**NBI – Real Estate Closings from Start to Finish – 12/18/2017**

**Ethical Considerations**

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1. **Ethics in the Closing Context**
2. **Competent Representation**

A Lawyer must provide competent representation and must exercise independent professional judgment in rendering advice. (Rules 1.1 and 2.1, Model Rules of Professional Conduct). When a Lawyer agrees to serve as a mere figurehead, so that it appears there is a Lawyer “handling” a closing, the Lawyer violates his/her obligations under the Rules of Professional Conduct (Model Rule 8.4). The Lawyer’s acceptance of the closing documents or signature on the closing statement is the imprimatur of a successful transaction. In many states, because only a Lawyer can close a real estate transaction, the Lawyer signing the closing statement or accepting the closing documents would be found to be doing so in his or her capacity as a Lawyer.

1. **Outsourcing Work**

The Rules of Professional Conduct allow Lawyers to outsource both legal and non-legal work.[[1]](#footnote-1) A Lawyer does not violate the Rules of Professional Conduct by receiving documents from the client or elsewhere for use in a closing transaction, even though the Lawyer has not supervised the preparation of the documents. However, the Lawyer is responsible for utilizing these documents in compliance with the Rules of Professional Conduct, and must review and adopt work used in a closing. Many states’ law allows a title insurance company or other persons to examine records of title to real property, prepare abstracts of title, and issue related insurance.[[2]](#footnote-2) Other persons may provide attorneys with paralegal and clerical services, so long as “at all times the attorney receiving the information or services shall maintain full professional and direct responsibility to his clients for the information and services received.”[[3]](#footnote-3)

The obligation to review, revise, approve and adopt documents used in a real estate closing applies to the entire series of events that comprise a closing. Such events may include, but not be limited to: (i) rendering an opinion as to title and the resolution of any defects in marketable title; (ii) preparation of deeds of conveyance, including warranty deeds, quitclaim deeds, deeds to secure debt, and mortgage deeds; (iii) overseeing and participating in the execution of instruments conveying title; (iv) supervising the recordation of documents conveying title; and (v) in those situations where the Lawyer receives funds, depositing and disbursing those funds in accordance with Rule 1.15(II). Even if some of these steps are performed elsewhere, the Lawyer maintains full professional and direct responsibility for the entire transaction and for the services rendered to the client.

1. **Handling of Funds**

As in any transaction in which a Lawyer receives client funds, a Lawyer must comply with Rule of Professional Conduct 1.15(II) when handling a real estate closing. If the Lawyer receives funds on behalf of a client or in any other fiduciary capacity he/she must deposit the funds into, and administer them from, a trust account in accordance with Rule 1.15(II). It should be noted that Georgia law also allows the lender to disburse funds.[[4]](#footnote-4) A Lawyer violates the Rules of Professional Conduct when he/she delivers closing proceeds to a title company or to a third party settlement company for disbursement instead of depositing them into and disbursing them from an attorney escrow account.

1. **Multiple Representation**

Lawyers are frequently asked to represent more than one party to real estate transactions, including every combination of seller, buyer, borrower, and lender. Even more frequently, lawyers are asked to perform limited real estate tasks (such as deed or mortgage drafting or title searching) for parties other than their principal clients in a transaction. Clients and real estate brokers often favor such practices, on the grounds that such practices promote economy and speed in the completion of the transaction. However, the potential for conflicts of interest is vast. Full disclosure and consent are minimum, not maximum, requirements for ethical compliance.

Even if consent is obtainable, the lawyer should decline to represent the general interests of both a buyer and a seller, or a lender and a borrower, absent unusual circumstances. Even if consent is obtainable, the lawyer should decline to represent the general interests of a secondary client in a transaction for which the lawyer represents the interests of a primary or original client, absent circumstances in which the lawyer and the parties reasonably believe that there is no likelihood of material disadvantage to either party. Avoidance of impermissible conflicts in the performance of specific tasks, particularly in the closing of standard residential transactions, is generally much easier. However, the lawyer’s performance of specific tasks for a secondary client still raises important issues of whether the lawyer can reasonably believe that such performance will not materially adversely affect either client. With this limited exception, the difficulty of the questions raised, and the ease in identifying the alternative - namely, separate representation - raise a presumption that the lawyer should generally decline multiple representation when there is any question of a potentially damaging conflict or appearance of impropriety.

Rule 1.7 of the Rules of Professional Conduct incorporates two vital components. First is the “directly adverse” component, which generally pertains to litigation. Second is the “materially limited” adversity component:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation and with knowledge of the consequences. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.”

Both consent and reasonable belief are thus required before multiple representation may be undertaken; consent alone is not sufficient. As a threshold matter, the lawyer should consider that declining multiple representation offers the advantage of avoiding the issue entirely.

1. **Disclosure of Defects**

Sellers typically have an affirmative duty to disclose known material defects. Buyers do not have a duty to find latent, or not readily observable, defects. However, buyers are required to take reasonable steps to discover ascertainable facts relating to the property, as there is no requirement for sellers to disclose defects that are readily visible or known to the buyer. This duty to disclose extends to residential real estate brokers as well and to attorneys. The Four Elements of a Non-Disclosure Claim are: (1) The seller of a home (or his agent or attorney) must have knowledge of a defect in the property, (2) The defect must materially affect the value of the property, (3) The defect must be not readily observable and must be unknown to the buyer, and (4) The buyer must establish that the seller (or his agent or attorney) failed to disclose the defect to the buyer.

According to the International Association of Certified Home Inspectors, a material defect is “a specific issue with a system or component of a residential property that may have a significant, adverse impact on the value of the property, or that poses an unreasonable risk to people.” This does not necessarily include systems or components that are at or beyond the end of their normal useful life. For instance, a furnace that works fine but was expected to break down years ago is not considered defective. So, as a lawyer, you may not have an independent obligation to investigate the house for defects, but, you do have an obligation to disclose them if known.

1. **Trust Funds**

In most states, the attorney must have all the money from the buyer or buyer’s lender and/or seller deposited in their trust account as required by statue.[[5]](#footnote-5) This includes any earnest money, buyer’s funds, and seller’s funds if the seller has to bring money to closing. All this money must be certified funds and available for withdrawal from the attorney’s trust account before any checks can be issued. Certified funds include money orders, cashier’s checks, and wired funds. A personal check is not considered certified funds and receipt of a personal check will further delay disbursement of all checks after a closing.

Next, if the purchase is being financed, the lender’s funds must be in the trust account and the closing attorney must have authorization to disburse those funds. Before the lender will authorize the use of the loan funds, all the closing documents must be properly executed and most lenders require approval. Another condition of funding authorization is that the executed deed and deed of trust must be recorded with the Register of Deeds office. Finally, once all the money is in the trust account, the lender has given funding authorization, and the recording documents have been recorded, the closing attorney can then release checks to the parties in the transaction.

**II. General Lawyer/Client Relationship Ethical Considerations**

**A. Scope of Representation.** Rule I .2 of Rules of Professional Conduct govern the scope of representation and allocation of authority between client and lawyer. Your first step should be to establish the scope of representation. It is important that both the lawyer and the client understand exactly what tasks the lawyer intends to take on behalf of the client. The client has the authority to determine the purposes to be served by the legal representation and the lawyer as the duty to explain what can be accomplished within the limits imposed by the law as well as the limits imposed by professional responsibility.

While the client has the authority to set the parameters of the actions to be taken; expenses to be incurred; and experts to be retained, it is the lawyer's obligation to make sure the client has the necessary information to set those parameters intelligently.

**B. Retainer Agreements.**

Retainer Agreement should be entered into as soon as possible once a client decides to retain the lawyer. The Retainer Agreement should describe the scope of representation, the objective of the action and what limitations are placed on those objectives. All limitations must be reasonable both under applicable law and the factual circumstances. Fees and the retaining of experts should also be dealt with. It is important that the client understand that they are directly responsible for payment of experts. Sometimes the clients are simply seeking general information and are not requiring the lawyer to commence actions immediately. It is important that the lawyer and the client have a clear understanding of exactly what actions the attorney will be taking on the client’s behalf.

**C. Communications**.

Communications between the lawyer and client are governed by Rule 1.4 of the Rules of Professional Responsibility. This communication begins with the Retainer Agreement which was discussed above. At the same time the Retainer Agreement is executed it is important that the lawyer explain the means and methods which the lawyer intends to follow in the matter. No matter how frustrating it may be, the lawyer needs to make sure the client has a clear grasp of all legal aspects of the engagement. During the engagement, it is important that the client be kept updated as to the status of the engagement and any changes in circumstances.

**D. Fees.**

Fees are governed by Rule 1.5 of the Rules of Professional Conduct. First it should be determined if fees to be charged are hourly or contingent. In determining fees, the lawyer should take into account the novelty or difficulty of the action, client demands, and the lawyer's experience and reputation. While it may appear on the face that all closings run the same course, which is not always the case. There are matters where the client demands the lawyer drop everything else and focus exclusively on the client's matter. It is important the lawyer discuss these factors with the client before commencing the engagement. Doing so will lead to a productive partnership between the lawyer and client.

Clients normally ask how much will this matter cost. The lawyer needs to keep in mind that he/she is dealing with property that has a finite value. It is therefore important that the lawyer provide some estimate of the cost so the client can determine if it makes economic sense to proceed with the closing using your services.

**E. Declining or Terminating Representation.**

There is always the case when the lawyer's view of what the result of an engagement will be differs from what the client insists upon. Under Rule 1.16, there are a number of basis upon which a lawyer can withdraw. If the client becomes unreasonably difficult to deal with or insists upon taking an action which the lawyer considers unreasonable or unsupportable, the lawyer has the right to withdraw. The lawyer has the right to withdraw if the client fails to fill their obligations under the Retainer Agreement. Sometimes it is not the case of the client failing to pay the attorney's fees but rather the client refusing to retain the necessary expert. In that situation, if the lawyer believes the case cannot be properly presented without the use of an expert, the lawyer needs to make that fact clear to the client and if the client refuses to change their position, the lawyer should withdraw.

In the process of withdrawing, the lawyer needs to protect the client against any material adverse effects. If necessary, it is the responsibility of the lawyer to cooperate with the client and the client's new lawyer to properly transfer the file. It is also advisable that the lawyer prepare a written statement setting forth the circumstances of the termination and forwarding it to the soon to be ex-client.

1. *See* ABA Formal Advisory Opinion 08-451. [↑](#footnote-ref-1)
2. See, e.g., (O.C.G.A. § 15-19-53) [↑](#footnote-ref-2)
3. O.C.G.A. § 15-19-54; *see* *also* UPL Advisory Opinion No. 2003-2 and Rules 5.3 and 5.5, Georgia Rules of Professional Conduct). [↑](#footnote-ref-3)
4. O.C.G.A. § 44-14-13(a)(10). [↑](#footnote-ref-4)
5. *See, e.g.,* North Carolina’s God Funds Settlement Act, N.C. Gen Stat. § 45A-1 [↑](#footnote-ref-5)