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**Bulletin #2005-014**

To: All South Carolina Agents, Approved Attorneys, and Their Staff

From: Joshua O. C. Lonon, Esq.

Date: October 28, 2005

Re: **New Ethics Advisory Opinion**

The South Carolina Bar's Ethics Advisory Committee has released a new ethics opinion concerning real estate practice in South Carolina. I have attached a copy for your review.

**Ethics Advisory Opinion 05-18** Upon the request of a member of the South Carolina Bar, the Ethics Advisory Committee has rendered this opinion on the ethical propriety of the inquirer's contemplated conduct. This Committee has no disciplinary authority. Lawyer discipline is administered solely by the South Carolina Supreme Court through its Commission on Lawyer Conduct.

### **South Carolina Bar Ethics Advisory Opinion 05-18**

#### **RULES 1.0(f), 1.1, 1.2(a), and 5.5(a)**

**Date:** October 21, 2005

#### **Facts**

Attorney is licensed to practice in South Carolina, and both Law Firm A and Law Firm B are located in South Carolina with South Carolina licensed attorneys. Attorney has been asked to perform real estate closings for Law Firm A. Law Firm A will not make it possible for Attorney to participate in pre-closing or post-closing activities. Law Firm A wants Attorney to merely explain the closing documents and obtain appropriate signatures on those documents. Attorney will typically receive a closing package at the closing table, and the package will not include the lender's closing instructions or a title abstract.

#### **Questions**

1. May Attorney act in this limited capacity within the South Carolina Rules of Professional Responsibility?
2. If Attorney performs the closings as requested by Law Firm A, is he/she ethically responsible for ensuring compliance with the lender's closing instructions?
3. If Attorney performs the closings as requested by Law Firm A, is he/she ethically responsible for ensuring that funds from the closing are properly disbursed?
4. If Attorney performs the closings as requested by Law Firm A, is he/she ethically responsible for ensuring that the closing documents are properly recorded?

#### **Facts & Questions II**

In accordance with the facts stated above, Attorney has been asked to perform closings for Law Firm A in which Law Firm A is acting as Law Firm B's "agent." Law Firm B is to handle all pre-closing and post-closing activities. Attorney is totally unfamiliar with Law Firm B and its personnel. Are any of the answers to the questions above altered as a result of this arrangement?

#### **Summary**

An attorney may limit representation in a real estate closing to certain portions or phases of the transaction without violating the South Carolina Rules of Professional Conduct, if the limitation is reasonable under the circumstances and the clients give informed consent. However, the arrangement presents elevated risks of ethical violations, and

attorneys are advised to take additional precautions to avoid violating, in particular, Rules 5.5(a), 1.1, and 1.2(c), or in the alternative should avoid undertaking the representation.

### **Discussion**

Attorney does not violate the South Carolina Rules of Professional Conduct, *per se*, by taking on the limited representation proposed.

However, Attorney should take precautions to ensure compliance with SCRPC 5.5(a), 1.1 and 1.2(c). Rule 5.5(a) of SCACR 407 provides:

A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.

In a line of cases beginning with *State v. Buyers Service*, 292 S.C. 426, 357 S.E.2d 15 (1987), the South Carolina Supreme Court has held that each phase of a real estate transaction, including the preparation of legal instruments and title abstracts, the closing, and recording of instruments, is the practice of law and therefore must be supervised by a licensed South Carolina attorney. See also, *In the Matter of Lester*, 353 S.C. 246, 578 S.E.2d 7 (2003); *Ex Parte Watson*, 356 S.C. 432, 589 S.E.2d 760 (2003); *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003).

Because Attorney either does not participate in, or is not permitted to participate in, “pre-closing” and “post-closing” duties, such as preparation of the title abstract and recordation of documents, Attorney may unwittingly assist a person who is not a member of the Bar in the unauthorized practice of law, in violation of 5.5(a). While the Committee does not make determinations as to what constitutes the unauthorized practice of law, in a handful of cases the South Carolina Supreme Court has disciplined attorneys involved in representations similar to the one proposed for violation of former Rule 5.5(b), which contained, in effect, the equivalent prohibition.

*In the Matter of Arsi*, 357 S.C. 8, 591 S.E.2d 627 (2004), for example, involved an attorney that was disbarred for, among other things, participating in real estate transactions which were not properly supervised by a South Carolina attorney. The attorney in that case reviewed a title abstract and closing documents prepared by a company and attended the closings as attorney for the borrowers. The attorney contended he “was under the mistaken impression” that another attorney would be handling the disbursement of funds and recordation of closing documents, but later learned disbursements were being made by a company without attorney supervision. The Court stated it was the attorney’s “responsibility to see that the transaction was properly closed and that the proceeds from the transaction were disbursed in accordance with the settlement statement,” and further that it was his responsibility to assist the clients in removing impediments to the closing when difficulties arose.

In a related case, *In the Matter of Pstrak*, 357 S.C. 1, 591 S.E.2d 623 (2003), attorney received a public reprimand for assisting a nonlawyer in the unauthorized practice of law when he attended a closing in place of another attorney, under the “good faith impression” that the other attorney had or would examine the title abstract and closing

documents and supervise disbursement of funds, when in fact such was not the case. The Court admonished that “when he served as the closing attorney in connection with the transaction it was his responsibility to see that an attorney had been involved in all other aspects of the transaction requiring attorney participation . . . that it was his responsibility to either see to the proper disbursement of the funds or see that an attorney approved by the client was going to handle or oversee the recordation of documents and proper disbursement of funds.” See also, *In the Matter of Boyce*, 364 S.C. 353, 613 S.E.2d 538 (2001) (public reprimand for attorney who participated in “witness only closing” without ensuring all phases of the transaction were properly supervised by a licensed attorney).

Even assuming Attorney has ensured that Law Firm A performs pre-closing and post-closing duties, Attorney must still take measures to ensure that he or she does not assist the nonlawyer staff of Law Firm A in the unauthorized practice of law. If the licensed attorneys of Law Firm A do not adequately supervise activities performed by nonlawyer staff, such as preparation of title abstract and recordation of documents, Attorney may assist in the unauthorized practice of law by participating in the closing. Because Attorney does not participate in supervision of nonlawyer staff, the proposed arrangement subjects Attorney to increased risk of violation of 5.5(a). See, e.g., *In re Wilkes*, 359 S.C. 540, 598 S.E.2d 272 (2004) (attorney disciplined for, among other things, failure to properly supervise nonlawyer assistant in preparation of deed).

Attorney is advised to obtain assurance from an attorney with Law Firm A, preferably in writing, that a South Carolina attorney with Law Firm A has adequately supervised specific pre- and post-closing activities of Law Firm A for each transaction in which Lawyer is involved. In particular, Attorney should obtain assurance that an attorney with Law Firm A has (or will) adequately searched the title (or reviewed and approved the title abstract), reviewed the deed, powers of attorney, and mortgage exhibits, if applicable, for accuracy, and will supervise timely recordation and disbursement of funds. Lawyer is advised to obtain verification after the closing of proper recordation and disbursement. If Law Firm A does not permit Attorney’s involvement in these activities, Attorney is advised to decline the representation.

Attorney must also evaluate whether the arrangement will allow him or her to provide competent representation under RPC 1.1. Rule 1.1 provides:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Again, because Attorney does not participate in pre-closing or post-closing activities, risks of errors, such as undiscovered or undisclosed title defects, erroneous closing documents, recording and disbursement mistakes, also increase. In the *Arsi*, *Pstrak*, and *Boyce* cases cited above, the Court indicated that the attorneys’ conduct violated Rule 1.1 and held the attorneys responsible even for portions of the transaction in which they were not involved. Attorney is advised to carefully evaluate Law Firm A to determine whether the firm’s attorneys have the relevant knowledge and experience and whether the work on which Attorney will rely will be performed with the requisite care and competence.

Regardless, if Attorney wishes to undertake the limited representation proposed, Attorney should comply with Rule 1.2(c), which states: “A lawyer may limit the objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” See also, *S.C. Bar Ethics Adv. Op. # 99-11*.

Attorney should first evaluate whether the limitation is reasonable under the circumstances of the particular transaction. This may include evaluation of factors such as, among other things, convenience to the client and whether Attorney and Law Firm A have the ability to work together to competently represent the client.

Secondly, prior to the closing, Attorney should obtain the clients’ informed consent. Rule 1.0(f) defines informed consent as “the agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Official Comment [6] clarifies that, ordinarily, informed consent requires “communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client’s or other person’s options and alternatives.”

Prior to the closing, attorney should disclose in writing to all clients that his or her representation will be limited to explanation and execution of closing documents, and that he or she performs work on a per-closing basis and is not regularly employed with Law Firm A. Attorney should further explain the risks involved in the proposed limited representation, the material advantages and disadvantages, and the reasonably available alternatives.

In addition, Comment [7] states that “obtaining informed consent will usually require an affirmative response by the client or other person,” and “in general, a lawyer may not assume consent from a client’s or other person’s silence,” although “consent may be inferred from the conduct of a client . . . who has reasonably adequate information about the matter.” Therefore, Attorney is advised to obtain the clients’ consent by signature. Attorney should also provide client with a contact person at Law Firm A and should inform client how to contact Attorney if necessary.

In light of the cases discussed above, Attorney is cautioned that, while it is possible ethically to limit the scope of actions or tasks performed for the clients, it appears Attorney cannot limit his or her professional liability or responsibility to only those tasks. Rather, in those cases the Court has made clear it would hold Attorney responsible even for issues arising outside Attorney’s limited scope of representation. The arrangement presents elevated risks of ethical violations, and attorneys are advised to take additional precautions to avoid violating the Rules of Professional Conduct, or in the alternative should avoid the arrangement altogether.

Based on the foregoing discussion, the Committee answers questions 2-4 in the affirmative and encourages Attorney to consider the foregoing discussion prior to

undertaking the limited representation proposed. Fact scenario II would not alter the Committee's answer, although the involvement of yet another law firm in the closing process further increases the risks of ethical violations.