

**Proposal of The Special Committee on Real Estate Closings of
the North Carolina State Bar
June 21, 2002**

**Authorized Practice Advisory Opinion
On Real Estate Transactions**

In a joint advocacy letter dated December 14, 2001, and in subsequent communications, the Federal Trade Commission and the Antitrust Division of the United States Department of Justice (the Agencies) requested that the North Carolina State Bar reconsider previously-issued opinions and decisions interpreting the North Carolina unauthorized practice of law statutes (N.C. Gen. Stat. §§84-2.1 to 84-5) in the context of residential real estate transactions. The North Carolina State Bar issues the present unauthorized practice of law opinion pursuant to N.C. Gen. Stat. §84-37(f) after full consideration and investigation of the issues raised by the Agencies. 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 that those opinions and decisions are inconsistent with the conclusions expressed herein. For purposes of the advisory opinion set forth below, "non-lawyer" shall mean a person who is not licensed to practice law in North Carolina, is not working under the direct supervision of an active member of the State Bar, and is not a party to the transaction.

Issue:

May a non-lawyer oversee the execution of the documents and disbursement of the proceeds necessary to close a North Carolina residential real estate sale or refinancing provided the non-lawyer does not give any legal advice or opinion?

Opinion:

Yes. Overseeing the execution of the documents and the disbursement of the closing proceeds necessary to complete a North Carolina residential real estate sale or refinancing does not, by itself, constitute the practice of law under the unauthorized practice of law statutes. A non-lawyer may present and identify the necessary documents, direct the parties where to sign, and ensure that the parties properly execute the documents. Also, a non-lawyer may receive and disburse proceeds as necessary to complete a residential real estate transaction. Such activities do not, by themselves, constitute the practice of law.

A non-lawyer who oversees the execution of the closing documents and disbursement of the proceeds may not, however, engage in any activities that constitute the practice of law. Activities that are the practice of law include the drafting of deeds, mortgages, and other legal documents; abstracting title; passing upon or giving an opinion on title; and advising or giving any opinion upon the legal rights of any person, firm or corporation. A non-lawyer who engages in any of these activities violates North Carolina's unauthorized practice of law statutes.

Discussion

Evidence considered by the State Bar 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 and obligations of the parties. At the State Bar's investigatory meeting concerning these matters⁽¹⁾, one experienced real property lawyer testified that at the time the documents are presented for execution, a lawyer may identify, for example, a legal problem concerning the form in which title to the property is to be taken. The witness pointed out that such issues can have significant tax or inheritance consequences for the party taking title. Only a licensed, active member of the North Carolina State Bar is authorized to give legal advice and opinions about such matters. On the whole, the evidence considered by the State Bar indicates that, even though not required by the unauthorized practice of law statutes, it is in the best interest of the consumer to be represented by a lawyer in connection with the execution of the documents and for the lawyer to be physically present when the documents are executed. This opinion should not be interpreted as implying that the State Bar disagrees with that evidence.

The State Bar also considered evidence indicating that having a licensed North Carolina lawyer receive and disburse the closing proceeds provides financial protection to the consumer. In particular, 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. Moreover, the State Bar Client Security Fund, may provide coverage for the injured consumer.

Notwithstanding the important consumer protection role of the lawyer at the execution of residential real estate closing documents and disbursement of the closing proceeds, in N.C. Gen. Stat. Chap. 45A and N.C. Gen. Stat. §24-1.1E(c)(6), the North Carolina General Assembly appears to have specifically contemplated that persons other than lawyers may oversee the execution of the closing documents and disburse closing proceeds. See also 21 N.C.A.C. 58A.0107(h).⁽²⁾

Moreover, the evidence the State Bar has considered shows that the execution of the documents and the disbursement of the proceeds may be accomplished--and often is 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 cannot in all cases be *presumed* that one cannot oversee the execution of residential real estate closing documents and the disbursement of proceeds without giving legal advice or opinions.⁽³⁾

The Agencies have urged that consumers should have the freedom to choose to proceed with the execution of residential real estate closing documents without a lawyer's involvement and that such freedom is likely to increase competition and decrease costs for such services. The State Bar has considered these arguments and the evidence that has been presented concerning them. The State Bar believes that the Agencies' position on these points, although pertinent, has not been proved conclusively. As noted above, the evidence the State Bar has received during its consideration of this matter, on the whole, indicates that the purchaser or borrower generally will be better off retaining a lawyer to protect his or her interests in connection with the execution of residential real estate documents and disbursement of the closing proceeds. As discussed in the preceding paragraph, however, the State Bar believes it to be appropriate to permit the parties to choose to proceed with a non-lawyer who gives no legal advice or opinions, and the State Bar believes that the Agencies' concerns about consumer choice, competition, and cost-savings are satisfactorily addressed by this opinion.

N.C. Gen. Stat. Sec. 24-1.1E(c)(6) prohibits lenders "from shifting any loss, liability, or claim of any kind to the closing agent or closing attorney" for any violation of the section. [Emphasis added.] (G.S. 24-1.1E generally prohibits lenders in home loan transactions from charging excessive interest or engaging in certain practices.)

In view of this opinion, it would, of course, be appropriate for an employee or an officer of a corporation that is a party to a residential real estate transaction to draft documents to which the employee or officer's corporation is a party and to oversee the execution of the closing documents, provided that such person does not give any legal advice or opinion to any of the other parties to the transaction or to any other third party. See *State v. Pledger*, 257 N.C. 634, 127 S.E. 2d 337 (1962).

1.

¹ 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.

2.

² **N.C. Gen. Stat. Chapter 45A, the Good Funds Settlement Act**, in section 45A-3, defines "settlement" and "settlement agent" as follows: (14) "Settlement" means the time when the settlement agent has received the duly executed deed, deed of trust or mortgage, and other loan documents and funds required to carry out the terms of the contracts between the parties.

(15) "Settlement agent" means the person or persons responsible for conducting the settlement and disbursement of the settlement proceeds, and *includes any individual, corporation, partnership, or other entity* conducting the settlement and disbursement of the closing funds. [Emphasis added.]

N.C. Gen. Stat. Sec. 24-1.1E(c)(6) prohibits lenders "from shifting any loss, liability, or claim of any kind to the closing agent or closing attorney" for any violation of the section. [Emphasis added.] (G.S. 24-1.1E generally prohibits lenders in home loan transactions from charging excessive interest or engaging in certain practices.)

3.

³ In view of this opinion, it would, of course, be appropriate for an employee or an officer of a corporation that is a party to a residential real estate transaction to draft documents to which the employee or officer's corporation is a party and to oversee the execution of the closing documents, provided that such person does not give any legal advice or opinion to any of the other parties to the transaction or to any other third party. See *State v. Pledger*, 257 N.C. 634, 127 S.E. 2d 337 (1962).