

Residential Mortgage Lending in North Carolina: Ethical Issues

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Three Questions

1. When is a “PAYOFF” a payoff of a deed of trust or a payoff of a loan?
2. What are “GOOD FUNDS” which are ‘IRREVOCABLY DELIVERED’?
3. What is the “PRACTICE OF LAW”?

ETHICS
IS JUST
“DOING THE RIGHT THING”

OR IS IT?

REAL ESTATE LAW is all
black-and-white, cut-and-dried

OR IS IT?

Closings are:

Relationships

Expectations

Communication

**IF
RELATIONSHIPS ARE NOT
CLEAR
OR
EXPECTATIONS ARE NOT
HONORED**

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REAL COSTS

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TIME

AGGRAVATION

LIABILITY

RPC 17
Revised Rule 8.3(a)

**A lawyer who acquires
knowledge of apparent
misconduct must report this
matter to the State Bar**

Relationships: Working with Others

- Who do you represent?
- Who are you making representations to that will rely on your “word”?
- Who are you making clear that you do not represent?
- Who might think you are representing them unless you clarify otherwise?

Relationships (External)

- Buyer / Borrower
- Seller
- Lender
- Mortgage Broker
- Realtor(s)
- Contractor
- Developer
- Title insurer
- Surveyor
- Prior lender(s)
- Casualty insurer
- DMV (if mobile home)
- Appraiser
- Register of Deeds
- Clerk of Superior Court
- Tax Dept
- Water-sewer Dept
- Planning Dept
- Creditors - incl. IRS
- Other attorneys & courts

Sources of Liability

- Ethical Obligations
- Malpractice vis-à-vis client
- Contractual rights
- Tort (misrepresentation)
- RESPA
- Fraudulent & Deceptive Trade Practices
 - double (G.S. 84 13) damages
 - treble (G.S. 75-1.1) damages

PRACTICE TIP:
Develop CHECKLISTS
or
STANDARD OPERATING
PROCEDURES
for all phases of closing and
responsibilities of all staff
members

PRE-CLOSING MATTERS

Title Evidence

- Discuss title issues with title insurer
- Organize affidavits, indemnities, requirements
- Disclose high-risk issues to parties
- Disclose relationships with parties
(97 FEO 8)

Disclosures - Mandatory

- Multiple representation
 - Buyer-Seller-Lender -- CPR 210
 - Buyer - Developer/Seller -- 97 FEO 8

(Required Pre-closing)
- Tacking (RPC 99)
- If not obtaining cancellations of prior liens (99 FEO 5)

Disclosure in Multiple Party Representation

- RPC 210
 - Existence of common representation
 - Risks of common representation
 - Scope of lawyer's representation of each
 - Explanation that if conflict develops, lawyer must withdraw from representation of all parties & may not continue to represent any of the clients in the transaction

Attorney is deemed to represent
both buyer and lender *unless
otherwise disclosed “in a timely
manner”*

RPC 210 & CPR 100

Disclosure -- representing Developer-Seller & Purchaser (97 FEO 8)

NOTE: RPC 17 - duty to report violations

Disclosure must be made **PRIOR TO CLOSING**
and must include:

- Full disclosure of advantages & risks of multiple representation
- Full disclosure of scope of representation
- Areas of potential conflict

Disclosure -- representing Developer-Seller & Purchaser *(Cont'd)*

- If conflict develops, lawyer must withdraw from representation of all parties
- Seller: Equal responsibilities to buyer
- Buyer: Extent of lawyer's prior & current representation of seller, legal work on the property & all work relating to the development of the subdivision

Disclosures -- recommended

- All title issues, even if affirmative coverage
- Will provide copies of title documents -- any additional charge
- Title Opinion (including Bar Form exclusions from coverage)
- Need title insurance
- Need survey

Cannot require particular attorney

- CPR 108
- CPR 240
- RESPA

No referral fees or fee-splitting

- RESPA
- G.S. 58-27-5
- CPR 104 and RPC 57

When is a “PAYOFF” a payoff
of a deed of trust or a payoff of a
loan?

AT

THE

CLOSING

At the Closing

- Disclosures
- Legal Advice
- Compliance with lender's closing instructions
- Compliance with title insurer's requirements
- Update, recording & final disbursement

Notary Acknowledgments

- Current rules - Chapter 10A of N.C.G.S.
 - Attorney as notary (2000 FEO 8)
 - Proper identification of parties
 - Within NC for NC notary
- Secretary of State's new proposed rules
 - Thumbprints
 - Journal
 - Surety Bond

Follow Lender's *Written* Closing Instructions

- RPC 44
- Accepting matter and/or signing instructions
- Insured Closing liability (incl. buyer/borrower)
- Final policy will reflect if requirements met (or not)
- “First Lien” requirement

Legal Advice -- High-Risk Areas

- Entities -- proper parties, proof of authority
 - Married, separated, pre-nuptial agreements
 - Corporations, LLC's, Partnerships
 - Churches
 - Attorneys in fact
- Seller-financing
- “Second” mortgages

Legal Advice -- High-Risk Areas

- Equity lines

Update, Recording & Disbursement

- RPC 191
- Good Funds Settlement Act
- Final Title Certification
- Lender instructions requiring “first lien” before disbursing funds
- Avoid simultaneous recordings

What are “Good Funds” and
when are they “irrevocably
credited?”

Post-Closing

- Title policy
 - Requirements met?
 - Compliance with closing instructions
- Cancellation of prior deeds of trust (99 FEO 5), taxes and judgments to assure “first lien” position
- Subordinations

REMEMBER!

IT AIN'T OVER UNTIL IT'S
ALL OVER!

Non-Lawyer Assistants

- Revised Rule 5.3
- Guidelines for Use of Non-Lawyers in Rendering Legal Services (7-17-98)
- Independent title abstractors
 - RPC 29 & RPC 216
- Disbarred Attorneys
 - 98 FEO 7, Revised Rule 5.5(d)
- 99 FEO 13, 2001 FEO 4 & 2001 FEO 8 under re-consideration

PENNY-WISE
AND
POUND-FOOLISH

UNAUTHORIZED

PRACTICE

OF

LAW

What is the
“PRACTICE OF LAW”?

The *Independent* Attorney Requirement

G.S. 84-2.1

- Legal documents (deed, deed of trust)
- Abstracting title
- Legal advice

G.S. 58-26-1

- Title certification for title insurance
- Closing Protection Letter

House Counsel cannot provide legal advice to others

- G.S. 84-5 and Rule _____
- Rule _____
- RPC 9
- Corporation cannot practice law
- Attorney cannot share legal fees with non-attorney
- Counsel employed by mortgage broker cannot advise borrowers

Witness Closing -- 98 FEO 8

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Distinguishing the Professional
from the Paper-pusher:

Commitment to Client

&

Commitment to Integrity of
NC's System of Public Records