

Authorized Practice Advisory Opinion 2002-1

January 24, 2003

Revised January 26, 2012

On the Role of Laypersons in the Consummation of Residential Real Estate Transactions

The North Carolina State Bar has been requested to interpret the North Carolina unauthorized practice of law statutes (N.C. Gen. Stat. §§84-2.1 to 84-5) as they apply to residential real estate transactions. The State Bar issues the following authorized practice of law advisory opinion pursuant to N.C. Gen. Stat. §84-37(f) after careful consideration and investigation. This opinion supersedes any prior opinions and decisions of any standing committee of the State Bar interpreting the unauthorized practice of law statutes to the extent those opinions and decisions are inconsistent with the conclusions expressed herein. As a result of its review of the activities of more than 50 nonlawyer service providers since the adoption of this opinion on January 24, 2003, including injunctions issued against two companies, the Committee is clarifying the opinion concerning issues that it has addressed since adoption of the opinion.

Issue 1:

May a nonlawyer handle a residential real estate closing for one or more of the parties to the transaction?

Opinion 1:

No. Residential real estate transactions typically involve several phases, including the following: reviewing the purchase agreement for any conditions that must be met before closing; abstracting titles; providing an opinion on title; applying for title insurance policies, including title insurance policies that may require tailored coverage to protect the interests of the lender, the owner, or both[i]; preparing legal documents, such as deeds (in the case of a purchase transaction), deeds of trust, and lien waivers or affidavits; interpreting and explaining documents implicating parties' legal rights, obligations, and options; resolving possible clouds on title and issues concerning the legal rights of parties to the transaction; overseeing execution and acknowledgement of documents in compliance with legal mandates; handling the recordation and cancellation of documents in accordance with North Carolina law; disbursing proceeds when legally permitted after legally-recognized funds are available and all closing conditions have been satisfied; and providing a post-closing final opinion of title for title insurance after all prior liens have been satisfied. These and other functions are sometimes called, collectively, the "closing" of the residential real estate transaction. As detailed below, the North Carolina General Assembly has determined specifically that only persons who are licensed to practice law in this state may handle most of these functions.[ii]

A person who is not licensed to practice law in North Carolina and is not working under the direct supervision of an active member of the State Bar may not perform functions or services that constitute the practice of law.[iii] Under the express language of N.C. Gen. Stat. §§ 84-2.1 and 84-4, a non-lawyer who is not working under the direct supervision of an active member of the State Bar would be engaged in the unauthorized practice of law if he or she performs any of the following functions for one or more of the parties to a residential real estate transaction: (i) preparing or aiding in preparation of deeds, deeds of trust, lien waivers or affidavits, or other legal documents; (ii) abstracting or passing upon titles; or (iii) advising or giving an opinion upon the legal rights or obligations of any person, firm, or corporation. Under the express language of N.C. Gen. Stat. § 84-4, it is unlawful for any person other than an active member of the State Bar to hold himself or herself out as competent or qualified to give legal advice or counsel or as furnishing any services that constitute the practice of law. Additionally, under N.C. Gen. Stat. § 84-5, a business entity, including a corporation or limited liability company, may not provide or offer to provide legal services or the services of attorneys to its customers even if the services are performed by licensed attorneys employed by the entity. See, *Duke Power Co. v. Daniels*, 86 N.C. App. 469, 358 S.E.2d 87 (1987); *Gardner v. North Carolina State Bar*, 316 N.C. 285, 341 S.E.2d 517 (1986), and *State ex rel. Seawell v. Carolina Motor Club, Inc.*, 209 N.C. 624, 184 S.E. 540 (1936).

Accordingly, a nonlawyer is engaged in the unauthorized practice of law if he or she performs any of the following functions in connection with a residential real estate closing (identified only as examples):

1. Abstracts or provides an opinion on title to real property;
2. Explains the legal status of title to real estate, the legal effect of anything found in the chain of title, or the legal effect of an item reported as an exception in a title insurance commitment except as necessary to underwrite a policy of insurance and except that a licensed title insurer, agency, or agent may explain an underwriting decision to an insured or prospective insured, including providing the reason for such decision;
3. Explains or gives advice or counsel about the rights or responsibilities of parties concerning matters disclosed by a land survey under circumstances that require the exercise of legal judgment or that have implications with respect to a party's legal rights or obligations;
4. Provides a legal opinion, advice, or counsel in response to inquiries by any of the parties regarding legal rights or obligations of any person, firm, or corporation, including but not limited to the rights and obligations created by the purchase agreement, a promissory note, the effect of a pre-payment penalty, the rights of parties under a right of rescission, and the rights of a lender under a deed of trust;

5. Advises, counsels, or instructs a party to the transaction with respect to alternative ways for taking title to the property or the legal consequences of taking title in a particular manner;
6. Drafts a legal document for a party to the transaction or assists a party in the completion of a legal document, or selects or assists a party in selecting a form legal document among several forms having different legal implications;
7. Explains or recommends a course of action to a party to the transaction under circumstances that require the exercise of legal judgment or that have implications with respect to the party's legal rights or obligations;
8. Attempts to settle or resolve a dispute between the parties to the transaction that will have implications with respect to their respective legal rights or obligations;
9. Determines that all conditions of the purchase agreement or the loan closing instructions have been satisfied in accordance with the buyer's or the lender's interests or instructions;
10. Determines that the deed and deed of trust may be recorded after an update of title for any intervening conveyances or liens since the preliminary opinion;
11. Determines that the funds may be legally disbursed pursuant to the North Carolina Good Funds Settlement Act, N.C. Gen. Stat. § 45A-1 et seq.^[iv]

The foregoing list of examples of functions that constitute the practice of law is not exclusive, but reflects a range of responsibilities and duties that involve the following: the exercise of legal judgment; the preparation of legal documents such as deeds, deeds of trust, and title opinions; the explanation or interpretation of legal documents in circumstances that require the exercise of legal judgment; the provision of legal advice or opinions; and the performance of other services that constitute the practice of law.

Issue 2:

May a nonlawyer who is not acting under the supervision of a lawyer licensed in North Carolina (1) present and identify the documents necessary to complete a North Carolina residential real estate closing, direct the parties where to sign the documents, and ensure that the parties have properly executed the documents; and (2) receive and disburse the closing funds?

Opinion 2:

Yes. So long as a nonlawyer does not engage in any of the activities referenced in Opinion 1, or in other activities that likewise constitute the practice of law, a nonlawyer may: (1) present and identify the documents necessary to complete a North Carolina residential real estate closing, direct the parties where to sign the documents, and ensure that the parties have properly executed the documents; or (2) receive and disburse the closing funds.

Although these limited duties may be performed by nonlawyers, this does not mean that the nonlawyer is handling the closing. Since, as described in issue 1 above, the closing is a collection of services, most of which involve the practice of law, a lawyer must provide the necessary legal services.^[v] And, since N.C. Gen. Stat. § 84-5 prohibits nonlawyers from arranging for or providing the lawyer or any legal services, nonlawyers may not advertise or represent to lenders, buyers/borrowers, or others in any manner that suggests that the nonlawyer will (i) handle the "closing;" (ii) provide the legal services associated with a closing, such as providing title searches, title opinions, document preparation, or the services of a lawyer for the closing; or (iii) "represent" any party to the closing.^[vi] The lawyer must be selected by the party for whom the legal services will be provided.

Notwithstanding this opinion, evidence considered by the State Bar with respect to this advisory opinion indicates that, at the time documents are presented to the parties for execution, a lawyer who is present may identify or be asked about important issues affecting the legal rights or obligations of the parties. A lawyer may provide important legal guidance about such issues, but a nonlawyer is not permitted to do so. Moreover, a consumer's retention of a licensed North Carolina lawyer provides financial protection to the consumer. The North Carolina Rules of Professional Conduct require a lawyer to properly handle all fiduciary funds, including residential real estate closing proceeds. In the event a lawyer mishandles the closing proceeds, the lawyer is subject to professional discipline, and the State Bar Client Security Fund may provide financial assistance for a person injured by the lawyer's improper application of funds. On the whole, the evidence considered by the State Bar indicates that it is in the best interest of a consumer to be represented by a lawyer with respect to all aspects of a residential real estate transaction.

The evidence the State Bar has considered suggests, however, that performing administrative or ministerial activities in connection with the execution of residential real estate closing documents and the receipt and disbursement of the closing proceeds does not necessarily require the exercise of legal judgment or the giving of legal advice or opinions. Indeed, the execution of closing documents and the disbursement of closing proceeds may be accomplished—and often have been accomplished—by mail, by email, or by other electronic means, or by some other procedure that would not involve the lawyer and the parties being physically present at one place and time. The State Bar therefore concludes that it should not be presumed that performing the task of overseeing the execution of residential real estate closing documents and receiving and disbursing closing proceeds necessarily involves giving legal advice or opinions or otherwise engaging in activities that

constitute the practice of law.

Nonlawyers who undertake such responsibilities, and those who retain their services, should also be aware that (1) the North Carolina State Bar retains oversight authority concerning complaints about activities that constitute the unauthorized practice of law; (2) the North Carolina criminal justice system may prosecute instances of the unauthorized practice of law; and (3) that N.C. Gen. Stat. §84-10 provides a private cause of action to recover damages and attorneys' fees to any person who is damaged by the unauthorized practice of law against both the person who engages in unauthorized practice and anyone who knowingly aids and abets such person. In addition, non-lawyers and consumers should bear in mind that other governmental authorities such as the Federal Trade Commission, the North Carolina Attorney General, district attorneys, and the banking commissioner, have jurisdiction over unfair trade practices and violations of requirements regarding lending practices.

Endnotes

[i] By statute, title insurance in North Carolina can be issued only after the title insurance company has received an opinion of title from a licensed North Carolina attorney who is not an employee or agent of the company and who "has conducted or caused to be conducted under the attorney's direct supervision a reasonable examination of the title." N.C. Gen. Stat. § 58-26-1.

[ii] Except as permitted under *State v. Pledger*, 257 N.C. 634, 127 S.E.2d 337 (1962), which allows a party having a "primary interest" in a transaction to prepare deeds of trust and other documents to effectuate the transaction.

[iii] The State Bar notes that the North Carolina General Assembly and Supreme Court are the entities that have the power to make the ultimate determination whether an activity constitutes the practice of law.

[iv] Since the original adoption of this opinion, the Committee has reviewed numerous complaints concerning nonlawyers, many of whom hold out to the closing parties that they will conduct "closings," including disbursement of funds, at any time of day, including after normal business hours. However, under the Good Funds Settlement Act, N.C. Gen. Stat. § 45A-4, funds may not be disbursed until the deed and deed of trust (if any) have been recorded, which in most counties requires physical delivery to the Register of Deeds during normal business hours. Accordingly, while execution of the documents may be conducted at any time, the actual "closing" and disbursement of funds may not occur until after the required documents are recorded.

[v] Except as permitted under *State v. Pledger, supra*, or by an individual *pro se*.

[vi] Almost without exception, these nonlawyer service providers are corporations or limited liability companies that market their services to lenders, not consumers. Most are also title insurance agents. Accordingly, lenders commonly inform borrowers that the nonlawyer will be conducting the closing without any meaningful opportunity for the borrower to decide to retain a lawyer to protect its interests. Additionally, when the nonlawyer is a title insurance agent, the borrower usually is given no choice on insurer or available rates. The Committee expresses no opinion whether these actions may violate N.C. Gen. Stat. § 75-17, which prohibits a lender from requiring its borrower to obtain a policy of title insurance from a particular insurance company, agent, broker or other person specified by the lender. Title companies (and other parties) may refer lenders or borrowers to attorneys at their customer's request, but may not require the use of a specific attorney or charge a fee for any such referral.

THE NORTH CAROLINA STATE BAR

217 E. Edenton Street • PO Box 25908 • Raleigh, NC 27611-5908 • 919.828.4620

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