessors where the attorney would be put in the position of inconsistent roles or obligations at the same time or in the same proceeding. Since neither of those circumstances exist, and the rules do not appear to be directly relevant by their terms or with regard to their purposes, Attorney A is not ethically prohibited from continuing to serve as Trustee in a contested foreclosure matter, despite his prior representation of [beneficiary of the deed of trust], where he does not currently represent [beneficiary] in the foreclosure or related proceedings.

To clarify these earlier opinions, a foreclosure proceeding is contested when the grantor, or anyone else with standing, seeks to enjoin the proceeding or contests any of the following issues at the foreclosure hearing: jurisdiction, service of process debt, default, notice, power of sale, and, in the case of residential mortgages, certification regarding subprime loans.1
A borrower's motion to continue the proceeding or request to postpone the sale does not render the foreclosure contested. As with the trustee's own motion for a continuance or decision to postpone, these are procedural matters to which the trustee may respond within his or her discretion without impairing his or her ability to foreclose on the property consistent with the statutory requirements and the deed of trust.

If Attorney A represents Bank Z in other matters and the foreclosure is contested, Attorney A can maintain his impartiality as trustee if the bank represents itself or hires a lawyer to represent it in the foreclosure proceeding. Nevertheless, if Attorney A determines that he cannot protect and advance the interests of the bank in the unrelated matters while remaining impartial in a contested foreclosure proceeding where a substantial interest of the bank is at stake, Attorney A would have a conflict of interest requiring him to decide whether to continue to represent the bank on the unrelated matters and relinquish the trustee role to someone who will not be similarly compromised or to fulfill the role of trustee by withdrawing from the representation of the bank in all other matters. *See also* Rule 1.7(a)(1)(concurrent conflict of interest exists if representation of one or more clients may be materially limited by the lawyer's responsibilities to a third person).

Inquiry #2:

Perceiving that he has a personal conflict of interest, Attorney A withdraws from the representation of Bank Z on all unrelated matters in order to continue to serve as trustee. Are the other lawyers in Law Firm required to withdraw from the representation of Bank Z on matters unrelated to the Loan if Attorney A serves as the substitute trustee for the contested foreclosure?

Opinion #2:

No, the other lawyers in the firm may continue to represent Bank Z on unrelated matters.

Rule 1.10(a) provides that a disqualification based upon a personal interest of a lawyer that does not present a significant risk of materially limiting the representation of a client by the remaining lawyers in a firm is not imputed to the remaining lawyers in the firm. Comment [3] to Rule 1.10 specifies that "[t]he rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented." Serving in the role of trustee does not raise questions of client loyalty or protection of confidential information because the lawyer/trustee does not represent either party in the foreclosure. Therefore, Attorney A's disqualification from the representation of Bank Z to maintain his impartiality is not imputed to the other lawyers in the firm who are representing the bank on matters unrelated to the Loan and the foreclosure.

Inquiry #3:

Attorney B, another lawyer in Law Firm, intends to act as the lawyer for Bank Z in connection with the Loan including representation in the foreclosure proceeding. May Attorney B represent Bank Z on all matters related to the Loan, including the foreclosure, if another lawyer in his firm is serving as the trustee?

Opinion #3:

No, if the foreclosure is contested, Attorney B may not represent Bank Z at the foreclosure proceeding or on any matter related to the Loan. Attorney A's impartiality may be impaired if another lawyer from his firm appears in the foreclosure or related matters on behalf of the bank. To preserve the integrity of the process and the impartiality of the trustee, Attorney A's disqualification from serving as an advocate for one of the parties to a contested foreclosure in any matter related to the Loan is imputed to the other lawyers in the firm. *See* Rule 1.10(a).

Inquiry #4:

May another lawyer in the firm represent Attorney A in his capacity as trustee for the foreclosure?

Opinion #4:

Yes, and the lawyer may continue to do unrelated legal work for the bank while representing Attorney A as trustee. *See* Opinion #1 above. However, if Attorney A determines that he has a conflict of interest in serving as the trustee while

continuing to represent the bank on unrelated matters and withdraws from the representation of the bank on unrelated matters to continue to serve as trustee, a lawyer representing Attorney A as trustee would be similarly disqualified. *See* Rule 1.10(a).

Inquiry #5:

Law Firm has set up a separate entity, Firmco, to serve as trustee on deeds of trust. Law Firm or its lawyers have a controlling ownership interest in Firmco. Firmco is substituted as trustee on the deed of trust securing the Loan made by Bank Z. May a lawyer in the firm represent Firmco in its capacity as trustee for the foreclosure? May the lawyer continue to do unrelated legal work for the bank?

Opinion #5:

Yes, the lawyer may represent Firmco as trustee and the lawyer representing Firmco may continue to do unrelated legal work for the bank. *See* Opinion #4. However, a lawyer for the firm may not simultaneously provide representation to Firmco and advocate for the lender in a contested foreclosure proceeding. *See* Opinion #1.

Inquiry #6:

Should the Borrower be informed that Attorney A and the other lawyers in Law Firm will continue to represent Bank Z on matters unrelated to the foreclosure?

Opinion #6:

Yes. The role of the trustee in a foreclosure proceeding is similar to the roles of arbitrator or mediator which are addressed in Rule 2.4. Rule 2.4(b) provides that when a lawyer serving as a third-party neutral knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third party neutral and a lawyer's role as one who represents a client. Similarly, explaining the role of the trustee and the role of the other lawyers in the firm (who continue to represent the bank) to a borrower in a foreclosure proceeding will help to avoid confusion and will allow the borrower to pursue his legal remedies to remove the trustee if he objects.

Inquiry #7:

If Borrower informally objects to Attorney A serving as the trustee because Attorney A and the other lawyers in the firm represent Bank Z on unrelated matters, is Attorney A required to withdraw from service as trustee?

Opinion #7:

No, Attorney A is not required to withdraw unless ordered to do so by a court.

Inquiry #8:

Do the responses to any of the preceding inquiries change if Bank Z is not one of the largest clients of Law Firm?

Opinion #8:

No.

Endnote
1. G.S. A745-105 allows the Commissioner of Banks (COB) to delay the time within which a lender can file a foreclosure proceeding on a subprime loan for a period of up to 30 days and to suspend a foreclosure on a subprime loan based upon its review of loan information that the lender must file with the Administrative Office of the Courts pursuant to G.S. A745-103. The clerk of court must find that the loan is not subprime or, if subprime, that the COB has not delayed the time for filing the foreclosure proceeding or suspended the foreclosure based its review of the loan information.

Lenders

CPR 105

Adopted April 15, 1977

Inquiry:
A mortgage banker trains one of its own salaried employees who works in its office to prepare the disclosure and settlement papers required under the Real Estate Settlement Act to be completed both before and simultaneously with the closing of a loan on real estate. The preparation of these papers is time-consuming. The mortgage banker basically employs a limited number of lawyers to do its title work, but the services of its employee are available to any lawyer approved by the mortgage banker to close real estate transactions. Any lawyer utilizing the services of the employee of the mortgage banker pays such employee for his help on a fee basis. When the employee is not engaged by lawyers in the work described, he performs normal duties for the mortgage banker and is paid for the performance of such duties by the mortgage banker. It is stated that the employee will not be in a position to refer loans to any particular lawyer.

Opinion:
The Real Estate Settlement Procedures Act provides that the papers required by the Act shall be prepared without additional charge to the borrower. A lawyer paying an employee outside his office for the preparation of these papers might be tempted to add this charge to his normal fee and thus do indirectly what the Act prohibits to be done directly. In any event, this work pertains to the lawyer's duties and is not done under his supervision. In addition, any payment by the lawyer to the employee of the mortgage banker on a fee basis would constitute a violation of DR 3-102(A). A lawyer may not ethically use the services of such an employee provided by the mortgage banker.

CPR 108

April 15, 1977
Inquiry: A lending institution lends money secured by deeds of trust on real estate and advises all borrowers that it will accept title certificates only from a single specified lawyer. This is the uniform practice of the lending institution. It has continued for a long time, and the lawyer specified by the lending institution is aware of the practice. The borrower pays the lawyer's fee. Is it ethical for the lawyer to accept employment under the facts stated?

Opinion: A lawyer is not ethically prohibited from accepting employment as the result of advice and recommendation from friends, relatives, business associates, or satisfied clients (EC 2-8), but where a lending institution over an extended period of time advises all borrowers that it will accept title certificates only from a specified lawyer, when other qualified lawyers are readily available, and the lawyer knows of this practice, it is unethical for him to accept employment as a result of such requirement by the lender. DR 2-103(D).

RPC 41

January 13, 1989

Lender Preparation of Closing Documents
Opinion rules that for the purposes of a real estate transaction, an attorney may, with proper notice to the borrower, represent only the lender, and that the lender may prepare the closing documents.
Inquiry:
ABC Co. is a title company which has contracted with a lending institution to provide title insurance and coordinate residential loan closings. ABC Co. wishes to enlist Attorney B as part of a "network" of approved attorneys who will perform closings subject to ABC Co.'s instructions.
All closing documents will be prepared by the lender and forwarded to Attorney B, who will meet with the parties, explain the documents and supervise their execution. Attorney B will then return the documents to ABC Co.
May Attorney B agree to handle closings in this manner?
Opinion:
Yes. The lender has a primary interest in the closing documents pursuant to *State v. Pledger*, 257 N.C. 634, 127 S.E.2d 337 (1962). Thus, the lender may draft the closing documents and Attorney B will not be assisting the unauthorized practice of law by conducting the closing under these circumstances.
If Attorney B intends only to represent the lender at the closing, he must clearly notify the borrower in time to permit the borrower to obtain other counsel.

RPC 40

April 17, 1989

Editor's Note: This opinion was originally published as RPC 40 (Revised).
Lender Preparation of Closing Documents
Opinion rules that for the purposes of a real estate transaction, an attorney may, with proper notice to the borrower, represent only the lender, and that the lender may prepare the closing documents.
Inquiry:
Lender A wishes to retain Attorney B to examine the title, render a title opinion, obtain title insurance, record documents and disburse funds at a real estate closing. Lender A will prepare all the necessary documents and states that it will hold Attorney B harmless for all errors in the closing documents. The borrower will be charged a document preparation fee by Lender A and will be notified that Attorney B represents only Lender A.

1. Does Lender A engage in the unauthorized practice of law by preparing the closing documents and charging a fee for this service?
2. Does Attorney B have a duty to notify the borrower of any problems Attorney B detects during the title search?
3. May Lender A waive Attorney B's liability for errors in the closing documents on behalf of itself and the borrower?
Opinion:
1. Lender A has a "primary" interest in the closing documents. Therefore, under the rule of *State v. Pledger*, 257 N.C. 634, 127 S.E.2d. 337 (1962), Lender A may draft these documents without engaging in the unauthorized practice of law.
2. If Attorney B clearly explains to the borrower that he represents only Lender A and makes that disclosure far enough in advance of the closing that the borrower can procure his own counsel if he wishes, Attorney B will have no duty to notify the borrower of potential defects in the title. CPR 100. It is suggested that any such notice be written.
3. Lender A may not "waive" Attorney B's liability for errors in the closing documents without the borrower's permission to do so. However, if Attorney B does not draft or review the documents and does not represent the borrower in any respect, it does not appear that Attorney B could be held responsible for errors in the closing documents.

Lender Directed Title Insurance

CPR 342
LENDER DIRECTED TITLE INSURANCE

April 11, 1984

Inquiry:
Attorney A represents a client obtaining a loan in connection with a real estate purchase or real estate owned by the client. Arrangements are made with Lender L for the loan. Attorney A is told by Lender L that he must obtain title insurance from Company TC. The borrower would prefer to obtain the title insurance from Company XYZ. Attorney A is aware that G.S. §75-17 prohibits a lender from requiring a borrower to deal with a particular insurer. May Attorney A ethically acquiesce in the request of Lender L to obtain the insurance for his client from Company TC instead of Company XYZ? Does Attorney A have an obligation to report the violation of §75-17?

Opinion:
Attorney A should not acquiesce in the request of Lender L to obtain the title insurance from Company TC when Attorney A knows that Lender L's insistence upon TC is a violation of G.S. §75-17. On the other hand, the Code of Professional Responsibility clearly does not require a lawyer to swear out a warrant or otherwise pursue prosecution or sanctions for other persons' or entities' violation of the law except when those other persons are themselves lawyers acting contrary to the Code. DR 1-103(A). Of course, a lawyer is always free to report violations of law or of ethical codes by other persons or entities should he choose to do so.

CPR 369
LENDER DIRECTED TITLE INSURANCE

October 23, 1985

Opinion rules that attorney may close loan when lender suggests particular title insurance company.

Inquiry:
X Savings and Loan Association operates Y Title Insurance Company through its wholly owned subsidiary, a servicing corporation. X asks each loan applicant if the applicant objects to purchasing title insurance from Y Title Insurance Company. If the applicant says he does not object, he is asked to sign a form requesting that title insurance by purchased from Y Company. X then issues closing instructions to the closing attorney requiring that the title insurance be purchased from Y Company. The subsidiary of X receives remuneration from Y through a stock dividend, premium split or through some other mode of payment. The attorney never has the opportunity to discuss with the borrower the advisability of purchasing title insurance from any company other than Y. The attorney knows that if he does and the borrower decides on some other title insurance company, the attorney's name will be removed from the list of attorneys approved to close loans for X. Under these circumstances, is it unethical for an attorney to close a loan using Y Title Insurance Company?

Opinion:
No, it is not necessarily unethical for the attorney to close the loan using Y Title Insurance Company. As the facts are stated here, X Savings and Loan Association did not require the borrower to purchase title insurance from Y Title Insurance Company. This assumes that there is no apparent violation of G.S. § 75-17, as there was in CPR 342, where the opinion ruled that the attorney could not acquiesce in the requirement by the lender that title insurance be obtained from a specific company, or G.S. § 58-135.1 or G.S. § 58-51.5. However, if the attorney feels the borrower would obtain a better policy or better price with a different company, he may advise the borrower accordingly and then be guided by the borrower's wishes as to whether to pursue the issue of obtaining title insurance from a different company.

Nonlawyer Support

RPC 29

PURCHASE AND USE OF TITLE ABSTRACTS
[Editor's Note: This opinion was originally published as RPC 29 (Revised).]

Adopted October 23, 1987

Opinion rules that an attorney may not rely upon title information from a nonlawyer assistant without direct supervision by said attorney.

Inquiry:
Attorney picks up a circular for a title or abstract firm, which states that the firm offers title examination services to attorneys for a flat fee of seventy dollars ($70.00) per tract plus copy costs.

Thereafter, attorney speaks with an employee of the firm who states that she can do a title search on a parcel of real property as above stated. She further states that she will telephone with any problems and that she will send a title summary and copies of the relevant documents. She states that she will not render an opinion on the title.

Attorney then gives her a deed book reference for a tract of land and requests a title examination. Thereafter, attorney received a mailing from the firm which includes the following:

1. Summary page indicating an abbreviated property description, the mortgages or deeds of trust, the tax listing information and judgements;

2. "Link" sheet for one descendant's estate;

3. "Link" sheet for the deeds represented to be in the chain of title with a copy of each deed;

4. City *ad valorem* tax printout signed by a City employee; and

5. Computer printout of the "out" conveyances for two (2) of the parties in the chain of title from the Register of Deeds. (The "out" conveyances for the owners prior to 1982 were listed on the link sheet by the firm's employee because the Registry does not have conveyances prior to such time on the computer.)

Attorney was not telephoned regarding examination or examination process. The firm does not employ an attorney. The work was performed by a non-licensed person. Attorney did not train or supervise the firm and was not requested to do so. Attorney has no knowledge regarding the firm's financial standing or liability insurance.

May attorney ethically rely upon the firm's "Abstract" or "Title Search" in rendering title opinions to clients, lenders or title insurance companies?

If so, what duty, if any, does attorney owe to investigate, evaluate, train and/or supervise firm's employees?

Opinion:

An attorney is responsible under Rule 3.3(a) to ensure that his firm has procedures which will reasonably assure that the conduct of any nonlawyer either employed or retained by that firm "is compatible with the professional obligations of the lawyer..." Further, an attorney may not ethically handle any "legal matter without preparation adequate under the circumstances." Rule 6(a)(2). For an attorney to rely on an abstract or title search by a nonlawyer not supervised by the attorney of the firm does not constitute adequate preparation under the circumstances for rendering of a title opinion or drafting a deed in reliance on the information disclosed by this title abstract or search. An attorney is required to supervise and evaluate the nonlawyer assistant. An attorney relying on nonlawyer assistants, whether employed by his firm or contracted with, must make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the lawyer's professional obligations, including his ethical obligations as required by Rule 3.3(a).

RPC 216

USING THE SERVICES OF AN INDEPENDENT TITLE ABSTRACTOR
[Editor's Note: This opinion was originally published as RPC 216 (Third Revision).]

Adopted July 18, 1997

Opinion rules that a lawyer may use the services of a nonlawyer independent contractor to search a title provided the nonlawyer is properly supervised by the lawyer.

Inquiry #1:
Paralegal is not a lawyer. She proposes to perform real estate title searches for lawyers working as an independent contractor. May Attorney A, who is a real estate lawyer, engage Paralegal as an independent contractor to perform title searches for real estate closings?

Opinion #1:
Yes, subject to certain limitations. A lawyer may use nonlawyers to assist him or her in the rendition of the lawyer's professional services. Comment to Rule 3.3 of the Rules of Professional Conduct. There is no requirement in the Rules of Professional Conduct that such nonlawyer assistants must be employees of the lawyer's firm. However, the lawyer must be able to meet his or her ethical responsibilities with regard to the supervision of a nonlawyer assistant regardless of whether the nonlawyer assistant is employed within the firm or as an independent contractor. The lawyer is responsible for the competent representation of clients, and therefore, the lawyer is also responsible for the work product of nonlawyer assistants. Rule 6(a)(1).

Before hiring or contracting with a nonlawyer assistant to perform title searches, Attorney A should take reasonable steps to ascertain that the nonlawyer is competent. Attorney A must also give the nonlawyer appropriate instruction and supervision. Comment for Rule 3.3 and RPC 29.

Inquiry #2:
Attorney Green has limited experience searching titles to real property and has limited knowledge of real property law. He would, however, like to expand his legal services to include the preparation of title opinions and real estate closings. He plans to expand into this area of practice by contracting Paralegal to perform title searches and then relying upon her research to prepare an opinion on title. Is Attorney Green's proposal ethical?

Opinion #2:
No. It is impossible for a lawyer to supervise adequately the work of a nonlawyer, pursuant to the requirements of Rule 3.3, if the lawyer is not himself or herself competent in the area of practice. Moreover, it is incompetent representation of a client, in violation of Rule 6, for a lawyer to adopt as his or her own an opinion on title prepared by a nonlawyer or to render a legal opinion on title if the lawyer's opinion is not based upon knowledge or the relevant records and documentation and the lawyer's own independent professional judgment, knowledge, and competence in real property law. *See* RPC 29.

Inquiry #3:
If Attorney A uses the services of a nonlawyer to search a title, either as an employee of his firm of as an independent contractor, must Attorney A disclose this to the client?

Opinion #3:

Yes, if the client inquires, Attorney A should advise the client that he uses the services of a nonlawyer title searcher.

Inquiry #4:
Does Attorney A have a duty to tell the client the name of the nonlawyer title searcher?

Opinion #4:
No, unless the client requests this information.

Inquiry: 5:
Should Attorney A explain to the client how the services provided by Paralegal will be charged to the client?

Opinion #5:
No, unless the client requests this information.

Inquiry #6:
If Attorney A hires Paralegal to perform title searches as an independent contractor, is Attorney A required to check for conflicts of interest?

Opinion #6:
Yes, a lawyer is always required to check for conflicts of interest. *See* Rule 3.3(B) and Rule 5.1.

Inquiry #7:
May Attorney A disclose to Paralegal the nature of the title search to be performed and the name of the client? Is client consent necessary prior to this disclosure?

Opinion #7:
If Attorney A has determined that Paralegal understands and will comply with Attorney A's duty to safeguard the confidences of his clients, he may disclose confidential information to Paralegal without the prior consent of the client. *See* Rule 4(c)(1).

99 Formal Ethics Opinion 6

July 23, 1999

Ownership of Title Agency
Opinion examines the ownership of a title insurance agency by lawyers in North and South Carolina as well as the supervision of an independent paralegal.
Inquiry #1:
Certain lawyers, some licensed to practice in only North Carolina and some licensed to practice in both North and South Carolina, own and operate a title insurance agency that issues title policies for properties in both North and South Carolina. The lawyers who are licensed to practice in South Carolina provide title certification to the title agency for the purpose of writing title policies on South Carolina properties.
May a North Carolina lawyer own all or part of a title insurance agency that writes title policies on North Carolina property?
Opinion #1:
Yes, provided the lawyer does not give a title opinion to the title insurance company for which the title agency issues policies. *See* RPC 185.
Inquiry #2:
May North Carolina lawyers own all or part of a title insurance company that writes title policies in South Carolina?
Opinion #2:
Yes, if allowed by law.
Inquiry #3:
May North Carolina lawyers act as title insurance agents for a title insurance company owned by the same lawyers?
Opinion #3:
Yes, if allowed by law and subject to opinion #1 above.
Inquiry #4:
May lawyers licensed to practice in both North and South Carolina who own a title insurance agency that writes policies in both states provide title certifications to the agency for real estate located in South Carolina?
Opinion #4:
Yes, if allowed by law and the ethical code of South Carolina.
Inquiry #5:
The North Carolina lawyers provide title certification services for North Carolina real estate transactions. To undertake certification of title to real estate located outside of the lawyers' immediate community, the lawyers utilize independent title abstractors who are not licensed lawyers. Prior to utilizing the services of a title abstractor, the lawyers conduct an interview of

each abstractor, evaluate his or her procedures and methods, determine his or her level of education and experience, and conduct a reference check to evaluate the abstractor's performance history. Is this level of supervision adequate under the Revised Rules of Professional Conduct?

Opinion #5:

No. RPC 216 requires a lawyer who is using the services of a non-lawyer independent contractor to search a title to take reasonable steps to ascertain that the non-lawyer is competent and, at all times that the non-lawyer is assisting the lawyer, to provide the non-lawyer with appropriate supervision and instruction regardless of the distance between the lawyer and non-lawyer. *See* Rule 5.3. The opinion also indicates that the lawyer may not issue a title opinion unless the opinion is based upon the lawyer's own independent professional judgment, competence, and personal knowledge of the relevant records and documentation. *See also* the *Guidelines for Use of Non-Lawyers in Rendering Legal Services* of the North Carolina State Bar (July 18, 1998, #10). [Note: this opinion assumes that the lawyer is not giving a title certification to the title agency owned by the lawyer. *See* G.S. §58-26-1(a).]

99 Formal Ethics Opinion 13

July 21, 2000

Supervision of Paralegal Closing a Residential Real Estate Transaction

Opinion rules that competent practice requires the presence of the closing lawyer at a residential real estate closing conference to explain the documents being executed, answer questions, and advocate for the client or clients. A non-lawyer may oversee the execution of documents outside the presence of the lawyer provided the closing lawyer provides adequate supervision and is present at the closing conference to complete the transaction.

Inquiry #1:

Paralegal is an in-house employee of Attorney A, a real estate lawyer. May Attorney A allow Paralegal to close a residential real estate purchase if Attorney A is not present at the closing?

Opinion #1:

No. A residential real estate closing, for purposes of this opinion, is defined as the entire series of events through which the ownership of property is transferred from one party to another party. One of the most important events in the typical transaction is the closing conference which occurs at the conclusion of the transaction when the documents are executed in the closing lawyer's office. The closing conference is the primary opportunity that the lawyer has to meet with the parties, to explain the closing documents, to define the client's rights and obligations, and to answer questions. More importantly, the closing conference may be the only opportunity that the lawyer has to intercede when the interests of the clients are threatened. Many, if not all, of these activities involve—and competent representation should require—the giving of advice and opinion upon the legal rights of the clients. The giving of such advice and opinion is the practice of law. *See* N.C.G.S. §84-2.1.

The duty to provide competent representation and the duty not to assist the unauthorized practice of law must be considered when supervising a non-lawyer. *See* Rule 1.1, Rule 5.3, Rule 5.5(b), and RPC 183. A non-lawyer does not have the requisite knowledge, skill, or authority to perform the critical advisory and advocacy roles necessary to provide competent representation in a residential real estate closing. Furthermore, a non-lawyer cannot give advice or opinion upon the legal rights of the client. Therefore, a non-lawyer may not close a residential real estate transaction.

Inquiry #2:

May Attorney A allow Paralegal to oversee the execution of the closing documents without Attorney A's presence in the room?

Opinion #2:

Yes, provided Attorney A is present at the closing conference to explain the documents, define the client's rights and obligations, answer questions, and advocate for the clients, and further provided, the clients are informed that Paralegal is not a lawyer. Paralegal must be instructed on the limitations of his or her role prior to the closing conference and Attorney A must maintain responsibility for the conduct and performance of Paralegal.

Rule 5.3(b) states that "a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer." Comment [1] to the rule adds the following:

A lawyer should give such nonlawyers appropriate instruction and supervision concerning the ethical aspects of their employment…and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

2001 Formal Ethics Opinion 4

October 19, 2001

Supervision of Paralegal Closing a Residential Real Estate Refinancing

Opinion rules that competent legal representation of a borrower requires the presence of the lawyer at the closing of a residential real estate refinancing. A nonlawyer may oversee the execution of documents outside the presence of the lawyer provided the lawyer adequately supervises the nonlawyer and is present at the closing conference to complete the transaction.

Inquiry:

99 Formal Ethics Opinion 13 rules that competent practice requires the presence of the closing lawyer at a residential real estate closing conference to explain the documents being executed, answer questions, and advocate for the client. A nonlawyer employee of the lawyer may oversee the execution of documents outside of the lawyer's presence; however, the closing lawyer must adequately supervise the nonlawyer and must be present at some time during the closing conference to complete the transaction.
When a homeowner refinances his or her residential property, there is a potential for harm to the interest of the homeowner from high interest rates, dissipation of equity, and refinancing pitfalls such as prepayment penalties and balloon notes. May a lawyer allow a nonlawyer employee to close a residential real estate refinancing if the lawyer is not present at the closing?

Opinion:

No. As with an initial purchase of residential property, the closing of a refinancing of residential property is the primary opportunity that a lawyer has to meet with the borrower, explain the refinancing documents, define the borrower's rights and obligations, and answer questions. These activities are the practice of law because the lawyer gives legal advice and opinion on the rights of the borrower. See 99 FEO 13. Therefore, competent representation requires that the closing lawyer must be present at the closing. Nevertheless, a lawyer may permit a nonlawyer employee to oversee the execution of the financing documents outside of the lawyer's presence. Nothing in this opinion is intended to infringe upon a lender's right to represent itself as provided in State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962).

2006 Formal Ethics Opinion 11

July 21, 2006

Preparation of Legal Documents at the Request of Another

Opinion rules that, outside of the commercial or business context, a lawyer may not, at the request of a third party, prepare documents, such as a will or trust instrument, that purport to speak solely for principal without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

Inquiry:

This inquiry seeks a clarification of the scope of 2003 Formal Ethics Opinion 7 which provides that a lawyer may not prepare a power of attorney for the benefit of the principal at the request of another individual without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal. The opinion responds to an inquiry involving the preparation of a power of attorney, the conduct of the attorney-in-fact, and the appropriate actions of the lawyer who is asked to prepare the power of attorney. The opinion provides as follows:

> When a lawyer is engaged by a person to render legal services to another person, the lawyer may not allow the third party to direct or regulate the lawyer's professional judgment in rendering such legal services. Rule 5.4(c). Similarly, Rule 1.8(f) provides that when a lawyer's services are being paid for by someone other than the client, the lawyer may not accept the

compensation unless the client gives informed consent, there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship, and confidential information relating to the representation of the client is protected…
The situation described in this inquiry is distinguishable from a commercial or business transaction in which the lawyer is engaged by one person to prepare a power of attorney for execution by another person. Frequently, the power of attorney names the person requesting the legal services as the attorney-in-fact. If the document is being prepared to facilitate a specific task for the benefit of this person, such as the transfer of stock or real estate, the lawyer represents the person requesting the legal services and does not represent the signatory on the power of attorney. Thus, the purpose and goals of the engagement determine the identity of the client, not the signatory on the document prepared by the lawyer.
A lawyer may be asked by a client to prepare a document for the signature of a third party under circumstances that give rise to a reasonable belief that the client may be using the lawyer's services for an improper purpose such as actual or constructive fraud or the exertion of undue influence. If so, the lawyer may not assist the client and must decline or withdraw from the representation. Rule 1.2(d) and Rule 1.16(a)(1).

Does 2003 FEO 7 apply only to the preparation of a power of attorney upon the request of the prospective attorney-in-fact or does it apply broadly to the preparation of other legal documents that purport to speak solely for the principal (such as a will, an advance directive, or a trust instrument) upon the request of another person?

Opinion:

2003 Formal Ethics Opinion 7 applies to the preparation of all such legal documents for the principal upon the request of another. (A notable exception is the preparation of documents in a business or commercial context as described in the quotation from 2003 FEO 7 above.) A lawyer should not undertake the representation of a client or the preparation of a legal document on behalf of that client without having consulted with the client to obtain his informed consent to the representation and to determine whether he needs or wants the legal services requested. Further, the lawyer must exercise his independent professional judgment, and advise the client accordingly, with respect to the advisability of and the scope of the requested legal services.

2009 Formal Ethics Opinion 2

April 24, 2009

Responding to Unauthorized Practice of Law in Preparation of a Deed

Opinion rules a closing lawyer who reasonably believes that a title company engaged in the unauthorized practice of law when preparing a deed must report the lawyer who assisted the title company but may close the transaction if client consents and doing so is in the client's interest.

Inquiry #1:

Buyer/borrower's counsel is preparing for closing. The day prior to closing a draft of a deed is forwarded to buyer/borrower's counsel by ABC Title Company. At or near the top of the draft deed it states in writing, "This deed was prepared by ABC Title Company under the supervision of John Doe, attorney at law." ABC Title Company is not a bank or a law firm. John Doe is not employed by ABC Title Company. Buyer/borrower's counsel believes that the deed is actually being prepared by a nonlawyer employee or independent contractor of the ABC Title Company who then forwards the deed to John Doe for his review and approval. John Doe does not directly employ the nonlegal staff person who prepares the deed, nor is that person an independent contractor hired by John Doe for the purpose of assisting John Doe with the legal work he performs on behalf of his clients.

What are the ethical obligations of buyer/borrower's counsel as to John Doe and ABC Title Company?

Opinion #1:

No opinion is expressed on the legal question of whether ABC Title Company is engaged in the unauthorized practice of law. For the purpose of responding to this inquiry, however, it is assumed that buyer/borrower's counsel reasonably believes that ABC is engaged in the unauthorized practice of law.
Rule 8.3(a) requires a lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, to inform

the North Carolina State Bar or a court having jurisdiction over the matter. Rule 8.3 only requires a lawyer to report rule violations of "another lawyer." There is no requirement under Rule 8.3 to report the unauthorized practice of law by a nonlawyer or company. Nevertheless, Rule 5.5(d) of the Rules of Professional Conduct prohibits a lawyer from assisting another person in the unauthorized practice of law.

If buyer/borrower's counsel suspects that John Doe is assisting ABC Title Company in the unauthorized practice of law, he should communicate his concerns to John Doe and advise John Doe that he may wish to contact the State Bar for an ethics opinion as to his future transactions with ABC Title Company. If, after communicating with John Doe, buyer/borrower's counsel reasonably believes that John Doe is knowingly assisting the title company in the unauthorized practice of law, and plans to continue participating in such conduct, buyer/borrower's counsel must report John Doe to the State Bar. Rule 8.3(a).

Inquiry #2:

May buyer/borrower's counsel proceed with the closing?

Opinion #2:

Buyer/borrower's counsel has an obligation to do what is in the best interest of his client while not assisting in the unauthorized practice of law. The lawyer should advise the client of his concerns about ABC's unauthorized practice of law and any harm that such conduct may pose to the client. However, if buyer/borrower's counsel determines that the deed appears to convey marketable title and the client decides to proceed with the closing after receiving his lawyer's advice, buyer/borrower's counsel may close the transaction. *See* 2007 FEO 3 (lawyer may proceed with representation of city council in quasi-judicial proceeding after advising the council of the legal implications of a nonlawyer appearing before the council in representative capacity). Buyer/borrower's participation in the closing does not further the unauthorized practice of law by ABC Title Company.

Authorized Practice Advisory Opinion 2002-1

January 24, 2003

Revised January 26, 2012

On the Role of Laypersons in the Consummation of Residential Real Estate Transactions

The North Carolina State Bar has been requested to interpret the North Carolina unauthorized practice of law statutes (N.C. Gen. Stat. §§84-2.1 to 84-5) as they apply to residential real estate transactions. The State Bar issues the following authorized practice of law advisory opinion pursuant to N.C. Gen. Stat. §84-37(f) after careful consideration and investigation. This opinion supersedes any prior opinions and decisions of any standing committee of the State Bar interpreting the unauthorized practice of law statutes to the extent those opinions and decisions are inconsistent with the conclusions expressed herein. As a result of its review of the activities of more than 50 nonlawyer service providers since the adoption of this opinion on January 24, 2003, including injunctions issued against two companies, the Committee is clarifying the opinion concerning issues that it has addressed since adoption of the opinion.

Issue 1:

May a nonlawyer handle a residential real estate closing for one or more of the parties to the transaction?

Opinion 1:

No. Residential real estate transactions typically involve several phases, including the following: reviewing the purchase agreement for any conditions that must be met before closing; abstracting titles; providing an opinion on title; applying for title insurance policies, including title insurance policies that may require tailored coverage to protect the interests of the lender, the owner, or both[i]; preparing legal documents, such as deeds (in the case of a purchase transaction), deeds of trust, and lien waivers or affidavits; interpreting and explaining documents implicating parties' legal rights, obligations, and options; resolving possible clouds on title and issues concerning the legal rights of parties to the transaction; overseeing execution and acknowledgement of documents in compliance with legal mandates; handling the recordation and cancellation of documents in

accordance with North Carolina law; disbursing proceeds when legally permitted after legally-recognized funds are available and all closing conditions have been satisfied; and providing a post-closing final opinion of title for title insurance after all prior liens have been satisfied. These and other functions are sometimes called, collectively, the "closing" of the residential real estate transaction. As detailed below, the North Carolina General Assembly has determined specifically that only persons who are licensed to practice law in this state may handle most of these functions.[ii]

A person who is not licensed to practice law in North Carolina and is not working under the direct supervision of an active member of the State Bar may not perform functions or services that constitute the practice of law.[iii] Under the express language of N.C. Gen. Stat. §§ 84-2.1 and 84-4, a non-lawyer who is not working under the direct supervision of an active member of the State Bar would be engaged in the unauthorized practice of law if he or she performs any of the following functions for one or more of the parties to a residential real estate transaction: (i) preparing or aiding in preparation of deeds, deeds of trust, lien waivers or affidavits, or other legal documents; (ii) abstracting or passing upon titles; or (iii) advising or giving an opinion upon the legal rights or obligations of any person, firm, or corporation.Under the express language of N.C. Gen. Stat. § 84-4, it is unlawful for any person other than an active member of the State Bar to hold himself or herself out as competent or qualified to give legal advice or counsel or as furnishing any services that constitute the practice of law.Additionally, under N.C. Gen. Stat. § 84-5, a business entity, including a corporation or limited liability company, may not provide or offer to provide legal services or the services of attorneys to its customers even if the services are performed by licensed attorneys employed by the entity.*See, Duke Power Co. v. Daniels*, 86 N.C. App. 469, 358 S.E.2d 87 (1987); *Gardner v. North Carolina State Bar*, 316 N.C. 285, 341 S.E.2d 517 (1986), and *State ex rel. Seawell v. Carolina Motor Club, Inc.*, 209 N.C. 624, 184 S.E. 540 (1936).

Accordingly, a nonlawyer is engaged in the unauthorized practice of law if he or she performs any of the following functions in connection with a residential real estate closing (identified only as examples):

1. Abstracts or provides an opinion on title to real property;

2. Explains the legal status of title to real estate, the legal effect of anything found in the chain of title, or the legal effect of an item reported as an exception in a title insurance commitment except as necessary to underwrite a policy of insurance and except that a licensed title insurer, agency, or agent may explain an underwriting decision to an insured or prospective insured, including providing the reason for such decision;

3. Explains or gives advice or counsel about the rights or responsibilities of parties concerning matters disclosed by a land survey under circumstances that require the exercise of legal judgment or that have implications with respect to a party's legal rights or obligations;

4. Provides a legal opinion, advice, or counsel in response to inquiries by any of the parties regarding legal rights or obligations of any person, firm, or corporation, including but not limited to the rights and obligations created by the purchase agreement, a promissory note, the effect of a pre-payment penalty, the rights of parties under a right of rescission, and the rights of a lender under a deed of trust;

5. Advises, counsels, or instructs a party to the transaction with respect to alternative ways for taking title to the property or the legal consequences of taking title in a particular manner;

6. Drafts a legal document for a party to the transaction or assists a party in the completion of a legal document, or selects or assists a party in selecting a form legal document among several forms having different legal implications;

7. Explains or recommends a course of action to a party to the transaction under circumstances that require the exercise of legal judgment or that have implications with respect to the party's legal rights or obligations;

8. Attempts to settle or resolve a dispute between the parties to the transaction that will have implications with respect to their respective legal rights or obligations;

9. Determines that all conditions of the purchase agreement or the loan closing instructions have been satisfied in accordance with the buyer's or the lender's interests or instructions;

10 Determines that the deed and deed of trust may be recorded after an update of title for any intervening conveyances or liens since the preliminary opinion;

11. Determines that the funds may be legally disbursed pursuant to the North Carolina Good Funds Settlement Act, N.C. Gen. Stat. § 45A-1 et seq.[iv]

The foregoing list of examples of functions that constitute the practice of law is not exclusive, but reflects a range of responsibilities and duties that involve the following: the exercise of legal judgment; the preparation of legal documents such as deeds, deeds of trust, and title opinions; the explanation or interpretation of legal documents in circumstances that require the exercise of legal judgment; the provision of legal advice or opinions; and the performance of other services that constitute the practice of law.

Issue 2:

May a nonlawyer who is not acting under the supervision of a lawyer licensed in North Carolina (1) present and identify the documents necessary to complete a North Carolina residential real estate closing, direct the parties where to sign the documents, and ensure that the parties have properly executed the documents; and (2) receive and disburse the closing funds?

Opinion 2:

Yes. So long as a nonlawyer does not engage in any of the activities referenced in Opinion 1, or in other activities that likewise constitute the practice of law, a nonlawyer may: (1) present and identify the documents necessary to complete a North Carolina residential real estate closing, direct the parties where to sign the documents, and ensure that the parties have properly executed the documents; or (2) receive and disburse the closing funds.

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

Notwithstanding this opinion, evidence considered by the State Bar with respect to this advisory opinion indicates that, at the time documents are presented to the parties for execution, a lawyer who is present may identify or be asked about important issues affecting the legal rights or obligations of the parties. A lawyer may provide important legal guidance about such issues, but a nonlawyer is not permitted to do so. Moreover, a consumer's retention of a licensed North Carolina lawyer provides financial protection to the consumer. The North Carolina Rules of Professional Conduct require a lawyer to properly handle all fiduciary funds, including residential real estate closing proceeds. In the event a lawyer mishandles the closing proceeds, the lawyer is subject to professional discipline, and the State Bar Client Security Fund may provide financial assistance for a person injured by the lawyer's improper application of funds. On the whole, the evidence considered by the State Bar indicates that it is in the best interest of a consumer to be represented by a lawyer with respect to all aspects of a residential real estate transaction.

The evidence the State Bar has considered suggests, however, that performing administrative or ministerial activities in connection with the execution of residential real estate closing documents and the receipt and disbursement of the closing proceeds does not necessarily require the exercise of legal judgment or the giving of legal advice or opinions. Indeed, the execution of closing documents and the disbursement of closing proceeds may be accomplished—and often have been accomplished—by mail, by email, or by other electronic means, or by some other procedure that would not involve the lawyer and the parties being physically present at one place and time. The State Bar therefore concludes that it should not be presumed that performing the task of overseeing the execution of residential real estate closing documents and receiving and disbursing closing proceeds necessarily involves giving legal advice or opinions or otherwise engaging in activities that constitute the practice of law.

Nonlawyers who undertake such responsibilities, and those who retain their services, should also be aware that (1) the North Carolina State Bar retains oversight authority concerning complaints about activities that constitute the unauthorized practice of law; (2) the North Carolina criminal justice system may prosecute instances of the unauthorized practice of law; and (3) that N.C. Gen. Stat. §84-10 provides a private cause of action to recover damages and attorneys' fees to any person who is damaged by the unauthorized practice of law against both the person who engages in unauthorized practice and anyone who knowingly aids and abets such person. In addition, non-lawyers and consumers should bear in mind that other governmental authorities such as the Federal Trade Commission, the North Carolina Attorney General, district attorneys, and the banking commissioner, have jurisdiction over unfair trade practices and violations of requirements regarding lending practices.

Endnotes

[i] By statute, title insurance in North Carolina can be issued only after the title insurance company has received an opinion of title from a licensed North Carolina attorney who is not an employee or agent of the company and who "has conducted or caused to be conducted under the attorney's direct supervision a reasonable examination of the title."N.C. Gen. Stat. § 58-26-1.

[ii] Except as permitted under *State v. Pledger*, 257 N.C. 634, 127 S.E.2d 337 (1962), which allows a party having a "primary interest" in a transaction to prepare deeds of trust and other documents to effectuate the transaction.

[iii] The State Bar notes that the North Carolina General Assembly and Supreme Court are the entities that have the power to make the ultimate determination whether an activity constitutes the practice of law.

[iv] Since the original adoption of this opinion, the Committee has reviewed numerous complaints concerning nonlawyers, many of whom hold out to the closing parties that they will conduct "closings," including disbursement of funds, at any time of day, including after normal business hours.However, under the Good Funds Settlement Act, N.C. Gen. Stat. § 45A-4, funds may not be disbursed until the deed and deed of trust (if any) have been recorded, which in most counties requires physical delivery to the Register of Deeds during normal business hours.Accordingly, while execution of the documents may be conducted at any time, the actual "closing" and disbursement of funds may not occur until after the required documents are recorded.

[v] Except as permitted under *State v. Pledger, supra,* or by an individual *pro se.*

[vi] Almost without exception, these nonlawyer service providers are corporations or limited liability companies that market their services to lenders, not consumers.Most are also title insurance agents.Accordingly, lenders commonly inform borrowers that the nonlawyer will be conducting the closing without any meaningful opportunity for the borrower to decide to retain a lawyer to protect its interests.Additionally, when the nonlawyer is a title insurance agent, the borrower usually is given no choice on insurer or available rates.The Committee expresses no opinion whether these actions may violate N.C. Gen. Stat. § 75-17, which prohibits a lender from requiring its borrower to obtain a policy of title insurance from a particular insurance company, agent, broker or other person specified by the lender.Title companies (and other parties) may refer lenders or borrowers to attorneys at their customer's request, but may not require the use of a specific attorney or charge a fee for any such referral.

2011 Formal Ethics Opinion 6

January 27, 2012

Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property

Opinion rules that a lawyer may contract with a vendor of software as a service provided the lawyer uses reasonable care to safeguard confidential client information.

Inquiry #1:

Much of software development, including the specialized software used by lawyers for case or practice management, document management, and billing/financial management, is moving to the "software as a service" (SaaS) model. The American Bar Association's Legal Technology Resource Center explains SaaS as follows:

SaaS is distinguished from traditional software in several ways. Rather than installing the software to your computer or the firm's server, SaaS is accessed via a web browser (like Internet Explorer or FireFox) over the internet. Data is stored in the vendor's data center rather than on the firm's computers. Upgrades and updates, both major and minor, are rolled out continuously…SaaS is usually sold on a subscription model, meaning that users pay a monthly fee rather than purchasing a license up front.1

Instances of SaaS software extend beyond the practice management sphere addressed above, and can include technologies as far-ranging as web-based email programs, online legal research software, online backup and storage, text messaging/SMS (short message service), voicemail on mobile or VoIP phones, online communication over social media, and beyond.

SaaS for law firms may involve the storage of a law firm's data, including client files, billing information, and work product, on remote servers rather than on the law firm's own computer and, therefore, outside the direct control of the firm's lawyers. Lawyers have duties to safeguard confidential client information, including protecting that information from unauthorized disclosure, and to protect client property from destruction, degradation, or loss (whether from system failure, natural disaster, or dissolution of a vendor's business). Lawyers also have a continuing need to retrieve client data in a form that is usable outside of a vendor's product.2
Given these duties and needs, may a law firm use SaaS?

Opinion #1:

Yes, provided steps are taken to minimize the risk of inadvertent or unauthorized disclosure of confidential client information and to protect client property, including the information in a client's file, from risk of loss.

The use of the internet to transmit and store client information presents significant challenges. In this complex and technical environment, a lawyer must be able to fulfill the fiduciary obligations to protect confidential client information and property from risk of disclosure and loss. The lawyer must protect against security weaknesses unique to the internet, particularly "end-user" vulnerabilities found in the lawyer's own law office. The lawyer must also engage in periodic education about ever-changing security risks presented by the internet.

Rule 1.6 of the Rules of Professional Conduct states that a lawyer may not reveal information acquired during the professional relationship with a client unless the client gives informed consent or the disclosure is impliedly authorized to carry out the representation. Comment [17] explains, "A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." Comment [18] adds that, when transmitting confidential client information, a lawyer must take "reasonable precautions to prevent the information from coming into the hands of unintended recipients."

Rule 1.15 requires a lawyer to preserve client property, including information in a client's file such as client documents and lawyer work product, from risk of loss due to destruction, degradation, or loss. See also RPC 209 (noting the "general fiduciary duty to safeguard the property of a client"), RPC 234 (requiring the storage of a client's original documents with legal significance in a safe place or their return to the client), and 98 FEO 15 (requiring exercise of lawyer's "due care" when selecting depository bank for trust account).

Although a lawyer has a professional obligation to protect confidential information from unauthorized disclosure, the Ethics Committee has long held that this duty does not compel any particular mode of handling confidential information nor does it prohibit the employment of vendors whose services may involve the handling of documents or data containing client information. See RPC 133 (stating there is no requirement that firm's waste paper be shredded if lawyer ascertains that persons or entities responsible for the disposal employ procedures that effectively minimize the risk of inadvertent or unauthorized disclosure of confidential information). Moreover, while the duty of confidentiality applies to lawyers who choose to use technology to communicate, "this obligation does not require that a lawyer use only infallibly secure methods of communication." RPC 215. Rather, the lawyer must use reasonable care to select a mode of communication that, in light of the circumstances, will best protect confidential client information and the lawyer must advise effected parties if there is reason to believe that the chosen communications technology presents an unreasonable risk to confidentiality. Id.

Furthermore, in 2008 FEO 5, the committee held that the use of a web-based document management system that allows both the law firm and the client access to the client's file is permissible:

provided the lawyer can fulfill his obligation to protect the confidential information of all clients. A lawyer must take steps to minimize the risk that confidential client information will be disclosed to other clients or to third parties. See RPC 133 and RPC 215…. A security code access procedure that only allows a client to access its own confidential information would be an appropriate measure to protect confidential client information…. If the law firm will be contracting with a third party to maintain the web-based management system, the law firm must ensure that the third party also employs measures which effectively minimize the risk that confidential information might be lost or disclosed. See RPC 133.

In a recent ethics opinion, the Arizona State Bar's Committee on the Rules of Professional Conduct concurred with the interpretation set forth in North Carolina's 2008 FEO 5 by holding that an Arizona law firm may use an online file storage and

retrieval system that allows clients to access their files over the internet provided the firm takes reasonable precautions to protect the security and confidentiality of client documents and information.3

In light of the above, the Ethics Committee concludes that a law firm may use SaaS if reasonable care is taken to minimize the risks of inadvertent disclosure of confidential information and to protect the security of client information and client files. A lawyer must fulfill the duties to protect confidential client information and to safeguard client files by applying the same diligence and competency to manage the risks of SaaS that the lawyer is required to apply when representing clients.

No opinion is expressed on the business question of whether SaaS is suitable for a particular law firm.

Inquiry #2:

Are there measures that a lawyer or law firm should consider when assessing a SaaS vendor or seeking to minimize the security risks of SaaS?

Opinion #2:

This opinion does not set forth specific security requirements because mandatory security measures would create a false sense of security in an environment where the risks are continually changing. Instead, due diligence and frequent and regular education are required.

Although a lawyer may use nonlawyers outside of the firm to assist in rendering legal services to clients, Rule 5.3(a) requires the lawyer to make reasonable efforts to ensure that the services are provided in a manner that is compatible with the professional obligations of the lawyer. The extent of this obligation when using a SaaS vendor to store and manipulate confidential client information will depend upon the experience, stability, and reputation of the vendor. Given the rapidity with which computer technology changes, law firms are encouraged to consult periodically with professionals competent in the area of online security. Some recommended security measures are listed below.

• Inclusion in the SaaS vendor's Terms of Service or Service Level Agreement, or in a separate agreement between the SaaS vendor and the lawyer or law firm, of an agreement on how the vendor will handle confidential client information in keeping with the lawyer's professional responsibilities.

• If the lawyer terminates use of the SaaS product, the SaaS vendor goes out of business, or the service otherwise has a break in continuity, the law firm will have a method for retrieving the data, the data will be available in a non-proprietary format that the law firm can access, or the firm will have access to the vendor's software or source code. The SaaS vendor is contractually required to return or destroy the hosted data promptly at the request of the law firm.

• Careful review of the terms of the law firm's user or license agreement with the SaaS vendor including the security policy.

• Evaluation of the SaaS vendor's (or any third party data hosting company's) measures for safeguarding the security and confidentiality of stored data including, but not limited to, firewalls, encryption techniques, socket security features, and intrusion-detection systems.4

• Evaluation of the extent to which the SaaS vendor backs up hosted data.

Endnotes

1. FYI: Software as a Service (SaaS) for Lawyers, ABA Legal Technology Resource Center at abanet.org/tech/ltrc/fyidocs/saas.html.

2. Id.

3. Paraphrasing the description of a lawyer's duties in Arizona State Bar Committee on Rules of Professional Conduct, Opinion 09-04 (Dec. 9, 2009).

4. A firewall is a system (which may consist of hardware, software, or both) that protects the resources of a private network from users of other networks. Encryption techniques are methods for ciphering messages into a foreign format that can only be deciphered using keys and reverse encryption algorithms. A socket security feature is a commonly-used protocol for managing

the security of message transmission on the internet. An intrusion detection system is a system (which may consist of hardware, software, or both) that monitors network and/or system activities for malicious activities and produces reports for management.

2006 Formal Ethics Opinion 8

July 21, 2006

Disbursement of Trust Funds

Opinion rules that a lawyer may disburse against deposited items in reliance upon a bank's funding schedule under certain circumstances.

Inquiry:

Attorney receives insurance company checks for payment of workers' compensation and personal injury settlements. Upon receipt, Attorney deposits these checks into her trust account. Because the insurance checks are not among the identified instruments in the Good Funds Settlement Act, G.S. §45A-4, she must wait until the funds have been "irrevocably credited" or collected before disbursing from the trust account to the client. RPC 191. Attorney has been unable to locate a bank that is willing to confirm when deposited funds have been collected.

Attorney has consulted with other lawyers in her locality with similar practices. Rather than call the bank to confirm that the funds have been collected, the lawyers routinely disburse against items deposited in the trust account, based upon prior dealings with the banks, in accordance with the following funding schedule: 3 business days for an in-state check and 7 business days for an out-of-state check. Attorney would like to follow this funding or "float" schedule for disbursements, as it appears to be the standard in her community.

May Attorney disburse funds from her trust account in reliance upon this schedule?

Opinion:

RPC 191 permits lawyers to disburse immediately from the trust account in reliance upon the deposit of funds provisionally credited to the account if the funds are in the form of cash, wired funds, or one of the enumerated instruments listed in the Good Funds Settlement Act. For all other instruments, a lawyer has an obligation to conduct reasonable due diligence to determine whether funds deposited into the trust account have been collected prior to disbursement.

Initially, a lawyer always should consult with her bank to determine when a particular instrument has been collected or funded. Before disbursing, a lawyer should also consider the source of the funds, i.e., whether the pay or is reputable and whether the instrument is likely to be honored. If a lawyer receives confirmation by the bank that the funds deposited are collected, then the lawyer may rely upon this information and disburse against the funds. A lawyer reasonably may rely upon her bank's funding or "float" schedule or policy *only* when the lawyer is unable to confirm whether funds have been irrevocably credited to his account and he has no reason to believe a particular instrument will not be honored under the circumstances. In any case, if the lawyer subsequently learns that an instrument has been dishonored, the lawyer must act immediately to protect other trust account property by personally paying the amount of any failed deposit or arranging for payment from other sources. "An attorney should take care not to disburse against uncollected funds in situations where the attorney's assets or credit would be insufficient to fund the trust account checks in the event that an... item is dishonored." RPC 191.

Therefore, if Attorney is unable to confirm that a particular insurance check has been collected, she may reasonably rely upon and disburse in accordance with her bank's funding schedule as long as 1) she reasonably believes the trust account check will be honored, and 2) she is able to fund the check in the event it is ultimately dishonored.

2008 Formal Ethics Opinion 13

July 24, 2009

Audit of Real Estate Trust Account by Title Insurer

Opinion rules that, unless affected clients expressly consent to the disclosure of their confidential information, a lawyer may allow a title insurer to audit the lawyer's real estate trust account and reconciliation reports only if certain written assurances to protect client confidences are obtained from the title insurer, the audited account is only used for real estate closings, and the audit is limited to certain records and to real estate transactions insured by the title insurer.

Inquiry #1:

Under North Carolina law, title insurance policies are issued upon receipt of title certification from a licensed North Carolina lawyer. A title insurer will only issue title assurances to approved lawyers as provided by N.C. Gen. Stat. §58-26.1. In the vast majority of real estate closings, the lender delivers the proceeds of the new loan (for the purchase or refinancing of the real estate) to the approved lawyer to be disbursed from the approved lawyer's trust account upon the closing of the transaction. Lenders and buyers/borrowers in real estate transactions frequently request title insurance coverage in the form of a closing protection letter in which the title insurer agrees to reimburse the lender and/or the buyer/borrower for, among other things, actual loss on account of the fraud or dishonesty of the approved lawyer in handling the lender's funds. Closing protection letters are necessary to facilitate real estate transactions in North Carolina as lenders are unwilling to risk their funds without these assurances from title insurers.

Title insurers are experiencing increasing liability for lawyer defalcations pursuant to closing protection letters and title insurance policies issued in connection with real estate transactions. In addition, parties to real estate transactions who are not covered by title insurance are suffering losses related to the misuse of funds deposited in real estate trust accounts.

To provide the assurances required by lenders and buyer/borrowers, title insurers need a way to assess whether funds from real estate trust accounts are being disbursed and accounted for properly. Real estate lawyers may use outside reconciliation services to reconcile their trust accounts. Title insurers would like to request either an audit of an approved lawyer's trust account and/or review of the lawyer's trust account reconciliation reports to ensure the safety of the funds and protect the interests of those whose funds are placed in the trust account and rely upon the appropriate disbursement of those funds.

Lawyer A is an approved lawyer with Title Insurer. Title Insurer has issued at least one closing protection letter for Lawyer A. May Lawyer A voluntarily permit Title Insurer to audit his trust account?

Opinion #1:

Yes, Lawyer A may voluntarily permit Title Insurer to audit any trust account used solely for real estate closings provided the audit is limited to transactions insured by Title Insurer and, further provided, Lawyer A obtains certain assurances from Title Insurer.

Rule 1.6 requires a lawyer to protect from disclosure all information acquired during the professional relationship including information about a client contained in the lawyer's trust account records. Nevertheless, confidential information may be revealed when the client gives informed consent, disclosure is impliedly authorized to carry out the representation, or a specific

exception allowing disclosure set forth in paragraph (b) of Rule 1.6 applies. Although the specific exceptions are not applicable here, the general exception that permits disclosure to carry out the representation is applicable. A self-evident objective of both the lender and the buyer/borrower, the clients in a real estate transaction, is that the loan proceeds will be used for the purpose for which they were intended and not misused or misappropriated by the closing lawyer. Therefore, there is implied consent by real estate clients to disclose such information as may be necessary to prevent defalcations including information necessary for a title insurer to perform an audit of the lawyer's trust account.

It cannot be assumed that non-real estate clients impliedly authorize the disclosure of confidential information about their deposits to a lawyer's general trust account to a title insurance company. Moreover, it cannot be assumed that a real estate client's implied consent extends to title companies that did not insure the client's transaction. Absent the express consent of those clients whose confidential information may be disclosed, a lawyer may only allow an audit that is limited to certain financial records related to a trust account used solely for real estate closings and to certain financial records related to real estate transactions insured by the title insurer. Specifically, the audit must be limited to review of the following records on the trust account: bank statements and deposit tickets for three months (not including copies of checks); reconciliation reports for three months (confidential client information redacted); and the general ledger for six months (names of payees redacted). The audit shall also be limited to the following records of real estate transactions insured by the title insurer: copies of cancelled checks; copies of deposited checks; cash receipts (if any); disbursement receipts; closing instructions; settlement statements (all drafts and final versions); pay-off statements; wiring instructions and wire confirmations; all recorded documents; the client-specific ledger; and the bank statement from any open interest-bearing account used for the transaction.

This opinion can be distinguished from 98 FEO 10 which holds that an insurance defense lawyer may not disclose confidential information about an insured's representation in bills submitted to an independent audit company at the insurance carrier's request unless the insured consents. That opinion provides that a lawyer should not ask for the consent of the insured "[w]hen the insured could be prejudiced by agreeing and gains nothing" such that "a disinterested lawyer would not conclude that the insured should agree in the absence of some special circumstance." 98 FEO 10 presumes that the interests of the insured and the insurance carrier relative to the payment of legal fees are in conflict because the insured wants the best defense money can buy and the insurance carrier wants to limit its expenditures on legal fees. This is not the case with regard to audits of real estate trust accounts where a title insurer's interest in preventing the theft of closing funds by a lawyer can be presumed to be the same as that of the buyer and the seller of the property. Another distinction resides in the type of information that would be obtained in an audit of a bill for legal services and in the audit of trust account records for a real estate closing. The legal bill often contains detailed information about the representation which is clearly confidential and may also be privileged under the law of evidence. Although the limited client information gained in an audit of a real estate trust account is confidential, it is probably not privileged.1 Therefore, the risk that the privilege will be waived as a consequence of the audit is remote.

To further protect confidential client information during the audit process, prior to an audit, Lawyer A must obtain written assurances from the title insurer of the following: (1) the information disclosed will be used for no other purposes than to confirm the proper use of funds and the lawyer's compliance with the trust accounting requirements in Rule 1.15; (2) the information will not be used by the title insurer for marketing or business purposes other than risk management; (3) access to the information will be limited to those employees of the title insurer who need the information to make risk management decisions; and (4) the disclosed information will not be shared with any third party except the State Bar and, in the event a defalcation is discovered, the information will be disclosed to the State Bar or other appropriate authorities. *See* Rule 1.15. Regardless of the title insurer's duty to report evidence of a defalcation to the State Bar, any North Carolina lawyer who has such knowledge is also required to report to the State Bar pursuant to Rule 8.3(a).

Although Lawyer A must obtain title insurer's written assurances relative to protecting confidential client information, he is not prohibited from allowing the title insurer's conclusions as a result of the audit to be released to a third party such as another title insurer.

Inquiry #2:

May Lawyer A voluntarily permit Title Insurer to examine and review Lawyer A's reconciliation reports whether generated by Lawyer A and his staff, or generated by an outside reconciliation service employed by Lawyer A?

Opinion #2:

Yes, provided the reconciliation reports are for a trust account that is used solely for real estate closings and the required written assurances from the title insurer set forth in opinion #1 are obtained. *See* opinion #1 above.

Inquiry #3:

Title Insurer conditions designation as an approved lawyer on the lawyer's agreement that Title Insurer may audit the lawyer's trust account and review the lawyer's reconciliation reports upon request. May a lawyer seek designation as an approved lawyer for Title Insurer?

Opinion #3:

Yes, provided the audit is limited to trust accounts, or the reconciliation reports therefore, that are used solely for real estate closings and the required written assurances from the auditor and the title insurer set forth in opinion #1 are obtained. *See* opinion #1 above.

Inquiry #4:

Would the responses to any of the preceding inquiries be different if multiple lawyers in the same firm use the same real estate trust account?

Opinion #4:

No.

Inquiry #5:

As noted above, many real estate lawyers use outside reconciliation services to reconcile their trust accounts. Is this practice permitted under the Rules of Professional Conduct?

Opinion #5:

Yes, a lawyer may delegate reconciliation to a company or to a non-lawyer who is not employed in the lawyer's firm provided the lawyer makes reasonable efforts to ensure that the person(s) providing the reconciliation services understands the lawyer's professional duties with regard to the management of the trust account under Rule 1.15 and also with regard to the protection of client confidences under Rule 1.6. The lawyer remains professionally responsible for the proper management and reconciliation of the account. *See* Rule 5.3.

Endnote

1. A privilege exists if (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated, and (5) the client has not waived the privilege. It is, however, a qualified privilege subject to the general supervisory powers of the trial court. *State v. McIntosh*, 336 NC 517, 444 S.E.2d 438 (1994).

2011 Formal Ethics Opinion 7
January 27, 2012

Using Online Banking to Manage a Trust Account

Opinion rules that a law firm may use online banking to manage its trust accounts provided the firm's managing lawyers are regularly educated on the security risks and actively maintain end-user security.

Inquiry:
Most banks and savings and loans provide "online banking" which allows customers to access accounts and conduct financial transactions over the internet on a secure website operated by the bank or savings and loan. Transactions that may be conducted via on-line banking include account-to-account transfers, payments to third parties, wire transfers, and applications for loans and new accounts. Online banking permits users to view recent transactions and view and/or download cleared check images and bank statements. Additional services may include account management software.

Financial transactions conducted over the internet are subject to the risk of theft by hackers and other computer criminals. Given the duty to safeguard client property, particularly the funds that a client deposits in a lawyer's trust account, may a law firm use online banking to manage a trust account?

Opinion:

Yes, provided the lawyers use reasonable care to minimize the risk of loss or theft of client property specifically including the regular education of the firm's managing lawyers on the *ever-changing* security risks of online banking and the active maintenance of end-user security.

As noted in [Proposed] 2011 FEO 6, *Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property*, the use of the internet to transmit and store client data (or, in this instance, data about client property) presents significant challenges. In this complex and technical environment, a lawyer must be able to fulfill the fiduciary obligations to protect confidential client information and property from risk of disclosure and loss. The lawyer must protect against security weaknesses unique to the internet, particularly "end-user" vulnerabilities found in the lawyer's own law office. The lawyer must also engage in frequent and regular education about the security risks presented by the internet.

Rule 1.15 requires a lawyer to preserve client property, to deposit client funds entrusted to the lawyer in a separate trust account, and to manage that trust account according to strict recordkeeping and procedural requirements. *See also* RPC 209 (noting the "general fiduciary duty to safeguard the property of a client") and 98 FEO 15 (requiring a lawyer to exercise "due care" when selecting depository bank for trust account). The rule is silent, however, about online banking.

Nevertheless, online banking may be used to manage a client trust account if the recordkeeping and fiduciary obligations in Rule 1.15 can be fulfilled. The recordkeeping requirements for trust accounts are set forth in Rule 1.15-3. Rule 1.15-3(b)(3) specifically requires a lawyer to maintain the following records relative to the transfer of funds from the trust account:

all instructions or authorizations to transfer, disburse, or withdraw funds from the trust account (including electronic transfers or debits), or a written or electronic record of any such transfer, disbursement, or withdrawal showing the amount, date, and recipient of the transfer or disbursement, and, in the case of a general trust account, also showing the name of the client or other person to whom the funds belong;
If the online banking software does not provide a method for making an official bank record of the required information when money is transferred from the trust account to another account, such transfers must be handled by a method that provides the required records.
To fulfill the fiduciary obligations in Rule 1.15, a lawyer managing a trust account must use reasonable care to minimize the risks to client funds on deposit in the trust account by remaining educated as to the dynamic risks involved in online banking and insuring that the law firm invests in proper protection and multiple layers of security to address those risks. *See* [Proposed] 2011 FEO 6.

A lawyer who is managing a trust account has affirmative duties to regularly educate himself as to the security risks of online banking; to actively maintain end-user security at the law firm through safety practices such as strong password policies and procedures, the use of encryption, and security software, and the hiring of an information technology consultant to advise the lawyer or firm employees; and to insure that all staff members who assist with the management of the trust account receive

training on and abide by the security measures adopted by the firm. Understanding the contract with the depository bank and the use of the resources and expertise available from the bank are good first steps toward fulfilling the lawyer's fiduciary obligations.

This opinion does not set forth specific security requirements because mandatory security measures would create a false sense of security in an environment where the risks are continually changing. Instead, due diligence and frequent and regular education are required. A lawyer must fulfill his fiduciary obligation to safeguard client funds by applying the same diligence and competency to manage the risks of on-line banking that a lawyer is required to apply when representing clients.

2013 Formal Ethics Opinion 13

January 24, 2014

Disbursement Against Funds Credited to Trust Account by ACH and EFT

Opinion rules that a lawyer may disburse immediately against funds that are credited to the lawyer's trust account by automated clearinghouse (ACH) transfer and electronic funds transfer (EFT) despite the risk that an originator may initiate a reversal.

Inquiry:

The originator of an automated clearinghouse (ACH) transfer[1] or an electronic funds transfer (EFT) can initiate a reversal of the transaction. However, the reversal must be requested by the originating bank and approved by the receiving bank. When a bank receives a reversal request, it typically will attempt to obtain authorization from the individual whose account was credited before making a reversal.

May a lawyer disburse immediately against funds that are credited to her trust account by ACH or EFT if there is some risk that the originator may initiate a reversal?

Opinion:

Yes. Electronic funds transfers, whether ACH or EFT, are designed to make funds available immediately, like wired funds. While there is some risk that the originator may initiate a reversal, the risk of reversal is slight. Moreover, the lawyer should get notice from the receiving bank in time to take action to prevent the reversal or otherwise to protect other client funds on deposit in the trust account. *See, e.g.*, 97 FEO 9 (lawyer may accept payments to a trust account by credit card although the bank is authorized to debit the trust account in the event a credit card charge is disputed).

A lawyer is not guilty of professional misconduct if that lawyer, upon learning that an ACH or EFT has been reversed, immediately acts to protect the funds of the lawyer's other clients on deposit in the trust account. This may be done by personally depositing the funds necessary to address the deficit created by the reversal or by securing or arranging payment from sources available to the lawyer other than trust account funds of other clients. *See* RPC 191.

Endnote

1. When a paper check is converted to an automated clearinghouse (ACH) debit, the check is taken either at the point-of-sale or through the mail for payment, the account information is captured from the check, and an electronic transaction is created for payment through the ACH system. The original physical check is typically destroyed by the converting entity (although an image of the check may be stored for a certain period of time). A law firm may convert the paper checks that it receives on behalf of a client or a client matter for payment to the trust account through the ACH system.

Authorized ACH debits from the trust account that are electronic transfers of funds (in which no checks are involved) are allowed provided the lawyer maintains a record of the transaction as required by Rule 1.15-3(b)(3) and (c)(3). The record, whether consisting of the instructions or authorization to debit the account, a record or receipt from the register of deeds or a financial institution, or the lawyer's independent record of the transaction, must show the amount, date, and recipient of the transfer or disbursement, and, in the case of a general trust account, also show the name of the client or other person to whom the funds belong.

Nevertheless, checks *drawn* on a trust account should not be converted to ACH because the lawyer will not receive a physical check or a check image that can be retained in satisfaction of the record-keeping requirements in Rule 1.15-3. The transaction will appear on the lawyer's trust account statement as an ACH debit with limited information about the payment (e.g., dollar amount, date processed, originator of the ACH debit). For this reason, lawyers are required to use business-size checks that contain an Auxiliary-On-Us field in the MICR line of the check because these checks cannot be converted to ACH. *See* Rule 1.15-3(a).

See generally Rule 1.15, comments [17] and [18] .

2015 Formal Ethics Opinion 6

October 23, 2015

Lawyer's Professional Responsibility When Third Party Steals Funds from Trust Account

Opinion rules that when funds are stolen from a lawyer's trust account by a third party who is not employed or supervised by the lawyer, and the lawyer was managing the trust account in compliance with the Rules of Professional Conduct, the lawyer is not professionally responsible for replacing the funds stolen from the account.

NOTE: This opinion is limited to a lawyer's professional responsibilities and is not intended to opine on a lawyer's legal liability.

Inquiry #1:

John Doe, a third party unaffiliated with Lawyer, created counterfeit checks that were identical to Lawyer's trust account checks. John Doe made the counterfeit checks, purportedly drawn on Lawyer's trust account, payable to himself and presented the counterfeit checks for payment at Bank. Bank honored some of the counterfeit checks. As a consequence, client funds held by Lawyer in his trust account were utilized for an unauthorized purpose. Lawyer properly supervised all nonlawyer staff participating in the record keeping for the trust account. Lawyer also maintained the trust account records and reconciled the trust account as required by Rule 1.15-3. Lawyer had no knowledge of the fraud and had no opportunity to prevent the theft.

Does Lawyer have a professional responsibility to replace the stolen funds?

Opinion #1:

No.

A lawyer who receives funds that belong to a client assumes the responsibilities of a fiduciary to safeguard those funds and to preserve the identity of the funds by depositing them into a designated trust account. Rule 1.15-2, RPC 191, and 97 FEO 9. The responsibilities of a fiduciary include the duty to ensure that the funds of a particular client are used only to satisfy the obligations of that client. RPC 191 and 97 FEO 9. Rule 1.15-3 requires a lawyer to keep accurate records of the trust account and to reconcile the trust account. A lawyer has an obligation to ensure that any nonlawyer assistant with access to the trust account is aware of the lawyer's professional obligations regarding entrusted funds and is properly supervised. Rule 5.3.

If Lawyer has managed the trust account in substantial compliance with the requirements of the Rules of Professional Conduct (*see* Rules 1.15-2, 1.15-3, and 5.3) but, nevertheless, is victimized by a third party theft, Lawyer is not required to replace the stolen funds. If, however, Lawyer failed to follow the Rules of Professional Conduct on trust accounting and supervision of staff, and the failure is a proximate cause of theft from the trust account, Lawyer may be professionally obligated to replace the stolen funds. *Compare* RPC 191 (if a lawyer disburses against provisionally credited funds, the lawyer is responsible for reimbursing the trust account for any losses caused by disbursing before the funds are irrevocably credited).

Under all circumstances, Lawyer must promptly investigate the matter and take steps to prevent further thefts of entrusted funds. Lawyer must seek out every available option to remedy the situation including researching the law to determine if Bank is liable;[1] communicating with Bank to discuss Bank's liability; asking Bank to determine if there is insurance to cover the loss; considering whether it is appropriate to close the trust account and transfer the funds to a new trust account; and working with law enforcement to recover the funds.

Inquiry #2:

Prior to learning of the fraud and theft from the trust account, Lawyer issued several trust account checks to clients and/or third parties for the benefit of a client. Despite the theft, there are sufficient total funds in the trust account to satisfy the outstanding checks. However, because of the theft, funds belonging to other clients will be used if the outstanding checks are cashed.

What is Lawyer's duty to safeguard the remaining funds in the trust account?

Opinion #2:

Lawyer must take reasonable measures to ensure that funds belonging to one client are not used to satisfy obligations to another client. Such reasonable measures include, but are not limited to, requesting that Bank issue stop payments on outstanding trust account checks; providing Bank with a list of outstanding checks and requesting that Bank contact Lawyer before honoring any outstanding checks; and determining if Bank is liable and, if so, demanding the outstanding checks be covered by Bank. If Lawyer determines Bank is not liable or liability is unclear, Lawyer must maintain the status quo and prevent further loss by not issuing new trust account checks. If payment will be stopped on the outstanding checks, Lawyer must contact the payees and alert them to the problem.

Inquiry #3:

Assume the same facts in Inquiry #2 except there are insufficient funds in the trust account to satisfy the outstanding checks. Must Lawyer deposit funds into the trust account to ensure that the outstanding checks are not presented against an account with insufficient funds?

Opinion #3:

No. In addition to the remedial measures listed in Opinion #2, Lawyer should notify the payees if Lawyer knows that the checks will not clear.

Inquiry #4:

Hacker gains illegal access to Lawyer's computer network and electronically transfers the balance of the funds in Lawyer's trust account to a separate account that is controlled by Hacker. Lawyer's trust account now has a zero balance. Lawyer has written several trust account checks to clients and/or third parties for the benefit of clients. Because of the theft, there are insufficient funds in the trust account to satisfy the outstanding checks.

Does Lawyer have a professional responsibility to replace the stolen funds?

Opinion #4:

No, Lawyer is not obligated to replace the stolen funds provided he has taken reasonable care to minimize the risks to client funds by implementing reasonable security measures in compliance with the requirements of Rule 1.15.

Rule 1.15 requires a lawyer to preserve client property, to deposit client funds entrusted to the lawyer in a separate trust account, and to manage that trust account according to strict recordkeeping and procedural requirements. To fulfill the fiduciary obligations in Rule 1.15, a lawyer managing a trust account must use reasonable care to minimize the risks to client funds on deposit in the trust account. 2011 FEO 7.

In 2011 FEO 7 the Ethics Committee opined that a lawyer has affirmative duties to educate himself regularly as to the security risks of online banking; to actively maintain end-user security at the law firm through safety practices such as strong password policies and procedures, the use of encryption and security software, and the hiring of an information technology consultant to advise the lawyer or firm employees; and to insure that all staff members who assist with the management of the trust account receive training on and abide by the security measures adopted by the firm.

If Lawyer has taken reasonable care to minimize the risks to client funds, Lawyer is not ethically obligated to replace the stolen funds. If, however, Lawyer failed to use reasonable care in following the Rules of Professional Conduct on trust accounting and supervision of staff, and the failure is a proximate cause of theft from the trust account, Lawyer may be professionally obligated to replace the stolen funds.

Inquiry #5:

Lawyer is retained to close a real estate transaction. Prior to the closing, Lawyer obtains information relevant to the closing, including the seller's name and mailing address. Lawyer also receives into his trust account the funds necessary for the closing. Lawyer's normal practice after the closing is to record the deed and disburse the funds. Lawyer then mails a trust account check to the seller in the amount of the seller proceeds.

Hacker gains access to information relating to the real estate transaction by hacking the email of one of the parties (lawyer, realtor, or seller). Hacker then creates a "spoof" email address that is similar to realtor's or seller's email address (only one letter is different). Hacker emails Lawyer with disbursement instructions directing Lawyer to wire funds to the account identified in the email instead of mailing a check to seller at the address included in Lawyer's file as previously instructed.[2] Lawyer follows the instructions in the email without first implementing security measures such as contacting the seller by phone at the phone number included in Lawyer's file to confirm the wiring instructions. After the closing and disbursement, the true seller calls Lawyer and demands his funds. Lawyer goes to Bank to request reversal of the wire. Bank refuses to reverse the wire and will not cooperate or communicate with Lawyer without a subpoena.

While pursuing other legal remedies, does Lawyer have a professional responsibility to replace the stolen funds?

Opinion #5:

Yes. Lawyers must use reasonable care to prevent third parties from gaining access to client funds held in the trust account. As stated in Opinion #4, Lawyer has a duty to implement reasonable security measures. Lawyer did not verify the disbursement change by calling seller at the phone number listed in Lawyer's file or confirming seller's email address. These were reasonable security measures that, if implemented, could have prevented the theft. Lawyer is, therefore, professionally responsible and must replace the funds stolen by Hacker. If it is later determined that Bank is legally responsible, or insurance covers the stolen funds, Lawyer may be reimbursed.

Inquiry #6:

While pursuing the remedies described in Opinion #2, may Lawyer deposit his own funds into the trust account?

Opinion #6:

Yes.

Generally, no funds belonging to a lawyer shall be deposited in a trust account or fiduciary account of the lawyer. Rule 1.15-2(f). The exceptions to the rule permit the lawyer to deposit funds sufficient to open or maintain an account, pay any bank service charges, or pay any tax levied on the account. *Id*. The exceptions were expanded in 1997 FEO 9 to include the deposit of lawyer funds when a bank would not route credit card chargeback debits to the lawyer's operating account. These exceptions to the prohibition on commingling enable lawyers to fulfill the fiduciary duty to safeguard entrusted funds.

Therefore, notwithstanding the prohibition on commingling, Lawyer may deposit his own funds into the trust account to replace the stolen funds until it is determined whether the Bank is liable for the loss, insurance is available to cover the loss, or the funds are otherwise recovered. If Lawyer decides to deposit his own funds, he must ensure that the trust accounting records accurately reflect the source of the funds, the reason for the deposit, the date of the deposit, and the client name(s) and matter(s) for which the funds were deposited.

Inquiry #7:

With regard to all of the situations described in this opinion, what duties does Lawyer owe to the clients whose funds were stolen?

Opinion #7:

Lawyer must notify the clients of the theft and advise the clients of the consequences for representation; help the clients to identify any source of funds, such as bank liability and insurance, to cover their losses; defer a client's matter (by seeking a continuance, for example) if necessary to protect the client's interest; and explain to third parties or opposing parties as necessary to protect the client's interests. If stop payments are issued against outstanding checks, Lawyer must take the remedial measures outlined in Opinions #1 and #2 to protect the client's interest. Finally, Lawyer must report the theft to the North Carolina State Bar's Trust Accounting Compliance Counsel.

Endnote

1. *See e.g.* N.C. Gen. Stat. §25-4-406.

2. The inquiry assumes that Lawyer believed that, by wiring the funds to the account designated in the email, he was disbursing the funds to the seller as required by the settlement statement.
This opinion does not address the issues of professional responsibility raised when a lawyer knowingly makes disbursements contrary to a settlement statement.

Attorney/Underwriter Affiliation

RPC 185

OWNERSHIP OF STOCK IN TITLE INSURANCE AGENCY

October 21, 1994
Opinion rules that a lawyer who owns any stock in a title insurance agency may not give title opinions to the title insurance company for which the title insurance agency issues policies.
Inquiry:
Attorney A has been invited to purchase shares of stock in a new North Carolina corporation to be called "Title Agency." Pursuant to a written contract, Title Agency will be an agent of Title Insurer for the purpose of issuing title policies and title commitments. Title Agency will do business in conformity with G.S. §58-27-5 and will comply with the prohibition on the unauthorized practice of law set forth in Chapter 84 of the General Statutes. Attorney A will give Title Insurer title opinions regarding transactions for which Attorney A acts as the closing lawyer. Attorney A is not an agent of Title Insurer and will not be an employee of Title Agency or a person holding a license pursuant to Chapter 58 of the General Statutes. Attorney A would like to acquire stock in Title Agency without violating the requirements of CPR 101 or engaging in any other unethical

conduct. What percentage of the shares of stock of Title Agency may Attorney A acquire without violating the Rules of Professional Conduct?

Opinion:

CPR 101 held that it is unethical for a lawyer who owns a substantial interest, directly or indirectly, in a title insurance company, agency, or agent, who acts as a lawyer in a real estate transaction insured by such title insurance company or through such agency or agent, to receive any commission, fee, salary, dividend, or other compensation or benefit from the title insurance company, agency, or agent, regardless of whether the ownership interest is disclosed to the client for whom the services are performed.

CPR 101 was based on the Code of Professional Responsibility which has been supplanted by the Rules of Professional Conduct. Rule 5.1(b) now governs potential conflicts of interest between a lawyer's own interests and the representation of a client. The rule disqualifies a lawyer from representing a client if the representation of the client may be materially limited by the lawyer's own interests unless: 1) the lawyer reasonably believes that the representation will not be adversely affected; and 2) the client consents after full disclosure.

CPR 101 authorized a lawyer who owns an insubstantial interest in a title insurance agency to render title opinions to the title insurer and to receive compensation from the title insurance agency in the form of dividends or otherwise. Even an insubstantial interest in a title insurance agency, however, could materially impair the judgment of a closing lawyer. RPC 49 addresses a closing lawyer's duty to his or her client when the lawyer owns shares in a realty firm that will realize a commission upon the closing of the transaction. RPC 49 states that the conflict of interest is too great to be allowed even if the client wishes to consent. This conflict is also present when a title agency, and, therefore, indirectly the closing lawyer who owns an interest in the title agency, will receive compensation from the client as a result of the closing of the transaction. The lawyer's personal interest in having the title insurance agency receive its compensation could conflict with the lawyer's duty to close the transaction only if it is in the client's best interest.

This opinion does not prohibit a lawyer from owning stock in a publicly traded title insurance company.

99 Formal Ethics Opinion 6

July 23, 1999

Ownership of Title Agency

Opinion examines the ownership of a title insurance agency by lawyers in North and South Carolina as well as the supervision of an independent paralegal.

Inquiry #1:

Certain lawyers, some licensed to practice in only North Carolina and some licensed to practice in both North and South Carolina, own and operate a title insurance agency that issues title policies for properties in both North and South Carolina. The lawyers who are licensed to practice in South Carolina provide title certification to the title agency for the purpose of writing title policies on South Carolina properties.

May a North Carolina lawyer own all or part of a title insurance agency that writes title policies on North Carolina property?

Opinion #1:

Yes, provided the lawyer does not give a title opinion to the title insurance company for which the title agency issues policies. *See* RPC 185.

Inquiry #2:

May North Carolina lawyers own all or part of a title insurance company that writes title policies in South Carolina?

Opinion #2:

Yes, if allowed by law.

Inquiry #3:

May North Carolina lawyers act as title insurance agents for a title insurance company owned by the same lawyers?

Opinion #3:

Yes, if allowed by law and subject to opinion #1 above.

Inquiry #4:

May lawyers licensed to practice in both North and South Carolina who own a title insurance agency that writes policies in both states provide title certifications to the agency for real estate located in South Carolina?

Opinion #4:

Yes, if allowed by law and the ethical code of South Carolina.

Inquiry #5:

The North Carolina lawyers provide title certification services for North Carolina real estate transactions. To undertake certification of title to real estate located outside of the lawyers' immediate community, the lawyers utilize independent title abstractors who are not licensed lawyers. Prior to utilizing the services of a title abstractor, the lawyers conduct an interview of each abstractor, evaluate his or her procedures and methods, determine his or her level of education and experience, and

conduct a reference check to evaluate the abstractor's performance history. Is this level of supervision adequate under the Revised Rules of Professional Conduct?

Opinion #5:

No. RPC 216 requires a lawyer who is using the services of a non-lawyer independent contractor to search a title to take reasonable steps to ascertain that the non-lawyer is competent and, at all times that the non-lawyer is assisting the lawyer, to provide the non-lawyer with appropriate supervision and instruction regardless of the distance between the lawyer and non-lawyer. *See* Rule 5.3. The opinion also indicates that the lawyer may not issue a title opinion unless the opinion is based upon the lawyer's own independent professional judgment, competence, and personal knowledge of the relevant records and documentation. *See also* the *Guidelines for Use of Non-Lawyers in Rendering Legal Services* of the North Carolina State Bar (July 18, 1998, #10). [Note: this opinion assumes that the lawyer is not giving a title certification to the title agency owned by the lawyer. *See* G.S. §58-26-1(a).]

2009 Formal Ethics Opinion 14

October 29, 2010

Placing Client's Title Insurance in Agency in Which Lawyer's Spouse Has an Ownership Interest

Opinion rules that a lawyer participating in a real estate transaction may not in such transaction place his client's title insurance in a title insurance agency in which the lawyer's spouse has any ownership interest.

Inquiry:

May Lawyer participating in a real estate transaction place his client's title insurance with a title insurance agency in which Lawyer's spouse has an ownership interest?

Opinion:

No. Rule 1.7 provides that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if the representation of one or more clients may be materially limited by a personal interest of the lawyer. Rule 1.7(a)(2).

The Ethics Committee has previously examined personal conflicts of interest between title insurance agencies and real estate closing lawyers. In CPR 101 (1977), the Ethics Committee concluded that it is unethical for a lawyer who owns a substantial interest, directly or indirectly, in a title insurance agency, and who acts as a lawyer in a real estate transaction insured by the title insurance agency, to receive any compensation or benefit from the title insurance agency regardless of whether the ownership interest is disclosed to the client.

In RPC 185 (1994), the Ethics Committee determined that even an insubstantial interest in a title insurance agency could materially impair the judgment of the closing lawyer. The opinion provides that if a title agency, and, therefore, indirectly a closing lawyer who owns an interest in the title agency, will receive compensation from the client as a result of the closing of the transaction, the lawyer's personal interest in having the title insurance agency receive its compensation could conflict with the lawyer's duty to close the transaction only if it is in the client's best interest. The opinion held that the conflict of interest is too great to be allowed even if the client wishes to consent.

In an unpublished ethics decision, ED 97-6 (1998), the Ethics Committee examined a fact scenario substantially similar to the one currently presented and determined that it is a conflict of interest for a lawyer to perform title work and place the title insurance with a title insurance agency operated by the lawyer's spouse.

The instant scenario presents a personal conflict of interest. The lawyer's personal interest in having his spouse's title insurance agency receive its compensation may conflict with the lawyer's duty to close the transaction only if it is in the client's best interest. In addition, the lawyer's personal relationship with the owner of the title insurance company will influence the lawyer's choice of the spouse's company as the insurer, as well as the vigorousness of the lawyer's negotiations with the title company on his client's behalf. Issues of title insurance coverage may have to be negotiated between the closing lawyer and

the insurer. The lawyer's client and the insurer will necessarily have competing interests as to the extent of the coverage and the amount of the premium.

The conflict of interest is too great to be allowed, even with the client's informed consent. A closing lawyer must be able to make an independent recommendation of a title insurance company to his client, unbiased by any personal interest. In addition, a lawyer opining on title to property should be independent from the title insurance agency issuing the title insurance in reliance upon that opinion. This is consistent with the emphasis that the North Carolina legislature has placed on the professional and financial independence of the closing lawyer from the title insurance agency. *See, e.g.* N.C.G.S. § 58-26-1(a)(title insurance company may not issue insurance as to North Carolina real property unless the company has obtained the opinion of a North Carolina licensed attorney who is *not an employee or agent of the company*) and N.C.G.S. § 58-27-5(a) (lawyer who performs legal services incident to a real estate sale may not receive any payment, directly or indirectly, in connection with the issuance of title insurance for any real property which is a part of such sale).

This scenario differs from RPC 188, in which the Ethics Committee concluded that a lawyer may represent the buyer and/or lender in a real estate transaction brokered by the lawyer's spouse. RPC 188 provides that, although there is a conflict, clients may consent to the representation. RPC 188 can be distinguished because the lawyer did not choose the real estate broker for his client and was not involved in negotiations with the real estate broker as to the terms of the real estate sales contract.

2011 Formal Ethics Opinion 4

April 27, 2012

Participation in Referral Arrangement

Opinion rules that a lawyer may not agree to procure title insurance exclusively from a particular title insurance agency on every transaction referred to the lawyer by a person associated with the agency.

Inquiry #1:

Attorney has developed a good working relationship with Referring Party who, over time, has referred real estate closings to Attorney's office. Referring Party has some affiliation with Title Insurance Agency. Attorney desires to maintain this working relationship with Referring Party. As a condition of receiving further referrals, Referring Party asks that Attorney agree to procure title insurance exclusively from Title Insurance Agency on every transaction referred to Attorney by Referring Party. May Attorney agree to such a referral arrangement with Title Insurance Agency?

Opinion #1:

No. The ethical duties set forth in the Rules of Professional Conduct prohibit a lawyer from entering into an exclusive reciprocal referral agreement with any service provider. Such an arrangement impairs the lawyer's ability to provide independent professional judgment in violation of Rules 2.1 and 5.4(c). In addition, the arrangement amounts to improper compensation for referrals in violation of Rule 7.2(b). Finally, such an arrangement creates a nonconsentable conflict of interest between the lawyer and the client. *See* Rule 1.7.

In most real estate transactions, the client delegates the choice of title insurer to the lawyer, who is charged with acting in the best interest of the client. In determining what is in the best interests of the client, it is appropriate for the lawyer to consider among other things the fees charged for title insurance, the financial stability of the insurer and/or title insurance underwriter, the willingness of the title insurer to provide coverage regarding title matters, and the ability of the insurer to meet the needs of the client with regard to the transaction.

The lawyer may also consider the lawyer's working relationship with a specific title insurer, particularly where the relationship may prove beneficial to the client. This is true even where the client has been referred to the lawyer by someone affiliated with the specific title insurer. The lawyer may, and should, strive to cultivate the types of business relationships and provide the quality of legal services that will encourage clients and other professionals to recommend the lawyer's services. What a lawyer cannot do, however, is permit a person who recommends the lawyer's services to direct or regulate the lawyer's professional judgment in rendering the legal services. *See* Rule 5.4(c).

If the client indicates a preference as to a particular title insurance company that the lawyer does not believe is the best selection for the client, the lawyer's role is to counsel the client so that the client may make an informed decision. Ultimately, the choice of the title insurer in a real estate transaction is in the province of the client acting in consultation with the lawyer.

Inquiry #2:

Upon becoming aware that another lawyer has agreed to procure title insurance exclusively from a title insurance agency on every transaction referred to the lawyer by someone associated with the title insurance company, is Attorney under an ethical obligation to report and refer the other lawyer's conduct to the State Bar?

Opinion #2:

Rule 8.3(a) requires a lawyer to inform the State Bar if the lawyer knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer. Attorney should communicate his concerns to the other lawyer and recommend that the lawyer contact the State Bar for an ethics opinion as to his continuing participation in what appears to be an improper referral arrangement. After this communication, if Attorney has knowledge that the lawyer has continued his participation in an improper referral arrangement, Attorney must report the lawyer to the State Bar.

Tacking

RPC 99

TITLE INSURANCE TACKING
[Editor's Note: This opinion was originally published as RPC 99 (Revised).]

Adopted April 12, 1991

Opinion rules that a lawyer may tack onto an existing title insurance policy.

Inquiry:
In 1986, Lawyer A represented Mr. Jones in his purchase of a house and lot. A performed a full title search and obtained a title insurance policy for Jones and his lender with Title Insurance Company. In 1990, Jones contracts to sell the house and lot to Ms. Smith. Smith retains Lawyer B to represent her in the transaction. B obtains a copy of the policy Title Insurance Company issued on the property.

Lawyer B's title search for Smith consists of updating Lawyer A's search; B searches the title from 1986 to 1990. Title Insurance Company allows B to apply for title insurance based on the update, and holds A liable for any title defects during A's search period that result in a claim against Smith. A never represented Smith. A has no knowledge that A's work is serving as the basis for providing title insurance to Smith. Title Company has never informed A that A's liability to title company extends beyond the time A's clients owned the property. Lawyer B has made no attempt to obtain A's permission to use A's base title.

May Lawyer B render a title opinion without having conducted a personal inspection of documents in the chain of title?

Opinion:
Yes. A lawyer may ethically render to a title insurance company a limited title opinion based upon a limited examination of the public records for the purpose of obtaining the issuance of a title insurance policy upon real property. The Rules of Professional Conduct do not require personal inspection of all documents in the chain of title so long as the lawyer rendering the opinion fully discloses to his or her client the precise nature of the service being rendered and the full extent thereof. The client should be advised that he or she should rely on the title insurance policy as to matters of title and not upon the attorney's examination of the public records. If the Title Insurance Company is willing to base its underwriting decision upon the fact that it or another title insurance company has previously issued a title insurance policy and Lawyer B's limited title opinion, that does not offend the Rules of Professional Conduct.

Since title insurers frequently omit exceptions in mortgagees' policies that would appear in owners' policies, tacking should be limited to tacking onto owners' policies.

Inquiry:
May Lawyer B tack onto Lawyers A's base title without first obtaining Lawyer A's permission?

Opinion:
Lawyer B may ethically apply for the issuance of a title insurance policy on the basis of her limited title opinion and the fact that a title insurance policy has previously been issued. In so doing, the Rules of Professional Conduct would not require Lawyer B to obtain Lawyer A's permission. It is a question of law as to whether or not Lawyer A's liability to the title insurance company would continue after the issuance of the new policy. It is beyond the purview of this committee to make that determination. A possible solution to this problem might be for a lawyer to include in her opinion to the title insurer a disclaimer to the effect that the opinion is submitted only with respect to the current transaction and is not to be relied upon in any future transaction.

Inquiry:
Must Lawyer B disclose to his or her client that B has updated the title and not performed a full title search? Must the disclosure be in writing? Must the disclosure be made before the client agrees to engage Lawyer B?

Opinion:
The disclosures referred to in the first opinion should be made by Lawyer B to the client prior to accepting employment. Rule 6(b)(2). The disclosures need not be in writing.

2009 Formal Ethics Opinion 17
October 29, 2010

Tacking as Question of Standard of Care

Opinion rules that whether a lawyer rendering a title opinion to a title insurer should tack to an owner's policy of title insurance or a mortgagee's (lender's) policy is a question of standard of care and outside the purview of the Ethics Committee

Inquiry:

RPC 99 holds that the Rules of Professional Conduct do not require personal inspection of all documents in the chain of title so long as a lawyer rendering an opinion on title for real property fully discloses to the client the precise nature and extent of the service being rendered. The opinion further states, "Since title insurers frequently omit exceptions in mortgagees' policies that would appear in owners' policies, tacking should be limited to tacking onto owners' policies."

May a lawyer render a title opinion to a title insurance company by tacking to a mortgagee's (lender's) title insurance policy?

Opinion:

This issue of the appropriate standard of care for rendering a title opinion is outside the purview of the Ethics Committee. To the extent that RPC 99 appeared to opine on the standard of care relative to tacking to an owner's policy versus a mortgagee's (lender's) policy for the purpose of rendering a title opinion, that part of the opinion is withdrawn.

Whether tacking to an owner's policy or a mortgagee's policy, a lawyer's duty is to provide competent representation to his client, consistent with Rule 1.1, and to reasonably consult with the client about the means used to accomplish the client's objectives. Rule 1.4(a)(2). The lawyer must consult with the client before using a method of rendering a title opinion that might present additional risk for the client.

Obtaining Canceled Documents

99 Formal Ethics Opinion 5

July 23, 1999

Obtaining Canceled Deed of Trust Following Residential Real Estate Closing

Opinion rules that whether the lawyer for a residential real estate closing must obtain the cancellation of record of a prior deed of trust depends upon the agreement of the parties.

Inquiry #1:

Attorney A engages in a high volume real estate practice. She routinely handles closing transactions in which existing mortgage loans are paid. Attorney A follows a procedure in which the payoff check is directed to the owner and holder of the note with a cover letter that directs the owner and holder to mark the original note and the deed of trust securing the note "paid and satisfied in full" and requests that the original papers be returned to Attorney A's office. Upon receipt of the "paid and satisfied"papers, Attorney A delivers the papers to the appropriate county registry for cancellation. Attorney A includes in the payoff letter a reference to N.C.G.S. 45-36.3(a)(1) which requires that "the holder of the evidence of the indebtedness" shall "within sixty days discharge and release of record such document and forward the document to the grantor, trustor, or mortgagor."

Lenders routinely fail to comply with their duty to return paid loan documents. Although Attorney A sends at least two reminder letters to lenders who fail to cooperate, she does not bring a lawsuit against lenders to enforce the return of the loan documents. Is Attorney A required by the Revised Rules of Professional Conduct to continue diligently to try to obtain the loan documents including bringing a civil action against a lender if necessary?

Opinion #1:

Although Rule 1.3 of the Revised Rules of Professional Conduct states that "a lawyer shall act with reasonable diligence and promptness in representing the client," whether there is a duty to obtain paid loan documents from a lender depends upon the lawyer's agreement with the new lender and the borrower. The lawyer's engagement letter, the lender's loan closing instructions, and the lawyer's representations to the clients establish the expectations of the clients. However, Rule 1.2(c) specifically permits a lawyer to limit the objectives of a representation with the client's consent. To avoid any misunderstanding, the lawyer must explain any limitations on her representation. Specifically, if she does not intend to obtain the cancellation of record of the paid deed of trust, she must so advise her clients.

Inquiry #2:

Does the procurement of an owner's title insurance policy relieve the lawyer of a duty to get the deed of trust canceled of record?

Opinion #2:

See opinion #1 above.

Inquiry #3:

If Attorney A collects a $25 "deed of trust cancellation fee," is she required to obtain the cancellation of the deed of trust before closing the file?

Opinion #3:

If a lawyer specifically charges for canceling the existing deed of trust on the property, the lawyer may not close the file until the deed of trust is canceled of record. The cancellation of the deed of trust should be pursued with reasonable diligence and promptness. *See* opinion #1 above.

Inquiry #4:

If Attorney A charges a "payoff processing fee," must she obtain the cancellation of record of the deed of trust before closing the file?

Opinion #4:

There is no practical distinction between a "deed of trust cancellation fee" and a "payoff processing fee." Regardless of what the fee is called, if a fee is charged, the client will expect the deed of trust to be canceled. *See* opinion #3 above.

Inquiry #5:

Is Attorney A required to disclose to the borrower that she will close the client's file after a certain period of time regardless of whether the prior deed of trust is canceled of record and that an uncancelled deed of trust may affect the marketability of title?

Opinion #5:

Attorney A must explain the limits of her representation sufficiently to allow the borrowers to make reasonably informed decisions about the representation. *See* opinion #1 above and Rule 1.4(b).