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April 11, 2008

***VIA HAND DELIVERY***

The Honorable Daniel E. Shearouse
Clerk of Court
The Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201

Re: South Carolina Bar Task Force on Closing Responsibilities (the "Task Force")
Proposed Guidelines for Residential and Commercial Real Estate Closings (the "Guidelines")

Dear Mr. Shearouse:

I appreciate the opportunity to offer comments on the proposed Guidelines as submitted by the Task Force. I have been involved in various aspects of real estate development, finance, acquisition and disposition for both commercial and residential properties for some 25 plus years. I applaud the Supreme Court, the South Carolina Bar and the Task Force in their endeavor to address issues affecting real estate transactions in South Carolina.

I would like to address a few issues:

1. Delineation of the Issues. I believe the Task Force's work and the Guidelines would be understood and appreciated if the Task Force would set forth the problems that are besetting the real estate closings in South Carolina, identify the sources of these problems, and the effectiveness of the proposed remedial measures. I feel there are certainly issues that need to be dealt with, but the issues are not only different for residential and commercial closings, but are often caused by factors beyond the closing process and the role of an attorney in that closing process.

2. Unauthorized Practice of Law Issues. I gather that a continuing concern of the Bar, this Court and the practicing attorneys as a whole revolves around non-attorneys involved in the closing of real estate transactions in contravention of the Court's decision in the *Buyer's Services* case and its progeny.

   In this regard, I am not certain another set of guidelines or rules would be appropriate, but would urge the Court and the Task Force to consider the factors that are contributing to the unauthorized practice of law and then clarify and/or confirm the role of South Carolina attorneys in real estate closings.

In conjunction with this analysis, I suggest issues concerning multi-jurisdictional practice need to be considered particularly for commercial transactions.

3. Best Practices. I heartily endorse any effort by the Court, the Bar and the Task Force to educate attorneys in the best practices of the practice of law, whether real estate closings, trial preparation or any other aspect of the practice of law.

   In considering whether we should adopt such a Best Practices listing, I think the Task Force should consider whether other states have had success in publishing such a listing and how such listing can or should be changed, modified or supplemented. I also question the cost implications of publishing a listing and whether borrowers, purchasers and/or sellers would be positively or negatively affected by adherence to such a list. Also, the implications for attorneys who do not follow the listing need to be considered.

4. Future Planning. Lastly, I feel any component of a review of the real estate closing practice in South Carolina needs to assess the future of such closings which would involve a survey of national market trends, economic pressures and the increasing role of paralegals and non-attorney staff in the closing and lending process, especially in the residential context.

Please note these are my thoughts and concerns and do not reflect the opinion or position of Haynsworth Sinkler Boyd or any of our clients.

I am happy to discuss these further with the Court or the Task Force.

Very truly yours,

Benton D. Williamson

BDW/md
Encl.

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April 11, 2008

Task Force on Closing Responsibilities
c/o H. Dave Whitener, Jr., Esquire
Whitener & Wharton, P.A.
2001 Park Street
Columbia, SC 29201

Dear Dave :

By this letter, McNair Law Firm, P.A. responds to the Preliminary Report of the Task Force on Closing Responsibilities. We join in the comments of the Corporations, Banking, and Securities Law Section's Task Force, dated January 4, 2008, and of the Professional Responsibility Committee's Subcommittee on Real Estate Closing dated January 11, 2008. For the sake of brevity, we will not repeat those comments. Instead, this letter addresses the impact on tax-exempt financings[1] of your Task Force's listing of seven activities which must be performed by a South Carolina attorney in certain real estate transactions (the "Proposals").

With respect to tax-exempt financings, the Proposals create two very serious problems which are not fair to South Carolina lawyers. First, key language in the Proposals is unclear and leads to multiple results and conclusions. If lawyers are going to be held to standards in professional practice, malpractice claims, and/or disciplinary proceedings, those standards should be clear. Second, the Proposals presume that South Carolina lawyers have powers that, as a practical matter, the lawyers generally do not have in tax-exempt financing transactions. Lawyers should not be subject to sanctions where the lawyer fails to accomplish the impossible.

Further, the Proposals are intended to protect consumers regarding real estate matters. Naïve consumers are not parties to tax-exempt financings. Instead, tax-exempt financings involve sophisticated parties represented by counsel and have not been implicated in reported disciplinary proceedings involving lawyers.

## Overview of Tax-Exempt Financing

Tax-exempt financing provides funding for capital projects of the State of South Carolina; of counties, municipalities, school districts, state colleges and universities, water and sewer companies, and other special purpose and special service districts; and of South Carolina

[1] Some of the concerns which prompt these comments may also apply to taxable commercial loan transactions.

Public Service Authority, tax-exempt hospitals, and other tax-exempt entities providing a public service. Tax-exempt financing also funds student loans and provides a mechanism for counties and municipalities to address immediate cash flow difficulties by borrowing short-term against tax revenues. Tax-exempt financings generally incur a significantly lower interest rate than that available for financings by corporate and commercial borrowers with comparable creditworthiness. This lower interest rate reduces the cost of the capital projects and programs, as well as the amount of taxes or other revenues needed to fund the cost of the capital projects and programs.

Many billions of dollars of tax-exempt financings have been issued on behalf of the State of South Carolina or South Carolina entities. As a result, every South Carolinian has benefited from tax-exempt financing.

A typical tax-exempt financing involves at least the borrower, one or more underwriters,[2] and a trustee to receive and disburse proceeds.[3] If the financing is made through South Carolina Jobs-Economic Development Authority ("JEDA") or another governmental entity issuer, that entity also participates in the transaction. Additionally, the underwriters may be able to obtain, in advance of the closing, commitments from insurance companies and other typical purchasers of tax-exempt bonds to purchase the bonds when they are issued. The underwriter, the trustee, JEDA, and the prospective purchasers are always sophisticated parties, and the borrower and any other governmental party are usually sophisticated with respect to this type of transaction.

All parties typically participate in negotiating and drafting the documents. Further, all parties have or have access to their respective counsel who are knowledgeable about this type of financing. In addition, bond counsel is involved to deliver the legal opinion confirming compliance with the tax laws providing tax-exempt status. All of the lawyers participate in drafting the documents and in the closing process. This process is normally collegial rather than adversarial.

Tax-exempt financing can be secured, in part, by a mortgage lien on land and improvements owned by the borrower and/or a leasehold mortgage on land and improvements leased by the borrower. Title insurance is almost always required for real estate collateral. These transactions with real property collateral potentially implicate the Proposals.

[2] Some smaller capital projects can be financed through tax-exempt loans made directly by a bank. However those transactions are rare.
[3] The trustee is an institution with trust powers, subject to examination by a federal or state authority, and having capital and surplus of, typically, at least $100 million.

Proposals

The Corporations, Banking, and Securities Law Task Force has enunciated numerous difficulties applying the Proposals to multi-state and other commercial transactions involving out-of-state lenders and out-of-state counsel. Most, if not all, of those same difficulties exist to some degree when the Proposals are applied to tax-exempt financings. Instead of repeating those concerns in this letter, the following address issues that appear to be specific to tax-exempt financings.

South Carolina lawyers must approve loan closing documents, explain issues relating to the transaction, and be responsible for the closing. (Proposals 3 & 4)

(a) Language Ambiguity. The concepts of approval of documents and of responsibility for the closing raises many questions, including the following:

1) What topics are to be addressed in the approval?
2) On whose behalf are documents being approved?
3) Does the approval requirement obligate a South Carolina lawyer to advise a party that is not the lawyer's client and that is represented by counsel?
4) Is the approval requirement satisfied by the delivery of an opinion letter confirming enforceability of the documents and that the documents are in recordable form?
5) Is the approval requirement satisfied by the delivery of an opinion letter that disclaims enforceability opinions as to certain matters?
6) What types of conduct are consistent with, or evidence of, responsibility for the closing?
7) What types of conduct are inconsistent with, or do not evidence, responsibility for the closing?

In all events, the Proposals should be clear that the lawyer's approval does not address the wisdom of the transaction as a business matter and that the lawyer's responsibility for the closing does not include a responsibility to assure that the parties perform their post-closing duties stated in the closing documents.

(b) Practicality. The practicality of exercising or demonstrating approval of documents and responsibility for closing in tax-exempt transactions is also questionable. For example, a lawyer's approval of the documents should be inferable from the lawyer's consent to the closing of the transaction after the lawyer has reviewed the documents with the client. The Proposals are unclear as to whether this consent constitutes sufficient approval of the documents. If a lawyer's approval of documents may be inferred from a closing, then all closed transactions in which a South Carolina lawyer participates would satisfy this Proposal.

Further, the typical tax-exempt financing process includes numerous opportunities for all lawyers and all parties to comment on documents. However the underwriter is generally the party with informal final approval rights, based on the underlying facts, on the degree of the borrower's flexibility, and on a sense of prospective market reaction to the financing's structure and terms. The bond counsel is the lawyer with final approval rights over the documents, because bond counsel must deliver the opinion letter confirming tax exemption and other matters. A lawyer who is not bond counsel may be able to prevent a transaction from closing if the lawyer refuses to deliver an opinion letter or other required document. Otherwise a South Carolina lawyer who is not bond counsel for the transaction does not have the power to prevent a transaction from closing simply because the lawyer may not "approve" the documents.

Responsibility for the closing is also an amorphous concept in tax-exempt transactions. Counsel for at least the borrower and the underwriter, along with bond counsel, participate in the closing. Counsel for other parties may or may not attend the closing. All counsel who are present play meaningful roles in the closing but bond counsel is usually the last attorney to review the documents and determine whether or not all conditions of the closing have been met. Because that decision of bond counsel should reflect input from all other counsel, it is unclear whether or not this procedure would violate the Proposals' requirement that a South Carolina lawyer be responsible for the closing if bond counsel is not a South Carolina lawyer.

South Carolina lawyers must disburse all funds related to the transaction and must oversee recordation of pertinent documents. (Proposals 5 & 7) In tax-exempt transactions where real property is collateral, mortgagee title insurance is almost always required. Consequently, disbursement and recordation are coordinated. Recordation is normally accomplished by South Carolina attorney agents for title insurance companies. Those attorneys may have no other involvement in the transaction. This process appears to satisfy the literal requirements of the Proposals, even though the attorney agent may simply be implementing directions given by another attorney who is not licensed in South Carolina.

At closing, the proceeds are disbursed directly to the trustee. Promptly after the closing, the trustee pays closing expenses from the loan proceeds, in amounts authorized by the borrower, and approved by bond counsel. At the same time, the trustee also disburses to the borrower loan proceeds that have been approved by bond counsel as allowed by applicable law. Thereafter, the trustee funds expenses incurred by the borrower that fall within certain pre-authorized categories and are requested on approved requisition forms. Those proceeds do not pass through attorneys' trust accounts in either event but are, instead, administered by sizable commercial banks with trust powers. Considering that tax-exempt financings routinely exceed $50 million, underwriters are more secure funding through a corporate trustee rather than through a lawyer's trust account.

Conclusion

The goals of protecting consumers in real estate transactions is laudable, and the Task Force's efforts and Proposals to achieve that goal are impressive and thought-provoking. However, we feel the Proposals are not appropriate for tax-exempt financings for at least the following reasons:

1) all principals in a tax-exempt financing are sophisticated entities and are represented by qualified counsel;
2) no attorney has been disciplined publicly in South Carolina for his or her role in a tax-exempt financing;
3) the Proposals create uncertainty regarding attorneys' roles in transactions where informal protocols have arisen over time, and this uncertainty could contribute to greater costs and delays in tax-exempt transactions;
4) members of the public throughout South Carolina will suffer if tax-exempt transactions become more expensive and/or more time-consuming, and no benefit will be realized in exchange for that suffering.

Thank you for this opportunity to comment on the Proposals. Members of our law firm will be pleased to respond to your questions and to discuss this project at your convenience.

Sincerely,

McNair Law Firm, P.A.

M. William Youngblood

MCG:jf
cc: Lanneau Wm. Lambert, Jr., Esquire
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April 9, 2008

The Honorable Daniel E. Shearhouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Real Estate Closing "Best Practices"

Dear Mr. Shearhouse:

I have reviewed the proposed guidelines and I wish to make the following comments to the Guidelines for Real Estate Closings:

1. I disagree with the guideline that the closing attorney be responsible for ordering a survey, if one is to be ordered. Requesting the survey exposes the lawyer and law firm to a cost that potentially would not be collected should the closing not occur. Typically no funds are collected prior to closing providing no protection to the attorney for advanced costs.
2. I question the guideline that requires the Closing Attorney to review hazard insurance declaration pages and ensure the policy specifications are satisfactory to the lender. While we do assist at times in forwarding declaration pages to lenders, we are not involved in ensuring that the lender is satisfied with the policy itself or the sufficiency of the policy regarding the property.

Thank you in advance for considering my comments to the proposed guidelines.

With warm regards, I am

Sincerely,

Ricci Land Welch

RLW:

April 10, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

RE: Buist Moore Smythe McGee P.A. Response to Preliminary Report of the Task Force on Closing Responsibilities

Please accept this letter as the response of Buist Moore Smythe McGee P.A. ("BMSM") to the preliminary report ("Report") of the Task Force on Closing Responsibilities ("Task Force"). BMSM believes the Report represents a radical change from existing practices in South Carolina and accordingly opposes the proposals contained in the Report. BMSM fully agrees with the comments of and supports the conclusions reached by the Corporations, Banking, and Securities Law Section of the South Carolina Bar in its letter to the Task Force, dated January 4, 2008.

As stated in the letter of the South Carolina Bar, dated December 17, 2007, the Task Force was asked to consider best practices to ensure consumer protection is provided to the public regarding real estate matters. Keeping in mind the stated goal of ensuring "consumer protection", BMSM has compiled its comments into a "residential" transactions section and a "commercial" transactions section.

**"RESIDENTIAL" TRANSACTIONS**

1. Economics of Residential Real Estate Transactions. The economics of the residential real estate legal practice force lawyers to charge flat fees for legal work and to allocate tasks to paralegals. Generally, paralegals order surveys, obtain payoff information, collect letters/inspection reports, and perform final title updates. Though South Carolina lawyers review, oversee and are held responsible for these tasks, both sets of "proposed guidelines" in the Report appear to require a South Carolina lawyer to perform these tasks. The Report, as written, places residential real estate lawyers in the ethical dilemma of choosing either to continue with their existing mode of operation or to comply with the "best practice" guidelines along with the associated higher transaction costs.

2. Broad Terminology. Residential transactions typically involve a single "closing attorney," who generally represents the buyer/borrower. Provided there is disclosure and consent to multiple representation, the closing attorney may also owe duties to the lender, and may in addition prepare seller documents. BMSM is concerned about the broadness of a number of terms in the Report and the increased potential exposure South Carolina lawyers may face as a

result of the Report. For example, the Report requires a South Carolina lawyer to "review and approve loan closing documents." Residential loan closing documents are typically prepared by the lender and the buyer/borrower generally has no ability to negotiate these documents. Normally, the parties have executed the sales contract and a loan commitment has been obtained from a lender before the South Carolina lawyer becomes involved. As such, the loan terms are set between buyer/borrower and seller and lender, respectively.

3. Home Equity Line of Credit. The Report takes the position that a financial institution may, in connection with a home equity line of credit ("HELOC"), perform certain duties normally required to be performed by South Carolina lawyers. We do not understand the logic of differentiating a HELOC from, for example, a second mortgage. Both are encumbrances on title. The HELOC loan documents, and in particular the note, are likely more confusing than the second mortgage loan documents due to adjustable rate of interest, draw period versus period to pay back after draw period terminates, and the open-ended nature of a HELOC.

The requirement that the HELOC be from a financial institution "insured by the Federal Deposit Insurance Corporation" fails to account for other federally insured institutions such as credit unions. Credit unions are insured by the National Credit Union Share Insurance Fund, not the Federal Deposit Insurance Corporation. Therefore, the distinction, even if other federally insured financial institutions were included in the Report, seems to have no relation to the ability of such financial institution to handle a HELOC.

The Report treats HELOCs differently depending on whether it is used to purchase the real estate that is the collateral. HELOCs loan documents are generally complicated and BMSM fails to see why lawyers are required in one context (Residential Real Estate Purchases, First Mortgage Loan Closings, and Junior Lien Loan Closings) but not in the other (HELOCs).

4. Proposed Guidelines. The following is a summary of specific comments to the proposed guidelines.

(a) Sales Contract. The guidelines require the lawyer to "review the sales contract." In the typical residential real estate transaction, the parties have fully signed the sales contract when the lawyer is asked to represent one of the parties in the transaction.

(b) Engagement Letter. The time period involved in a residential real estate closing is usually short and lawyers often do not receive signed copies of the engagement letter until the closing. It is impractical for lawyers to wait until receiving a signed engagement letter before proceeding with pre-closing obligations.

(c) Notice of Eligibility for 4% Tax Assessment. Residential purchasers should be given the appropriate information about eligibility for a 4% tax assessment. However, some purchasers may not occupy the house as a primary residence or may decide to occupy the house

as a primary residence at a later date. It is impractical to require a lawyer to "review and approve" the "Notice of Eligibility for 4% Tax Assessment."

**"COMMERCIAL" TRANSACTIONS**

Parties to commercial transactions are typically sophisticated, represented by separate counsel, and are generally able to allocate risk more efficiently than the average consumer. Accordingly, consumer protection is less relevant in the commercial context. The Report fails to acknowledge such a distinction.

To reiterate earlier comments, BMSM fully agrees with the comments of and supports the conclusions reached by the Corporations, Banking, and Securities Law Section of the South Carolina Bar in its letter to the Task Force, dated January 4, 2008 and incorporates such comments and conclusions into this letter. The following summary highlights a few major points:

1. Multi-State Transaction. The Report fails to recognize the limited role a South Carolina lawyer may play in a multi-state real estate transaction. Depending on the transaction, a client may hire a South Carolina lawyer only to perform limited functions (e.g., to give an enforceability opinion). The Report places substantial responsibility on a South Carolina lawyer to perform certain duties regardless of the scope of representation. BMSM believes this level of responsibility is inappropriate and represents a radical change from current practices in South Carolina. If these proposal are adopted, BMSM believes they will have substantial adverse consequences to the practice of law in South Carolina.

2. Broad Terminology. The Report requires a South Carolina lawyer to "draft, oversee the drafting or review and approve loan closing documents." Large commercial lenders typically have regular outside counsel that prepare loan documents. Depending on the complexity of the type of financing, regular outside counsel is likely in a better position to draft the loan documents. Accordingly, a South Carolina lawyer is tasked with the responsibility of "reviewing and approving" these loan documents. However, the concept of "reviewing and approving" loan documents is broad and uncertain in meaning. BMSM requests clarity as to what "review and approve" means.

In short, if the proposed rules are adopted, commercial real estate lawyers in South Carolina will not know whether it is permitted to play a limited role in these types of transactions as they have been doing for years.

BMSM endorses the comments contained in the following letters: (1) the letter of the South Carolina Bar Professional Responsibility Committee, Subcommittee on Real Estate Closings, dated January 11, 2008; (2) the letter of the Unauthorized Practice of Law Committee of the South Carolina Bar, dated January 11, 2008; and (3) the letter of the Real Estate Practices

Section of the South Carolina Bar, dated January 14, 2008. BMSM believes the proposals contained in the Report cause more harm than good. For the reasons set forth in this letter, we request that the Supreme Court of South Carolina not adopt the proposed guidelines or "best practices" for attorneys conducting residential or commercial real estate closings in South Carolina.

Respectfully submitted,

BUIST MOORE SMYTHE MCGEE P.A.

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April 9, 2008

The Honorable Daniel E. Shearhouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

**RE: GUIDELINES FOR REAL ESTATE CLOSINGS**

Dear Mr. Shearhouse:

This correspondence is to submit my comments regarding the proposed guidelines for real estate closings in South Carolina. I am a member of the South Carolina bar, having been admitted in 1987. Since 1996, my practice has primarily been in the area of residential real estate closings. I would first ask that you extend to the members of the committee and our Supreme Court my thanks and appreciation for addressing this issue. I do believe that our bar and state will benefit from an increased overall level of professionalism in the area of residential real estate closings. While I believe the overall level of professionalism is excellent in our bar, it is also my opinion that the closing area has in many ways become a trap for unwary attorneys (often newer admittees to the bar) who, if not careful, can easily find themselves to be in trouble. Having said the above, the following are my comments:

As to the issue of guidelines in general, I believe the first question to be addressed is whether real estate closings should continue to be considered the practice of law in our state, or whether we should adopt the approach taken in many other states that lay persons may certify titles and handle all other matters relating to closings. To be candid, that is the direction I personally see the “closing industry” going on a nationwide basis. If this were to immediately occur in our state, it is my opinion that interested attorneys could remain involved in real estate in a commercial practice and could also remain involved in the residential closing arena by undertaking closings through a title agency or title company, if demand for residential closings through law offices significantly diminishes. If the Court continues to define the practice of law as including real estate closings, I believe, for the benefit of the bar, consumers and ethical lenders, that real estate closings should be certified as a specialty and educational and training requirements be placed on attorneys who choose to handle closings. I see this as the

best manner to ensure the highest standards of professionalism and the best protection of consumers on an ongoing basis. While I see the guidelines as positive and beneficial, I, again speaking candidly, see them more as a band aid than a cure to the problem issues relating to closings in our state.

As to the guidelines in particular, the following are my comments:

1. I find it problematic to define the practice of law as including the matters set forth in items 1 – 7 of the list on first mortgage and junior lien closings, then to allow a corporation (lender) to engage in these activities if the consumer consents. In my opinion, if these activities constitute the practice of law, then it seems to me it is outside the constitutional authority of the Supreme Court to allow non-lawyers to engage in the same, not to mention potential conflict with S.C. Code Section 40-5-320(3). Furthermore, if it is acceptable for a bank employee to handle the closing, then why would it not be acceptable for the lender to retain a third party closing agent who is not an attorney to perform the same function as the bank employee at the home of the consumer or at another location? And if a bank employee can handle a closing, then what is the rationale for prohibiting a trained paralegal at a law firm from conducting such a closing rather than an attorney? Again, speaking candidly, I do not see a great harm to consumers by banks closing equity lines in house, but I do see the Supreme Court allowing lenders to engage in the practice of law as problematic and I see the rationale for the Supreme Court thereafter prohibiting third party settlement agents and other lay persons from conducting such closings also as problematic.

2. As to the informed consent to multiple representation, I see it being difficult in closings involving out of state lenders to obtaining written consent in all situations, and would request the Court consider including language to the effect that "Lenders involved in closings in South Carolina are deemed to have notice of the role of the closing attorney and his or her obligations and it shall not be necessary for a closing attorney to obtain signed consent to multiple representation by the lender, provided the closing attorney closes the loan in conformity with the written closing instructions of the lender, to the extent that such are reasonable and customary for closings in the State of South Carolina". The reason for my request is that large, out of state lenders quite regularly refuse to do anything outside the norm of closings on a nationwide basis. If it is not a common practice for these lenders to sign such consent letters/forms on a nationwide basis, then I envision lenders refusing to sign the letter/form. This is one scenario I see occurring: Executive asks law firm to close refinance loan with a lender such as Wells Fargo. His rate was locked in at 5.35 percent on a 30 year loan as rates bottomed. His lock is short and rates have gone up. He asks for a "quick close" within ten days. The law firm schedules and the paralegal makes contact with his or her Wells Fargo "closer" and the process begins. The closing attorney reminds the paralegal to get Wells Fargo's consent in writing. The "closer" at Wells Fargo in Texas says he has never heard of this but it should be okay. A consent document is sent out. On the morning of

closing, the attorney is reviewing the loan documents with the paralegal and asks if she ever got the written consent form back from Wells Fargo. She discovers the "closer" at Wells Fargo never sent it back to her. She calls and he tells her he is sorry but his compliance department said they could not sign the form, but that their instructions made it clear what the settlement agent's role and obligations are to Wells Fargo. The attorney calls and Wells Fargo still refuses to sign. The attorney then either closes the loan or his or her client loses their interest rate, costing them thousands of dollars over time (or thousands to "buy down" the loan if another attorney will close it later), as rates have risen since the loan was "locked". I see this as a very real scenario – a real situation I experienced was where I closed a purchase for a local bank president, who later scheduled an equity line with Wells Fargo. When I found out it was "witness only" I called Wells Fargo, whose manager informed me that their compliance department had determined such was acceptable and that they had an attorney in South Carolina who would close the loan, The bank president was from out of state. I had to call him and do my best to explain in understandable terms to a lay person why I could not close a "witness only" loan, especially since another attorney was willing to close the loan. He was very polite but said he would go ahead and let the other attorney close the loan.

3. I would ask that the phrase "and approve" be deleted from paragraph 11 on Pre-Closing guidelines relative to the loan documents. The reason for the request is that the loan documents are typically reviewed the day of closing, and my experience is that lenders typically do not change terms, even if not approved of by the closing attorney. I personally have experienced two situations where a lender refused to delete a prepayment penalty on the grounds that they were federally chartered and their charter "pre-empted" any state prepayment penalty laws. I advised the borrower of my opinion and the lenders position, but I did not "approve of" the prepayment penalty. My personal opinion is that the role of the closing attorney is to review the documents with the borrower and answer any legal questions of the borrower regarding the same, but that it is the lender's responsibility prior to closing to make sure its loan documents are in conformity with all applicable state and federal laws through its compliance counsel. I may be misinterpreting what is meant by the term "approve" but I would suggest that, as a practical matter, the authority of the closing attorney to "approve" or "disapprove" any loan documents is typically nonexistent, and compliance issues are the responsibility of the lender prior to closing through its own compliance counsel. I also see this position as consistent with S.C. Code Section 37-10-102 which reads in part as follows: "Any legal fees other than for the examination and certification of title, the preparation of all required documents and the closing of the transaction required or incurred by the creditor in connection with the transaction <u>is the responsibility of the creditor</u> regardless of which party pays for the title work, document preparation, and closing" (emphasis added). I see this provision as being consistent with the position that if the lender provides its loan documents for closing, then it is its responsibility to make sure such are

compliant with applicable state (and federal) law and it is responsible for compliance legal fees.

4. As to post-closing responsibilities, I would ask that paragraph 1.(b.) be revised to read as follows “Verify that all documents were indexed of public record by the Office of the Register of Deeds or Clerk of Court”. I would suggest that the word “properly” be deleted as the closing attorney has no control over indexing and the definition of what is “proper” indexing with the modern computer systems is subject to interpretation. I give the following examples from Greenville County: First, there are numerous subcategories the county now uses for indexing. One example is “plats small” and “plats large”. I have seen plats indexed as “plats large” that I would have considered “plats small”. While this is a somewhat harmless example, which is proper? A more troublesome example is as follows: I asked a paralegal to run a title update on a builder client for a lot it was selling that we had closed on within the last year or so. She did and selected “mortgages” as a search category. No mortgages appeared from the search. I knew the property was encumbered, and had been under a “Mortgage Spreader Agreement”. The document appeared under a general search but not under a mortgage search. Was this document “properly” indexed? In my opinion it should have been indexed under mortgages but the Register of Deeds, an independent elected official who runs his own office, follows different guidelines. Closing attorneys cannot control computer (or other) indexing by public officials and I would ask that it be made clear that closing attorneys are not responsible for the indexing categories chosen by county officials or for indexing mistakes made by county officials.

5. As to paragraph 10 of the Pre-Closing section on residential real estate purchase closings, please consider adding this phrase to the end of the sentence “, or otherwise determine from the parties that the conditions of the sales contract have been met, modified or waived, and that the parties are ready to close”. The purpose for the request is that the closing attorney is typically not involved in matters relating to appraisals, home inspections, repairs, etc. and, in my opinion, it is unduly burdensome to require the closing attorney to collect copies of these documents on each closing. Furthermore, I would suggest that the scope of representation of a closing attorney should not include the review and interpretation of appraisals, home inspections, repair memos, etc. While the closing attorney certainly can provide assistance in addressing specific items when requested by the parties, I suggest the limited role of the closing attorney be stressed and it further be stressed that the closing attorney should not be expected to interpret reports unless specifically agreed to by the closing attorney. An attorney is typically not an appraiser, home inspector, home repair person or licensed pest control operator, and trouble often arises when questions/issues relating to reports made by these professionals are “answered” by the closing attorney rather than the professional who made the report or another professional in that field of expertise.

With regard to paragraph 12 of the Pre-Closing section on residential real estate purchase closings, I would request the committee and Court consider revising the sentence to read "Collect such documents as required for closing under the lender's instructions, as such are reasonable and customary in the state of South Carolina" on the same rationale as outlined above as collecting reports for the buyer(s) prior to closing.

As to the section on residential purchase closings, I would ask that the committee and Court consider adding a "preamble" statement such as the following: "Buyer(s), sellers(s), lenders, realtors and other interested parties are reminded that the role of the closing attorney is typically limited to closing the transaction in accordance with the terms of the sales contract agreed upon by the parties and in accordance with the instructions of the lender (if a loan is involved), to the extent such are reasonable and customary in the state of South Carolina. The closing attorney typically will have ethical responsibilities to the buyer(s), seller(s), lender and title company. If the buyer(s) or seller(s) wish to have legal counsel that is not subject to the limitations and ethical obligations of the closing attorney, then such buyer(s) or seller(s) should retain separate counsel to provide representation in addition to any representation provided by the closing attorney."

As to commercial real estate transactions, I would suggest that the "approval" of the loan documents be deleted in paragraph 3 under the same rationale set forth above on residential closings, that being that the closing attorney more often than not has little or no control over the loan documents and it should be the responsibility of the lender to determine compliance through its compliance counsel prior to closing, unless otherwise agreed to by the closing attorney. Also, while I am not typically involved in multi-state transactions, it seems to me clarification is warranted noting that it is acceptable for South Carolina attorneys to provide representation on the South Carolina portion of a multi-state transaction when the loan is closed out of state and funds are disbursed out of state, and the South Carolina attorney is just handling the title search/legal description/recording/title insurance on the South Carolina property involved in the transaction.

As to the guidelines in general, I would also request the Court consider adding a conclusory statement such as the following to the guidelines: "The Supreme Court of South Carolina recognizes that these guidelines are general in nature and are intended as an outline for closing attorneys, lenders, other interested parties and the general public, and they are not intended to prohibit the exercise of reasonable discretion and judgment by the closing attorney in response to specific situations which may justify a deviation from these guidelines. If a specific situation justifies a deviation from these guidelines, any such deviation should be made in accordance with the applicable rules of professional conduct, should be reasonable and necessary under the circumstances and should be in accordance with reasonable and customary practices of closing attorneys in the state of South Carolina. These guidelines are not intended to place responsibility on the closing attorney for the failure of a lender to comply with state or federal law in the drafting of loan documents or otherwise and these guidelines are not

intended to place liability on a closing attorney for the manner of indexing of recorded documents by public officials or any mistake in the indexing or recording of documents by public officials. These guidelines instead are intended to educate lenders, other interested parties and the general public as to the role of the closing attorney in South Carolina and to promote professionalism in real estate closings in the state of South Carolina".

Again, please extend my thanks to the members of the committee and the Supreme Court for addressing this matter and for the opportunity to submit comments.

With kind regards, I remain

Yours very truly,

Henry S. Sullivan, III

HSS:ldh

**STEVE O'KEEFE**
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April 7, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Re: Proposed Guidelines for Real Estate Closings

Dear Mr. Shearouse:

Please accept this letter as my written comments on the proposed guidelines for residential and commercial real estate closings.

As a South Carolina lawyer and real estate practitioner, I admire the efforts of the Task Force on Closing Responsibilities, as it is certainly a massive undertaking to determine "best practices" for the complex and diverse field of real estate closings. However, for many of the same reasons expressed by the Bar Sections in their published comments, I strongly oppose the adoption of all-encompassing guidelines. It is my belief that statutory law, case law, and the Rules of Professional Conduct provide the broad guidance that the practitioner should apply to his/her real estate practice, and instituting numerous "best practices" would serve only to limit consumer choices and restrict the lawyer's professional judgment in any given transaction.

Instead, the Supreme Court could help us practitioners tremendously by simply clarifying one area of South Carolina law:

> **Issue: Can the closing attorney supervise the execution of closing documents by phone?** The words "physically present" used in the case titled *In re Lester*, 353 S.C. 246, 578 S.E.2d 7 (2003), have caused some South Carolina lawyers to avoid representing borrowers who prefer to execute documents at a different location than where the closing attorney is physically located. It has also contributed to the influx of signing/notary services, which are marketed as a way for lenders to have their documents signed in the borrower's home as a convenience to the borrower. Although *Ethics Advisory Opinion 05-16* indicates that a mail-away or phone closing is permissible, the *Lester* case was subsequently cited in the case titled *In re Hall*, 370 S.C. 469, 636 S.E.2d 621 (2006), causing some lawyers to question the reliability of *Ethics Advisory Opinion 05-16*. It has also caused some lawyers to make unrealistic recommendations, such as requiring an out-of-state borrower to come in-state simply to sign documents face-to-face with the attorney or, in the alternative, requiring a borrower (in-state or out-of-state) to pay for the attorney to travel to the borrower.

**Recommendations:** Yes, the closing attorney can supervise the execution of documents by phone as long as the attorney is the one who is explaining the closing documents and answering any legal question that may arise during the closing process. If closing by phone, however, the closing attorney must ensure that a notary public and another person will be physically present to witness signatures and that all documents will be sent to the attorney for his/her review to ensure proper execution. The Supreme Court could answer this question once and for all by simply adding a comment to Professional Conduct Rule 1.2.

Resolving this issue, as recommended, would provide the public with definitive guidance from the Supreme Court and allow attorneys to compete with and eventually eliminate signing/notary services, which do not provide consumers with the same protection as an attorney.

Without attorney supervision, signing/notary services are obviously the unauthorized practice of law ("UPL"). However, many lenders who hire such signing/notary services are not aware of the possibility that their mortgage could be voided at foreclosure if the mortgage was not closed legally. Also, most signing/notary services simply ignore attorneys who bring UPL to their attention because South Carolina has not been aggressively prosecuting UPL violators. Even when an attorney is involved with a signing/notary service, the UPL violator does not have much incentive to clean up its act since the consequences for UPL have been the suspension of the "supervising attorney," not the prosecution of the actual violator.

South Carolina will be a better place for real estate transactions when non-lawyers are forced to take responsibility for their own actions. Only then will processes be constructively developed between lawyer and non-lawyer corporations with regard for UPL.

I appreciate the opportunity to comment and look forward to the speedy resolution of the issue raised in this letter.

Sincerely,

Steve O'Keefe

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April 18, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Re: Request for Written Comments and Notice of Public Hearing on Proposed Guidelines for Residential and Commercial Real Estate Closings

Dear Sir:

I write you in response to the February 22, 2008 request issued by the South Carolina Supreme Court. I am so happy that the task force issued such a complete and thoughtful outline of the responsibilities of a South Carolina lawyer in real estate transactions. My comments are limited to the section concerning home equity lines of credit, which I have marked and have annexed hereto for your convenience.

The exception carved out for home equity lines exposes the focus of our concern, the unsophisticated borrower, to the greatest potential for harm. Without an attorney, these transaction would only involve two people: other transactions described in the Supreme Court request have multiple sets of eyes and levels of sophistication that may catch harmful and abusive acts, and these other transactions also include the oversight of the South Carolina lawyer in the process.

The exception sets the scene with the unsophisticated borrower appearing at the bank across the desk from the big bank loan officer, over the coffee table at the borrower's home, or over the hood of the loan closer's car.[1] The unsophisticated home owning borrower is told that she can consolidate bills to reduce the monthly payment. This is music to her ears at the time.

[1]The idea of closing on the hood of a car is in fact, not cliche.

Imagine the rate is printed on the top of the "home equity maximizer agreement" in ***CONSPICUOUS LARGE NUMBERS***. The problem may be that the loan officer or "closer:"

- $ does not describe in detail that the rate is variable and that it can go up, but has a basement and cannot go down;

- $ does not describe that there may be a pre-payment penalty because the line is from a federally charted bank not subject to the South Carolina statutory protection against such;

- $ encourages the expenditure of a lump sum amount in the first six months because of a discounted rate in effect for the first six months (then the rate adjusts back to the non-discounted rate after that time and the borrower is stuck with that balance);

- $ may push credit/life/disability or other insurance products that are not disclosed before the closing;

- $ may not make sure the borrower knows that of the 25 year line, only 10 years is the time she can withdraw money and is paying interest only with a minimum payment and that does not reduce her balance, and the remaining 15 years is not a draw period but a payoff time so her bill each month goes up;

- $ may not make sure the borrower knows that it is really a 10 year balloon on a 25 year amortization so she will owe the whole thing in 10 years but had small monthly payments;

- $ engages in mere puffery as to the loan terms;

- $ may not make sure the borrower knows that the loan officer has an interest in closing the loan because he is not paid if it does not close; and

- $ tells the borrower about the right to an attorney, but that "lawyers a expensive and besides, you don't need one anyway. . . just sign here."

Fortunately for the public, the lowly South Carolina dirt lawyer[2] functions as the braking system for many transactions. Sometimes these small transactions go way too fast, but not fast enough for the lender. Many times, the lender will not give a second thought to the actual purpose of the right to cancel, the right to counsel or other consumer protection documents and

[2]The term "dirt lawyer" is used in the context of lawyers who deal in real estate law that has become popular in today's bar; it is not used as a disparaging remark as the author of this note is a dirt lawyer engaged in the general practice of law. By way of further explanation, see Handbook for South Carolina Dirt Lawyers, Claire T. Manning, Second Edition, 2008, a South Carolina Bar Publication.

looks for ways to get around it or fund it anyway. At all times, the lender will only do what is in its best interest. Sometimes, the lender's best interest is in direct conflict with the borrower. Most dirt lawyers are not closing mills, but live in small towns and see their clients on the street or go to church with them.

One instance occurred in my office this week. A national behemoth out of state lender told an elderly lady, and life tenant, in writing, that she needed to regain fee simple absolute title from her remaindermen for it to approve her on a loan with 50% loan-to-value first mortgage. This was not an equity line, but just as easily could have been. She and all the remaindermen (her children) agreed to execute the HUD-1A, TIL, right to cancel, mortgage and other loan documents necessary to secure the money owned by a fee simple absolute estate. The life estate/remainder deed was drawn on purpose years ago for specific reasons.

A bank should never meddle in folks' property ownership. Given the chance, they will convince them to do things against their best interest simply to qualify for a loan. I understand that a lawyer may have been employed to draw the deed, but be sure; it would have been the bank's lawyer with a lengthy "we only represent you in the limited capacity for deed preparation requested by you" disclosure. The consequences will never be discussed. Recall the lawyers are too expensive conversation above, "just sign here."

Lenders are in such a position of influence that they may take advantage of a borrower not out of intentional behavior, but as a result of sheer volume or sheer ignorance. Many lenders have no idea what the difference is between a probate and an acknowledgment, how to execute either pursuant to our recoding statute, and many have never actually read the promissory note and mortgage they are asking to be signed by someone else who has not read it.

If a loan officer ruins a borrower's life, he is fired, and the bank may pay a verdict after a long time engaged in litigation or may not. However, that bad loan officer has moved on to another bank and is doing the same things to similarly situated borrowers, i.e., closing loan on the hood of his car with a lot of mere puffing about the product.

Dirt lawyers do not have this luxury and do not have the ease to move around the state with a tarnished name. The advance sheets are constant reminders of those who have stepped afoul and a weekly reminder that our most important obligation is to those who need help, the help of dirt lawyers, that unsophisticated borrower. Dirt lawyers need to stay involved in all real estate transactions, but most especially the home equity loans. Dirt lawyers at least act as a speed bump in front of the lenders out for the bottom line.

I encourage of the Justices to initiate an equity line now. Allow them to see for themselves the potential problems. Then recall that the folks entering into these agreements to encumber where they live are not Supreme Court Justices, but are more like the same folks on a trial jury. I have been told that I should make my case at trial understandable to the 6$^{th}$ grade level. Why assume any differently here? While nobody can hold the hands of the borrowers at

all times and each borrower needs to take responsibility for her own actions, let them be informed and let the dirt lawyers continue to at least try to protect those that need the protection by the decree of the Supreme Court of the great state of South Carolina.

If I can be of any further service, please do not hesitate to contact me.

Yours Truly,

James Graham Padgett, III

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Brandy C. Snyder
Attorney

April 11, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

**RE: Comment on Proposed Guidelines for Residential and Commercial Real Estate Closings**

To Whom It May Concern:

In light of recent activity within the State of South Carolina by various "vendor management" companies attempting to handle real estate transactions within the State, I am compelled to send this letter of comment on the proposed guidelines for residential and commercial real estate closings (hereinafter referred to as the "Guidelines"). My colleagues and I have been informed that there are vendor management companies performing attorney functions in the residential real estate sector without true oversight by an attorney licensed by the State of South Carolina. I am, therefore, submitting this letter of comment in support of the proposed Guidelines. Since my practice focuses predominately on residential real estate closings, I will limit my support of these Guidelines accordingly.

The Task Force on Closing Responsibilities has undertaken a grave task in its attempt to establish basic reform that is required to ensure the proper handling of real estate transactions in this State. A prime example as to why the proposed Guidelines (or some form thereof) should be established can be seen in the State Bar's inability to monitor and/or discipline vendor management companies that perform and control all aspects of the real estate closing with little to no oversight by a South Carolina licensed attorney. Some vendor management companies have gone so far as to request that the attorney prepare a cover letter giving the vendor manager instruction as to how to record the closing documents and disburse the funds. The attorney apparently does nothing more than receive the closing package from the vendor manager, obtain the necessary signatures on the documents, and return the package to the vendor manager along with the attorney's instructional cover letter. These vendor managers are then using the cover letter obtained from the "closing attorney" as a tactful means of getting around the prohibition of the unauthorized practice of law within the State.

The thought of attorneys being involved in such a practice alone should repulse even those least affected by the proposed Guidelines. Should "closing attorneys" be allowed to hide behind the façade of these vendor management companies when they are not actively involved in the day to day operations of the company and do not participate in the preparation of the closing documents? The Supreme Court of South Carolina and the State Bar have gone to great lengths to set standards for our legal profession and to protect the general public from those engaged in the unauthorized practice of law. Without the codification of specific rules to govern attorneys' involvement in real estate transactions, we risk being

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Brandy C. Snyder
Attorney



unable to discipline these same attorneys when mistakes and errors caused by non-attorney supervised companies and firms are discovered. To whom does the vendor manager ultimately answer? It does not appear to be the attorney retained to get the documents signed and submit the instructional cover letter. If the vendor management company's functions are not overseen by an attorney, the vendor management company's activity within the State goes unmonitored. This is precisely why reform is needed and why the Task Force should be supported in its efforts to establish guidelines for attorneys involved in real estate transactions.

The Guidelines as a whole appear to be an attempt to outline and codify the responsibilities of an attorney in a real estate closing. I agree that promulgation of the accepted and best practices in this field are needed; however, the Guidelines as written would require additional clarification before being implemented. Given the magnitude and far reaching effects the proposed Guidelines could have on the legal profession, it is my opinion, despite the current shortcomings and stated opposition from the Real Estate Practices Section Council of the South Carolina Bar and the Unauthorized Practice of Law Committee, the Guidelines are a step in the right direction.

Respectfully Submitted,

Brandy C. Snyder, Esq.
SC Bar #71227
GA Bar #666236

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Brandy C. Snyder
Attorney



The undersigned join me in submitting this letter of comment regarding the proposed guidelines for residential and commercial real estate closings.

Sharonview FCU

April 21, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Dear Sir(s):

I am writing this letter in response to the Court's request for public comment regarding proposed guidelines for attorneys for conducting residential and real estate closings in SC.

As a lender in SC and other states, we rely on attorneys to close mortgage loans for our borrowers. In SC, there is a great deal of confusion over acceptable or permissible procedures for the attorney's supervision of the closing. While some attorneys in SC acknowledge that it may be permissible to conduct a closing via telephone, some state that it is not permissible. Borrowers, lenders and attorneys are all being negatively affected by this confusion.

As a resident of SC, I feel that requiring the attorney and the borrower to be in the same room in order to meet the closing requirements is difficult to achieve in today's busy world. With fuel prices being the way they are as well as all other products needed by consumers, why should I as a consumer have to lose time on my job, and incur a fuel cost to drive to an attorney's office when I can just visit my credit union there at my job site and talk with an attorney via phone. The process of doing a mortgage is frightening enough with all that is being said on the news. Why make it more difficult by requiring me to sit in front of an attorney that I have never met prior to the closing when I can see my local credit union loan officer and talk with an attorney via telephone. In addition as a borrower, I face the challenge of working with the attorney's schedule over my own in order to close my loan.

While we certainly support the fact that attorneys should supervise and manage the closing process, we believe it is also well within reason to provide for alternatives to meet the demands of today's busy lifestyles. We would therefore like to see clarification in these guidelines that it is permissible for the attorney to conduct a closing that is done via telephone and/or mail or in a manner that does not require the borrower and the attorney to be in the same room to execute closing documents.

Should you have any questions or wish to discuss further, please feel free to contact me directly as indicated below.

Sincerely,

Patricia M. O'Bryant
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Rock Hill, SC 29732
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April 11, 2008

**VIA HAND DELIVERY**

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

**Re: Comments of the South Carolina Financial Services Association on guidelines proposed by South Carolina Bar Task Force on Closing Responsibilities**

Dear Honorable Justices of the Supreme Court of South Carolina:

Please allow this letter to express the South Carolina Financial Services Association's comments about the real estate closing guidelines proposed by the South Carolina Bar Task Force on Closing Responsibilities. The South Carolina Financial Services Association is an affiliate of the American Financial Services Association, and its members include companies that make residential mortgage loans in South Carolina. While the Association commends the efforts of the Task Force, the Association does have some concerns about the guidelines. Accordingly, the Association echoes most of the concerns raised by the comments of the Corporations, Banking, and Securities Law Section and also respectfully offers the following comments:

- The Association joins in the concerns voiced by the Unauthorized Practice of Law Committee and others with regard to the nature of the guidelines. To the best of our knowledge, nothing like these guidelines has ever been adopted before with respect to an area of legal practice in South Carolina. Clarity is needed as to the guidelines' nature. Would the guidelines have the same effect as does a Rule of Professional Conduct? Would they change substantive law? If an attorney's actions (or inactions) in a closing are contrary to the guidelines, what would be the effect of that?

- What is meant by the attorney's "[b]e[ing] responsible for" the closing? For example, in many foreclosure cases where mortgagee purchasers are selling property purchased at a foreclosure sale (commonly referred to as selling out of "REO"), the former mortgagee, now the selling owner, retains counsel separate and apart from the buyer's counsel to represent the seller's interests in the sale. Common duties of this attorney are to coordinate with the buyer's attorney and furnish any seller instructions, deal with any title issues, review the contract, prepare a proper deed, review the HUD-1 settlement statement and any other relevant documents, and to ensure the transaction is timely and properly closed and the funds have been disbursed to the seller. Must one attorney perform all the tasks that the guidelines mention?

- In a volume closing practice, sending an individual engagement letter to each client is not practical. Rule 1.5(b), SCRPC, does not require this. Moreover, in the typical closing, such a letter would not be warranted.

- With regard to disbursement of funds, the proposed guidelines are contrary to existing precedent of this Court. In Doe Law Firm v. Richardson, 371 S.C. 14, 636 S.E.2d 866 (2006), the Court held that, while an attorney must supervise the disbursement of funds, the funds are not required to pass through the attorney's trust account. In Doe Law Firm, Disciplinary Counsel argued that the closing attorney has an affirmative duty under the Rules of Professional Conduct to collect and disburse the funds subject of a closing; however, the Court rejected that argument. The proposed guidelines appear to seek the reversal of Doe Law Firm to make Disciplinary Counsel's previously rejected argument the law.

- In a typical closing, many people perform many tasks, not all of them tasks that entail specialized legal knowledge or ability or for which attorney supervision is required under existing law. In State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987), and Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773 (2003), the Court identified four areas of a closing requiring attorney involvement: the title search, the review of loan documents, the closing (meaning the actual meeting at which the documents such as the deed, note, and mortgage are signed), and recordation of documents. In Doe Law Firm, the Court added the supervision of disbursement to this list. The proposed guidelines go significantly beyond Buyers Service, McMaster, and Doe Law Firm. Under the guidelines, the closing attorney is required to perform many tasks that are not the practice of law under any standard. Why must the *attorney*, and not another person involved in the transaction, order a survey, obtain the payoff information, review the hazard insurance information, and collect inspection reports? These activities are not the practice of law. Those

involved in the transaction are, and ought to be, free to allocate such tasks among themselves as they choose. Buyers Service, McMaster, and Doe Law Firm balance the need for attorney involvement in a closing with the flexibility that exists in business transactions. It seems that the guidelines would shift this balance.

- We live in a changing world. The inflexibility of the proposed guidelines is likely to increase costs associated with real estate closings in South Carolina, especially as technological developments change lenders' internal practices. The guidelines are written in contemplation of tasks that are a part of closings as they take place today, with today's processes and technology in mind. In the area of real estate closings, change due to technological innovation is inevitable. Financial institutions are often at the forefront of such change. Electronic recording and closings that may be wholly conducted over the internet are just over the horizon; the technology to make them happen exists now. The parties involved in a real estate closing, including the closing attorney, need to operate within rules that are flexible enough to accommodate such change. We are concerned that this flexibility is not present in the guidelines.

Thank you for your attention to these comments. Of course, if you have any questions or concerns, please do not hesitate to contact us.

With kind regards, we are,

Very Truly Yours,
**JAMES C. HARRISON, JR. P.A.**

James C. Harrison, Jr.
Andrew S. Radeker

ASR/lk

cc: The Honorable Daniel E. Shearouse (copy by U.S. Mail)
South Carolina Financial Services Association
South Carolina Bar Task Force on Closing Responsibilities (via U.S. Mail to H. David Whitener, Jr., Esq.)

# *H. MICHAEL WHITE, JR.*
***Attorney at Law***

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***Please Reply To:***

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April 9, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Request for Written Comments
SC Bar Taskforce on Closing Responsibilities

Dear Sir:

I appreciate the efforts of the members of the South Carolina Bar Task Force on Closing Responsibilities to provide clear guidelines for attorneys who conduct residential or commercial real estate closings. As an attorney practicing primarily in the area of real estate for some fifteen years, I applaud the Task Force's committee members for their desire to serve the legal profession and the public for whom the legal profession stands to protect. I believe, however, that certain of the recommendations made by the Task Force will have unintended detrimental effects that render more unclear what the actual practice of law is and harm the interests of the public.

First, the provision enabling a borrower obtaining a Home Equity Line of Credit from a financial institution either to choose his own attorney or to waive his right to have an attorney results in the borrower having no meaningful choice at all for his attorney. Lenders, particularly out-of-state lenders, pressure borrowers to do things the lender's way. For example, one of my clients last month gave timely notice to a lender of her choice of attorney. The lender ignored her stated choice of attorney. When she demanded that the lender honor her choice of attorney, the lender said that it was too late to use her attorney and that she would lose the lock of the loan if she insisted on taking the time to use her own attorney. My client reluctantly proceeded to close with the attorney sent to her home by the lender because she needed the loan to go through. The attorney that came to her home did not explain the documents to her properly. To remedy the lack of proper counsel, she requested me to explain the documents to her after the closing had already taken place. It is almost certain that if the Task Force's guidelines are approved in current form, that the pressure will not be for the borrower to use the lender's attorney, but to forego the use of an attorney at all. Make no mistake, this request to enable the borrower to have "choice" of whether he or she desires legal representation is not for the borrower's benefit, but

rather for the lenders themselves to the detriment to the borrower. In the example stated above, for instance, my client would not have received a title reissue credit but for her having me review the closing documents on her behalf.

Second, concerning the borrower's waiver of his right to an attorney for Home Equity Lines of Credit, the result would be to state that financial institutions may indeed practice law by drafting the closing documents, handling the actual closing, ensure proper recording of the documents, disburse funds, etc. If these responsibilities are the practice of law in a first mortgage refinance or a purchase, then they are the practice of law in a Home Equity Line of Credit closing. There is no meaningful difference between a purchase transaction, a first mortgage transaction, or a Home Equity Line of Credit. Permitting lenders to perform such legal functions as stated above renders unclear what the practice of law is if these duties are deemed "the practice of law" in one type of loan transaction and "not the practice of law" in another type of loan transaction.

Third, concerning again the waiver of attorney for Home Equity Lines of Credit, there is harm to the public interest because the public records are rendered less accurate, hence less trustworthy. Some years ago, a few lenders decided to disregard South Carolina law and conducted Home Equity Lines of Credit closings without attorneys. The result was that some mortgages were not recorded at all or were improperly indexed due to errors in the mortgages that were drafted by the lenders. It does take a title search and a legal opinion to determine if the borrower took title to the property in the same name as the borrower currently uses. For instance, if a woman purchased property as "Smith" then later divorced and changed back to her maiden name of "Jones", then the drafter of the mortgage must form an opinion as to the legal name of the borrower and file the mortgage under both the original name of Smith and the current name of Jones concurrently in order that the mortgage be locatable by the public. Lenders have neither the training nor inclination to provide this level of care in properly determining the name of the borrower. Worse, if the borrower re-marries and becomes "Mrs. Green", then the mortgage would not be found if a lender neglected to provide the current name of the borrower (Green) along with the aliases of Smith and Jones. Due to such an omission, the searcher of the records, not knowing all of the borrower's aliases, would not find the mortgage in the indices. Hypothetically, consider the possibility a borrower deciding to sell the property: (1) The mortgage is not found; (2) The seller neglects to inform the purchaser's attorney of her former name and the existence of the mortgage; (3) The result is that the new purchaser's title is negatively impacted by the prior owner's improperly indexed mortgage. A court may find that the lender was at fault for improperly filing the mortgage and remove the lien from the purchaser's property, but the defense is costly in time and expense.

Finally, as a generality, lenders who primarily conduct their businesses from other states by telephone, email, etc., have little or no local presence and therefore have no substantial accountability to the public. By contrast, an attorney usually is local and is accountable by virtue of his or her desire to maintain a good reputation in the community in which he or she lives and works and also by virtue of his oath of office as an attorney. I am dismayed by the practice of non-local-lenders to neglect to respond to e-mail inquiries, telephone calls, etc., to determine status of loans in progress. No real estate attorney who is similarly unresponsive to clients' calls will long remain in this business. I do not believe that removing possibly the only local link to the transaction, the closing attorney, helps the public in any way.

Thank you for this opportunity to provide my thoughts and comments.

Respectfully Yours,

H. Michael White, Jr.

HMW,JR.\

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Thursday, February 28, 2008

The Honorable Chief Justice Jean Hoefer Toal
The Supreme Court of South Carolina
Post Office Box 12456
Columbia, South Carolina 29211

Re: Task Force on Closing Responsibilities

Chief Justice Toal, after reviewing the proposed guidelines for residential and commercial real estate closings, I would like to offer some observations.

Over the past eighteen years, I have unfortunately seen a growing segment of my time being spent as an expert witness for and against South Carolina attorneys for their alleged errors in handling real estate closings. I have served as a consulting or testifying attorney witness in more than eighty cases. Most cases have a common denominator: the attorney has limited experience in closings. Many of the defendant attorneys have extensive experience in other areas, such as litigation, estate planning, workers compensation, etc., but have either stepped or been thrown into the closing arena under the impression that it is a "lesser" aspect of the practice and "any lawyer can do it". With younger lawyers, real estate closings have been undertaken as their full time practice, while the more experienced attorneys have usually found themselves in an isolated transaction.

It is my respectfully submitted recommendation that the guidelines not only outline what an attorney must do, but also prescribe the attorney's qualifications to do these acts and that the qualifications must be more than the mere admission to practice law. We require certain experiences before a licensed attorney can appear alone in a court proceeding. It is not unreasonable to similarly require certain mentored experiences and/or CLE attendances before a licensed attorney can "solo" a real estate closing. A closing is an intense and demanding setting requiring great care and judicious consideration. It is much more that shuffling papers and getting signatures. The issues that can arise number literally in the thousands. Only an experienced attorney can properly guide the process.

A license to practice law does not, in and of itself, prepare an individual to close real estate transactions. I would suggest that the court not only establish some minimal experiences under the tutelage of an

experienced attorney, but also require CLE experiences which allow real estate attorneys to maintain and hone their skills over the course of a career. Based upon my experience and observations, this would reduce the claims of error while furnishing guidelines to the Bar.

Thank you for your consideration.

C. Joseph Roof

c: Task Force on Closing Responsibilities
c/o David H. Whitener, Jr., Esquire
Whitener & Wharton, PA
2001 Park Street
Columbia, South Carolina 29201

Sharonview FCU

April 23, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Dear Sir(s):

I am writing this letter in response to the Court's request for public comment regarding proposed guidelines for attorneys for conducting residential and real estate closings in SC.

As a lender in SC and other states, we rely on attorneys to close mortgage loans for our borrowers. In SC, there is a great deal of confusion over acceptable or permissible procedures for the attorney's supervision of the closing. While some attorneys in SC acknowledge that it may be permissible to conduct a closing via telephone, some state that it is not permissible. Borrowers, lenders and attorneys are all being negatively affected by this confusion.

As a resident of SC, I feel that requiring the attorney and the borrower to be in the same room in order to meet the closing requirements is difficult to achieve in today's busy world. With fuel prices being the way they are as well as all other products needed by consumers, why should I as a consumer have to lose time on my job, and incur a fuel cost to drive to an attorney's office when I can just visit my credit union there at my job site and talk with an attorney via phone. The process of doing a mortgage is frightening enough with all that is being said on the news. Why make it more difficult by requiring me to sit in front of an attorney that I have never met prior to the closing when I can see my local credit union loan officer and talk with an attorney via telephone. In addition as a borrower, I face the challenge of working with the attorney's schedule over my own in order to close my loan.

While we certainly support the fact that attorneys should supervise and manage the closing process, we believe it is also well within reason to provide for alternatives to meet the demands of today's busy lifestyles. We would therefore like to see clarification in these guidelines that it is permissible for the attorney to conduct a closing that is done via telephone and/or mail or in a manner that does not require the borrower and the attorney to be in the same room to execute closing documents.

Should you have any questions or wish to discuss further, please feel free to contact me directly as indicated below.

Sincerely,

Deidre W. Pittman
Sharonview Federal Credit Union
PO Box 2070
Ft. Mill, SC 29716
704-969-6710
Deidre.pittman@sharonview.org

2405 Falling Leaf Court
Rock Hill, SC 29732
April 18, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Dear Sir(s):

I am writing this letter in response to the Court's request for public comment regarding proposed guidelines for attorneys for conducting residential and real estate closings in South Carolina.

I work for a real estate lender in South Carolina, and we rely on attorneys to close mortgage loans for our borrowers. In South Carolina, there is a great deal of confusion over acceptable or permissible procedures for the attorney's supervision of the closing. While some attorneys in South Carolina acknowledge that it may be permissible to conduct a closing via telephone and/or mail, others state that it is not permissible. Borrowers, lenders and attorneys are all being negatively affected by this confusion. I urge the court to consider a closing supervised by an attorney via telephone and/or mail to be permissible in South Carolina.

As a resident of South Carolina, I feel that requiring the attorney and the borrower to be in the same room in order to meet the closing requirements is both unnecessary and difficult to achieve in today's busy world. I strongly believe that adequate representation can be obtained via telephone from the attorney for a remote closing location. Supervising a telephone closing provides me with a reduced cost for closing the transaction, with the exact same level of representation that I would have obtained if I met with the attorney at his/her office. I believe that all parties would benefit from this arrangement, as telephone/mail closings would offer not only reduced transaction costs, but more convenient scheduling times as well. I would not have to physically meet my attorney at his/her office, subject to the days/hours that office is available. Instead, the attorney could supervise the closing process via phone while I'm signing the documentation at my credit union's office. My credit union offers much more scheduling flexibility and allows the credit union lender to also attend the closing to answer my questions (in addition to the attorney's supervision via telephone). Again, I urge the court to consider a closing supervised by an attorney via telephone and/or mail to be permissible in South Carolina.

I believe it is well within reason to provide for closing supervision alternatives to meet the demands of today's busy lifestyles. I would therefore like to see clarification in these guidelines that it is permissible for the attorney to conduct a closing that is done via telephone and/or mail or in a manner that does not require the borrower and the attorney to physically be in the same room to execute closing documents.

Should you have any questions or wish to discuss further, please feel free to contact me directly as indicated below.

Sincerely,

Casey Munn
VP Loan Operations and South Carolina Resident
Sharonview Federal Credit Union
Casey.Munn@Sharonview.org

Sharonview FCU

April 24, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Dear Sir(s):

I am writing this letter in response to the Court's request for public comment regarding proposed guidelines for attorneys for conducting residential and real estate closings in SC.

As a lender in SC and other states, we rely on attorneys to close mortgage loans for our borrowers. In SC, there is a great deal of confusion over acceptable or permissible procedures for the attorney's supervision of the closing. While some attorneys in SC acknowledge that it may be permissible to conduct a closing via telephone, some state that it is not permissible. Borrowers, lenders and attorneys are all being negatively affected by this confusion.

As a resident of SC, I feel that requiring the attorney and the borrower to be in the same room in order to meet the closing requirements is difficult to achieve in today's busy world. With fuel prices being the way they are as well as all other products needed by consumers, why should I as a consumer have to lose time on my job, and incur a fuel cost to drive to an attorney's office when I can just visit my credit union there at my job site and talk with an attorney via phone. The process of doing a mortgage is frightening enough with all that is being said on the news. Why make it more difficult by requiring me to sit in front of an attorney that I have never met prior to the closing when I can see my local credit union loan officer and talk with an attorney via telephone. In addition as a borrower, I face the challenge of working with the attorney's schedule over my own in order to close my loan.

While we certainly support the fact that attorneys should supervise and manage the closing process, we believe it is also well within reason to provide for alternatives to meet the demands of today's busy lifestyles. We would therefore like to see clarification in these guidelines that it is permissible for the attorney to conduct a closing that is done via telephone and/or mail or in a manner that does not require the borrower and the attorney to be in the same room to execute closing documents.

Should you have any questions or wish to discuss further, please feel free to contact me directly as indicated below.

Sincerely,

Angela Self
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UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

April 15, 2008

By email and first class mail
The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Proposed Guidelines for Residential and Commercial Real Estate Closings

Dear Mr. Shearouse:

The Federal Trade Commission (FTC) and the Department of Justice are pleased to respond to the South Carolina Supreme Court's request for comments on the Proposed Guidelines for Residential and Commercial Real Estate Closings that delineate the scope of the practice of law as it relates to the transfer of real property.[1] This Court has observed that defining what constitutes the practice of law should be guided by consumers' interests.[2] The Justice Department and the FTC agree: we believe that consumers receive the greatest benefit when non-attorneys compete with attorneys except in circumstances where specialized legal knowledge and training has been demonstrated to be necessary to protect the interests of

[1] The notice and proposed guidelines are available at http://www.sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=436. The proposed guidelines delineate seven tasks related to residential and commercial real estate transactions that must be performed by an attorney licensed to practice in South Carolina, including performing all title work, preparing deeds, overseeing the drafting of documents pertinent to the loan closing, supervising the closing, and disbursing all funds related to the transaction. In the case of a home equity line of credit, the proposed guidelines still would require consumers to hire an attorney to perform title work and to prepare deeds. The guidelines appear to reiterate the current state of South Carolina law in this area. *See, e.g., Doe v. McMaster*, 355 S.C. 306 (2003); *State v. Buyers Service Company, Inc.*, 292 S.C. 426 (1987).

[2] *See Doe*, 355 S.C. at 311 n.3 (2003) ("this Court grounds it unauthorized practice rules in the State's ability to protect consumers in the state and not as a method to enhance the business opportunities of lawyers").

consumers.[3] As this Court grapples with the important issue of what should constitute the practice of law in the context of commercial and residential real estate transactions, we respectfully suggest that it may wish to take note of the benefits consumers in other states have received from competition and consider relaxing current restraints on competition between attorneys and non-attorneys in this area, which likely will benefit South Carolina consumers.[4]

A small minority of states (including South Carolina) restrict non-attorneys from providing services related to real estate transactions, such as title searching, title abstracting, title opinions, preparing deeds and mortgages, supervising closings, and disbursing funds.[5] The

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[3] Accordingly, through advocacy letters and *amicus curiae* briefs, the Justice Department and the FTC have urged several state supreme courts and legislatures, the American Bar Association, and many state bar associations to reject or narrow undue restrictions on competition between attorneys and non-attorneys. *See* letter from the Department of Justice and FTC to the Hawaii Supreme Court (January 25, 2008) *available at* http://www.ftc.gov/os/2008/01/V080004letter.pdf; two letters from the Justice Department and the FTC to the Committee on the Judiciary of the New York State Assembly (June 21, 2006 and April 27, 2007) *available at* http://www.ftc.gov/os/2006/06/V060016 NYUplFinal.pdf and http://www.ftc.gov/be/V070004.pdf; letter from the Justice Department and the FTC to Executive Director of the Kansas Bar Ass'n (Feb. 4, 2005) *available at* http://www.ftc.gov/be/v050002.pdf; letter from the Justice Department and the FTC to Task Force to Define the Practice of Law in Massachusetts, Massachusetts Bar Ass'n ( Dec. 16, 2004) *available at* http://www.ftc.gov/os/2004/12/ 041216massuplltr.pdf; letter from the Justice Department and the FTC to Unauthorized Practice of Law Committee, Indiana State Bar Ass'n (Oct. 1, 2003) *available at* http://www.ftc.gov/os/2003/10/uplindiana.htm; letter from the Justice Department and the FTC to Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003) *available at* http://www.ftc.gov/be/v030007.htm; letter from the Justice Department to Speaker of the Rhode Island House of Representatives (Mar. 28, 2003) *available at* http://www.ftc.gov/be/v020013.htm; letter from the Justice Department and the FTC to Task Force on the Model Definition of the Practice of Law, American Bar Ass'n (Dec. 20, 2002) *available at* http://www.ftc.gov/opa/2002/12/lettertoaba.htm; letter from the Justice Department and the FTC to Speaker of the Rhode Island House of Representatives, *et al.* (Mar. 29, 2002) *available at* http://www.ftc.gov/be/v020013.pdf; letter from the Justice Department and the FTC to President of the North Carolina State Bar (July 11, 2002) *available at* http://www.ftc.gov/os/2002/07/non-attorneyinvolvment.pdf; letter from the Justice Department and the FTC to Ethics Committee of the North Carolina State Bar (Dec. 14, 2001) *available at* http://www.ftc.gov/be/V020006.htm; letters from the Justice Department to Board of Governors of the Kentucky Bar Ass'n (June 10, 1999 and Sept. 10, 1997); letter from the Justice Department and the FTC to Supreme Court of Virginia (Jan. 3, 1997); letter from the Justice Department and the FTC to Virginia State Bar (Sept. 20, 1996). Brief *Amicus Curiae* of the United States of America and the FTC in *Lorrie McMahon v. Advanced Title Servs. Co. of W. Va.*, No. 31706 (May 25, 2004) *available at* http://www.usdoj.gov/atr/cases/f203700/203790. htm; Brief *Amicus Curiae* of the United States of America and the FTC in On Review of ULP Advisory Opinion 2003-2 (July 28, 2003) available at http://www.usdoj.gov/atr/cases/f201100/201197.htm; Brief *Amicus Curiae* of the United States of America in Support of Movants Kentucky Land Title Ass'n *et al.* in *Ky. Land Title Ass'n v. Ky. Bar Ass'n*, No. 2000-SC-000207-KB (Feb. 29, 2000) *available at* http://www.usdoj.gov/atr/ cases/f4400/4491.htm.

[4] We understand that relaxing restrictions on non-lawyers relative to those set forth in the proposed Guidelines also may require changes in the law as articulated in South Carolina judicial decisions.

[5] In a majority of states, non-lawyers compete with lawyers to provide services related to the real estate transaction, including preparation and execution of a deed, title searching and issuing title reports, the answering of non-legal questions during the closing process, witnessing the signatures at closing, and the disbursement of funds. *See*, *e.g.*, Joyce Palomar, *The War Between Attorneys & Lay Conveyancers – Empirical Evidence Says "Cease*

available empirical evidence shows that consumers in these states pay higher prices to settle their real estate transactions than do consumers in states that allow non-attorney competition.[6] At the same time, because there is no evidence that non-attorneys provide lower quality services related to real estate transactions than do attorneys, such restrictions on competition do not appear to provide consumers with any countervailing benefits.

## Concern for the Public Interest Should Guide the Imposition of Restrictions on Competition between Attorneys and Non-Attorneys

This Court has observed that it is guided by consumers' interests when delineating those tasks that require an attorney from those that a non-attorney can perform.[7] The Justice Department and the FTC recognize that there are some services requiring the specialized knowledge and skill of a person trained in the law that should be provided only by attorneys. For example, only an individual with legal knowledge and requisite understanding of law and litigation procedures should represent clients in open court in matters involving their legal rights. Such a limitation protects consumers as well as the court and provides for an efficient process without significant risk to consumers.

Like all consumers, however, consumers of professional services benefit from competition,[8] and if competition to provide such services is restrained, consumers may be forced to pay higher prices or accept lower quality services. Allowing non-attorneys to compete in the provision of certain types of services permits consumers to select from a broader range of options, considering for themselves such factors as cost, convenience, and their confidence in the competence and quality of the services provided. As the United States Supreme Court stated:

> The assumption that competition is the best method of allocating resources in a free market recognizes that *all elements of a bargain - quality, service, safety, and*

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*Fire!*," 31 CONN. L. REV. 423, 487-88 (1999) (noting that there are more states in which non-attorneys perform the majority of real estate transactions than in which attorneys perform them); Michael Braunstein, *Structural Change & Inter-Professional Competitive Advantage: An Example Drawn from Residential Real Estate Conveyancing*, 62 MO. L. REV. 241, 264-65 (1997) (reporting that in only eight states is it customary for an attorney to be involved in settlement).

[6] *See* notes 12-15, *infra*, and accompanying text.

[7] *See Doe*, 355 S.C. at 311 n.3 (2003).

[8] *See, e.g., Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 689 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975); *see also United States v. Am. Bar Ass'n*, 934 F. Supp. 435 (D.D.C. 1996), *modified,* 135 F. Supp. 2d 28 (D.D.C. 2001).

*durability* - and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.[9]

In general, sound competition policy calls for competition to be restricted only when necessary to protect the public from significant harm, and for the restriction to be narrowly drawn to minimize its anticompetitive impact.[10] In some instances, although competence is required to provide the services in question, a license to practice law may not equate to such competence, nor may legal training be necessary skillfully to perform the services. The inquiry into the public interest involves not only an assessment of the harm that consumers may suffer from allowing non-attorneys to perform certain tasks, but also consideration of the benefits that accrue to consumers when attorneys and non-attorneys compete to provide services that need not be reserved exclusively for attorneys.[11]

## Consumers Required to Hire Lawyers to Settle Real Estate Transactions Pay Higher Prices Than Consumers Who are Permitted to Hire Non-Attorneys

Evidence suggests that preventing non-attorneys from competing with attorneys to provide services like title abstracting, drafting deeds, supervising closings, and disbursing funds likely causes consumers to pay higher prices to close their real estate transactions than they otherwise would. First, those examining the issue have found that non-attorneys charge less than attorneys to provide these services. For example, a survey conducted in Virginia found that consumers paid on average almost $200 less when a non-attorney settled their real estate transaction compared to fees charged by an attorney.[12] In addition to charging lower prices, some lay service providers compete with attorneys on the basis of timeliness and convenience.[13]

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[9] *Prof'l Eng'rs*, 435 U.S. at 695 (emphasis added); *accord*, *FTC v Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990).

[10] *Cf. FTC. v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986) ("Absent some countervailing procompetitive virtue," an impediment to "the ordinary give and take of the market place . . . cannot be sustained under the Rule of Reason.") (internal quotations and citations omitted).

[11] *See Prof'l Eng'rs*, 435 U.S. at 689; *Goldfarb*, 421 U.S. at 787. *See also In re Opinion No. 26 of the Comm. on Unauthorized Practice of Law*, 654 A.2d 1344, 1345-46 (N.J. 1995) (lawyer/non-lawyer competition benefits the public interest).

[12] MEDIA GENERAL, *RESIDENTIAL REAL ESTATE CLOSING COST SURVEY*, 5 (Sept. 1996).

[13] *See Perkins v. CTX Mortgage Co.*, 969 P.2d 93, 100 (Wash. 1999) ("permitting mortgage lenders to prepare loan documents in the way the CTX does relieves borrowers of the cost and inconvenience of having attorneys prepare their loan documents"); *State Bar v. Guardian Abstract & Title Co.*, 575 P.2d 943, 949 (N.M. 1978) ("The uncontroverted evidence was that using lawyers for this simple operation considerably slowed the loan closings and cost the persons involved a great deal more money.").

Second, even those consumers who prefer to employ attorneys to handle their real estate transaction likely pay higher prices in the absence of competition from non-attorney providers. The availability of alternative, lower-cost lay service providers typically constrains the fees that attorneys can charge to settle real estate transactions. Indeed, when it examined this issue, the Kentucky Supreme Court found "before title companies emerged on the scene, [the Kentucky Bar Association's] members' rates for such services were significantly higher – in some areas as much as 1% of the loan amount plus additional fees."[14] The court in *Countrywide* also noted that "the presence of title companies encourages attorneys to work more cost-effectively."[15]

## There Is No Indication that the Existing Restrictions Are Necessary to Prevent Consumer Harm

Restrictions on competition generally are considered harmful to consumers. Accordingly, such restrictions are justified only by a showing that they are necessary to prevent significant countervailing consumer harm and are narrowly drawn to minimize their anticompetitive impact.[16] Without a showing that allowing non-attorneys to perform certain tasks related to the real estate transaction has a negative impact on consumers, the current restraints on competition likely harm consumers by raising prices and eliminating their ability to choose among competing providers, without providing any countervailing benefits.

The trend in states that have opened real estate settlement services to non-attorney competition has been to achieve consumer benefits without an increase in consumer injury attributable or unique to non-attorney services. As the Restatement (Third) of Law Governing Lawyers has explained:

> Several jurisdictions recognize that many such [law-related] services can be provided by nonlawyers without significant risk of incompetent service, that actual experience in several states with extensive nonlawyer provision of traditional legal services indicates no significant risk of harm to consumers of such services, that persons in need of legal services may be significantly aided in obtaining assistance at a much lower price than would be entailed by

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[14] *Countrywide Home Loans, Inc. v. Ky. Bar Ass'n*, 113 S.W.3d 105, 120 (Ky. 2003). *See also, In re Opinion No. 26 of the Comm. on Unauthorized Practice of Law*, 654 A.2d at 1349 (evidence gathered in that proceeding indicated that buyers and sellers in areas of New Jersey where lay-assisted closings were prevalent paid on average $350 and $450 less for closings, respectively, than did buyers and sellers in parts of the state where lay-assisted closings were not prevalent).

[15] *Countrywide Home Loans,* 113 S.W.3d at 120.

[16] *Ind. Fed'n of Dentists,* 476 U.S. at 459.

> segregating out a portion of a transaction to be handled by a lawyer for a fee, and that many persons can ill afford, and most persons are at least inconvenienced by, the typically higher cost of lawyer services. In addition, traditional common-law and statutory consumer-protection measures offer significant protection to consumers of such nonlawyer services.[17]

In addition, an empirical study compared five states where lay providers examined title evidence, drafted instruments, and facilitated the closing of real estate transactions with five states that prohibited lay provision of these settlement services. The author found "[t]he only clear conclusion" to be "that the evidence does not substantiate the claim that the public bears a sufficient risk from lay provision of real estate settlement services to warrant blanket prohibition of those services under the auspices of preventing the unauthorized practice of law."[18] Perhaps most significantly, a 1999 survey found that in most states complaints about the unauthorized practice of law did not come from consumers, the potential victims of such conduct, but from attorneys, who did not allege any claims of specific injury.[19]

## Other Jurisdictions Have Fostered Competition While Protecting Consumers Through Less Restrictive Alternatives

To the extent other states have been concerned about reducing the risk of harm to consumers of real estate settlement services, some have chosen alternatives that better preserve competition. For example, the New Jersey Supreme Court has required written notice to consumers of the risks involved in proceeding with a real estate transaction without an attorney,[20] which permits consumers to make an informed choice about whether to use lay closing services. Another example is Virginia's Consumer Real Estate Settlement Protection Act (CRESPA),[21] which allows licensed attorneys, title insurance companies, title insurance agents, or any licensed financial institution to provide settlement services. Also, CRESPA defines "settlement services" to include title searches; all aspects of arranging for title insurance; receiving and issuing receipts of money; ordering loan checks, payoffs, surveys, and inspections; preparing settlement statements; determining that all closing documents conform to the parties'

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[17] RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 4 cmt. c (2000).

[18] Palomar, supra n. 5 at 520.

[19] Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 407-08 (2004).

[20] *In re Op. No. 26,* 654 A.2d. at 1363.

[21] *See* VA. CODE § 6.1-2.21(A).

contract requirements; and making all logistical arrangements for closings.[22] CRESPA requires anyone (including lawyers) providing settlement services to be registered with the state.[23] By adopting an expansive definition of settlement services and allowing more people to provide such services, and by requiring that settlement agents register with the state and be insured, CRESPA preserves competition while also providing safeguards for consumers. Though more regulatory than the New Jersey approach, the Virginia approach is clearly a more competitive approach than an outright ban on non-attorney closings.

## Conclusion

The assistance of an attorney during a real estate-related transaction may be desirable, and consumers may decide to retain an attorney in certain situations. Nonetheless, the choice of hiring an attorney or a non-attorney settlement service provider should rest with the consumer, particularly when there is no evidence that consumers are harmed by using non-attorneys to provide certain types of real estate settlement services. We therefore encourage this Court to delineate the scope of the practice of law in a way that fosters competition in service areas for which the knowledge and skill of a lawyer is not required while protecting consumers of real estate settlement services.

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[22] *Id.* *See also* "Unauthorized Practice of Law (UPL) Guidelines for Real Estate Settlement Agents," Virginia State Bar, § III, *available at* http://www.vsb.org/crespa/13guidelines.html.

[23] CRESPA also requires that settlement agents obtain insurance with minimum coverage limits of $250,000, have employee fidelity bonds in the amount of $100,000, and maintain a surety bond not less than $100,000. Virginia does not require attorneys to have malpractice insurance but requires an insurance disclosure. Va. Code § 6.1-2.21(D).

Sincerely yours,

Thomas O. Barnett
Assistant Attorney General

David L.Meyer
Deputy Assistant Attorney General

United States Department of Justice
Antitrust Division

By direction of the
Federal Trade Commission,

William E. Kovacic
Chairman

Maureen K. Ohlhausen
Director
Office of Policy Planning

April 8, 2008

Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: *Daubert* and SCRE, Rule 702

Dear Mr. Shearouse:

I am writing in response to the Court's invitation of March 19, 2008; and I request that you also note my desire to be heard on July 9. 2008.

I am mindful of the laudable initiative of the courts to insure that the ultimate result in the litigation process is not contaminated by the influence of what is believed by some to be "junk science." I am mindful of the rulings in *Daubert v Merrell Dow Pharm*, and *Kumho Tire Co*. I am mindful that the *Daubert* concerns were shared by our Court which adopted an alternative solution in *State v Council*. I am mindful that the *Council* analysis has evolved to include yet another layer in *State v White.*

I am also mindful that we should never fear to have our heads in the clouds as we "reach for the stars" in our effort to achieve the ideal; provided however, that our feet never leave the ground, and that the rules we ultimately adopt do not actually operate to obstruct justice in a world that is real.

The rules as proposed will be beneficial in ten per cent of the cases at the expense of the remaining ninety per cent. The overwhelming numbers of cases involving experts are injury cases where physician's opinions are grist for the mill of justice. The treating physician has been appropriately afforded special recognition by virtue of his training, experience, and familiarity with the patient (*SCRCP*. Rule 30(i)). The rules as proposed do not provide for this exception and will require an additional major layer of work for that small remaining number of physicians who are patient advocates, and who are willing to become involved in the litigation process. The net result will be an insurmountable hurdle for the litigant and a change in the role of the court from "gate keeper" to arbiter of persuasiveness.

At a time when the entire world is struggling to find a meaningful forum for the just resolution of their problems one with another, and with their governments, we remain alone in that community by having an open courthouse door for anyone with a grievance; a forum that does not presume one's grievance is without merit, but rather allows the individual to hear that determination from his peers. To the extent that we continue to close the courthouse door, we invite violence in the streets, as it is in the rest of the world.

Sincerely yours,

WILLIAM H. EHLIES, II

/he

Sharonview FCU

April 25, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Dear Sir(s):

I am writing this letter in response to the Court's request for public comment regarding proposed guidelines for attorneys for conducting residential and real estate closings in SC.

As a lender in SC and other states, we rely on attorneys to close mortgage loans for our borrowers. In SC, there is a great deal of confusion over acceptable or permissible procedures for the attorney's supervision of the closing. While some attorneys in SC acknowledge that it may be permissible to conduct a closing via telephone, some state that it is not permissible. Borrowers, lenders and attorneys are all being negatively affected by this confusion.

As a resident of SC, I feel that requiring the attorney and the borrower to be in the same room in order to meet the closing requirements is difficult to achieve in today's busy world. With fuel prices being the way they are as well as all other products needed by consumers, why should I as a consumer have to lose time on my job, and incur a fuel cost to drive to an attorney's office when I can just visit my credit union there at my job site and talk with an attorney via phone. The process of doing a mortgage is frightening enough with all that is being said on the news. Why make it more difficult by requiring me to sit in front of an attorney that I have never met prior to the closing when I can see my local credit union loan officer and talk with an attorney via telephone. In addition as a borrower, I face the challenge of working with the attorney's schedule over my own in order to close my loan.

While we certainly support the fact that attorneys should supervise and manage the closing process, we believe it is also well within reason to provide for alternatives to meet the demands of today's busy lifestyles. We would therefore like to see clarification in these guidelines that it is permissible for the attorney to conduct a closing that is done via telephone and/or mail or in a manner that does not require the borrower and the attorney to be in the same room to execute closing documents.

Should you have any questions or wish to discuss further, please feel free to contact me directly as indicated below.

Sincerely,

Brenda Kinard
Credit Administration and SC Resident
Sharonview Federal Credit Union
PO Box 2070
Ft. Mill, SC 29716
704-969-6743
brenda.kinard @sharonview.org

Sharonview FCU

April 25, 2008

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Requiring the attorney and the borrower to be in the same room in order to meet the closing requirements is detrimental to borrowers. It is more costly for the borrower in both time and money. I personally know of several attorneys that view this "requirement" as a burden on them as well because the attorney is forced to deal with scheduling challenges and dedicating office space for closings. As a lender, we often find ourselves in the unenviable position of having to tell members/borrowers the attorney requires closing at their office and the borrower will have to take time off of work to attend – even though in other states closing via remote "supervision" by the attorney is allowed.

While we certainly support the fact that attorneys should supervise and manage the closing process, we believe it is also well within reason to provide for alternatives to meet the demands of today's busy lifestyles. We would therefore like to see clarification in these guidelines that it is permissible for the attorney to conduct a closing that is done via telephone and/or mail or in a manner that does not require the borrower and the attorney to be in the same room to execute closing documents.

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Sincerely,

F. Michael Sisk
Senior Vice-President, Lending
Sharonview Federal Credit Union
PO Box 2070
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Sharonview FCU

April 25, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

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Should you have any questions or wish to discuss further, please feel free to contact me directly as indicated below.

Sincerely,

Angela Tate
Real Estate Supervisor and SC Resident
Sharonview Federal Credit Union
PO Box 2070
Ft. Mill, SC 29716
704-969-6767
Angela.tate@sharonview.org

Sharonview FCU

April 25, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

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Should you have any questions or wish to discuss further, please feel free to contact me directly as indicated below.

Sincerely,

Summer Whalen
Consumer Lending
Sharonview Federal Credit Union
PO Box 2070
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704-969-6700

Sharonview FCU

April 25, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

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Should you have any questions or wish to discuss further, please feel free to contact me directly as indicated below.

Sincerely,

Libby Worley
Real Estate Closer
Sharonview Federal Credit Union
PO Box 2070
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April 9, 2008

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Request for Written Comments
SC Bar Taskforce on Closing Responsibilities

Dear Sir:

Please accept the following comments relative to the above matter:

As an attorney whose practice is approximately 90% real estate oriented and as one who closes hundreds of loans each year, I want to say that I applaud the efforts to create some uniform guidelines but am concerned with several key topics:

1. The Unauthorized Practice of Law. There is no way that the recommendation that FDIC lenders be allowed to perform non-purchase Home Equity Lines of Credit, is compatible with the prohibition of non-lawyers performing tasks which are clearly the "practice of law". The granting of exemptions to lenders, CPA's or any other non-lawyer is antithetical to the very concept of what is practicing law. If we agree that the items 3-7 in the draft constitute the practice of law in purchase closings, how, then, can we say that in HELOC situations these same items are not? This exclusion is simply the "camel's nose under the tent" of the practice of law. We need to be forceful in requiring our members to adhere to the guidelines proposed, but we also need to forcefully defend the very nature of the practice of law.

2. Integrity of Title. That very important consideration aside, bank personnel are simply not equipped to perform the lawyerly tasks associated with preparing, explaining and recording loans and mortgages. In speaking to many of my

peers, and with abstractors that deal with mis-indexed and mis-recorded documents, the same concerns were raised. Banks have demonstrated, as any closing attorney will tell you that they are not nearly as reliable in either recording or following-up on indexing as an attorney who is sworn to perform diligently and is held accountable if he or she does not. When a mortgage is improperly recorded or, as has happened in the past, not recorded at all, huge problems arise in the chain of title, all to the detriment of the public. Lawyers are relatively permanent; if there is a problem with a title matter, the lawyer will assist in fixing it. Bank employees, on the other hand are transient in nature and have no personal investment in seeing to it that errors are promptly and correctly addressed. A lawyer who does not perform properly risks the loss of his insurance, and, ultimately, professional discipline- a bank employee faces no such consequences for non-performance.

3. Review of Surveys. While we regularly review surveys for obvious defects, such as failures to close, what, exactly does this mean? We are not surveyors and rely on their expertise to render an accurate product.

Even now, lenders are discouraging our clients from using their attorney of choice in favor of an attorney related to the bank. We regularly are called by clients who have felt pressured to use the bank's more "convenient" attorney in spite of the client's request to use an attorney of their own choosing. In effect, the banks are mandating the use of counsel who have struck a friendly pose with the lender. In the scenario presented in the recommendations, the bank will have the opportunity to "guide" the client away from using any attorney; is it reasonable to believe that they will not?

While the argument may be that the exceptions are more consumer friendly, the fact is that the very protection that is provided to a borrower by the use of that borrower's attorney in a closing is eliminated. As far as savings go, this is a competitive type of practice and the market sets our fees whether we like it or not. The loser here is not only the public, but the profession as well. Either the performance of lawyerly tasks is the practice of law or it is not. Should we say that the drafting of simple wills where the estate is less than $100,000 may be performed by a non-attorney but that over that amount the activity would be considered the unlawful practice of law?

Respectfully,

Richard J. Brownyard

CC: Members of the Task Force