

THE UNAUTHORIZED PRACTICE OF LAW: PITFALLS FOR THE UNWARY ATTORNEY CLOSING RESIDENTIAL REAL ESTATE TRANSACTIONS

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I. Why Does North Carolina Regulate UPL?

The primary purpose for regulating the practice of law is to protect the public from harm that may result from the activities of dishonest, unethical and incompetent providers of legal services, and to ensure that certain ethical duties to the client, the courts and the public, are adhered to (these duties include loyalty, competence, diligence and candor). *See State v. Pledger*, 257 N.C. 634, 637, 127 S.E.2d 337,339 (1962). In sum, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. *See* Rules of Professional Conduct (“RPC”) 5.5(d), Comment 9. Keep in mind, however, that RPC 5.5(d) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer adequately supervises the delegated work and retains responsibility for their work. *See* RPC 5.3.

II. What is the Unauthorized Practice of Law?

North Carolina, like most states, has an unauthorized practice of law statute, which provides:

[I]t shall be unlawful for any person or association of persons, except active members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys-at-law, to appear as attorney or counselor at law in any action or proceeding before any judicial body, including the North Carolina Industrial Commission, or the Utilities Commission; ... to maintain, conduct or defend the same,... or, by word, sign, letter or advertisement, to hold out himself, or themselves, as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor-at-law, or in furnishing the services of a lawyer or lawyers and it shall be unlawful [for any such unlicensed person] to give legal advice or counsel, perform for or furnish to another legal services, or to prepare directly or through another person, firm or corporation any will or testamentary disposition, or instrument of trust, or to organize any corporations or prepare for another person, firm or corporation, any other legal document.

N.C. Gen. Stat. § 84-4 (2005). Pursuant to N.C.G.S. § 84-2.1, the definition of what constitutes the "practice of law" in North Carolina includes:

1. The preparation or aiding the preparation of deeds, mortgages, wills, trust instruments, legal documents, and contracts by which legal rights are secured;
2. Preparing or aiding the preparation of any petitions or orders in any probate or court proceeding;
3. Abstracting or passing on titles;
4. The preparation and filing of petitions for use in any court, including administrative tribunals and other judicial and quasi-judicial bodies; or
5. By assisting by advice, counsel or otherwise in any legal work.

N.C.G.S. § 84-2.1.

North Carolina courts on several occasions have addressed the issue of what constitutes the unauthorized practice of law under the state's UPL statutes. In Seawell v. Carolina Motor Club, Inc., 209 N.C. 624, 184 S.E. 540 (1936), the North Carolina Supreme Court decided whether a motor club's operation of a claims and adjustment department constituted the unauthorized practice of law. Id. at 630, 184 S.E. at 543. The claim and adjustment services were performed by lay employees and agents of the club, and by attorneys employed, retained, and paid by the Motor Club. Id. at 629, 184 S.E. at 542. As stated by the Court in Seawell, North Carolina's UPL statutes were not enacted for the purpose of giving the legal profession a monopoly in the preparation of legal documents, but rather to provide "security of the people against incompetency and dishonesty in an area of activity affecting general welfare." State v. Pledger, 257 N.C. 634, 637, 127 S.E.2d 337,339 (1962). Nevertheless, the Seawell court concluded that the offering of services for compensation violated the ban on unauthorized practice by corporations. Id. at 632, 184 S.E. at 545. The court reasoned that "[a] corporation cannot lawfully practice law and that it is a personal right of the individual . . . [that] cannot be delegated or assigned...." Id. at 631, 184 S.E. at 544. Since a corporation cannot practice law directly, it cannot do so indirectly by employing lawyers to practice for it. See Lexis-Nexis v. Travishan Corp., 155 N.C. App. 205, 573 S.E.2d 547 (2002).

North Carolina General Statute § 84-5 generally prohibits a corporation from practicing law or appearing as an attorney. Lexis-Nexis v. Travishan Corp., 155 N.C. App. 205, 573 S.E.2d 547 (2002). Lawyers employed by a corporation are not permitted to appear on the corporation's behalf in court, except for the limited purpose of avoiding default or prosecuting a claim in small claims court. Duke Power Co. v. Daniels, 86 N.C. App. 469 (1987). A corporation may also not be represented "pro se" by its CEO, a member of its board of directors, or shareholders. See Lexis-Nexis v. Travishan Corp., 155 N.C. App. 205, 573 S.E.2d 547 (2002). Obviously, corporations specifically authorized to practice law (i.e., law firms) under Chapter 55B of the General Statutes are exempted from the prohibition set forth in N.C.G.S. § 84-5.

In Gardner v. North Carolina State Bar, 316 N.C. 285, 341 S.E.2d 517 (1986), the North Carolina Supreme Court upheld an ethics opinion of the North Carolina State Bar finding a UPL violation. The North Carolina State Bar determined that an attorney who was also a full-time salaried employee of an insurance company could not represent an insured as counsel of record.

Id. at 288, 341 S.E.2d at 519. The North Carolina Supreme Court found that representation by the attorney would constitute the unauthorized practice of law. Id. The court affirmed the Bar's reasoning that allowing attorney-employees to represent insureds would "violate the ban on the practice of law by corporations" and that "the proposed practice would result in an increased risk of conflicts of interest that the Bar considered unacceptable." Id. See also Lexis-Nexis v. Travishan Corp., 155 N.C. App. 205, 573 S.E.2d 547 (2002).

III. How Attorneys Assist Non-attorneys Engage in UPL in Real Estate Transactions and What the State Bar Can Do with Your License if You Do?

A. How Did We Get Into This Mess in the First Place?

As many attorneys across the State can recall, the issue of non-lawyers or lay closers conducting and closing residential real estate loans was hotly debated by the North Carolina State Bar from 1999 to 2003. First, the State Bar ruled in 1999 FEO 13 that an attorney must be present and readily available to answer questions at a residential real estate closing. Then, in two Formal Ethics Opinions in 2001 the State Bar confirmed and clarified the requirement that an attorney be "physically present" at the closing table (2001 FEO 8 and 2001 FEO 4). Copies of these two Ethics Opinions are on-line at <http://www.ncbar.gov/ethics/ethics.asp>.

These actions by the Ethics Committee of the State Bar caused the Department of Justice and the Federal Trade Commission to intervene and write a letter dated December 14, 2001 to the North Carolina State Bar Ethics Committee objecting to mandatory attorney presence at residential real estate closings. The grounds laid out by the DOJ/FTC as to their objections to 2001 FEO 8 and 2001 FEO 4 included that requiring attorneys to be physically present at closing would:

1. force consumers preferring to forego attorney presence at the closing to hire an attorney;
2. raise the cost of closings and refinancing;
3. reduce competition from out-of-state lending companies; and
4. result in harmful delays in the closing process.

See Letter from the Federal Trade Commission and the Department of Justice to the Ethics Committee, North Carolina State Bar (December 14, 2001), on-line at <http://www.ftc.gov/be/V020006.shtm>. In the jointly issued letter, the FTC and DOJ warned the North Carolina State Bar that prohibiting laypersons from conducting residential real estate closings under the guise of constituting UPL may create monopoly conditions and therefore violate federal antitrust laws. Id.

On receiving the objections of the FTC and DOJ, the State Bar initiated a further inquiry into the legality and justifications surrounding 2001 FEO 8 and 2001 FEO 4. The State Bar formed a Special Committee on Real Estate Closings which issued 2002 Formal Ethics Opinion 9 and 2002 Authorized Practice Advisory Opinion 1. In 2002 FEO 9 (on-line at <http://www.ncbar.gov/ethics/ethics.asp>), the State Bar established a rule that an attorney-supervised lay assistant, outside of an attorney's presence, may identify the documents to be executed to the parties of the transaction, show the client the correct place for signature on each document, and handle the proceeds' disbursement for residential real estate transactions. This Opinion formally withdrew the requirement that an attorney must be physically present at the closing as mandated in 2001 FEO 4 and 2001 FEO 8. The ruling in 2002 FEO 9 also creates the possibility of attorneys conducting closings by "mail, by e-mail, [or] by other electronic means." The State Bar, however, emphasized in 2002 FEO 9 its belief that attorney representation at closings serves as the best protection for consumers against closing mishaps.

After receiving further comment from various stakeholders and reviewing and revising draft opinions, the State Bar adopted 2002 Authorized Practice Advisory Opinion 1 ("2002 APAO 1"), which addressed two main questions. A copy of 2002 APAO 1 is on-line at http://www.ncbar.gov/programs/auth_notes.asp#opinion2002. The first question presented in 2002 APAO 1 was "may a non-lawyer handle or represent any party in a residential real estate closing." The question presented was on the surface a very simple one. As to this seemingly simple and straight-forward issue, and after explaining the primary phases and functions performed in the typical real estate closing, the State Bar answered quite definitively in the negative ruling that non-lawyers are not permitted to conduct residential real estate closings under NC law. Additionally, the State Bar listed eight specific activities that, if performed by a non-attorney, would constitute UPL:

- 1) performing abstracts or providing an opinion as to the title of real property;
- 2) explaining the legal status of a real estate title, the legal impact of anything found in the chain of title, or the legal effect of any title insurance commitment exception, unless a licensed title insurer, agency, or agent explains an underwriting decision to the insured or prospective insured;
- 3) explaining or giving advice regarding the rights or responsibilities of parties concerning the land survey to the extent such explanations affect the parties' legal rights or obligations;
- 4) providing legal opinions or advice at the request of any party;
- 5) advising or instructing a party to the transaction regarding alternate means of taking title to the property or the legal consequences of acquiring property in a particular manner;
- 6) drafting legal documents for a party to the transaction or assisting a party in the completion of a legal document or aiding a transaction party in choosing the appropriate legal document form from among several forms;

- 7) explaining or recommending a course of action which requires legal judgment or will affect a party's legal rights or obligations;
- 8) attempting to resolve or settle a dispute between the parties that will affect their legal rights or obligations.

Per the State Bar, the list above was meant to be illustrative and was not to be viewed as the limit of prohibited conduct by non-lawyers.

It is the State Bar's answer to the second question raised in 2002 APAO 1 that apparently created conditions where lay closing companies mistakenly believed that their businesses were granted a right to begin closing real estate loans in North Carolina. The second question raised by the State Bar in 2002 APAO 1 asked:

May a non-lawyer 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?

As to these two specific questions, the State Bar ruled that a non-lawyer may oversee only two distinct elements of a closing (witness/acknowledgment of documents and disbursement of funds) as long as the non-attorney does not participate in any of the aforementioned eight activities which constitute the practice of law. The Bar emphasized, however, the benefits derived from attorney presence during a closing including the State Bar's Client Security Fund, which may provide financial assistance to a person injured by an attorney's misappropriation of funds in a real estate closing. Another benefit gained from using an attorney's services stems from the State Bar's ability to professionally discipline attorneys. The Opinion also warns non-attorneys seeking to conduct closings that their actions will be judged against bar-created standards of what constitutes the practice of law and that they may be prosecuted criminally if they engage in the unauthorized practice of law. The statements from the State Bar in 2002 APAO 1 clearly establish the well-defined role of attorneys within the real estate closing process and places non-attorneys on alert that they may not close residential real estate transactions on behalf of consumers.

B. How do Lay Closing Shops Operate in NC and Close Real Estate Transactions?

In many instances, lay closing shops regularly exceed the very limited authority of non-attorneys to perform work required for the closing of a residential the real estate transaction. Despite the State Bar's narrow ruling in 2002 APAO 1 defining the limited role of laypersons in real estate closings, and that only attorneys could "handle a residential real estate transaction," several homegrown and out-of-state lay closing companies interpreted a "green light" and continued to set up shop and market their services for closing real estate loans across North Carolina. The primary business model adopted by the lay closers involved a company which

markets its services to real estate agents, lenders, mortgage brokers, banks, etc. The closing shops advertise that they are able to close real estate loans as a “single source” closing provider. Some closing companies even offered discounts to real estate professionals offering “10% off your buyer’s closing costs.” The goal of the closing companies was to secure as many buyer clients as possible from other real estate professionals and lenders and provide “one-stop” settlement or closing services in connection with residential real estate transactions.

Typically, the lay closing company is operated by persons with real estate backgrounds or an as an affiliated business by title agents operating within and outside North Carolina. The general business model of the closing companies involves the hiring or contracting of non-attorneys to conduct and manage the closing process. Further, the closing companies normally engage contract title searchers/abstractors (usually non-attorneys) to perform title searches so as to secure a title commitment required by a lender. To do so, however, the non-attorney closing company is forced to work directly with a licensed North Carolina attorney so that the title search and preliminary opinion of title is certified by a licensed North Carolina attorney as required by G.S. § 58-26-1. It is often this function that ensnares the unwary real estate attorney into assisting the unauthorized practice of law in violation of RPC 5.5(d).

In many cases, the lay closing company or its non-attorney title searcher provides a NC attorney a “title report,” and the attorney, for a relatively small fee, then certifies title. The attorney forwards his title certification to closing company or title agent “handling” the closing, and they in turn provide the title certification to a title insurance company to secure issuance of the required policy prior to closing. In some documented cases, licensed attorneys have been found to have certified title for as little as \$3.50, raising serious question as to what effort an attorney may realistically have made (if any) to adequately supervise the non-attorneys who, most likely, actually performed the title search.

Once the real estate attorney “certifies” title in this manner, the lay closing company often drafts a deed for “review and approval” by the licensed NC attorney, or have the attorney prepare it for a relatively small fee. Alternatively, especially with out-of state closing companies, they will simply prepare the deed themselves and charge a fee on the HUD. With the deed and title commitment in place, the lay closing company then manages the remainder of the closing process, including, preparation of the HUD, execution of closing documents, recording, loan pay-offs and disbursement, communicating with the borrower-client, and other post-closing work.

At this point, all the elements necessary to close a real estate transaction are generally complete and no attorney would have ever had occasion to establish a lawyer-client relationship with the prospective buyer-borrower. Rather, the client relationship is managed entirely between the closing company and the buyer-borrower and the closing company “quarterbacks” the entire closing process including contracting out the two functions that are specifically defined by statute as “practicing law” under N.C.G.S. § 84-2.1. Based on this process, consumers are often lulled into thinking they are represented by an attorney in their real estate transaction, but are never given direct access to the attorney for advice and counsel. Rather, in these circumstances, the buyer-client relationship is normally managed entirely by the closing company and the attorney never speaks with the borrower-buyer at all, nor is the attorney generally made available

to answer questions or warn of potential title issues or other pitfalls. Thus, many consumers are given a false sense of protection that really does not exist in fact.

After numerous UPL complaints to the Bar Association's Consumer Protection Committee and directly to the State Bar Authorized Practice Committee, the State Bar began to take action and find that the business model of several of the more "aggressive" closing companies was illegal and ordered them to cease and desist their illegal business practices. Unfortunately for the closing companies, it appears they miscalculated the intent and breadth of the State Bar's ruling in 2002 APAO 1 by interpreting its limitations overly narrow and viewing its permitted conduct overly broad to authorize lay closing shops in North Carolina to conduct real estate closings. The primary problem for the State Bar was that the closing companies had turned 2002 APAO 1 on its head. In the advisory opinion, it was clear that the State Bar was of the opinion that non-lawyers are not authorized by North Carolina law to "handle" a residential real estate transaction from beginning to end. Yet, by their actions, many closing companies sought to entirely supplant the attorney role in the closing process and the attorneys were transformed into, in essence, a mere contractor for the closing companies who otherwise managed and controlled the entire closing and collected the bulk of the fees for doing so. As a result, the relationship with the borrower-buyer client was primarily with the closing company, and not with the attorney that by law is supposed to be tasked with handling the real estate closing.

One of the recent illustrative cases of UPL by a closing company using such a business model involved a company located in Charlotte which we shall refer to anonymously as "Settlement Co." After complaints lodged by the State Bar, Settlement Co. was found to have engaged in business practices in violation of Chapter 84 on at least two separate occasions and issued a letter of caution to cease and desist. Evidence was revealed that a lawyer working for the company was certifying title and preparing deeds for closings, which violates the prohibition in N.C.G.S. § 84-5 against corporations practicing law. Settlement Co. then began to send title work and deed preparation to a Florida licensed attorney who had failed the North Carolina Bar Exam at the time and was unlicensed to practice law in North Carolina. This Florida licensed attorney conveniently shared an office suite with Settlement Co. as well. After it was brought to the Florida attorney's attention that her conduct violated Chapter 84 prohibitions against UPL, she then established through filing with the State Bar a registered "interstate law firm." To do so, the Florida attorney hired a North Carolina attorney that "supervised" the title work and deed preparation at the interstate law firm.

After several complaints that initiated an investigation and hearings before the Authorized Practice Committee, the chair of the committee issued a July 30, 2007 Cease and Desist Letter to Settlement Co. that restated the thrust of 2002 APAO 1 and its prohibition against non-lawyers handling residential real estate closings. The Settlement Co. Cease and Desist Letter specifically found that the business model created by Settlement Co., which is described in general terms above, was illegal. Among the facts which led the AP Committee to conclude the company was engaging in illegal UPL include:

- i. offering to provide residential real estate closing services,

- ii. marketing the company's services to real estate agents, homebuilders, and lenders,
- iii. holding out as able to provide the full panoply of real estate closing services,
- iv. advertising title services and the services of a "paralegal" who will "prepare documents" and "bring intimate knowledge about the process . . . to the closing table,"
- v. advertising that as part of the company's services they review every document and "look for errors, uncover hidden pitfalls, anticipate needs, and troubleshoot potential problems,"
- vi. making arrangements with attorneys to provide title opinions and legal documents for or on behalf of the buyer and the lender for closings conducted by Settlement Co.,
- vii. employing paralegals to provide title abstracts to attorneys that Settlement Co. engages to provide the legal, closing services,
- viii. preparation of deeds, and
- ix. intermingling resources (including domain names) with at least one attorney making it appear that the attorney was part of Settlement Co.

The July 30, 2007 Cease and Desist letter also concluded that Settlement Co.'s marketing of its real estate closing services to real estate agents, homebuilders and lenders is illegal and must end immediately as such marketing stated or implied the company can provide all the necessary services for a closing so as to convince these parties to influence the buyer's decision to use Settlement Co.'s closing services. Re-emphasizing that 2002 APAO 1 prohibits non-lawyers from handling residential real estate closings, it follows that non-lawyers are also prohibited from holding themselves out and advertising their business as a "one-stop loan closing solution." In addition, the Florida licensed attorney which assisted Settlement Co. through a registered "interstate law firm" was also issued a Cease and Desist letter for UPL in connection with her actions closing residential real estate loans as counsel for Settlement Co. and for circumventing North Carolina laws against UPL in forming the separate registered "interstate law firm" with no substantial presence out-of-state and hiring North Carolina attorneys to "oversee" her work closing real estate loans in this state. *See* Cease and Desist Letter dated July 30, 2007 to Tracy Cabanis-Robinson.

Though the State Bar stood firm in issuing the July 30, 2007 Cease and Desist Letter to Settlement Co., other lay closers continue to close loans across North Carolina in a variety of business models, some legal and others in violation of Chapter 84. Those companies that restrict their services and marketing to only services of (a) identifying documents and telling borrower-buyers where to sign, and (b) receiving and disbursing closing funds, will apparently not run afoul of the State Bar and its ruling in 2002 APAO 1. How a company can survive by providing these limited services in a market where attorneys generally include such services in their closing

fee remains to be seen. However, those companies that perform services other than the two stated loan closing functions set out by the State Bar, or advertise their business and hold themselves out as able to provide other loan closing services which constitute the practice of law as defined and delineated by North Carolina law and 2002 APAO 1, may be at risk of engaging in UPL.

The ability of non-attorneys to engage in certain limited functions in a real estate transaction without being adequately supervised by a NC attorney (as defined by the State Bar) has created an opportunity for some creative real estate businesses to find additional fee generating revenue in the form of a “settlement fee”. To do so, however, these companies must involve a NC licensed attorney who will be complicit in, or unknowingly ignorant that, these businesses may be violating North Carolina law against UPL. In doing so, and if found to be helping a settlement company engage in UPL, an attorney can be found to have violated clear strictures of the very Rules of Professional Conduct that can result in the attorney’s discipline which, of course, includes disbarment.

C. Attorney Discipline for Unethical Conduct Regarding Real Estate Transactions

Two recent NC State Bar grievance proceedings vividly illustrate the trouble which can befall an attorney for doing business with illegal closing shops. The first case involves licensed attorney *Lawrence S. Maitin*. In this case, Maitin was found to be assisting a non-lawyer Eric August to facilitate real estate closings in a manner similar to the business model outlined above. The State Bar found that August owned and operated a real estate closing business known as “Preferred Closing Services, Inc.” Maitin and August worked together on a contract basis, and Maitin even gave August the authority to write checks from his trust account, which ended up being a big mistake for Mr. Maitin. Through a company called “Preferred Closings,” and together with the assistance of Maitin who certified title and prepared legal documents, August was able to close numerous real estate transactions for his borrower-clients. As referenced by the State Bar in its Censure of Maitin in August, 2007, Maitin knew from the very beginning of the relationship that:

- a. August was not a lawyer;
- b. August was running a business to facilitate real estate closings;
- c. August was advertising the ability to provide all the services connected with real estate closings, including legal services;
- d. That August was using Maitin’s services to allow August’s business to practice law or offer legal services.

Based on these facts, the State Bar concluded that,

“By agreeing to be the closing agent for August’s clients, you assisted August in the unauthorized practice of law in violation of Rule 5.5(d)

“You also failed to adequately supervise August and as a result August stole client money (from Maitin’s trust account), and facilitated a fraudulent real estate transfer [which involved the theft by August from Maitin’s trust account in the amount of \$140,000].”

“You have violated Rule 5.3(a)(b), Responsibilities Regarding Nonlawyer Assistants. . . . You are hereby censured by the North Carolina State Bar for your violation of the Rules of Professional Conduct.”

A copy of the Censure Order In the Matter of Lawrence S. Maitin is on-line at <http://www.ncbar.com/orders/06g0233.pdf>. The State Bar Authorized Practice Committee dismissed a previously filed UPL complaint against Eric August, due largely to the fact that he had already ceased operations and dissolved his company, Preferred Closing Services, Inc., effective September 21, 2005. Just prior to dissolving his closing company, however, Mr. August formed a new company named America’s Title Insurance Agency, Inc., which is advertised as a title insurance agency seeking to sell title insurance for residential real estate closings (*see* www.americastitle.net). The moral of this story, of course, is no matter how bad the conduct of the person committing the fraudulent transaction, it is the attorney that ends up paying the price and suffering the consequences in the end.

Another recent illustrative disciplinary action by the NC State Bar found further violations of the Rules of Professional Conduct by Charlotte lawyer *Robert A. Forquer*. Based on the State Bar’s findings, Mr. Forquer’s unethical conduct appears to have been even more far reaching than the conduct by attorney Maitin outlined above. In Mr. Forquer’s case in North Carolina, he was found to have engaged in conduct in violation of (i) Rule 5.4(c), Professional Independence of a Lawyer, (ii) Rule 1.8(f), Conflicts of Interest, (iii) failing to communicate with a client in violation of Rule 1.4(a)(b), Communication, and of course, (iv) Rule 5.5(d), Unauthorized Practice of Law. The State Bar specifically found that, by assisting a closing company in its business of closing residential real estate loans, Forquer engaged in a conflict of interest by accepting payment from a third party without his client’s consent, failed to communicate with his client, prepared a deed at the direction of a third party and thereby allowing a third party to direct his services, improperly split a legal fee with a non-lawyer, and assisted a third party’s unauthorized practice of law. A copy of the Censure Order of Robert A. Forquer is available on-line at <http://www.ncbar.gov/orders/07g0641.pdf>.

Of note to young attorneys practicing as associates in law firms which close residential real estate loans on a volume basis is the case of South Carolina attorney John B. Bowden. Keep in mind that South Carolina is similar to North Carolina in that licensed attorneys are required to close residential real estate transactions. When associate attorney Bowden started work as a managing associate for the Forquer Law Firm in Greenville, S.C., he discovered that the firm was inflating government recording fees on settlement statements for HUD-1 real estate transactions. When he asked his boss in the firm’s Charlotte, NC office about it, Mr. Robert Forquer told Bowden the practice was legal and ethical. Of course, that was the wrong answer. The South Carolina Office of Disciplinary Counsel informed Bowden that the firm’s Greenville office failed to keep sufficient records of recording fee charges and failed to track client funds relating to those fees. Even worse, Forquer was apparently using excess fees to cover office expenses and make various payments to himself, according to a ruling by the South Carolina

Supreme Court in a disciplinary action against Bowden. Fortunately for Bowden, or more precisely, for his license to practice law, he wasn't aware of the misuse of funds. But in an agreement with SC Office of Disciplinary Counsel that resulted in a public reprimand by the court, Bowden acknowledged that it was his duty to tell clients that their bills were inflated and to assure that HUD-1 forms were accurate in closings he supervised. He also acknowledged an ethical duty to assure that other lawyers in his office complied with state ethics rules. *See* In the Matter of John B. Bowden, No. 25978 (May 9, 2005); <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=sc&vol=25978&invol=1>.

IV. Who Prosecutes UPL and How?

The legal authority to investigate UPL is vested in the North Carolina State Bar Council or any of its committees appointed by it for that purpose (i.e. the AP Committee), including the power to investigate charges or complaints of:

1. unauthorized or unlawful practice of law; or
2. the use of the designations, "North Carolina Certified Paralegal," "North Carolina State Bar Certified Paralegal," or "Paralegal Certified by the North Carolina State Bar Board of Paralegal Certification."

N.C.G.S. § 84-37(a); 27 North Carolina Administrative Code (NCAC) .0206(1). District attorneys also have inherent power to investigate UPL arising from the fact that any person found violating the provisions of N.C.G.S. §§ 84-4 to 84-8 (prohibiting the practice of law by persons unlicensed to practice in this State) may be found guilty of a Class 1 criminal misdemeanor.

The North Carolina State Bar established the AP Committee to investigate allegations of UPL and to protect the public from being unlawfully advised and represented in legal matters by unqualified persons. 27 NCAC .0201. District bars are not permitted to conduct separate proceedings into UPL matters and are required by State Bar regulations to assist and cooperate with the State Bar in reporting and investigating matters of alleged UPL. 27 NCAC .0202(b). Thus, in terms of the profession policing UPL, the power to investigate and enjoin UPL is statutorily vested in the North Carolina State Bar.

There are several layers of responsibility within the State Bar for addressing the issue of UPL. The State Bar Council supervises the administration of the AP Committee and appoints a counsel who serves at the pleasure of the council. 27 NCAC .0204. The Chair of the AP Committee has general power to supervise counsel, to recommend to the AP Committee an investigation be initiated, that a complaint be dismissed, to direct that a letter of notice to an accused person be sent, to notify an accused if a complaint is dismissed, to call meeting of the AP Committee, to issue subpoenas, to administer oaths, and to file and verify complaints. 27 NCAC .0205(a).

The AP Committee's powers in connection with the unauthorized practice of law include:

1. to direct counsel to investigate alleged UPL; 27 NCAC .0206(1);
2. to hold preliminary hearings, find probable cause, and recommend to the Executive Committee of the State Bar that a complaint for injunction be filed against a respondent; 27 NCAC .0206(2);
3. to dismiss allegations of UPL upon a finding of no probable cause 27 NCAC .0206(3);
4. to issue letters of caution, which may include a demand to cease and desist, to respondents in cases where the Committee concludes that
 - a) there is probable cause to believe that a respondent has engaged in UPL, but
 - i. the respondent has agreed to refrain from engaging in the conduct in the future;
 - ii. respondent is unlikely to engage in the conduct again; or
 - iii. either referral to a district attorney or complaint for injunction is not warranted under the circumstances.
 - b) there is no probable cause established that respondent has engaged in UPL, but
 - i. the respondent's conduct may be improper and may become the basis for injunctive relief if continued;
 - ii. the Committee otherwise finds it appropriate to caution the respondent;
5. to direct counsel to stop an investigation and take no action; 27 NCAC .0206(5);
6. to refer a matter to another agency, including the district attorney for criminal prosecution and to other committees of the North Carolina State Bar; 27 NCAC .0206(6)
7. to issue advisory opinions as to whether contemplated conduct of nonlawyers would constitute UPL in North Carolina; 27 NCAC .0206(7).

The AP Committee and its Chair rely heavily on the work performed by its counsel. The AP Committee counsel is likely the person that the public has the most contact with on a day to day basis in connection with alleged UPL matters and on-going investigations by the State Bar. The counsel serving the AP Committee works directly with the Committee Chair in determining

the agenda and matters brought to the attention of the State Bar, communicating with those under investigation, and taking complaints for further action. *See* 27 NCAC .0207.

The Council of the North Carolina State Bar, through the AP Committee and its counsel, may also bring or cause to be brought and maintained in the name of the North Carolina State Bar an action or actions, against any person or entity that engages in rendering any legal service, holds himself or herself out as a North Carolina certified paralegal by use of the designations set forth above, or makes it a practice or business to render legal services that are unauthorized or prohibited by law. *Id.*

Upon receiving a recommendation from the AP Committee that a complaint seeking injunctive relief be filed, the State Bar Executive Committee reviews the matter and determines whether injunctive relief is necessary to protect the public interest and ought to be prosecuted. 27 NCAC .0208(a). Upon deciding a matter ought to be pursued, the State Bar Executive Committee directs counsel to prepare the necessary pleadings as soon as practical for signature by the chairperson and filing with the appropriate tribunal. 27 NCAC .0208(2). If the State Bar Executive Committee decides not to follow the AP Committee's recommendation, the matter then goes before then full State Bar Council at the same quarterly meeting to determine whether the recommended action is necessary to protect the public interest and ought to be prosecuted. 27 NCAC .0208(c). If the Council decides not to follow the AP Committee's recommendation, the matter is referred back to the AP Committee for alternative disposition. 27 NCAC .0208(d). If probable cause exists to believe a respondent is engaged in UPL and immediate action is needed to protect the public interest before the next quarterly meeting of the AP Committee, the chairperson, with the approval of the president of the Council, may file and verify a complaint or petition in the name of the North Carolina State Bar. 27 NCAC .0208(e). Thus, in addition to its explicit authority to investigate UPL under N.C.G.S. § 84-37, the State Bar is also vested with the authority to go to court to secure an order to enjoin such unlawful conduct.

In any action brought to restrain or enjoin UPL or other conduct prohibited by N.C.G.S. § 84-37, any final judgment in favor of the North Carolina State Bar perpetually restrains the defendant or defendants from the commission or continuance of the unauthorized or unlawful act or acts. N.C.G.S. § 84-37(b). Further, a temporary injunction to restrain the commission or continuance of the act or acts complained of may be granted upon proof or by affidavit that the defendant or defendants have violated any of the laws applicable to the unauthorized or unlawful practice of law or any designation implying certification by the North Carolina State Bar. *Id.* Venue for actions brought to enjoin conduct prohibited by Chapter 84 is in the superior court of any county in which the relevant acts are alleged to have been committed or in which there appear reasonable grounds that they will be committed in the county where the defendants in the action reside, or in Wake County. N.C.G.S. § 84-37(c). In actions brought under Chapter 84, the North Carolina State Bar has the power to "examine the adverse party and witnesses before filing a complaint and before trial in the same manner as in civil actions and as permitted by law." N.C.G.S. § 84-37(d).

While the State Bar does have the authority to enjoin UPL under N.C.G.S. § 84-37, District attorneys across the State also have a statutory duty to enforce laws prohibiting UPL. Specifically, the district attorney of any of the superior courts shall, upon the application of any

member of the Bar, or of any bar association of the State of North Carolina, bring such action in the name of the State as may be proper to enjoin any person, corporation or association of persons who are alleged to have violated the prohibitions against UPL set forth in N.C.G.S. §§ 84-4 to 84-8. N.C.G.S. § 84-7. It is also the stated “duty” of the district attorneys of this State to indict any person, corporation, or association of persons upon the receipt of information of the violation of the provisions of N.C.G.S. §§ 84-4 to 84-8. Persons found to have violated the provisions of N.C.G.S. §§ 84-4 to 84-8 shall be guilty of a Class 1 misdemeanor.

In Baars v. Campbell University, Inc., 148 N.C. App. 408, 558 S.E.2d 871 (2002), the Court of Appeals found that a private individual could not recover from a corporation for alleged UPL under N.C.G.S. § 84-5 because “that statute does not provide a private cause of action.” Though not specifically decided by this opinion or in any other North Carolina case reviewed by this author, and in light of the holding in Baars, it is likely a court could similarly find that there exists no private cause of action for an individual’s violation of the prohibition against UPL in N.C.G.S. § 84-4. If that is the case, the only options for enforcement against persons or companies engaged in UPL is through injunction proceedings initiated and prosecuted by the North Carolina State Bar or a local district attorney, or by prosecution of an offender by a district attorney for the criminal offense of unauthorized practice of law which is a Class 1 misdemeanor under N.C.G.S. § 84-8. However, other courses of action by private individuals who are harmed by UPL may be viable (i.e. unfair and deceptive trade practices).

V. NCBA And The Real Property Section Consumer Protection Attorney

As a member of the NC Bar Association (NCBA) and member of the Real Property Section, many folks may not know that part of the dues that they pay are dedicated to the NCBA’s consumer protection efforts. This consumer protection role was created the RPS almost 10 years ago in response to concerns that consumers were being subjected to increasingly higher risks arising from the emergence of new “real estate professionals” who have sought to assist consumers with closing a loan, foreclosures, estate plans, do-it-yourself divorce, and other legal related services that are operated by persons with no legal training whatsoever.

In general, the Consumer Protection Attorney is analogous to the “geeky kid” you remember from grade school who the teacher chooses to sit at the front of the class and take names when the teacher leaves the classroom so that those misbehaving will be held to account for their transgressions. Seriously, the primary function of the RPS Consumer Protection Committee and the Consumer Protection Attorney is to monitor complaints of UPL and other instances of consumer harm, investigate such complaints to determine if there is a reasonable basis to conclude that UPL has been or may be committed, and to serve as a liaison between consumers and the state agencies that can investigate those accused of engaging in UPL or other consumer harm and enforce the laws which prohibit such conduct.

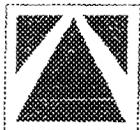
The Consumer Protection Attorney works on behalf of the Consumer Protection Committee (CPC) of the Real Property Section. The CPC is made up of an eight person subcommittee responsible for directing, advising and supervising the work performed by the Consumer Protection Attorney. The CPC is advised and kept informed of various investigation

matters on a regular basis, primarily through email correspondence and regular updates. On a quarterly basis the Consumer Protection Attorney also reports to the Real Property Section Council as to the status of on-going investigations and actions taken by various State enforcement agencies such as the North Carolina State Bar's Authorized Committee ("AP Committee").

Complaints sounding in unauthorized practice of law are routinely referred to the North Carolina State Bar's Authorized Practice Committee for further investigation and action. Other complaints regarding consumer harm arising from real estate transactions, for example those involving mortgage or banking fraud, are referred to the North Carolina Banking Commission. Complaints involving title insurance agents and/or underwriters are referred to the North Carolina Department of Insurance. Issues involving notaries are generally referred to the North Carolina Secretary of State unless the matter involved is one of UPL, in which case the matter is referred to the North Carolina State Bar. From time to time, when a matter involves a more widespread issue of actual or potential consumer harm, the Consumer Protection Committee has acted to refer matters to the Consumer Protection Division of the North Carolina Department of Justice which is responsible for prosecuting violations of numerous consumer protection laws.

VI. CONCLUSION

Over the past decade the unauthorized practice of law may have appeared to be a growth industry with the proliferation of closing shops, document preparation companies, online do-it-yourself kits, and the like. In many cases, UPL exists and threatens consumers only because there are a few attorneys that enable unscrupulous businesses to collect fees for services they are not legally permitted to offer or provide to consumers. As always, once regulators figure out and proscribe or shut down unlawful conduct which poses hazards for consumers, the market seems willing to squeeze out a new variant or scheme by which some bad actors will seek to exploit or take advantage of others in order to make money. There are simply too few resources at the Bar Association, the State Bar, and in local and state law enforcement agencies to "wack all the moles" as they pop up. Nevertheless, there are professionals at the State Bar and the Bar Association that each day work on behalf of members of the Bar and the general public to safeguard the trust which the public has entrusted to this profession to regulate itself and to identify and stop the bad actors, which can sometimes ensnare or include attorneys, and thus jeopardize the practice of law and consumers' confidence in the provision of legal services. The work of the State Bar Council Members who sit on the AP and Ethics Committees, and all other committees of the State Bar, deserve our appreciation and thanks for all the hard work they do to assist us in our practice and to protect consumers across North Carolina.



The North Carolina State Bar
Authorized Practice Committee

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Web: www.ncbar.gov

JUL 30 2007

Ms. Tracey C. Robinson
212 S. Tryon Street
Suite 480
Charlotte, North Carolina 28281

LETTER OF CAUTION
Cease & Desist

Re: Allegation of Unauthorized Practice of Law
File number: 06AP0010

Dear Ms. Robinson:

On July 11, 2007, the Authorized Practice Committee met and considered the results of its investigation into your activities in the above referenced matter. As you will recall, you were informed of the allegations before the Committee and given an opportunity to respond. You responded, and the Committee carefully considered both the information received by it and your response. You also attended the Committee's meeting on April 18, 2007 at which you made a presentation and responded to questions, which the Committee considered as well. You then attended the July meeting and responded to additional questions from the Committee. The Committee thanks you for your cooperation and willingness to respond to its questions.

Based upon all of the information available to it, the Committee concluded that there was probable cause to believe that you have engaged in the unauthorized practice of law in North Carolina. Among the facts that led the Committee to this conclusion are: You are a licensed Florida attorney who resides in Charlotte, North Carolina. You informed the Committee that you are a North Carolina resident with a North Carolina drivers' license and that you are registered to vote in North Carolina. After moving to North Carolina in 2003, you attempted, but were unsuccessful, in obtaining a North Carolina law license by exam in February 2005. Shortly after the results of the Bar exam were mailed, you established a Florida professional corporation named Tracey Cabanis Robinson, P.A. on April 13, 2005. You listed the corporation's principal place of business as the same address as your registered agent, Bethony Brenman. However, you did not have a law office at that address and you identified the corporation's mailing address as a Charlotte address, which appears to be your residence at the time. You then opened an office for the practice of law in North Carolina under the name of your Florida corporation. You concurrently registered with the North Carolina State Bar as an interstate law firm even though you told the Committee that you are only in Florida sporadically, you do not have many Florida clients, and your membership record with the Florida Bar gives only a North Carolina address.

Anthony S. Di Santi, Chair
Joshua W. Willey, Jr., Vice-Chair

After you opened your law office in Charlotte, you entered into a relationship with a business named "The Settlement Co." whereby your firm was asked to provide legal services associated with residential real estate closings. You actively communicated with clients, provided legal advice, and supervised the activities and legal services of this office. You employed or engaged North Carolina attorneys as an employer or contractor to assist you in providing legal services in North Carolina. You and your office prepared legal documents associated with a real estate practice, including deeds, and provided title opinions for buyers and lenders. You were actively involved in overseeing this work as the only principal of your firm.

Eventually, you severed your relationship with the Settlement Co. and created a limited liability partnership for the practice of law with a North Carolina attorney even though you still were not licensed to practice in North Carolina. You still engage in day to day legal work from a North Carolina law office and continue to hold yourself out as an attorney.

It is the unauthorized practice of law in North Carolina for anyone other than a North Carolina licensed attorney to provide legal services or hold out to the North Carolina public as an attorney or as able to provide legal services. N.C. Gen. Stat. §§ 84-2.1, 4, and 5. The registration of your Florida professional corporation, which was only established after you became a North Carolina resident, did not confer upon you any ability to practice law in North Carolina. 27 NCAC 1, Sub. E § .0205. The Committee concluded that there was probable cause to believe that your conduct constituted the unauthorized practice of law in violation of these statutes. Accordingly, it voted to issue this Letter of Caution to notify you of its decision and to demand that you stop engaging in your activities now.

Your conduct is illegal and must end immediately. You may not circumvent the North Carolina laws on unauthorized practice by creating an interstate law firm that has no significant or substantial presence in Florida or forming a partnership with North Carolina attorneys while you live and provide legal services in North Carolina. Additionally, you may not maintain a law firm in North Carolina for which you are a principal and employ North Carolina attorneys to oversee your work product. Further, you may not provide any legal services related to the closing or settlement of North Carolina residential real property transactions, including but not necessarily limited to preparation of legal documents, providing opinions of title, and advising parties about their legal rights or obligations under the closing documents.

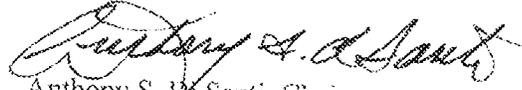
If you continue your activities, the State Bar may seek a court order to perpetually enjoin your unlawful conduct, as the Bar is authorized to do pursuant to North Carolina General Statute Section 84-37 and Chapter 1, Subchapter D, Section .0200 through .0207 of the Rules and Regulations of the North Carolina State Bar. Please also be aware that the unauthorized practice of law can be prosecuted as a criminal misdemeanor offense pursuant to North Carolina General Statute Sections 84-7 and 84-8 (copies enclosed). Because you are a licensed attorney in Florida, the Committee directed that a copy of this letter be sent to the Florida Bar.

Please provide a response with evidence that you have complied with the Committee's decision within 15 days of your receipt of this letter.

Page 3

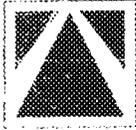
Thank you for your cooperation in this matter. Please contact the Committee's counsel, David R. Johnson, if you have any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Anthony S. Di Santi".

Anthony S. Di Santi, Chair
Authorized Practice Committee

ASD/lr



The North Carolina State Bar
Authorized Practice Committee

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JUL 30 2007

"The Settlement Co."
c/o Mr. Don Lampe
Womble Carlyle Sandridge & Rice
One Wachovia Center, Suite 3500
301 South College Street
Charlotte, North Carolina 28202-6037

LETTER OF CAUTION
Cease & Desist

Re: Allegation of Unauthorized Practice of Law
File number: 06AP0011

Dear Mr. Holmes:

On July 11, 2007, the Authorized Practice Committee met and considered the results of its investigation into your activities in the above referenced matter. As you will recall, you were informed of the allegations before the Committee and given an opportunity to respond. You responded, both on your own and later through your counsel, Mr. Lampe. You and Mr. Lampe attended the meeting on July 11, 2007 and you responded to the Committee's questions. The Committee thanks you for your attendance and cooperation. The Committee carefully considered both the information received by it and your response.

Based upon all of the information available to it, the Committee concluded that there was probable cause to believe that you and your business had engaged in the unauthorized practice of law. Among the facts that led the Committee to this conclusion were: You have established a business that offers to provide residential real estate closing services. Your business markets its services to real estate agents, homebuilders, and lenders. Your business holds itself out as able to provide the full panoply of real estate closing services. Among the services that you offer in your advertising are title services and the services of a "paralegal" who you indicate will "prepare documents" and who will be present at the closing to bring "intimate knowledge and insight about the process...to the closing table." You also advertise that you review every document and "look for errors, uncover hidden pitfalls, anticipate needs, and troubleshoot potential problems." In addition, you also admitted that you have made arrangements with specific attorneys to provide title opinions and legal documents for or on behalf of the buyer and the lender for the closings conducted by your firm. The attorneys provide the buyer/borrower with an engagement letter that indicates that they represent the buyer in the transaction. Your business also employs "paralegals" who provide title abstracts to the attorneys that your firm has engaged to provide the legal, closing services. There is also evidence that your firm has prepared

Anthony S. Di Santi, Chair
Joshua W. Willey, Jr., Vice-Chair

deeds and has intermingled resources (including email domains) with at least one attorney such that it appeared that the attorney was part of your firm.

It is the unauthorized practice of law in North Carolina for anyone other than a licensed attorney at law to provide or offer to provide legal services in North Carolina to other persons, firms, or corporations. N.C. Gen. Stat. §§ 84-2.1, 4, and 5. Legal services include the giving of legal advice and the preparation of legal documents. A business may not provide legal services to its customers even if the services are performed by a licensed attorney at law. The statutes specifically provide that abstracting and passing upon title as well as the preparation of deeds constitute the practice of law. The Committee concluded that there was probable cause to believe that your conduct constituted the unauthorized practice of law in violation of these statutes. Accordingly, it voted to issue this Letter of Caution to notify you of its decision and to demand that you stop engaging in your activities now.

In reaching this conclusion, the Committee was mindful of the arguments presented by Mr. Lampe in his letter of June 21, 2007 to the Committee and his presentation at the July meeting. However, the Committee believes that your business model is based upon a flawed premise as quoted by Mr. Lampe from the FAQ on your website. The quoted FAQ states

Q. Does "The Settlement Co." offer legal services?

A. No. In January 2003, the North Carolina Bar Association [sic] gave the opinion that non-attorneys may conduct real estate closings...

The opinion you reference is the State Bar's Authorized Practice Advisory Opinion 2002-1. The opinion specifically states that nonlawyers may *not* handle a residential real estate closing. As related in the opinion, the closing involves a bundle of functions, most of which are legal in nature. The opinion did state that two administrative or ministerial functions of a closing could be conducted by nonlawyers without the supervision of an attorney – 1) presenting the closing documents, showing where parties need to sign the documents, and ensuring that the documents were properly signed; and 2) receiving and disbursing the closing funds. The opinion did not authorize the establishment of businesses to conduct or supervise residential real estate closings or arrange for the legal services necessary for the closing. Thus, the opinion merely permits attorneys to allow independent nonlawyers to provide two of the functions in closings that they supervise, not to authorize the nonlawyers to conduct the closing.

Since the adoption of the opinion, the Bar has attempted to assure compliance and understanding with the opinion. In two injunction proceedings and several letters of caution, businesses similar to yours have been instructed to refrain from explicitly or implicitly offering to provide legal services or the services of attorneys in real estate closings, including suggestions that the business may provide title searches, title opinions, document preparation, or the services of attorneys. These businesses have also been told that they may not arrange for attorneys to provide legal services for their customers. The Committee does not believe your business services are substantially distinguishable from the services of these other businesses.

Although you market your services to real estate agents, homebuilders, and lenders, it is clear that the services you are attempting to offer are intended for the buyer. Your marketing is intended to have these other participants in the transaction direct the buyer to your office for your services. Your advertising states or implies that you can provide all of the necessary services for a closing in an effort to convince these parties to influence the decision of the buyer to use your closing services.

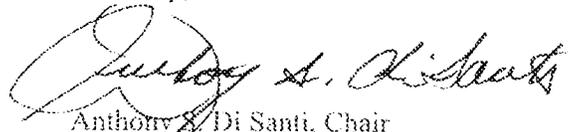
Your conduct is illegal and must end immediately. You must comply with the statutes and the Bar's advisory opinion. You may not state or imply that you will have "paralegals" who will provide any knowledge or expertise related to any aspect of a closing other than overseeing the signing of the documents. You may not state or imply that you are providing any legal services through "paralegals" or otherwise, including any review of documents for "errors, pitfalls, or problems," any preparation of documents required for closing, and any title searches or opinions. Further, you may not contract or arrange for any attorneys to provide any legal services to buyers, sellers, or lenders in residential real estate transactions. The services that you may offer are strictly limited to those cited in the advisory opinion - overseeing the execution of the documents and receipt and disbursement of the closing funds.

If you continue your activities, the State Bar may seek a court order to perpetually enjoin your unlawful conduct, as the Bar is authorized to do pursuant to North Carolina General Statute Section 84-37 and Chapter 1, Subchapter D, Section .0200 through .0207 of the Rules and Regulations of the North Carolina State Bar. Please also be aware that the unauthorized practice of law can be prosecuted as a criminal misdemeanor offense pursuant to North Carolina General Statute Sections 84-7 and 84-8 (copies enclosed)

Please provide a response with evidence that you have complied with the Committee's decision within 15 days of your receipt of this letter.

Thank you for your cooperation in this matter. Please contact the Committee's counsel, David R. Johnson, if you have any questions.

Sincerely,



Anthony S. Di Santi, Chair
Authorized Practice Committee

ASD/lt