

January 11, 2008

H. David Whitener, Jr., Esq.
Chairman, Task Force on Closing Responsibilities
Whitener & Wharton, P.A.
2001 Park Street
Columbia, South Carolina 29201

Re: South Carolina Bar Professional Responsibility Committee Subcommittee on Real Estate Closings/Comments to the Preliminary Report of the Task Force on Closing Responsibilities

Dear Dave:

Please accept this letter as the response of the South Carolina Bar's Professional Responsibility Committee's Subcommittee on Real Estate Closings (the "Subcommittee") to the preliminary report (the "Report") of the Task Force on Closing Responsibilities (the "Task Force"). The Subcommittee has aspired to limit its analysis of the Report to professional responsibility issues generally and, specifically, the Rules of Professional Conduct ("RPC") found in Supreme Court Rule 407. The members of the Subcommittee are Todd Ericsson (Chair), Steedley Bogan, Jason Buffkin, Charles Hedgepath, Bill Higgins, and Benton Williamson.

Based on the December 17, 2007 letter from Chief Justice Toal and Lanny Lambert to various South Carolina Bar constituent groups, the Subcommittee understands that the Task Force was asked "to look into the issue of how to ensure consumer protection is provided regarding real estate matters," and "was invited to consider best practices;" consequently, the Subcommittee has attempted to analyze the Task Force's Report in light of those parameters.

Based on the foregoing, the Subcommittee hereby submits the following comments, concerns, and observations in response to the Report:

1. Lack of clarity as to what problems the Report seeks to address and what the Report is intended to accomplish. The Report does not indicate what problems it seeks to address, although clearly unauthorized practice of law is in view. The Report includes two (2) lists dealing specifically with unauthorized practice of law ("UPL") issues (the "UPL Lists"). The UPL Lists appear to be largely an attempt to codify existing South Carolina Supreme Court jurisprudence regarding UPL in real estate transactions; however, it is unclear as to what the Task Force intends the UPL Lists to become. The two (2) "Guidelines" documents included in the Report appear to be an attempt to delineate "best practices" for real estate transactions, but it is unclear as to what the Task Force has intended with respect to those "Guidelines" documents. The Subcommittee believes the Task Force should specify the problems the Report seeks to address. Additionally, the Subcommittee believes that the Task Force should identify how it intends to implement the Report and then should consider the impact such implementation would have on issues related to the unauthorized practice of law, the existing RPC, and standards of care/professional negligence.

2. Defining unauthorized practice of law. The Subcommittee notes that our Supreme Court has avoided defining the practice of law, and correspondingly, the unauthorized practice of law. The UPL Lists in the Report, however, seem to propose a form of such a definition. This approach seems inconsistent with our Supreme Court's unwillingness to attempt to create such a definition.

3. Problems in trying to capture existing jurisprudence in a single rule. South Carolina jurisprudence in the area of real estate closings has been dynamic and malleable, particularly over the last decade, as different factual scenarios and business arrangements have been presented. An attempt to capture the existing jurisprudence in a single rule would merely represent a snapshot of the current state of affairs which the Subcommittee believes would likely create confusion and uncertainty in the future.

4. Problems with a rule specific to real estate closings. The Subcommittee believes that a rule specific to real estate practice would serve to abrogate (rather than ensure) the professional independence and judgment of lawyers, resulting in closing attorneys being little more than automatons. This seems contrary to the notion of consumer protection in real estate closings through the involvement of lawyers who apply their legal training and experience and who exercise independent legal judgment on an issue by issue basis. Additionally, with the limited exception of some specific rules regarding litigation practice, the existing RPC do not include practice-specific provisions. Any attempt to introduce practice-specific rules should be viewed with great caution as a significant departure from existing practice.

5. Potential conflicts with existing rules. The Subcommittee believes that any attempt to create a rule specific to real estate practice will create potential conflicts with existing rules contained in the RPC such as Rule 1.1 (Competence), Rule 1.2 (Scope of Representation), Rule 1.3 (Diligence), Rule 1.4 (Communication), portions of Rule 5.5 (Unauthorized Practice; Multijurisdictional Practice), and perhaps others.

6. Problems with multistate transactions. Multistate real estate transactions present various issues from a professional responsibility perspective that the Subcommittee does not believe are adequately addressed in the Report. For instance, the role of a South Carolina attorney in a multistate transaction may be very limited based on the client's demands and/or the nature of the transaction. The Report is silent as to the reality that other lawyers involved in the transaction (but not licensed in South Carolina) may be handling certain aspects of the transaction that the Report suggests should or must be undertaken by a South Carolina attorney. In larger commercial transactions, it is often impractical, if not impossible, for the South Carolina attorney to be aware of all other parties involved and the extent to which others may or may not be adhering to the Report. The Subcommittee suggests that the Task Force consider the role of other parties and other counsel in transactions, particularly in multistate commercial transactions.

7. Scope of representation. The Subcommittee believes that the Report does not address the reality that a lawyer's scope of representation in a real estate transaction may be, and often is, properly limited by the client's objectives, including cost containment.

8. Cost implications. The Subcommittee is concerned that the Report, if adopted, could result in significantly increased attorneys' fees for consumers involved in real estate transactions.

The Subcommittee lauds the Task Force for its efforts to address the myriad and complex issues related to residential real estate closings, and this Subcommittee is more than willing to assist the Task Force in its future efforts. However, for the reasons set forth in this response, the Subcommittee chooses not to support an attempt to convert the UPL Lists into an appellate court rule or other Supreme Court mandate, and believes that the "Guidelines" documents should not be codified or otherwise established as an official statement of "best practices".

Respectfully Submitted,

South Carolina Bar Professional Responsibility Committee
Subcommittee on Real Estate Closings