Real Property Traps

Risk Management Handouts of
Lawyers Mutual

LAWYERS MUTUAL | LIABILITY INSURANCE COMPANY OF NORTH CAROLINA

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INTRODUCTION

Real estate law is one of the most dangerous areas of practice. Thirty-five to forty percent of all claims reported to Lawyers Mutual each year originated as real estate matters. Unfortunately, unlike litigation claims, real estate claims are usually beyond repair once discovered.

Surprisingly, most real estate claims, with the exception of errors related to the closing statement, are not the result of inexperience. Most are the result of simple, human clerical errors caused by doing too much, too fast, too often, and for too little money. The pitfalls listed below happen to the experienced and the inexperienced, the attorney and the paralegal, the big firm and the solo practitioner, the worst attorneys in the state and the best. In short, they happen to everyone.

AVOIDING MALPRACTICE PITFALLS

SELLER FINANCING

One of the most dangerous transactions for a real estate attorney is that which involves purchase money financing by the seller. An initial issue faced by the attorney is deciding whom the attorney represents. According to State Bar Ethics Opinion CPR 100, the attorney not only represents the borrower and the lender, the primary clients, the attorney may also prepare documents for the seller.

Several claims have arisen where the seller in a purchase money transaction accuses the attorney of not fully informing the seller of all the ramifications of purchase money financing. *See e.g. Smith v. Childs*, 112 N.C. App. 672, 437 S.E. 2d 500 (1993) (sellers alleged attorney negligently failed to advise them of the legal implications of the subordination agreement); *Greene v. Carpenter, Wilson, Cannon and Blair, P.A.*, 119 N.C. App. 415, 458 S.E. 2d 507 (1995) (sellers sued closing attorney for negligence for failure to explain the legal effect of a "Purchase Money Note and Deed of Trust"); *Cornelius v. Helms*, 120 N.C. App. 172, 461 S.E. 2d 338 (1995) (closing attorneys breached fiduciary duty by not insuring that sellers received a first lien mortgage on the property).

This issue most often arises, with the greatest exposure, when undeveloped land is sold to a commercial developer who not only wants the seller-financed loan, but needs it subordinated to a construction loan. The project fails and the buyer defaults on both loans. The seller's only recourse is to bid in at the foreclosure sale of the construction loan, even though the property may not be worth the total indebtedness. Even if the sale of the land fails to satisfy the purchase money mortgage, the Anti-Deficiency Judgment Statute, N.C. Gen. Stat. § 45-21.38 precludes the seller from recovering the balance from the first lienholder. The seller then looks to the closing attorney to make him whole.

If your primary client is the buyer, inform the seller in writing that your representation is limited to only drafting the seller's documents. The seller should be advised to seek separate counsel for legal advice. If you represent only the seller, advise your client in writing of the legal ramifications of the Anti-Deficiency Statute and subordination requests and/or financing.

THE CONTRACT

Get one in writing! Read the one you have! Lawyers Mutual receives a few claims each year where the attorney closes upon an oral contract (remember the Statute of Frauds?) or never reads the

written one. For example, Lawyers Mutual handled a malpractice claim resulting from a contract for the sale of two adjoining office condominiums. During discussions about the sale, the parties referred only to the larger of the two condominiums leading the attorney to assume that the sale involved only one unit. The attorney failed to read the contract and drafted the deed describing only one of the units. The seller retained legal title to the other unit even after it became occupied by the purchaser. When the seller went bankrupt, Lawyers Mutual, on behalf of the insured attorney, needed to buy the condominium from the bankrupt estate in order to make the purchaser whole.

Get the contract, read it and always have its terms in the back (or front) of your mind, especially while searching title. A real estate practice is system oriented. Quirks in the contract cause the system to break down. Be on the lookout for issues involving restrictive covenants, property descriptions, septic tanks, mobile homes and loan assumptions. Lawyers Mutual has handled several claims involving combined sales of mobile homes and restricted lots. In these cases, the contract for sale of the land may be conditioned upon the property being used for a mobile home. A title search is completed by a paralegal who is not given a copy of the purchase contract and is left uninformed about the condition. She then fails to note that the title search reveals that the land restricts the use of mobile homes. The attorney, of course, is on the hook for any damages the client suffers as a result.

CLOSING INSTRUCTIONS

Read and follow the closing instructions carefully every time. If the instructions are unclear, make sure that you receive clarification from the lender prior to closing the transaction. In *North Carolina Federal Savings and Loan v. Ray*, 95 N.C. App. 317, 382 S.E. 2d 851 (1989), the plaintiff tendered a check in the amount of $67,500.00 to the closing attorney with ambiguous instructions regarding its disbursement. North Carolina Federal intended for the closing attorney to use the monies to pay off a first lienholder so that its construction loan would be in first position. Instead, the closing attorney disbursed the funds to the borrower with the understanding that he would pay off the lien. The borrower failed to satisfy the first lien and later defaulted on the construction loan. North Carolina Federal successfully sued the closing attorney for negligence, alleging in part that he failed to follow the closing instructions. The Court of Appeals held that even though the instructions were ambiguous, the attorney had a duty to get clarification from the lender. Document clarifications given over the telephone with a follow up letter. Don't rely on any verbal changes to the closing instructions. Always require that all changes be made in writing. *See Title Ins. Co. of Minnesota v. Debnam, Hibbert and Pahl*, 119 N.C. App. 608, 613-17, 459 S.E. 2d 801, 805-06 (1995) (attorney held liable to title insurer for error certifying title because there was no written documentation of lender's agreement to not pay liens).

SURVEY/TITLE INSURANCE/HAZARD AND FLOOD INSURANCE

Always recommend that clients obtain both a survey and title insurance, even in loan assumptions. Following hurricanes Fran and Floyd, Lawyers Mutual received several claims from buyers alleging that their closing attorney failed to advise them to obtain flood insurance. If the property is in a flood plain, be sure to advise the client to obtain flood insurance. Although claims related to hazard insurance are rare, they often increase following natural disasters such as hurricanes. Be especially careful if you are closing a real estate loan on property located in the path of an oncoming hurricane. Check with the property insurer to make sure that the house will not be excluded from coverage due to the approaching storm. In these cases it may be prudent to advise the client to close the loan after the hurricane warning has been lifted. Be on the lookout for lenders who do not require insurance escrow deposits or allow the buyer to purchase a shortterm policy. Claims have also arisen when the mortgage loan and escrow accounts on a rental property is assumed by a buyer who intends to use the property as a personal residence. After the house is burglarized, the new owner learns that the property insurance does not cover the personal contents of the

home. When the uninsured property owner suffers a loss she will sometimes blame the closing attorney for not giving adequate advice.

If a client chooses to disregard your advice regarding obtaining a survey or insurance, have her sign a form letter acknowledging that the advice was given and declined. It is not uncommon for clients to "forget" that their attorney advised them to obtain a survey or insurance after they have suffered a loss.

LOAN PAYOFFS

The most common preventable real estate error we see at Lawyers Mutual involves the failure to properly cancel a deed of trust securing an equity line of credit after a house has been sold. For example, the buyer purchases a home that is subject to an equity line of credit that was acquired by the seller. The closing attorney presents a pay-off check to the lender with oral instructions to cancel the equity line of credit and the deed of trust. In some cases the lender fails to cancel the deed of trust per the attorney's instructions, and the seller continues to use the line of credit attached to the home he sold. The innocent buyer and his lender, who thought they had a first place mortgage, are eventually threatened with foreclosure proceedings when the seller fails to make the payments on the equity loan. *See e.g., Raintree Realty and Constr., Inc. v. Kasey*, 116 N.C. App. 340, 447 S.E.2d 823 (1994), *aff'd*, 341 N.C. 195, 459 S.E.2d 273 (1995). The equity lender is not required to cancel the deed of trust securing the line of credit unless (1) the balance of all outstanding amounts secured by the mortgage or deed of trust is zero, and (2) the borrower (seller) has made a request that the lender cancel the deed of trust by means of "written entry upon the security instrument showing payment and satisfaction." *Id.* at 342, 447 S.E.2d at 825. In the absence of written notice from the seller to the seller's lender, there is no tangible evidence that such a request was ever made. The buyer, who believes he has clear title to the property, will seek recompense from the attorney who handled the closing. To avoid this trap, obtain a letter from the seller requesting that all deeds of trust be cancelled at the time of closing. Send the cancellation letter to the lender with a copy to be acknowledged and returned upon receipt. Mark your calendar for two weeks following to check whether receipt of the letter has been acknowledged and received by your office. A sample letter is located on page 13.

These claims arise from time demands caused by lenders and the secondary mortgage market. The title binder requires cancellation or release of the prior lien. The new lender demands a final title policy immediately, yet the prior deed of trust hasn't been cancelled. The attorney, having paid off the prior lender, assumes the risk and certifies cancellation.

You are not a title insurance company. Don't act like one. If the new lender requires a title policy prior to the cancellation of the existing lien, follow this procedure: When submitting your final title opinion, disclose the non-cancellation of the prior deed of trust to the insurer. Submit copies of your payoff letter, the closing statement, a copy of your trust account check and the "Fed Ex" receipt to the title company, requesting that it not show the prior lien as an exception on the final policy.

If the title company assists you by assuming this risk, return the favor. Make a calendar entry for about six weeks after the closing to see if the cancellation has occurred. *See* N.C. Gen. Stat. § 45-36.3. If the deed of trust has not been cancelled, send a follow-up letter to the prior lender. If in a few weeks there is still no cancellation, notify the title insurer to determine your next step. If the seller happens to be drawing down on a still open equity line of credit that the prior lender has failed to close, it might be caught before the line is exhausted.

DOCUMENT PREPARATION AND TIMELINESS

Proofread! Proofread! Proofread! Make sure the legal description is exactly right. A one-letter typo in a lot/block/plat description can describe a non-existent parcel. Double-check entities, names and exceptions to title. Be especially meticulous with documents prepared by other attorneys. While you may think of the borrower as husband and wife, the other attorney may consider the couple a corporation or partnership. By the time these errors are discovered, it may be too late to file corrective instruments, especially if intervening liens have been recorded.

In our "pure race" state, it is difficult to successfully defend an attorney on a malpractice claim involving a typographical error which is in black and white at the courthouse for everyone to see.

Although you should take your time in real estate law, don't procrastinate. Tie up loose ends, wrap things up in a timely manner and then close your file. Failure to timely record either the original document or a corrective instrument can have major ramifications in a "pure race" state. If your client's interest is damaged due to a failure to timely record, you will find out just how harsh and inequitable our recording statute can be.

TITLE ERRORS

Title search errors are by far the greatest cause of real estate malpractice claims, accounting for 50% of all real estate claims reported in most years. Although title insurance subrogation claims are significant and appear to be increasing, the greatest exposure is to the lender that doesn't require title insurance. These lenders turn your liability policy into their title insurance policy and make Lawyers Mutual a "de facto" title insurance company.

Although any item can be missed within a title search (especially deeds of trust), one specific type of error occurs repeatedly. The certifying attorney improperly reviews a deed of trust that encumbers multiple tracts of land. This usually occurs because the legal description of the deed of trust is poorly drafted. For example, some deeds of trust describe multiple tracts in multiple counties, but the legal description appears at first reading to be of only one tract in one county. Other deeds of trust will describe one tract on the face of the document, but then include the "hidden" statement: "See attached Schedule A." A closer examination reveals that Schedule A doesn't describe the property being searched. In other cases, there are several "Schedule A's," each describing only one tract and each on a separate page. Be careful, take your time and look at every single page of a recorded instrument.

A simple clerical error made during a title search can be the source of a major malpractice claim. For example, the abstractor locates and notes an encumbrance on the property but inadvertently fails to transfer the information to the title opinion. To avoid this common mistake, use a title summary sheet during the title search and note the encumbrance on it immediately upon discovery. Later, go back and review your title notes again, double-checking the notes, summary sheet and title opinion against each other.

KNOW WHEN TO SAY NO

Be careful not to become overly dependent upon one client, developer or lender. It is difficult to say "no" to a client if the client is your primary source of business. When a developer or lender goes under, the creditors start looking for other sources of funds to mitigate their losses. If you've made any type of error, it will come to light. At the same time you're losing deductibles, billable hours and claim-related stress, you're also hurting economically because a major source of revenue is no longer available. Diversify your client base - it's smart business planning as well as good risk management.

RESTRICTIVE COVENANTS

There is no other real estate error that causes lawyers to worry about their own title work as those concerning restrictive covenants. It is not the square footage/ setbacks/etc. issues that cause problems. It's those strange little provisions that don't seem important, until after closing. Review the restrictive covenants in every transaction immediately after reviewing the contract. These two documents, plus the specific terms or facts of the transaction, don't always fit together perfectly. Make sure the buyer has reviewed the restrictive covenants prior to closing. One lawyer was sued by a buyer who was a sports addict and became infuriated when he later learned that the subdivision didn't have cable and prohibited satellite dishes!

CLOSING STATEMENTS

Very few claims arise from the preparation of the closing statement. Those that do arise usually involve

the inexperienced attorney who does not understand the mechanics of a HUD-1 closing statement. A"checks in/checks out" balance sheet is an excellent method of doublechecking the HUD-1.

TACKING

The State Bar has issued an opinion allowing the use of tacking. Among other statements, note that the latest version of the opinion requires full disclosure to the client and suggests tacking should only be done from an owner's title insurance policy.

Double-check your limited title opinion to make sure it clearly indicates the limited search period and doesn't mistakenly certify a full search. Also, recognize that a client could assert damages from a title error that are above and beyond those covered by a title insurance policy. Clients have named several insureds in lawsuits for these types of errors, even though the error occurred several links back. Competition, especially in urban areas, increases the practice of tacking. If you do tack, recognize the potential exposure.

DISBURSEMENT

The Good Funds Settlement Act, Chapter 45A of the North Carolina General Statutes, states the general rule that the closing attorney is prohibited from disbursing funds deposited in the attorney trust account until those funds have been collected. *See* N.C. Gen. Stat. § 45A-4 (1999). Notwithstanding the general rule, the Act sets out certain exceptions under which the attorney may disburse uncollected funds, including a check issued by a lender who is approved by the U.S. Department of Housing and Urban Development "HUD."

In ethics opinion RPC 191, the North Carolina State Bar concludes that failure to comply with the Good Funds Settlement Act constitutes professional misconduct, whether or not the funds are eventually collected. The real danger arises in those cases where the closing attorney disburses in reliance on provisional credit in compliance with the The Good Funds Settlement Act, and later learns that the lender has stopped payment on the check or the check has been dishonored. The State Bar mandates that under these circumstances the closing attorney must personally pay the amount of the failed deposit by either using personal funds or by obtaining sufficient credit to cover the shortfall in the trust account. The attorney may not use the trust account funds of other clients to cover the deposit. Failure to cover the lost funds constitutes professional misconduct.

To avoid this nightmare, always demand wired funds or a cashier's check prior to making any disbursements from the trust account. Never disburse uncollected funds!

RECORDATION

If you are recording multiple deeds of trust, make sure you either wait a minute between filings or have "subject to . . . " language within the subordinate lien. It is the time of recordation, not the page number, that governs the order of priority. Therefore, if you record a first and second deed of trust at the same minute without subordination language in the second deed of trust, you will have two competing deeds of trust in a first lien position.

CLAIMS OF LIEN

When filing a claim of lien, read the statutes every time. These statutes are very technical and can lead to minor but costly errors. Until you are very experienced in this area, don't assume your memory is correct, but review the statutes every time for deadlines, requirements, etc. Get a copy of Urban & Miles' *Mechanics Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement and Priority*, 12 Wake For. L. Rev. 283-385 (1976) and use it as your claim of lien Bible.

FORECLOSURE

This is clearly the fastest growing area of real estate malpractice claims. Until the economic downturn,

the most common claim was the debtor's allegation of a breach of fiduciary duty that, usually, was just a delaying tactic. Now the claims involve three main areas:

Conflicts of interest. Read the numerous ethical opinions concerning a trustee's duties in a foreclosure. *See* CPR 325; RPC 64; RPC 82; RPC 90. Know the limits on what you can and cannot do for the lender.

Technical errors. The foreclosure statutes are detailed and specific. Read them carefully before each foreclosure. Be especially careful if you discover an IRS tax lien during your title search since federal law requires special notice to the IRS, even if its lien is subsequent to the lien you're foreclosing, before its right of redemption is extinguished.

Disbursement. Beware the lender who holds a second mortgage and wants to pay off the existing first mortgage through the foreclosure sale. Debtors across the state are arguing the prior loan's payoff is really their "equity because the foreclosed property was advertised and sold subject to all existing debts, liens and encumbrances" even though the debtors have been relieved of their liability on the prior lien's promissory note. If these debtors are successful with this argument, unjust enrichment clearly occurs.

THE CLOSING CEREMONY

Attend it! Who answers the legal questions if the attorney isn't present? Nonlawyers who work under the direct supervision of a licensed attorney are permitted to close residential real estate transactions pursuant to 2002 FEO 9, but they are nevertheless prohibited from offering legal advice. There is strong evidence supporting the State Bar's finding that it is in the best interest of the client that the attorney be physically present at the closing ceremony. Although a residential closing may seem routine to the attorney, always remember you are assisting your clients in making what is probably the biggest financial transaction of their lives. Treat the transaction and your client accordingly.

CONCLUSION

As these pitfalls show, real estate errors are simple, human mistakes caused by trying to do too much, too quick. A real estate practice is competitive and usually only profitable if done in volume. However, recognize when you take a little extra time in preventing an error, it helps your profit margin in the long run when compared to the lost billable time, stress, and deductible liability you will incur if a claim arises. If you do have a claim, call Lawyers Mutual as soon as possible. Don't try to fix it yourself first. In one claim, an insured's efforts at fixing a problem himself waived a defense that could have been asserted to deny liability.

If there's a way to fix the problem for your client, Lawyers Mutual will work with you through our claims repair program. But Lawyers Mutual can not help you if we don't know about the problem.

ETHICS TIP:

You can find State Bar ethics opinions on the web at:

www.ncbar.gov
or call (919) 828-4620.

SELLER FINANCING PRACTICE POINTERS

- Disclose (in writing) to all parties the nature of non-recourse financing as a result of NC Gen. Stat. Section 45-21.38.
- Disclose (in writing) the conflict to all parties; resist the temptation to represent the buyer and the seller. Do not be lulled into thinking that you are only a "scrivener", especially if the parties have already address some (but not all) of the terms in their contract (see, e.g., the new addendum promulgated by the Board of Realtors).
- Resist the request to try to circumvent the statute, because those efforts will likely fail. For example,
  - Do not incorporate extra land into the deed of trust as additional collateral (that is beyond what is being sold); do not add personal property as collateral (stock, etc.);
  - Do not be lulled into thinking that if you put the property into one name and have the note executed by a third party that you will avoid the transaction being set aside;
  - Do not have guarantees signed by third parties (they won't work).
  - Disclose (in writing) to all parties the issues related to subordination; if the seller financing involves future subordination of the purchase money debt, heed the rules of *Smith v. Martin*, 124 N.C. App. 592, 478 S.E.2nd 228 (l996); include in the documents: maximum amount of the future loan; maximum rate of interest.
  - Do not fail to disclose the seller financing to other institutional lenders involved.
  - Do mark the note and deed of trust "purchase money" on the face of the instruments. *See* N.C. Gen. Stat. sec. 45-21.38.
  - Do not allow the buyer (your client) to split your attorney fees with the seller (not your client) because the seller will later argue that you represented both the seller and the buyer.

WHAT THE CLOSING ATTORNEY DOES

Most Buyers, and even real estate agents, do not know or understand the duties and work of a closing or title attorney. The following describes the work most title attorneys must perform to insure the soundness of the title to the property the Buyer wishes to purchase.

CURRENT TITLE OR OWNER

After receiving a copy of the sales contract, the title attorney must find the current record or title owner of the property in the public records. This means the title attorney must find the current record owner of the property as established by the public records. In some cases the Buyer may think he is purchasing the property from John Smith, but in reality the record owner is a corporation named J.S. Associates, Inc. The title attorney must then contact the Secretary of State's office to determine the corporate owner's status as a corporation.

CHAIN OF TITLE

The title attorney must then establish the "chain of title" either for the last sixty years or since the last date of issuance of a title policy. Every prior deed of conveyance of title must be scrutinized for proper execution of the document. In some cases, estate files must be reviewed where a prior owner died before the next conveyance was made. Sometimes the title

attorney will have to contact former owners or those who knew the former owners to verify ownership of the property.

SURVEY

A surveyor is extremely important to a title attorney (and incidentally to the Buyer) as a surveyor defines the real boundary lines of the property to be purchased. Where rural or old property (as opposed to a lot in a subdivision) is involved, a title attorney may have a survey conducted contemporaneously with the title search. This is true where the bounds of the property are uncertain and must be established to conduct a reliable search and to formally advise the Buyer what is being purchased.

OUT CONVEYANCES

Once the chain of title is established, the title attorney must review the Grantor indices held at the County Register of Deeds office to determine all out conveyances of record made by each of the prior owners of the property. This is done to insure that none of the prior owners ever conveyed the subject property (or a portion of it) previously. This can mean checking five to ten out conveyances on up to several hundred, depending on the activity of any of the former owners. Additionally, checking the "outs" will establish the outstanding deeds of trust against the property - deeds of trust, which must be paid off before the Buyer can obtain clear record title.

JUDGMENTS AND LIENS

After establishing the chain of title and out conveyances, the title attorney must also check the judgments, civil actions, special proceedings, lis pendens, miscellaneous, taxes and assessments which may have become liens against or affect title to the property. If there are outstanding judgments against a previous owner, these must be satisfied or released as to the property to clear title for the Buyer. Releases and other agreements must be drafted to facilitate clearance of title.

RESTRICTIVE COVENANTS

Most subdivisions, townhouse and condominium projects have restrictive covenants, which apply to each and every lot within the subdivision. These restrictive covenants provide requirements for location of a house on a lot, the use of the lot and location of service and drainage easements. The title attorney must review these restrictive covenants and a current survey of the lot to be sure there are no violations of the restrictive covenants (i.e. a shed which violates a side set back).

LENDER'S INSTRUCTIONS

The closing attorney's office also prepares the loan documentation according to the lender's closing instructions. While the closing attorney cannot negotiate or change the terms and fees associated with the loan, the closing attorney is responsible for:

- Ensuring that the correct fees and charges are included on the HUD-1 Settlement Statement according to the lender's closing instructions;
- Ensuring that the correct legal description on the lender's deed of trust and proper recordation of same;
- Ensuriing that the lender's loan package and title policy are delivered to lender as soon as possible.

The foregoing represents an outline of the work a title attorney should do for a Buyer of real property. Many times far more work is involved if there are numerous judgments, assessments or other title defects associated with the property. At a minimum, a title attorney will spend ten (10) hours of work time devoted to the entire transaction of a Buyer from beginning to end. Many closings require far more time where issues involving interim lease agreements, negotiations of purchase terms and other special documentation are required.

THE TEN COMMANDMENTS OF CLOSINGS

I. Thou shalt not walk into the deed vault nor close a real estate transaction unless thou knowest what thou art doing or thou has learned brethren or sistren to lend a helping hand. The days when "anyone can close a loan" are gone.

II. Thou art not a title insurance company nor is thy malpractice carrier. Many are those, both owners and lenders, who are using the attorney as their title insurance company.

III. Thou shalt document the substance of every telephone conversation involved in the transaction. Thou shalt cover thine hind parts.

IV. Thou shalt have a working knowledge of environmental law. And lo, there shall one day be pestilence upon the entire face of the earth and environmental law will touch every transaction.

V. Verily, verily I say unto you that the closing attorney is as the hub of a wheel and each party to the transaction a spoke. If in the future any of the spokes is broken economically, ye whose name was blessed at closing shall be called "Oh cursed one." Beware of the potential conflicts of interest that could be alleged in the future and proceed cautiously.

VI. Thou shalt not disburse loan proceeds before updating and recording title. "Tis better to suffer the wrath of an angry realtor or property owner than to bury thy law license in the sand."

VII. Thou shalt uncover thine eyes and proofread carefully the work of those thou superviseth. If thy support staff has erred and thou hast not reviewed their work, then two errors have occurred. Many are the attorneys who have suffered a claim because of a typo the size of a mustard seed.

VIII. Thou shalt say "Get thee behind me Satan" if thou art pressured to perform a transaction in a way that thou thinks is improper. Do not succumb to the almighty dollar. Tis better to lose a closing fee that to suffer the slings of multiple claims resulting from a system breakdown because one has worshipped at the altar of the "Cash Cow" client.

IX. Thou shalt always review each instrument within the title search in its entirety. Beware the deed of trust that encumbers the property in the hidden "Attached Schedule A."

X. Thou shalt never forget this real estate transaction is the biggest transaction of thy client's life. Communicate, communicate, communicate.

CLOSING CHECKLIST FOR THE BUYER

The following guidelines are provided to help assure a smooth closing:

☐ **Repairs** - Several weeks before closing, check to see if the seller is making the repairs to which you both agreed. Don't wait until the week of closing to begin inspecting repairs, as this may be too late for you to cause the seller to make the changes you require.

☐ **Building Inspector** - If you are building a house, it is a good idea to retain the services of a professional engineer or licensed general contractor to work for you as a home inspector. This person should be in a neutral position (i.e., not affiliated with your builder) and periodically inspect the construction and advise you of the quality and the progress of the work.

☐ **Lender's Conditions** - Obtain a written list of all conditions your lender will require from you for loan approval. Promptly comply with all of your lender's requirements and hand-deliver all documentation to your loan officer. Keep copies for your files with a record of the date and time the originals were delivered.

☐ **Termite Report** - If you are buying an existing house, order a termite report of the subject property within three to four weeks of closing. Immediately after you receive the report, give a copy to this office and to your lender. If you are buying property in a rural area, your lender will probably require a well/septic report or a community water report.

☐ **Homeowner's Insurance** - One week before closing have your insurance agent deliver a homeowner's (also known as hazard insurance) policy to this office. Ask your lender/loan officer how much coverage your loan will require and how the mortgagee clause of your policy should read.

☐ **Closing Services** - You will not need to obtain a survey or title insurance as these are items that I will procure as part of my closing services to you.

☐ **Attendance at Closing** - If you, or any of your co-borrowers or buyers cannot attend the closing, please advise this office and your lender at least one week prior to closing. The buyers who cannot attend a closing will be required to execute a power of attorney which designates someone who can attend the closing to sign on the absent buyer's behalf.

☐ **Scheduling the Closing** - Please be aware that most closings are, by popular demand, scheduled for the end of the month. Please be advised that if your closing is scheduled for the end of the month, our ability to serve you is inhibited by the high volume of demand made by all of those wishing to close at that time. We ask your patience and consideration of others at this peak time. We would be delighted if you would prefer to close at another time in the month. Please notify us if you would like to reschedule for another time.

SAMPLE LETTER TO CLIENT-SELLER

Dear [Client Seller]:

Thank you for selecting this firm to represent you in connection with the sale of your real property located at _____ to _____.

OPTION A: DISCLOSURE RE LIMITS ON SELLER FINANCING

As I explained to you by telephone, North Carolina has an unusual statute which limits the remedies available in the event a seller takes back a note and deed of trust as part of the purchase price in the sale of real property. This type of financing is called "seller financing" or "purchase money financing". In particular, the statute provides that the seller may foreclose in the event of default, but a seller may not sue the borrower on the note (either in lieu of a foreclosure or in the event there is still a deficiency owed to you after the foreclosure sale). Likewise, you may not sue to recover your attorney fees. In light of these limitations on your remedies, you need to be certain your buyer is an acceptable credit risk. You can best protect yourself with a larger deposit than you might otherwise see in this size transaction. Also, you can refuse to subordinate your debt. Another consideration would be to require a "due on sale" clause when in the event the buyer transfers the property, so you can be paid off at that time. It will not be possible to avoid this statute by obtaining guarantees or other collateral.

OPTION B: DISCLOSURE OF RISKS RE SUBORDINATION

If you consider subordination, you must be very careful because your risk is greatly increased. In other words, if the buyer requests that you subordinate your deed of trust to another lender so that the buyer can more easily obtain additional financing, your deed of trust becomes a "second" or "junior" deed of trust and is not paid off at a foreclosure sale until the first deed of trust is paid in full. That means a second deed of trust may not be paid off in full or may not be paid any funds at all if the foreclosure sale does not generate sufficient funds to pay off even the first deed of trust. If you agree to subordinate for business reasons, the buyer must commit to the maximum amount of the new loan and the maximum interest rate in the subordination agreement. Please have the subordination agreement reviewed by counsel before you sign it.

Sincerely yours,

(FIRM NAME)

(Closing Attorney Name)

RECEIPT ACKNOWLEDGE: Received this _____ day of _____, 20___.

By: _____

SAMPLE LETTER TO NON-CLIENT SELLER

Dear [Non-Client Seller]:

You have asked this firm to represent you in connection with the preparation of certain documents for the sale of real property located at _____ to _____.

OPTION A (DISCLOSE CONFLICT/DISCLOSE LIMITATION ON REMEDY):

Unfortunately, I cannot represent you as I represent the buyer. You will need separate counsel, particularly since a portion of your purchase price will be in the form of a note and deed of trust. This type of financing is called "seller financing" or "purchase money financing". A seller who accepts this type of payment from a buyer is limited in the remedies available upon default. For example, a seller may institute a foreclosure proceeding if there is a default, but may not institute a suit on the note. These limitations and others should be explained to you by your attorney as I represent only the buyer.

OPTION B (DISCLOSE CONFLICT/DISCLOSE LIMITATION ON REMEDY/AGREE TO PREPARE ALL DOCUMENTS ON BEHALF OF THE BUYER)

Unfortunately, I cannot represent you as I represent the buyer. You will need separate counsel, particularly since a portion of your purchase price will be in the form of a note and deed of trust. This type of financing is called "seller financing" or "purchase money" financing. A seller who accepts this type of payment from a buyer is limited in the remedies available upon default. For example, a seller may institute a foreclosure proceeding if there is a default, but may not institute a suit on the note. These limitations and others should be explained to you by your attorney as I represent only the buyer.

The buyer has agreed, however, to employ me to prepare all the documents for the closing, including the documents normally prepared by the seller (including the deed, lien affidavit, note and deed of trust). While I am pleased to prepare these documents for the buyer and at the expense of the buyer, I will not be able to give you legal advice about their terms as I only represent the buyer.

Sincerely yours,

(FIRM NAME)

(Closing Attorney Name)

RECEIPT ACKNOWLEDGE: Received this _____ day of _____, 20___.

By: _____

SUBMISSION OF MORTGAGE LOAN PAYOFF AND AUTHORIZATION TO CANCEL DEED OF TRUST/ MORTGAGE INCLUDING EQUITY LINES AND FUTURE ADVANCE DEED OF TRUST IF APPLICABLE

Re: Loan Number:
Borrowers:
Property Address:
Payoff Amount Enclosed:

Dear Sir or Madam:

Enclosed is our firm's trust account check in the amount of $_____ which is intended to satisfy the outstanding balance of the above-captioned loan in full. The Deed of Trust securing this loan, that is to be cancelled, is recorded in Book _____, Page _____, _____ County Registry. This check is tendered to you subject to the following conditions:

1) North Carolina General Statutes §45-36.9 requires that you must submit a satisfaction instrument to the _____ County Register of Deeds in form which complies with Article 4 of Chapter 45 of the North Carolina General Statutes within thirty (30) days of receipt of this payment. North Carolina General Statutes §45-36.9 provides a penalty if you do not submit the satisfaction instrument within the thirty (30) day time period.

PLEASE DO NOT SEND THE ORIGINAL UNCANCELLED DOCUMENTS TO THE BORROWER.

If you prefer, you may also send the original promissory note and deed of trust both marked "paid and satisfied" along with the date of satisfaction signed by an authorized individual to the undersigned and we will submit the paid documents for cancellation.

2) If this check is not sufficient to satisfy your loan in full, please treat the payment as a payment of all accrued interest and a prepayment of the principal and notify the undersigned immediately. We will immediately send you any additional funds necessary to pay the loan in full: DO NOT RETURN THIS CHECK WITHOUT FIRST CONTACTING THE UNDERSIGNED.

3) NOTE: IF THIS IS AN EQUITY LINE OR A FUTURE ADVANCE DEED OF TRUST this loan is to be paid in full and the account is to be closed immediately. You are hereby directed not to advance any additional funds on this equity line and to immediately block/freeze this account and not to honor any further draws, checks, or advances of any kind.

4) Please remit any excess funds or escrow refunds to the Borrowers at _____ _____. If you have any questions, please call the person signing this letter at _____. Thank you for your assistance and cooperation.

Sincerely yours,

_____

_____ _____

Borrower Borrower

Enclosure

ENGAGEMENT LETTER: RESIDENTIAL REAL ESTATE TRANSACTION - FULL TITLE SEARCH

[Date]

[Client Name]
[Client Address]
[Client Address]

Re: Purchase of [Property Address], [Property County]
File ID:

Dear [Client's Name]:

Thank you for selecting our firm to represent you in closing the purchase of your Property in [County]. Upon receipt of the necessary information from your lender, we will proceed to search the title of the Property and prepare all necessary documents for closing.

To give you some idea of what to expect, typical categories for which costs will be incurred, associated with the purchase of the Property include:

(a) Survey;
(b) Title insurance;
(c) Recording fees;
(d) Bank fees;
(e) Escrows;
(f) Attorney fees;
(g) Copy charges;
(h) Express mail charges.

You will not need a hazard insurance policy for closing, given your lot is vacant. You will, however, need hazard insurance coverage in place prior to placing any improvements on the Property. We will order the survey and title insurance commitment.

In preparation for closing, we will perform a title search. The nature of that search may take one of two forms, depending upon whether or not the title has previously been insured. If the title has not been previously insured, a search of the public records for a period of time satisfactory to the title insurance company will be required. If the title has previously been insured, we can obtain affirmative coverage for you and your lender by having the title inspected from the effective date of that coverage to the present. Therefore, absent your objection, we will determine if title insurance coverage exists on the Property and, if so, have the public records examined from the date of that coverage. This procedure will enable us to keep your cost to a minimum while, at the same time, providing full title insurance coverage for you and satisfying your lender's requirements.

We, as closing attorneys, make no representation as to the structural integrity of any improvements on the Property (if any), nor do we provide any opinion as to the environmental condition of the Property. In addition, the survey should reveal whether or not the Property lies within a flood plain. As we are not surveyors nor are we engineers, we make no representations as to whether or not the property lies within a flood plain. Our ability to provide you with flood plain information is limited by what is disclosed to us by the surveyor's report and by what, if anything, we may find on the public record.

A survey of the Property may reveal the existence of boundary overlaps, gaps, gores or encroachments affecting the Property. If you do not want us to order a survey of your property, please advise us of that in writing within 48 hours of your receipt of this letter. For your reference, if you elect not to have a survey performed, your title insurance policy will contain an exception as to matters of survey which could prove problematic for you in the future.

Presumably you have been provided copies of restrictive covenants applicable to the Property by your real estate agent or the Seller. If you have not, you should obtain a copy of such covenants to be certain your proposed use of the Property to be consistent with those restrictions. In that we have not yet searched the title to the Property, we do not have copies of any such restrictions. If you want us to obtain copies of such restrictions for you, we will be glad to do so in the course of our title search. Please let us know if you want us to provide them to you.

[Conform as Applicable to Facts: It is our understanding from you that the Property is not served by public water and sewer services. Accordingly, you should make arrangements to have the Property evaluated by the appropriate governmental agencies to determine if there is adequate percolation to support a septic system and to determine if the location of such percolation site in anyway conflicts with the location on the Property you have selected to place your house. We recommend that prior to closing you actually obtain a septic permit for the Property. Be mindful of the number of bedrooms allowed by the septic permit as septic systems are permitted based upon the number of bedrooms (not bathrooms) that you will have in your house. Also be mindful of any requirements such as the installation of low pressure pumping systems as they can prove costly and require maintenance. As for lack of public water, we recommend that you determine prior to closing that adequate water is present on the Property to support a residential dwelling.]

We will be in touch with you to confirm your closing date and time. No time of yet has been set. In the event either of you are unable to attend the closing, please let us know immediately. It is possible to close by Power of Attorney if necessary, but your lender must approve that procedure in advance of closing, and necessary document preparation must be completed prior to the date of closing.

Our fee for the above service is $_____. In addition to the foregoing flat fee, you will also be responsible for payment of any expenses incurred by our firm in connection with your closing such as copy charges, express mail charges, fax and long distance telephone charges, each and all of which will be set out on the Settlement Statement at closing.

Upon receipt of your closing package, a closing statement will be prepared by our office. Until that time, we will be unable to provide you with the dollar amount of funds needed to close. When that number is available, we will let you know immediately. Please note that you will need to bring those funds to closing in the form of a certified or cashier's Check Made Payable to [Law Firm] Trust Account in order for us to comply with State Bar requirements.

Also, please remember to bring your drivers license or some other form of picture I.D., as many of the documents need to be notarized.

Should you have any questions regarding your closing at any time, please do not hesitate to contact us. We will be glad to answer any questions you may have.

With kindest personal regards, we remain

Sincerely,

[Attorney Name]
[Law Firm Name]
[Date]

Note: This is a sample form only and is written for the general purposes of facilitating clear expectations and avoiding misunderstandings between an attorney and client. It is not intended as legal advice or opinion and will not provide absolute protection against a malpractice action.

ENGAGEMENT LETTER: RESIDENTIAL REAL ESTATE TRANSACTION - LIMITED TITLE SEARCH

Re: Purchase of _____ (the "Property")

Dear _____:

Thank you for selecting our firm to represent you in closing the purchase of your Property in _____ County. Upon receipt of the necessary information from your lender, we will proceed to search the title to the Property and prepare all necessary documents for closing.

To give you some idea of what to expect, typical categories for which costs will be incurred, associated with the purchase of the Property include:

(a) Survey;
(b) Title insurance;
(c) Recording fees;
(d) Bank fees;
(e) Escrow;
(f) Attorney fees;
(g) Copy charges;
(h) Express mail charges;
(i) Hazard Insurance policy.

We will obtain the title insurance commitment and title insurance policy.

In preparation for closing, we will perform a title search. The nature of that search may take on many one of two forms, depending upon whether or not the title has previously been insured. If the title has not been previously insured, a search of the public records for a period of time satisfactory to the title insurance company will be required. If the title has previously been insured, we can obtain coverage for you and your lender by having the title examined from the effective date of that coverage to the present. The process of performing only a limited title search is what is known as "tacking". If we tack to an existing title insurance policy, you will be relying on your policy of title insurance and not our having actually examined the public records for any matter affecting your title prior to the date of the existing policy of title insurance to which we tacked. Therefore, absent your timely objection, we will determine if title insurance coverage exists on the Property and, if so, have the public records examined only from the date of that coverage to the present. In other words absent your timely objection, we will "tack" to that existing policy of title insurance. This procedure will enable us to keep your costs to a minimum while, at the same time, providing full title insurance coverage for you and satisfying your lender's requirements.

You should be advised that title insurance, while a valuable insurance coverage, does not cover any and all damage that may arise from a title defect. Title insurance also does not necessarily provide immediate relief in the form of the payment of a claim given title insurers have a reasonable time to correct defects in title which the insurer reasonably believes can be corrected. What constitutes a "reasonable time" depends upon the nature of the defect.

We, as closing attorneys, make no representation as to the structural integrity of any improvements on the Property (if any), nor do we provide any opinion as to the environmental condition of the Property. In addition, the survey should reveal whether or not the Property lies within a flood plain. As we are not surveyors nor are we engineers, we make no representations as to whether or not the Property lies within a flood plain. Our ability to provide you with flood plain

information is limited by what is disclosed to us by the surveyor's report and by what, if anything, we may find on the public record.

A survey of the Property may reveal the existence of boundary overlaps, gaps, gores or encroachments affecting the Property. We recommend you have the Property surveyed prior to closing. If a new survey is not performed, you will not be insured by the title insurer for any matters that a new survey would have revealed. We will have the property surveyed absent hearing from you within the next five (5) days to the contrary.

If the Property is a condominium unit, no survey be performed. Therefore at or prior to closing, you should review the recorded condominium plats and plans to be sure the condominium unit you think you are purchasing is actually the condominium unit you have contracted to purchase.

Presumably you have been provided copies of restrictive covenants applicable to the Property by your real estate agent or the Seller. If you have not, you should obtain those covenants to be certain your proposed use of the Property is consistent with those restrictions. In that we have .not yet searched title to the Property we do not have copies of any such restrictions. If you want us to obtain copies of such restrictions for you we will be glad to do so in the course of our title search. Please let us know if you want us to provide them to you.

We will be in touch with you to discuss your closing date and time. In the event either of you are unable to attend the closing, please let us know immediately. It may be possible to close by Power of Attorney, if necessary, but your lender must approve that procedure in advance of closing and necessary document preparation must be completed prior to tile date of closing.

Our fee for the above service is $_____. In addition to the foregoing flat fee, you will be responsible for payment of any expenses incurred by our firm in connection with your closing such as copy charges, express mail charges, fax and long distance telephone charges each and all of which will be set out on the Settlement Statement at closing.

Upon receipt of your closing package, a closing statement will be prepared by our office. Until that time we will be unable to provide you with the dollar amount of funds needed to close. When that number is available we will let you know immediately. Please note that you will need to bring those funds to closing IN THE FORM OF A CERTIFIED OR CASHIER'S CHECK MADE PAYABLE TO "_____LAW FIRM TRUST ACCOUNT" or wire the funds to us in order for us to comply with State Bar requirements. [If you wish to wire the funds, please contact our office and request our firm wire instructions.

ALSO, PLEASE REMEMBER TO BRING YOUR DRIVERS LICENSE OR SOME OTHER FORM OF PICTURE I.D. to closing.

Should you have any questions regarding your closing at any time, please do not hesitate to contact us. We will be glad to answer any question you may have.

With best regards I am,

Sincerely,

_____ LAW FIRM

By: _____

Note: This is a sample form only and is written for the general purposes of facilitating clear expectations and avoiding misunderstandings between an attorney and client. It is not intended as legal advice or opinion and will not provide absolute protection against a malpractice action.

DUAL REPRESENTATION DISCLOSURE AND ACKNOWLEDGMENT

STATE OF NORTH CAROLINA

COUNTY OF _____

DUAL REPRESENTATION
DISCLOSURE AND
ACKNOWLEDGMENT

RE: Lot __, __ Subdivision as shown and more fully described on that certain plat recorded in Book of Maps __, Page __, __ County Registry (hereinafter referred to as the "Property").
Buyer: _____ (hereinafter referred to as the "Buyer")
Seller: _____ (hereinafter referred to as the "Seller")
Closing Attorney: _____, Attorneys at Law (hereinafter referred to as the "Closing Attorneys")

THE UNDERSIGNED Closing Attorneys, in connection with the purchase and sale of the above Property, do hereby make the following disclosures to both Buyer and Seller:

1. That the Closing Attorneys have had for __ years, and continue to have, an attorney-client relationship with the Seller whereby the Closing Attorneys regularly represent the Seller in connection with the following matters:

   a) Acquisition of raw land for development, including but not limited to, contract negotiation, zoning and land use, permitting, legal aspects of infrastructure improvements, restrictive covenants and homeowners association formation; and

   b) Such other legal matters as may arise involving the Seller.

2. That specifically, the Closing Attorneys represented the Seller at the time it acquired the base acreage of which the above referenced Lot __ is a part.

3. That at the time the Seller acquired the base acreage, inclusive of what is now Lot __, the Closing Attorneys certified title to the base acreage and obtained for the Seller an owner's policy of title insurance.

4. That there are no unusual adverse conditions affecting title to Lot __, however, there are the typical easements for utilities benefitting Lot __ as well as a Declaration of Covenants, Conditions and Restrictions which we prepared and caused to be recorded against the base acreage, inclusive of Lot __.

5. That we neither prepared nor negotiated the Offer to Purchase and Contract (the "Contract") between the Buyer and Seller; however, we have examined the same and do not find the Buyer's intended uses for Lot __ to be inconsistent with the Declaration of Covenants, Conditions and Restrictions. Accordingly, we know of no issue pertaining to Lot __ that would lead us to reasonably believe that our acting as counsel to both Buyer and Seller in this transaction will be adverse to the interests of either Buyer or Seller.

6. That based upon all of the information we presently have, it is our conclusion that the interests of the Buyer and Seller in connection with Lot __ are aligned and that we can manage the potential conflict of interest between Buyer and Seller in connection with Buyer's purchase of Lot __ from Seller.

7. That we have considered whether there is any obstacle to our representation of Buyer and Seller in the closing of Lot __ and we do not believe that there is.

8. That while we have represented the Seller for many years as aforementioned, and while we have a financial interest in continuing to represent the Seller, after careful and thoughtful evaluation, we have determined we will be able to act impartially in closing the purchase of Lot __ by the Buyer. Accordingly, we do not reasonably believe that our loyalty to the Seller will interfere with our responsibilities to the Buyer.

9. That we believe there is little likelihood that an actual conflict will arise from our representing both Buyer and Seller in the closing of Lot __ ; however, should a conflict arise, the potential prejudice to Buyer and Seller will be minimal.

10. That while we believe we can manage the common representation of Buyer and Seller in connection with Buyer's purchase of Lot __, there are advantages and risks associated with common representation. The advantages of common representation are: _____
_____
_____
_____

    The risks of common representation are: _____
_____
_____

11. That as Closing Attorneys, we have an equal responsibility to the Buyer and Seller, regardless of our prior and ongoing representation of the Seller and we cannot prefer the interests of the Seller over the interests of the Buyer.

12. That the scope of our representation of the Seller in this transaction is to perform the following tasks for the Seller:

    a) Prepare Deed, Lien Affidavit and Waiver and Taxpayer Identification Certification; and

    b) Take appropriate steps to cause Lot __ to be released from the lien and operation of any deed of trust or other lien encumbering such lot.

    c) _____

    d) _____

13. That the scope of our representation of the Buyer in this transaction is to perform the following tasks for the benefit of the Buyer:

    a) Examine title to Lot __;

    b) Issue an opinion on title (both Preliminary and Final) to a title insurance company to obtain a policy of title insurance in favor of Buyer and Buyer's lender;

    c) Be sure the conditions of the Contract have been satisfied at or prior to closing; and

    d) Comply in all respects with Buyer's lender's closing instructions.

    e) _____

    f) _____

14. That in the event a conflict should arise between Seller and Buyer, we will have to withdraw from representing all parties to the transaction.

The disclosures contained herein are intended to meet our exceed obligations imposed by RPC 210 and 97 FEO 8 promulgated by The North Carolina State Bar.

CLOSING ATTORNEYS:

_____

By: _____

The Undersigned Seller acknowledges receipt of this Dual Representation Disclosure and Acknowledgment this _____ day of _____, 2011.

SELLER:

_____

By: _____

The undersigned Buyer acknowledges receipt of this Dual Representation Disclosure and Acknowledgment this _____ day of _____, 2011.

BUYER:

_____

_____

_____

_____

CLOSING ATTORNEYS

STATE OF NORTH CAROLINA, COUNTY OF _____

I, _____, a Notary Public of the County and State aforesaid; certify that _____ personally appeared before me this day and acknowledged that (s)he is the _____of _____ and that by the authority duly given and as the act of the corporation, the foregoing instrument was signed in its name by its _____.

Witness my hand and official stamp or seal this the __ day of _____.

_____
Notary Public

_____
Printed Name
My Commission Expires: _____

SELLER

STATE OF NORTH CAROLINA, COUNTY OF _____

I, _____, a Notary Public of the County and State aforesaid; certify that _____ personally appeared before me this day and acknowledged that (s)he is the _____of _____ and that by the authority duly given and as the act of the corporation, the foregoing instrument was signed in its name by its _____.

Witness my hand and official stamp or seal this the __ day of _____.

_____
Notary Public

_____
Printed Name
My Commission Expires: _____

BUYER

STATE OF NORTH CAROLINA, COUNTY OF _____

I, _____, a Notary Public of the County and State aforesaid; certify that _____ personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official stamp or seal this the __ day of _____.

_____
Notary Public

_____
Printed Name
My Commission Expires: _____

BUYER

STATE OF NORTH CAROLINA, COUNTY OF _____

I, _____, a Notary Public of the County and State aforesaid; certify that _____ personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official stamp or seal this the __ day of _____.

_____
Notary Public

_____
Printed Name
My Commission Expires: _____