

January 11, 2008

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Chairman, Task Force on Closing Responsibilities
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RE: Unauthorized Practice of Law (UPL) Committee Response to
Real Estate Closing Task Force Preliminary Work

Dear Dave:

This letter is in response to the invitation from Chief Justice Toal and Bar President Lambert to review and comment on the Real Estate Closing Task Force's preliminary work. The UPL Committee offers the following comments:

1. With respect to the two documents delineating activities that only lawyers licensed in South Carolina are allowed to do the following comments apply:
 - a. In the header, should the phrase "can do" be amended to read "may do"?
 - b. Should item 2 be amended to read "The preparation, or supervision of preparation, and review of a deed for accuracy, completeness, and suitability to the transaction"? Also, should there be some recognition of distinctions between i) a single attorney closing and a closing involving more than one attorney and ii) the seller's attorney's duty(ies) and the buyer's attorney's duty(ies)?
 - c. While admittedly "responsible for" a closing, should item 4 be amended to insure that the attorney's responsibility includes physically attending a closing?
 - d. Still in item 4, should there be a description or list of the "pertinent issues related to the transaction" together with a purpose such as "to promote the ability of the parties to the closing to make informed decisions regarding such issues"?
 - e. The economics of real estate closings are such that we would hazard a guess that real estate closing attorneys cannot afford to spend much more than 30 minutes or so on any given closing. While we understand that some feel that these guidelines may cause law firms to increase their billings for closing-related services in recognition of their increased responsibilities, that outcome is only one possibility among several. In our opinion, given the economic leverage available to different players within the system, it is at least as likely that some firms (perhaps solo and small firms?) may try to retain business by holding the line on pricing with the possibility of either reduced profitability (the law firm's risk) or reduced service (the client's and the attorney's and the system's risk).
 - f. responsibilities, that outcome is only one possibility among several. In our opinion, given the economic leverage available to different players within the system, it is at least as likely that some firms (perhaps solo and small firms?) may try to retain business by holding the line on pricing with the possibility of either reduced profitability (the law firm's risk) or reduced service (the client's and the attorney's and the system's risk).
2. With respect to the two documents referred to as "Guidelines for Closing Attorneys..."

- a. While certainly desirable that an attorney should be involved in all of the activities listed, should there be a distinction as to whether the attorney actually “performs” a function, as opposed to “conducts”, “supervises”, “reviews”, etc.?
 - b. What is the relationship, if any, between this document and the document referred to in item 1 above? What is the effect intended by the drafter with respect to non-compliance with “Best Practices”? Do we know where “Best Practices leave off and whether and to what extent they overlap with the SC Supreme Court’s decisions? Also, is a clarification needed as to who is supposed or allowed to do what? Thus, for example, are all such duties to be performed by or under the supervision of licensed SC attorneys?
3. With respect to Part II.1.b of Guidelines for Non-purchase Residential Real Estate Transactions and Part II.1.c of the Guidelines for Residential Real Estate Purchase Transactions:
 - a. A proper explanation to the buyer/borrower of the documents and concepts listed would doubtless be of inestimable value and likely take an inestimable amount of time. Here again, we believe that the pressure of simple economics (not to mention client patience) will weigh heavily here. Also, as became quite evident during our meeting, not all attorneys understand some of the language in closing documents. With that fact in mind, what level of explanation will be required of closing attorneys? We presume that having a standard is better than fishing for one in a multiplicity of lawsuits.
4. With respect to Part III of Guidelines for Non-purchase Residential Real Estate Transactions and Part III of the Guidelines for Residential Real Estate Purchase Transactions:
 - a. Should there be some standard as to when a title update is to be performed?
 - b. The subject of indexing is not a simple one, arguably few attorneys are aware of its significance, and clerk of courts offices (and perhaps also register of deeds offices) may not have standards or measurements in place to afford attorneys the opportunity to verify indexing in any reasonable manner. To the extent that they are not in a position to carry out the responsibilities allocated to them, closing attorneys may face an increased risk of legal malpractice actions for which they could be placed in a position of having (arguably unfairly) to prove the negative, i.e., that they were not guilty of a negligent act or omission.
5. Commercial Short List
 - a. Item 7 fails to include a provision for out-of -state attorneys disbursing during a multi-state transaction
6. Residential Short List
 - a. Allowing a lender to conduct a HELOC own their on opens a door that shouldn’t be. What if that HELOC is the primary loan? The committee questions the wisdom of allowing a lender to conduct the closing without an attorney.

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7. Both of the guidelines reference “Insured Closing Letter” (items 13e and 15e) this should be “Closing Protection Letter.”

We appreciate the magnitude of the project that you have undertaken. Should you have any questions, please do not hesitate to contact me at (803) 951-2232.

Very truly yours.

Bradford T. Cunningham
Chairperson
South Carolina Bar
Unauthorized Practice of Law
Committee