Closings in South Carolina are the province of a licensed South Carolina attorney. South Carolina's Supreme Court has issued a number of opinions recently which appear to build higher the fence of protection of the South Carolina real estate bar as having an exclusive reign over matters affecting land in South Carolina. At the same time, they are continuing to enforce the yoke of responsibility which they place on South Carolina attorneys. Our case law has really not changed that much, though. Since 1987, pursuant to the "Buyers Service" decision the Court held South Carolina attorneys must be involved in closings affecting South Carolina land. As more and more out of state lenders and sellers began to come into the state the issues began to be blurred in everyone's mind (except our Supreme Court.)

- **Buyers Service** (1987) detailed that a SC lawyer must be involved in four specific areas of a real estate transaction-document preparation (deeds, mortgages, etc..), title abstract(conducting the search and review), closing(at the table instructing how to execute) and recordation(instructing as to the manner of recording).
- **Doe v. McMaster** (2003) basically restated Buyers Service and added that the rules apply even to refinances, though it implicitly allowed title companies to disburse.
- **Doe Law Firm** (2006) establishes the fact that attorney are not required to disburse but are required to supervise the disbursement process.

Post Doe v. McMaster the decisions affecting real estate closings have been coming down as attorney disciplinary actions, basically our Court saying we give you full reign over closings but you have full responsibility for every aspect of the closing AND you better be AT the table and IF you help anyone else (give an opinion to an out of state company who will be doing a "witness only" closing), then you are facilitating the unauthorized practice of law and we will take your law license. Needless to say, our attorneys do not want to help unless they are handling all aspects of the closing. Our Attorney General recently explained it as, "if you (South Carolina attorney) take a bite out of the apple you better eat the whole thing."
While more of the cases are included in this file. of particular interest are:

- **Matter of Lester** (2003) held a lawyer and not non-lawyer personnel must be physically present at the closing table, not just available by phone or down the hall if questions arise.
- **Matter of Pstrak** (2004) said lawyer can not put client money in non-lawyer hands.
- **Matter of Fortson** (2004) prohibited use of an outside escrow; required funds go through account reconciled monthly by South Carolina attorney.
- **Matter of Boyce** (2005) reiterated the problems of witness only closings.
- **Ex Parte Watson** (2003) necessitates title examinations be performed under the supervision of an SC attorney.
- **Matter of Hall** (2006) reiterated the requirements of attorney presence, South Carolina lawyer dispersal supervision and proper witnessing.
- **Matter of Powell** (2008) reminds the attorney of exactly what their role is in a closing with an out of state agent/National agent

There are also individual lawsuits arising such as a case recently filed against an attorney handling timeshares (but not attending the closing.) Some jurisdictions have even invalidated the effect of a mortgage for failure to comply with South Carolina law. In 2011 the SC Supreme Court confirmed two opinions issued within a month of each other, in 2010, that are particularly important in this regard. Both matters concerned the making of a mortgage loan without the use of a South Carolina attorney. In both instances the Court held that closing the loan without a South Carolina attorney

constituted the Unauthorized Practice of Law and the lender was barred from seeking equitable relief. The one thing the Supreme Court did make very clear in Matrix II is that any lender closing a mortgage loan without an attorney after August 8, 2011 does so at its own peril because UPL will bar all recovery.

- **Matrix vs. Frazer, et al. (2011)** held that closing the loan without a South Carolina attorney constituted the Unauthorized Practice of Law and the lender was barred from seeking equitable relief.
- **Wachovia vs. Coffey (2010)** lender barred from seeking equitable relief because of the Unauthorized Practice of Law
- **BAC vs. Kinder (2012)** Confirms Matrix II and set the date at August 8, 2011 for any mortgage loan closed without an attorney

STATE V. BUYERS SERVICE CO., INC.
357 S.E.2d 15, 292 S.C. 426 (S.C. 1987)

Supreme Court of South Carolina.
STATE of South Carolina, Appellant-Respondent,
v.
BUYERS SERVICE COMPANY, INC., Respondent-Appellant.
No. 22730.
Heard Jan. 20, 1987.
Decided June 1, 1987.

SYNOPSIS

The State brought action alleging that commercial title company which assisted homeowners in purchasing residential real estate had engaged in the unauthorized practice of law. The Richland County Court of Common Pleas, George M. Stuckey, Special Circuit Judge, found that the company had illegally engaged in the practice of law and enjoined it from performing future acts constituting the practice of law. Company appealed. The Supreme Court held that: (1) company's conduct in providing reports, opinions or certificate as to status of titles to real estate and mortgage liens constituted unauthorized practice of law; (2) action of preparing documents affecting title to real property constituted unauthorized practice of law; (3) handling of real estate closings and mortgage loan closings constituted unauthorized practice of law; and (4) physical transportation or mailing of documents, when occurring as part of real estate transfer, constituted the unauthorized practice of law.
Affirmed in part and reversed in part.

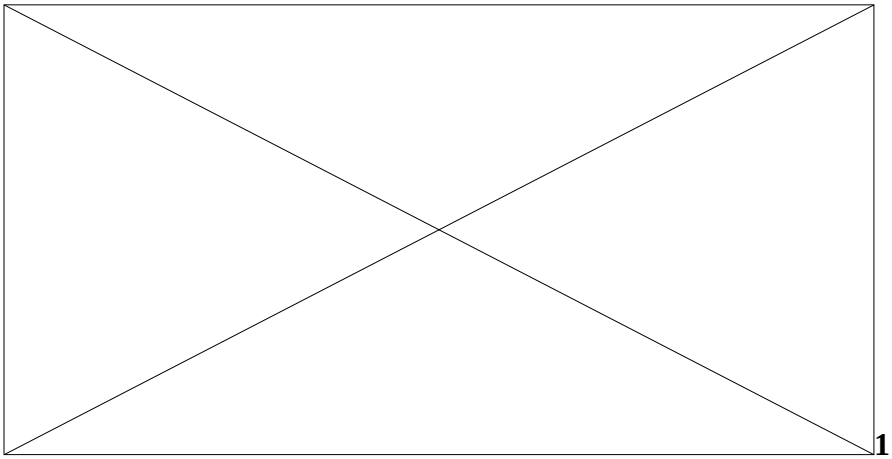
HEADNOTES

[1] Attorney and Client 11(3)

45 ----
45I The Office of Attorney
45I(A) Admission to Practice
45k11 Practitioners Not Admitted or Not Licensed
45k11(2) Acts Constituting Practice of Law in General
45k11(3) Drafting or Preparation of Documents.

A commercial title company which also assisted homeowners in purchasing residential real estate performed acts constituting the practice of law in preparing deeds, notes and other instruments relating to mortgage loans and transfers of real property, notwithstanding fact that forms were standard and did not require creative drafting. Code 1976, § 40-5-320.

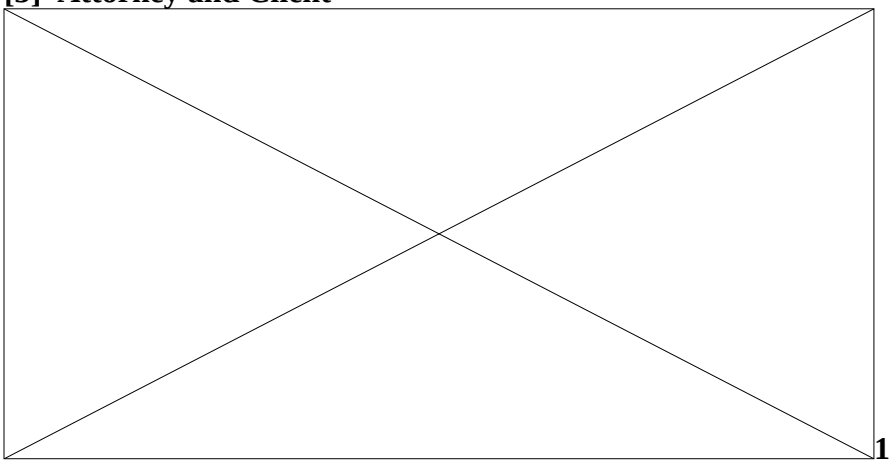
[2] Attorney and Client

 **11(2.1)**

45 ----
45I The Office of Attorney
45I(A) Admission to Practice
45k11 Practitioners Not Admitted or Not Licensed
45k11(2) Acts Constituting Practice of Law in General
45k11(2.1) In General.
(Formerly 45k11(2))

The practice of law is not confined to litigation, but extends to activities in other fields which entail specialized legal knowledge and ability.

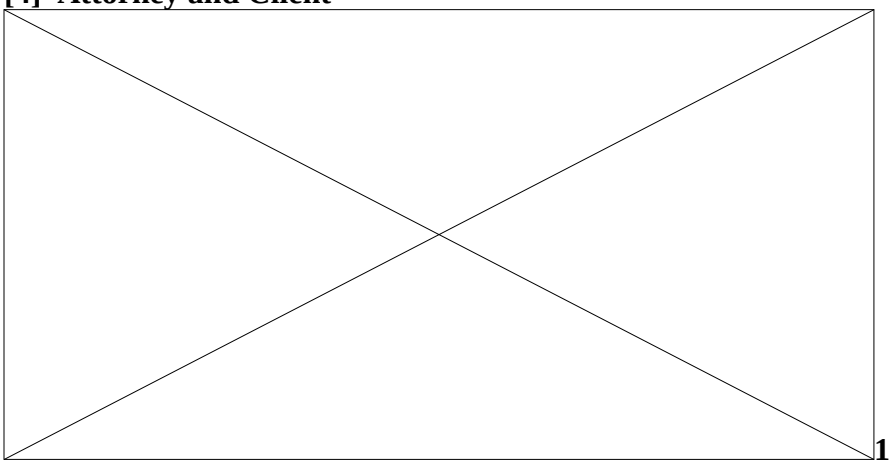
[3] Attorney and Client

 **11(3)**

45 ----
45I The Office of Attorney
45I(A) Admission to Practice
45k11 Practitioners Not Admitted or Not Licensed
45k11(2) Acts Constituting Practice of Law in General
45k11(3) Drafting or Preparation of Documents.

Preparation of instruments by lay persons is prohibited as the unauthorized practice of law in order to protect the public from potentially severe economic and emotional consequences which could flow from erroneous advice given by persons untrained in the law.

[4] Attorney and Client

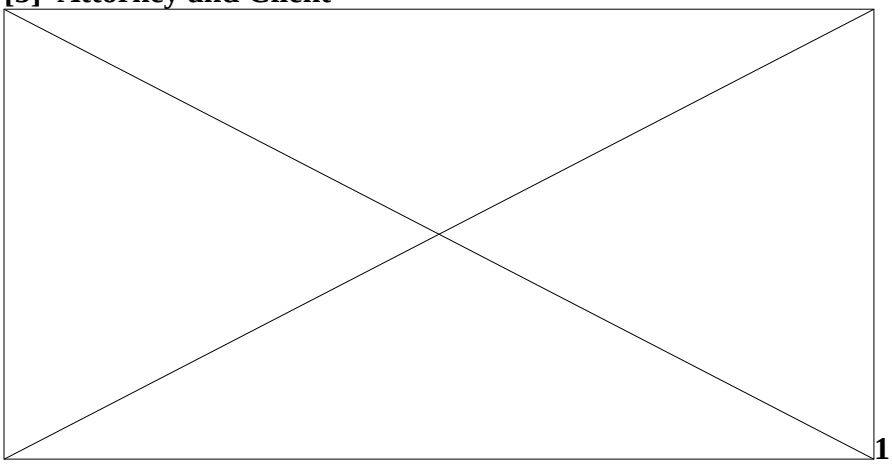


11(3)

45 ----
45I The Office of Attorney
45I(A) Admission to Practice
45k11 Practitioners Not Admitted or Not Licensed
45k11(2) Acts Constituting Practice of Law in General
45k11(3) Drafting or Preparation of Documents.

The fact that a commercial title company which assisted homeowners in purchasing residential real estate had retained attorneys to review the closing documents, did not save its activities of preparing deeds, mortgages, notes and other legal instruments related to mortgage loans and transfers of real property, from constituting the unauthorized practice of law. Code 1976, § 40-5-320.

[5] Attorney and Client



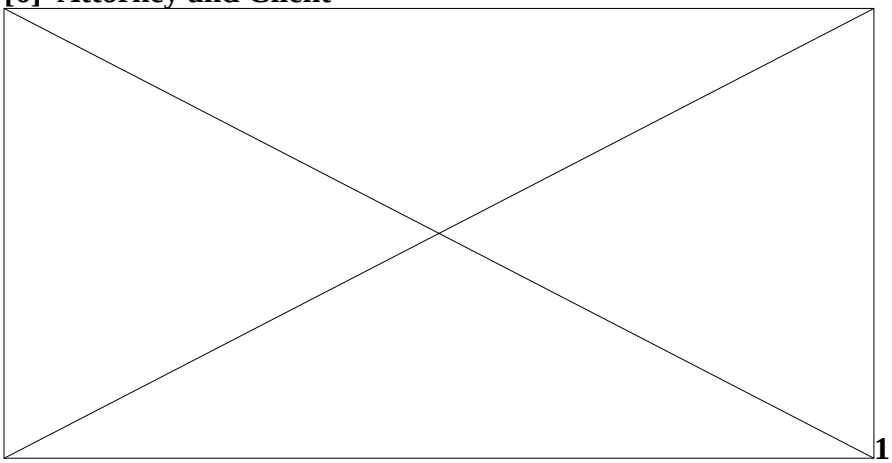
11(5)

45 ----
45I The Office of Attorney
45I(A) Admission to Practice
45k11 Practitioners Not Admitted or Not Licensed
45k11(5) Banks and Trust Companies; Title Companies.

The preparation of title abstracts for persons other than attorneys constituted the unauthorized practice of law notwithstanding fact that the title abstract was furnished to the mortgagee rather than the purchaser, as the purchaser relied upon the title abstract to

determine he was receiving good, marketable title.

[6] Attorney and Client

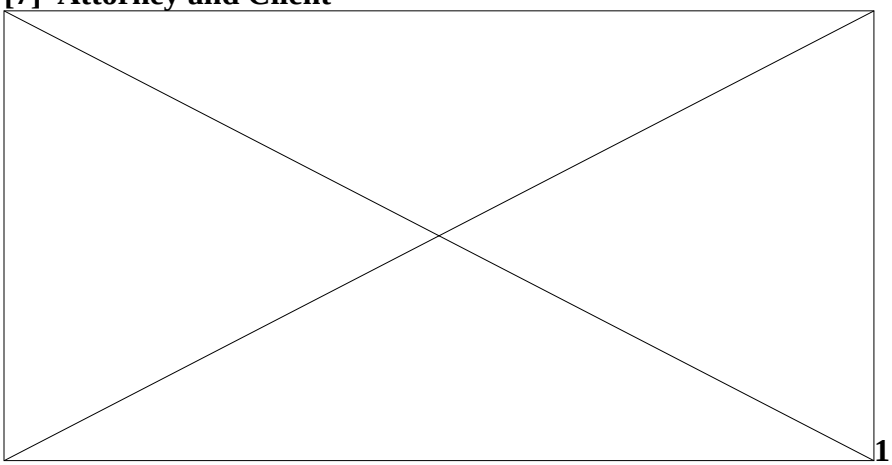


11(2.1)

45 ----
45I The Office of Attorney
45I(A) Admission to Practice
45k11 Practitioners Not Admitted or Not Licensed
45k11(2) Acts Constituting Practice of Law in General
45k11(2.1) In General.
(Formerly 45k11(2))

The conduct of a commercial title company which assisted homeowners in purchasing residential real estate, in instructing clients on the manner in which to execute legal documents, constituted the unauthorized practice of law. Code 1976, §§ 27-7-10, 30-5-30.

[7] Attorney and Client



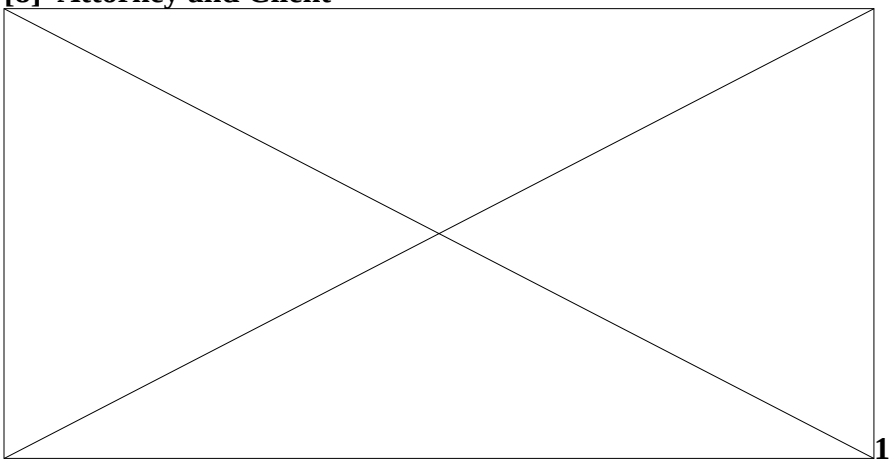
11(2.1)

45 ----
45I The Office of Attorney
45I(A) Admission to Practice
45k11 Practitioners Not Admitted or Not Licensed
45k11(2) Acts Constituting Practice of Law in General
45k11(2.1) In General.

(Formerly 45k11(2))

Real estate and mortgage loan closing should be conducted only under the supervision of attorneys, who have the ability to furnish their clients legal advice should the need arise and who fall under the regulatory rules of the Supreme Court, rather than laypersons. Code 1976, §§ 27-7-10, 30-5-30.

[8] Attorney and Client

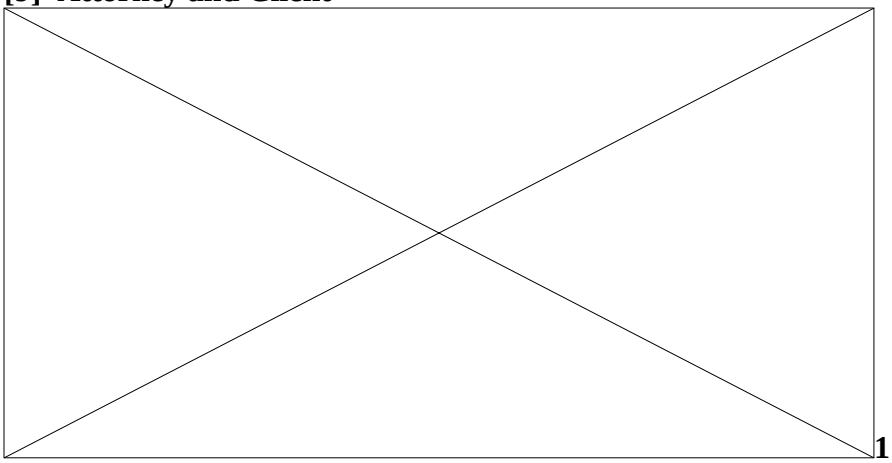


11(2.1)

45 ----
45I The Office of Attorney
45I(A) Admission to Practice
45k11 Practitioners Not Admitted or Not Licensed
45k11(2) Acts Constituting Practice of Law in General
45k11(2.1) In General.
(Formerly 45k11(2))

Although the physical transportation or mailing of documents to the courthouse did not in itself constitute the practice of law, when it took place as part of a real estate transfer it fell within the definition of activity constituting the practice of law as an aspect of conveyancing which affected legal rights.

[9] Attorney and Client



11(2.1)

45 ----
45I The Office of Attorney

45I(A) Admission to Practice
45k11 Practitioners Not Admitted or Not Licensed
45k11(2) Acts Constituting Practice of Law in General
45k11(2.1) In General.
(Formerly 45k11(2))

Instructions to the clerk of court or register of mesne conveyances as to the manner of recording title to real property, if given by a layperson for the benefit of another, must be given under the supervision of an attorney.

COUNSEL

[*16] [**427] Atty. Gen. T. Travis Medlock and Sr. Asst. Atty. Gen. Richard B. Kale, Jr., Columbia, for appellant-respondent.

Ray L. Derrick, of Funderburk and Derrick, Columbia, for respondent-appellant.

Edward G. Menzie, of Nexsen, Pruet, Jacobs and Pollard, Columbia, amicus curiae for South Carolina Bar.

OPINION

PER CURIAM:

In this action the circuit court issued a declaratory judgment that Buyers Service Company, Inc. (Buyers Service) has illegally engaged in the practice of law. Additionally, Buyers Service was enjoined from performing future acts [**428] deemed to constitute the practice of law. We affirm in part and reverse in part.

FACTS

Buyers Service is a commercial title company which also assists homeowners in purchasing residential real estate. Its principal place of business is Hilton Head Island.

The State brought this action alleging Buyers Service has engaged in the unauthorized practice of law by: (1) providing reports, opinions or certificates as to the status of titles to real estate and mortgage liens; (2) preparing documents affecting title to real property; (3) handling real estate closings; (4) recording legal documents at the courthouse; and (5) advertising to the public that it may handle conveyancing and real estate closings.

Buyers Service's clients are usually prospective home purchasers referred by local real estate agents. Its general procedures for handling a real estate transaction are as follows:

After a client is referred, Buyers Service receives an executed contract of sale from the realtor. If the sale involves a mortgage, the buyer makes an application to a local lender. If the lender approves the loan, it notifies Buyers Service and sends a letter of commitment to the buyer stating the terms. Buyers Service then orders the loan package from the lender. This consists of a set of instructions, a note and mortgage, truth in lending statement, HUD-1 Statement, miscellaneous affidavits regarding employment, and other forms. The documents arrive in various degrees of completion depending upon the particular lender. Buyers Service fills in the mortgagor-mortgagee on the mortgage, the grantor-grantee on the deed, consideration, the legal description and other blank spaces.

Buyers Service sends the completed forms to the purchaser for his examination and signature. Thereafter, the lender examines the loan package and funds the loan. Buyers Service deposits the loan proceeds check in its escrow account and disburses the funds

according to the HUD-1 Statement and the closing instructions. Buyers Service also prepares settlement statements after loans are closed.

When a title search is necessary, Buyers Service sends an [**429] employee to the courthouse to abstract the title. The purchaser pays $50 for this service. The abstract is reviewed by a non-attorney employee who determines if the seller has fee simple title to the property. Buyers Service gives purchasers a fact sheet describing three ways to hold fee simple title in South Carolina. If a purchaser has questions, an employee of Buyers Service elaborates. The purchasers then tell Buyers Service how they wish to hold title.

Subsequent to the commencement of the litigation, Buyers Service retained an attorney to review its closing documents. The **[*17]** attorney, whose name and charges appear on the settlement sheet, receives $35 for this service. Buyers Service pays this fee and passes it on to the purchaser. There is no direct contact between the attorney and the purchaser.

Buyers Service conducts closings without any attorney present. The majority are handled by mail. For these, Buyers Service sends written instructions to the parties as to the manner of signing the legal documents. When the purchaser comes to Buyers Service's office for the closing, an employee supervises the signing of the legal documents. If the purchaser has any questions, the employee answers them or refers the purchaser to the mortgage lender.

Buyers Service has legal instruments hand-carried or mailed to the courthouse for recording. It sends a form instruction letter with each set of documents but does not take responsibility for ensuring proper recording, which it maintains is the responsibility of the clerk of court.

The circuit court's order enjoins Buyers Service from the following activities:

"1. Providing reports, opinions or certificates as to the status of real estate titles to persons other than attorneys licensed to practice law in the State of South Carolina and seeking separate compensation for performing title work in connection with [Buyers Service's] title insurance business.

2. Preparing deeds, mortgages, notes and other legal instruments related to transfer of real property or mortgage loans.

3. Giving legal advice during the closing of real estate transfers or real estate mortgage loan transactions.

4. Advertising to the general public that the Defendant is [**430] a full-service closing company and may handle complete real estate closings, practice law, or perform any activity constituting the practice of law."

Both Buyers Service and the State have appealed.

DISCUSSION

This court in *In re Duncan,* 83 S.C. 186, 189, 65 S.E. 210, 211 (1909) held the practice of law includes "... conveyancing, the preparation of legal instruments of all kinds, and, in general, all advice to clients, and all action for them in matters connected with the law." *See also State v. Wells,* 191 S.C. 468, 5 S.E.2d 181 (1939); *Matter of Easler,* 275 S.C. 400, 272 S.E.2d 32 (1980). Additionally, S.C. Code Ann. § 40-5-320 (1986) strictly prohibits corporations from the practice of law.

A. *Preparation of Instruments*

[1] Buyers Service contends the circuit court erred in holding it may not prepare deeds, notes and other instruments related to mortgage loans and transfers of real

property. It argues the forms are standard and require no creative drafting. The State counters that preparation of instruments falls within the definition of the practice of law of *In re Duncan,* and that Buyers Service acts as more than a mere scrivener in the process. We agree.

[2] The practice of law is not confined to litigation, but extends to activities in other fields which entail specialized legal knowledge and ability. Often, the line between such activities and permissible business conduct by non-attorneys is unclear. However, courts of other jurisdictions considering the issue of whether preparation of instruments involves the practice of law have held that it does.

In *Pioneer Title Ins. & Trust Co. v. State Bar of Nev.*, 74 Nev. 186, 326 P.2d 408 (1958) escrow agents were enjoined from preparation of instruments necessary to effectuate real estate sales transactions. The court reasoned that preparation of instruments, even with *preprinted forms,* involves more than a mere scrivener's duties. By necessity, the agents pass upon the legal sufficiency of the instruments to accomplish the contractual agreement of the parties. *See also Arkansas Bar Ass'n v. Block*, 230 Ark. 430, 323 S.W.2d 912, [**431] *cert. denied,* 361 U.S. 836, 80 S.Ct. 87, 4 L.Ed.2d 76 (1959).

[*18] [3] The reason preparation of instruments by lay persons must be held to constitute the unauthorized practice of law is not for the economic protection of the legal profession. Rather, it is for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law. This principle was stated by the Supreme Court of Washington in *Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc.*, 96 Wash.2d 443, 635 P.2d 730 (1981). There, the legislature had enacted a statute authorizing escrow agents to perform services such as selection, preparation and completion of instruments in real estate transactions. The court previously had held these activities to constitute the unauthorized practice of law. *See Washington State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n*, 91 Wash.2d 48, 586 P.2d 870 (1978). The statute was held unconstitutional on the ground it violated the court's exclusive power to regulate the practice of law:

> The statute fails to consider who is to determine whether such agents and employees of banks, etc., are possessed of the requisite skill, competence and ethics. Only the Supreme Court has the power to make that determination through a bar examination, yearly Continuing Legal Education requirements, and the Code of Professional Responsibility. The public is also protected against unethical attorneys by a client's security fund maintained by the Washington State Bar Association.

635 P.2d at 734.

Similar protections are afforded to the public in South Carolina through this Court's regulation of attorneys' competency and conduct.

[4] As noted in the statement of facts, Buyers Service has retained attorneys to review the closing documents. This does not save its activities from constituting the unauthorized practice of law. In *State Bar of Ariz. v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 366 P.2d 1, *reheard,* 91 Ariz. 293, 371 P.2d 1020 (1962), a title company employed staff counsel to prepare legal instruments. The [**432] court cited the Arizona prohibition against a corporation's practice of law similar to that in S.C. Code Ann. § 40-5-320 (1986). The court then noted the conflicts of interest inherent in such an

arrangement, reasoning that the adverse interests in real estate transactions make it extremely difficult for the attorney to maintain a proper professional posture toward each party.

We agree and hold the circuit court properly enjoined Buyers Service from the preparation of deeds, mortgages, notes and other legal instruments related to mortgage loans and transfers of real property.

B. *Title Abstracts*

Buyers Service next contends the circuit court erred in holding that preparation of title abstracts for persons other than attorneys constitutes the unauthorized practice of law. As noted in the statement of facts, the buyer pays Buyers Service $50 for title searches. However, the resulting title abstract is furnished not to the buyer, but to the mortgagee to certify that fee simple title will be vested in the buyer.

[5] The State argues that even though the buyer does not see the title abstract, he nevertheless relies upon it to determine if he receives good, marketable title. That is, because the buyer knows a title search has been conducted, he reasonably assumes title is good if nothing adverse is reported. We agree.

The same principles which render the preparation of instruments the practice of law apply equally to the preparation of title abstracts. In *Beach Abstract & Guar. Co. v. Bar Ass'n of Ark.*, 230 Ark. 494, 326 S.W.2d 900 (1959), the court relied upon its earlier holding in *Arkansas Bar Ass'n v. Block*, *supra*, in holding that title examination, when done for another, constitutes the practice of law. The court rejected the title insurance company's arguments that the examinations were performed only incidentally to its own business and that no separate fee was charged.

We affirm the circuit court's injunction which provides Buyers Service may conduct**[*19]** title examinations and prepare abstracts only for the benefit of attorneys. The examination of titles requires expert legal knowledge and skill. For the protection of the public such activities, if conducted by lay [**433] persons, must be under the supervision of a licensed attorney.

C. *Real Estate Closings*

The terms of the circuit court's injunction permit Buyers Service to continue its practice of handling real estate and mortgage loan closings with the restriction that no legal advice be given to the parties during the closing sessions.

[6] The State contends instructing clients in the manner in which to execute legal documents is itself the practice of law and requires a legal knowledge of statutes and case law. *See, e.g.*, S.C. Code Ann. §§ 27-7-10 and 30-5-30 (1976). We agree.

Courts of other jurisdictions have recognized dangers in allowing lay persons to handle real estate closings. *See, e.g., Bowers v. Transamerica Title Ins. Co.*, 100 Wash.2d 581, 675 P.2d 193 (1983); *Coffee County Abstract and Title Co. v. State ex rel. Norwood*, 445 So.2d 852 (Ala.1984); *Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n*, 135 Colo. 398, 312 P.2d 998 (1957); *Oregon State Bar v. Security Escrows, Inc.*, 233 Or. 80, 377 P.2d 334 (1962); *New Jersey State Bar Ass'n v. Northern N.J. Mortgage Assocs.*, 32 N.J. 430, 161 A.2d 257 (1960).

While some of these cases hold that lay persons may conduct closings, they note that giving advice as to the effect of the various instruments required to be executed constitutes the unauthorized practice of law. Thus, in *Coffee County Abstract and Title Co., supra*, the title company was permitted to conduct real estate closings with the

restriction that no legal advice or opinions be given. Chief Justice Torbert, concurring, gave instructions as to how such a closing should be handled: "If the parties to the transaction raise a legal question at the closing, the title company should stop the proceeding and instruct them to consult their attorneys." 445 So.2d at 857.

We agree this approach, in theory, would protect the public from receiving improper legal advice. However, there is in practice no way of assuring that lay persons conducting a closing will adhere to the restrictions. One handling a closing might easily be tempted to offer a few words of [**434] explanation, however innocent, rather than risk losing a fee for his or her employer.

[7] We are convinced that real estate and mortgage loan closings should be conducted only under the supervision of attorneys, who have the ability to furnish their clients legal advice should the need arise and fall under the regulatory rules of this court. Again, protection of the public is of paramount concern.

D. *Recording Instruments*

The circuit court's order permits Buyers Service to continue its practice of mailing or hand-carrying instruments to the courthouse for recording. The State contends this activity is the practice of law. We agree.

[8] We do not consider the physical transportation or mailing of documents to the courthouse to be the practice of law. However, when this step takes place as part of a real estate transfer it falls under the definition of the practice of law as formulated by this court in *In re Duncan, supra.* It is an aspect of conveyancing and affects legal rights. The appropriate sequence of recording is critical in order to protect a purchaser's title to property.

[9] We conclude that instructions to the Clerk of Court or Register of Mesne Conveyances as to the manner of recording, if given by a lay person for the benefit of another, must be given under the supervision of an attorney.

Both parties' remaining exceptions relating to evidentiary rulings are without merit, and we affirm pursuant to Supreme Court Rule 23.

AFFIRMED IN PART AND REVERSED IN PART.

[*20] NESS, C.J., GREGORY and FINNEY, JJ., and RICHTER, Acting Associate J., concur.

CHANDLER, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Doe, Alias, Petitioner,

v.

Henry D. McMaster, Attorney General for the State of South Carolina, Respondent,

And

South Carolina Bankers Association and South Carolina Bar, Intervenors.

IN THE ORIGINAL JURISDICTION

Opinion No. 25508
Reheard April 2, 2003 - Refiled August 18, 2003

David A. Wilson, of Horton, Drawdy, Ward & Jenkins, of Greenville, for petitioner.

Attorney General Henry D. McMaster, Deputy Attorney General Treva G. Ashworth, and Assistant Deputy Attorney General J. Emory Smith, Jr., all of Columbia, for respondent.

John T. Moore, C. Mitchell Brown and B. Rush Smith, III, all of Nelson, Mullins, Riley & Scarborough, of Columbia, for Intervenor South Carolina Bankers Association.

John S. Nichols, of Bluestein & Nichols, of Columbia; and F. Earl Ellis, Jr., of Ellis, Lawhorne & Sims, of Columbia, for Intervenor South Carolina Bar.

Edward G. Menzie and Brian C. Bonner, both of Nexsen, Pruet, Jacobs & Pollard, of Columbia, for Amicus Curiae American Financial Services Associates.

JUSTICE BURNETT: John Doe ("Doe"), a lawyer, petitioned this Court in its original jurisdiction to determine whether his business association with a lender bank ("Lender") and a title insurance company ("Title Company") constitutes the unauthorized practice of law in violation of Rule 5.5 (b), of Rule 407 SCACR.[1] This Court granted the petition to provide declaratory judgment and appointed the Honorable Edward B. Cottingham as referee. We conclude Doe's business association, when conducted as herein below prescribed, is proper.

FACTS

The parties have stipulated Lender contacted Doe to supervise the execution and recordation of loan documents under the following scenario:

1. Borrower contracts with Lender to **refinance** an existing first mortgage loan previously obtained from the same Lender.

2. Lender notifies Title Insurance Company of refinance transaction and provides relevant Borrower information.

3. Out of state office of Title Insurance Company licensed to do business in South Carolina orders title search from an independent contractor of its choosing.

4. Upon receipt of title search, Title Insurance Company prepares a title commitment for the benefit of the Lender.

5. Title Insurance Company orders pay-off of existing mortgage.

6. Title Insurance Company orders endorsement for Borrower's existing homeowners insurance policy, if requested by Lender.

7. Lender prepares loan documents including a set of instructions, a note and mortgage, Truth-in-Lending Statement, HUD-1 settlement statement, miscellaneous affidavits regarding employment and other forms and forwards to Attorney.

8. Attorney reviews loan documents and title commitment and performs any necessary curative work on the loan documents or regarding the title.

9. Attorney meets with Borrower to explain legal ramifications of loan documents and answer any questions Borrower may have regarding the documents or the refinancing process.

10. Attorney supervises execution of loan documents.

11. Attorney forwards properly executed loan documents to Title Insurance Company with specific instructions regarding how, when and where to satisfy the existing first mortgage and to record the new mortgage and any assignments, if applicable. Attorney also authorizes the disbursement of funds if the Borrower does not rescind during the three-day period set forth in the Truth-In-Lending Act, 15 U.S.C. § 1601, et seq. (1997).

12. In accordance with the Attorney's instructions, Title Insurance Company satisfies the existing first mortgage and transmits for recording the new mortgage and any assignments, if applicable, and disburses funds pursuant to the HUD-1 settlement statement.

13. The Lender or, in accordance with the Attorney's instructions, the Title Insurance Company transmits documents evidencing the satisfaction of the paid-off mortgage to the appropriate Register of Deeds for recording.

14. Title Insurance Company issues final title insurance policy to Lender.

15. For representing the Borrower, Attorney receives a fee consistent with the fee typically charged in a South Carolina refinance transaction.[2]

DISCUSSION

The issue of unauthorized practice of law in the area of real estate closings is a prolonged legal issue assuming growing national prominence.[3] The South Carolina Constitution provides the Supreme Court with the duty to regulate the practice of law in the state. See S.C. Const. art. V, § 4; In re Unauthorized Practice of Law Rules, supra; see also S.C. Code Ann. § 40-5-10 (1986).

"The generally understood definition of the practice of law 'embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts.'" State v. Despain, 319 S.C. 317, 319, 460 S.E.2d 576, 577 (1995) (quoting In re Duncan, 83 S.C. 186, 189, 65 S.E. 210, 211 (1909)). The practice of law, however, "is not confined to litigation, but extends to activities in other fields which entail specialized legal knowledge and ability." State v. Buyers Service Co., Inc., 292 S.C. 426, 430, 357 S.E.2d 15, 17 (1987). For this reason, this Court has consistently refrained from adopting a specific rule to define the practice of law. In re Unauthorized Practice of Law Rules, 309 S.C. at 305, 422 S.E.2d at 124 (stating "it is neither practicable nor wise" to formulate a comprehensive definition of what the practice of law is). Instead, the definition of what constitutes the practice of law turns on the facts of each specific case. Id.

This Court last addressed the unauthorized practice of law in the context of real estate closings in State v. Buyers Service Co., Inc., supra. Buyers Service divided the purchase of residential real estate into four steps: 1) title search; 2) preparation of loan documents; 3) closing; and 4) recording title and mortgage.

Initially, Doe suggests the present case is different from Buyers Service because the buyer and Lender are attempting to refinance an existing mortgage and not to purchase new property. This distinction is without significance.

In refinancing a real estate mortgage the four steps in the initial purchase situations still exist. A title examination is conducted to determine the current status of the title and any new encumbrances; new loan documents and instruments must be crafted to ensure buyer obtains funds to pay off an existing mortgage and Lender receives a mortgage to protect its interest; buyer and Lender must close on the loan; and the settlement of the old mortgage and recordation of the new mortgage must be perfected. In sum, refinancing affects identical legal rights of the buyer and Lender as initial financing and protection of these rights is the crux of the practice of law.

A. Title Search

The title search portion of the present case encompasses stipulated facts 2 through 6. Doe asserts Title Company has a right to furnish title because it is incidental to its business.

In Buyers Service, this Court addressed a commercial title company's preparation of title abstracts for persons other than attorneys or themselves. The State in the case argued the

buyer relies on the title search to determine if he receives good, marketable title. We agreed and rejected the title company's argument that it did not need attorney supervision because the title search was merely incidental to their own business. Instead, we found the title search company could conduct title examinations only under the supervision of a licensed attorney because the "examination of titles requires expert legal knowledge and skill" and the search affected the rights of buyers. Id. at 432, 357 S.E.2d at 18.

According to the stipulated facts it appears Title Company conducts a title search and prepares a commitment, for the benefit of the Lender, without supervision by a licensed attorney. While Doe notes the Title Company is licensed to do business in South Carolina, we rejected the incidental-to-business approach in Buyers Service.

Title Company's title search and preparation of title documents for the Lender, without direct attorney supervision, constitutes the unauthorized practice of law. The title search and subsequent preparation of related documentation is permissible only when a licensed attorney supervises the process. In order to comply with this Court's ruling Doe must ensure the title search and preparation of loan documents are supervised by an attorney.

B. Preparation of Loan Documents

Stipulated facts 7 and 8 concern Lender's preparation of loan documents as well as the attorney's review of the documents and subsequent curative work, if needed. Doe argues the preparation of real estate documents constitutes the practice of law, but Lender has a *pro se* right to prepare documents where it is a party. We disagree.

South Carolina law recognizes an individual's ability to appear *pro se* with leave of the court. See S.C. Code Ann. § 40-5-80 (Supp. 2002). Corporations, which are artificial creatures of state law, do not have a right to appear *pro se* in all instances. See S.C. Code Ann. § 40-5-320 (1986). We granted corporations the ability to appear *pro se*, with leave of the court, in civil magistrate's court. See In re Unauthorized Practice of Law, supra. We explicitly rejected a corporation's ability to appear *pro se* in a state circuit or appellate court. Renaissance Enterprises, Inc. v. Summit Teleservices, Inc., 334 S.C. 649, 515 S.E.2d 257 (1999).

The right of a corporation to practice law by completing real estate loan documents is not co-extensive with an individual's right. Doe's citation to this Court's previous holdings to suggest otherwise is misplaced.[4] In Buyers Service we specifically held the preparation of real estate instruments by lay persons constituted the unauthorized practice of law. See Buyers Service, 292 S.C. at 430-31, 357 S.E.2d at 17-18. Without the presence of Doe, acting as an independent supervising attorney, Lender could not prepare such instruments.

Doe correctly differentiates this case from Buyers Service because an independent attorney will review the documents and correct them, if needed. Lender may prepare legal documents for use in refinancing a loan for real property as long as an independent attorney reviews and corrects, if needed, the documents to ensure their compliance with law.

C. Closing

Stipulated facts 9 and 10 describe the closing process. We held in Buyers Service "real estate and mortgage loan closings should be conducted only under the supervision of attorneys." Id. at 434, 357 S.E.2d at 19.

Doe differentiates the present case from Buyers Service because an attorney is actively involved in the closing and answers any questions the buyer may have. The purchaser in Buyers Service never spoke with an attorney and any questions were answered by non-attorney employees of the title company. Additionally, in Buyers Service the title company employed attorneys to review the closing documents. Yet, we concluded the presence of attorneys, acting as employees, did not save the company from unauthorized practice of law. This Court cited to an Arizona case[5] and approved its rationale that "adverse interests in real estate transactions make it extremely difficult for the attorney to maintain a proper professional posture toward each party." Id. at 431-32, 357 S.E.2d at 18.

Here Lender employs Doe as an attorney to supervise the preparation of legal documents, then supervise the loan's closing and provide legal advice to the buyer. Doe is an independent attorney unlike the attorneys in Buyers Service who were employees of the title company. Doe's activities may still pose an ethical dilemma, however, because a lawyer may not represent a client whose interests may be adverse to another client unless the lawyer believes the representation will not adversely affect the relationship with the other client and the client consents after consultation.[6] See Rule 407, SCACR (Rule 1.7 Conflict of Interest).

Under the stipulated facts Lender retains Doe to supervise its own legal work as well as provide advice to the buyer at closing. Although the Lender and Buyer have adverse interests, there is no consultation with the buyer to waive any potential conflict. Because real estate closings present a unique situation regarding dual representation we do not believe it to be in the public's interest to create a *per se* rule barring an attorney under the stipulated facts from representing Lender and borrower. Instead, Doe may participate in the closing after giving full disclosure of his role to both parties and obtaining consent from both parties to continue.

D. Recording Instruments

The final phase of the real estate loan process is recordation of the new mortgage and related documents, shown in stipulated facts 11 through 13. Buyers Service clarified the mailing of documents to the courthouse occurs as part of a real estate transfer, which is an aspect of conveyancing affecting legal rights, is the practice of law. We held "instructions to the Clerk of Court or Register of Mesne Conveyances as to the manner of recording, if given by a lay person for the benefit of another, must be given under the supervision of an attorney." Buyers Service, 292 S.C. at 434, 357 S.E.2d at 19.

The recordation process in the stipulation of facts establishes attorney supervision of the process. As such, Doe's supervisory activities do not constitute the unauthorized practice of law.

CONCLUSION

We conclude Doe's association as discussed is not violative of the proscription against the unauthorized practice of law, as long as the association is conducted as herein prescribed.

TOAL, C.J., MOORE, WALLER and PLEICONES, JJ., concur.

[1] Rule 5.5 (b), SCACR prohibits an attorney from assisting "a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."

[2] Due to the nature and procedural posture of this case, this opinion is limited to the stipulated facts outlined above. See In re Unauthorized Practice of Law Rules, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992).

[3] Disputes between attorneys and real estate service providers consistently appear in cases since 1917. See, e.g., Title Guar. & Trust Co. v. Maloney, 165 N.Y.S. 280 (N.Y. Sup. Ct. 1917); see generally Joyce Palomar, The War Between Attorneys and Lay Conveyancers Empirical Evidence Says "Cease Fire!", 31 Conn. L. Rev. 423, 471-74 (1999). The issue is attracting attention from the Federal Trade Commission and the Anti-Trust Division of the United States Department of Justice. The FTC and USDOJ have taken a greater interest in the monopolistic effects of state's unauthorized practice of law rules in the real estate context. See John Gibeaut, Real Estate Closing Tussle in Tarheel State, 1 No. 3 ABA J. E-Report 7 (2002). However, state limitations in the area are exempt from federal antitrust liability under the Sherman Act's state action exception. See Lender's Serv., Inc. v. Dayton Bar Ass'n, 758 F. Supp. 429, 434-41 (S.D. Ohio 1991). Further, this Court grounds its unauthorized practice rules in the State's ability to protect consumers in the state and not as a method to enhance the business opportunities for lawyers. See In re Unauthorized Practice of Law Rules, supra.

[4] Doe cites to In re Easler, 275 S.C. 400, 272 S.E.2d 32 (1980) (holding that the preparation of a deed for another constitutes the unauthorized practice of law); State v. Despain, 319 S.C. 317, 460 S.E.2d 576 (1995) (holding that the preparation of legal documents for others to present in family court constitutes the practice of law). Doe argues these cases imply a corporation engages in unauthorized practice of law **only** where it seeks to act on behalf of others and not solely itself. We disagree.

In re Easler and State v. Despain concerned an individual attempting to provide legal advice or services to other individuals. The fact-specific holdings involved individuals providing legal services to others for a fee, therefore, the individual was not acting within the *pro se* exception. As previously stated, the *pro se* exception for corporations is strictly limited.

[5] State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1, reheard, 91 Ariz. 293, 371 P.2d 1020 (1962).

[6] These ethical concerns are only applicable when there is a business relationship between Lender and the attorney. At oral argument, Doe made clear that there is no formal business arrangement between himself and Lender. Doe is chosen, as is often the case, by Borrower from a list of attorneys provided by Lender. Doe affirmed Lender informs Borrower of her right to employ an attorney not on the list.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Doe Law Firm, Petitioner,

v.

Henry B. Richardson, Jr., Disciplinary Counsel, and Henry Dargan McMaster, Attorney General, Respondents.

ORIGINAL JURISDICTION

Opinion No. 26214
Heard October 5, 2006 – Filed October 23, 2006

Desa Ballard and Jason B. Buffkin, both of West Columbia, for Petitioner.

Michael James Virzi, of Columbia, for Respondent Disciplinary Counsel.

Assistant Deputy Attorney General J. Emory Smith, Jr., of Columbia, for Respondent Attorney General.

John S. Nichols, of Bluestein & Nichols, LLC, of Columbia, for Amicus Curiae South Carolina Bar.

Sue Berkowitz and Robert Thuss, both of Columbia, for Amicus Curiae South Carolina Appleseed Legal Justice Center.

James C. Harrison, Jr., and Andrew S. Radeker, both of Columbia, for Amicus Curiae South Carolina Financial Services Association, Inc.

Scott E. Lawrence and Brook B. Shuler, both of Lawrence Law Firm, and Michael Stephen Chambers, all of Greenville, and Matthew Allen Lewis, of Attorneys' Title Insurance Fund, of Columbia, for Amicus Curiae Attorneys' Title Insurance Fund, Inc.

PER CURIAM: We agreed to hear this matter in our original jurisdiction to decide whether the disbursement of loan proceeds in conjunction with a residential refinancing or

credit line transaction is the practice of law.[1] We hold that disbursement is an integral step in the closing of a residential refinancing or credit line transaction which must be conducted under the supervision of an attorney. Since our decision today is a new rule, and since it is likely that lenders and attorneys may have established procedures which do not account for this step in the closing process, we delay the effective date of this opinion until January 22, 2007.

FACTS

The case is before us on the following stipulation of facts:

- Doe Law Firm is a South Carolina law firm employing attorneys licensed to practice here
- Lender is an out of state business which makes residential home loans to South Carolina consumers
- Lender retains Doe to serve as its closing attorney for certain in-state refinancing and credit line transactions
- Doe represents both Lender and the borrower in connection with the transactions, after making proper disclosure to both regarding dual representation
- Doe supervises the title search and certifies title in accordance with South Carolina law
- A title company affiliated with Doe issues title commitments and policies to Lender
- Lender prepares the loan documents, including the appropriate HUD Statement, and forwards them to Doe. The documents include determining any existing mortgage payoffs and calculating *pro rata* expenses, including real property taxes
- The HUD Statements conform to federal requirements
- Doe is shown as the "settlement agent" on the HUD Statement and its address is shown as the "place of settlement"
- Doe reviews all closing documents before closing in a manner that satisfies South Carolina's legal requirements
- A lawyer from the Doe firm attends the closing, explains the loan documents to the borrower and supervises the execution of the documents, including the HUD Statements, as required by state law
- If the closing takes place other than at the Doe firm's office, the HUD Statement is amended to include that address as well as the firm's address
- Neither the Doe firm nor any individual lawyer signs the HUD form (and such signatures are not required by federal law)

- Doe records the mortgage and any other documents

- Doe returns the loan and closing documents to Lender with instructions to make disbursements as set forth in the HUD Statement

- Disbursements are made by Lender; Doe receives only its attorneys' fees and costs as provided in the HUD Statement. Doe does not have signatory authority over any of Lender's accounts, nor does it review or reconcile these accounts or retain any records of Lender's disbursements

ISSUE

Whether the disbursement of residential loan proceeds is the practice of law?

ANALYSIS

Both Doe and respondents acknowledge it is an open question in South Carolina whether the disbursement of residential loan proceeds is the practice of law. In Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773 (2003) (McMaster), we refined the definition of the unauthorized practice of law in the context of residential real estate closings first set forth in State v. Buyers Serv. Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987) (Buyers Service). In McMaster and Buyers Service the Court identified four steps in a residential real estate closing that involve the practice of law:

1) Title Search
The title search and preparation of title documents for the lender and subsequent preparation of related documents is the practice of law which must be performed or supervised by an attorney.

2) Loan Documents
A lender may prepare legal documents for use in financing or refinancing a real property loan so long as an independent attorney reviews them and makes any corrections necessary "to ensure their compliance with law."

3) Closing
Real estate closings and mortgage loan closings should be conducted only under an attorney's supervision. The supervising attorney may represent both the lender and the borrower after full disclosure and with each party's consent.

4) Recordation of Documents
The recording of documents is the "final phase" of the real estate loan process and must be done under the supervision of an attorney.

In both McMaster and Buyers Service the funds were disbursed directly by the lender pursuant to the HUD Settlement Statement, yet the Court did not define this step as one involving the practice of law. As the parties candidly acknowledge, however, the disbursement process was not at issue in either case. Similarly, several attorney disciplinary

cases have implied, but not decided, that disbursement is the practice of law when performed in connection with a residential real estate loan closing. See In re Boulware, 366 S.C. 561, 623 S.E.2d 652 (2005); In re Fortson, 361 S.C. 561, 596 S.E.2d 461 (2004); In re McMillian, 359 S.C. 52, 596 S.E.2d 494 (2004); In re Arsi, 357 S.C. 8, 591 S.E.2d 627 (2004); In re Pstrak, 357 S.C. 1, 591 S.E.2d 623 (2004); see also In re Boyce, 364 S.C. 353, 613 S.E.2d 538 (2005).

Viewed in isolation, it cannot be said that the disbursement of loan proceeds in and of itself "entail[s] specialized legal knowledge and ability," such that it constitutes the practice of law. Buyers Service, 292 S.C. at 430, 357 S.E.2d at 17. In our view, however, the disbursement of funds in the context of a residential real estate loan closing cannot and should not be separated from the process as a whole. Accordingly, we hold that the disbursement of the funds must be supervised by an attorney. We do not specify the form that supervision must take, nor do we require that the funds pass through the supervising attorney's trust account. Rather, we hold that the attorney's obligation to both his clients if he represents the buyer and the lender, and to his individual client if he represents only one party, includes overseeing this step of the closing process. As explained above, we delay the effective date of this opinion until January 22, 2007 in order to afford persons with ongoing business relationships the opportunity to adjust their practices and procedures to conform to this new rule.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

---

[1] See In re Unauthorized Practice of Law Rules, 309 S.C. 304, 422 S.E.2d 123 (1993) (Court will determine unauthorized practice of law questions in its original jurisdiction).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Richard E. Lester, Respondent.

Opinion No. 25605
Submitted February 11, 2003 - Filed March 10, 2003

PUBLIC REPRIMAND

Henry B. Richardson, Jr. and Michael S. Pauley, both of Columbia, for the Office of Disciplinary Counsel.

George M. Hearn, Jr., of Hearn, Brittain & Martin, P.A., of Conway; and Sally Wiggins Speth, of Columbia, for Respondent.

PER CURIAM: Respondent and Disciplinary Counsel have entered into an agreement pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to accept an admonition or a public reprimand. We accept the agreement and issue a public reprimand.

According to the facts stated in the agreement, respondent represented the purchaser in a real estate transaction. Respondent was out of town on the date of the closing.

Prior to leaving town, respondent caused to be prepared a HUD-1 settlement statement, as well as several other closing documents, which he personally reviewed. However, the HUD-1 statement was actually signed for him by a paralegal, who signed at respondent's direction and with his permission, on the date of the closing. The paralegal did not include a notation adjacent to respondent's signature indicating her authority to sign on his behalf.

The closing was conducted by the paralegal without respondent or another attorney present. Respondent maintains he remained accessible to the paralegal by telephone throughout the closing. He also maintains other attorneys in his law firm were available and could have responded to any inquiries that may have arisen at the closing.

Respondent admits that he has allowed other real estate transactions or closings to be conducted outside his presence and that the transactions and closings were conducted by non-lawyer personnel who were instructed to contact respondent by telephone if necessary. Respondent now recognizes that either he or another licensed attorney should have been physically present to conduct the actual real estate transactions and closings. Respondent states he has modified the methods employed in his law practice to institute such a policy.

As a result of his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.2(a) (a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued); Rule 5.3(a) (a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that a non-lawyer assistant's conduct is compatible with the professional obligations of the lawyer); Rule 5.3(b) (a lawyer having direct supervisory authority over a non-lawyer assistant shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer); Rule 5.5(b) (a lawyer shall not assist a person who is not a member of the bar in the performance of an activity that constitutes the unauthorized practice of law); and Rule 8.4(a) (it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of others). By violating the Rules of Professional Conduct, respondent has also violated Rule 7(a)(1) of Rule 413, SCACR.

We agree with the finding of improper conduct and find that a public reprimand is the appropriate sanction. Accordingly, respondent is hereby reprimanded for the conduct detailed above.

We also take this opportunity to state that we view with alarm the growing tendency of attorneys to allow support staff to perform functions which should be performed by attorneys. We caution members of the Bar that this practice dilutes the attorney-client relationship and diminishes the attorney's ability to monitor all aspects of a case for which the attorney is ultimately responsible. We further direct the Bar's attention, once again, to In re Easler, 275 S.C. 400, 272 S.E.2d 32 (1980), in which this Court set forth guidelines with regard to the role of paralegals in assisting attorneys, and to State v. Buyer's Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987), in which this Court held that real estate closings should be conducted only under the supervision of attorneys. We encourage members of the Bar to review these cases as well as the provisions of the Rules of Professional Conduct cited above which address the delegation of functions to support staff.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Stephen M. Pstrak, Respondent.

Opinion No. 25767
Submitted December 8, 2003 – Filed January 12, 2004

PUBLIC REPRIMAND

Henry B. Richardson, Jr., of Columbia, for Office of Disciplinary Counsel.

Stephen M. Pstrak, of Lexington, Pro Se.

PER CURIAM: Respondent and Disciplinary Counsel have entered into an agreement pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to accept an admonition or a public reprimand. We accept the agreement and issue a public reprimand. [1] The facts, as set forth in the agreement, are as follows.

Facts

I. Real Estate Closing Matter I

Respondent attended a real estate closing in place of attorney J. Wendell Arsi, who had a conflict and could not attend. [2] The closing involved the purchase of a mobile home from a mobile home dealer and real property from a developer. The transaction was being financed by a lender. Respondent was only asked to attend the closing and be responsible for the review and execution of the closing documents. Respondent was "under the good faith impression" that Arsi had examined, or would be examining, or at least reviewing, the abstract of title and had drafted, or at least reviewed, the closing documents.

Respondent attended the closing at the offices of Carolina Title Services, Inc. (CTS). The HUD-1 Settlement Statement reflected that attorney William J.

McMillian, III, was the settlement agent. Respondent gathered from that information that the proceeds from the transaction would be disbursed by McMillian in accordance with the Settlement Statement. It was unclear to respondent whether Arsi or McMillian was to be responsible for updating the title and seeing to the recordation of documents in connection with this transaction, but respondent incorrectly assumed that one of those attorneys would do so.

Respondent is now advised, and does not dispute, that the loan documents were prepared by CTS, that Amy Cook, the owner and manager of CTS, advised Arsi that the funds from this transaction would be disbursed by McMillian, and that Arsi was under the impression that he was only expected to attend the closing and that other aspects of the transaction required by applicable rules to be handled by an attorney would be handled by McMillian. [3] Respondent did not confirm any of the foregoing with Arsi or McMillian and respondent is advised, and does not dispute, that Arsi did not confirm any of the foregoing with McMillian. It is now known and acknowledged that McMillian had no involvement with the transaction whatsoever, that McMillian had previously opened an IOLTA account with BB&T on which he allowed Cook to be a signatory, that the checkbooks for that IOLTA account were kept by Cook at CTS, that the cancelled checks and bank statements concerning real estate transactions were returned to and maintained by Cook, that McMillian was not reconciling or even reviewing the bank statements and cancelled checks pursuant to Rule 417, SCACR, and that McMillian's only involvement with transactions such as the instant transaction was to allow CTS to use his IOLTA account and show McMillian as settlement agent.

Subsequently, there was a substantial shortage discovered in McMillian's IOLTA account. It is reported that BB&T placed a "sweep" on the account at the direction of Cook and would "sweep" the funds from the account into Cook's account on a daily basis. After the shortage of funds in McMillian's IOLTA account was discovered, McMillian was placed on interim suspension. In the Matter of McMillian, 350 S.C. 216, 565 S.E.2d 765 (2002).

The closing appeared to be a relatively simple matter. Respondent had no file in connection with the transaction when he arrived for the closing. Respondent questioned Cook about getting a file to Arsi. Respondent later checked with Arsi's office, which confirmed that it had received a file in connection with the closing, which, in turn, "triggered" the firm to compensate respondent for standing in for Arsi at the closing. At the time, respondent was under the impression that his involvement in the transaction ended upon the review and execution of the closing documents and the file being sent to Arsi.

As a result of delays and the subsequent suspension of McMillian, the transaction was not completed. The mobile home dealer received payment for the mobile home, but the developer did not receive payment for the real estate. Respondent subsequently received a telephone call from an attorney

representing the developer advising that the transaction had not been completed. Respondent left a message on the attorney's answering machine relating his limited involvement in the transaction and advising her to contact Arsi.

When the purchaser became aware that the transaction had not been completed in a timely manner, he filed a complaint with the Commission on Lawyer Conduct. He maintained he had expended funds to clear the real property and to have the driveway installed, but was not able to register his mobile home or get connections for water or electricity or a permit for a septic tank because the transaction had not been completed. The purchaser was under the impression that respondent was standing in for McMillian at the closing and was unaware of Arsi having any involvement in the matter.

Respondent now recognizes that, pursuant to State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987) and Doe v. McMaster, 351 S.C. 158, 568 S.E.2d 356 (2003), Cook was engaged in the unauthorized practice of law and that respondent, albeit unintentionally, assisted Cook in doing so. Respondent now acknowledges that when he served as the closing attorney in connection with the transaction it was his responsibility to see that an attorney had been involved in all other aspects of the transaction requiring attorney participation under the aforementioned cases, that it was his responsibility to either see to the proper disbursement of the funds or see that an attorney approved by the client was going to handle or oversee the recordation of documents and proper disbursement of the funds.

In mitigation, Disciplinary Counsel states respondent was under the good-faith impression that either Arsi or McMillian were to see to the other aspects of the closing that required attorney participation, that respondent was unaware that Cook was engaging in the unauthorized practice of law, that respondent was unaware Cook had unsupervised access to and use of McMillian's IOLTA account and that respondent in no way contributed to the subsequent defalcations in the transaction. Furthermore, Disciplinary Counsel has been advised by the attorney subsequently retained by the developer that the matters set forth herein were resolved to the satisfaction of the purchaser within a few months after the closing.

II. Real Estate Closing Matter II

Respondent was contacted by a paralegal in Arsi's office to attend a second closing in Arsi's place. The paralegal asked only that respondent attend the closing and perform as closing attorney at the closing. Respondent attended the closing, reviewed the closing documents with the clients and supervised the execution of the closing documents. Respondent did not undertake any further work on the transaction after attending the closing and, instead, left the executed

documents and the proceeds from the transaction in the hands of Cook or another employee of CTS.

Respondent was under the impression that either Arsi or McMillian had conducted the title examination or reviewed a title abstract in connection with the property, had prepared and reviewed the closing documents, and would see to the finalization of the transaction, including updating the title prior to recordation, recordation of the necessary documents in the public records, and disbursement of the proceeds in accordance with the HUD-1 Settlement Statement presented and executed at closing. [4]

It was respondent's understanding, from his conversation with Arsi's paralegal, that his sole function at the closing was to review the closing documents, see to the proper execution of the documents, and answer any questions that the clients might have concerning the closing documents and the closing. Respondent did not advise the clients of the limited scope of his representation.

Due to McMillian being placed on interim suspension and his IOLTA account being frozen, the transaction could not be closed. The clients called respondent's office to discuss the impediments to closing the transaction. Respondent instructed his secretary to tell the clients that respondent's involvement was limited to attending the closing and they should contact Arsi about the problems they were having getting the transaction closed. Respondent tried to contact the clients directly on two occasions, but was unable to reach them. He left a message on their answering machine to contact Arsi since respondent was only at the closing to assist Arsi and that he understood Arsi to be the actual closing attorney. The clients were able to remove the impediments to the transaction a year later after hiring counsel to assist them.

Arsi reported that had he been able to attend the closing, his participation would have been limited to the same participation respondent had in the transaction, that no lawyer examined the title to the real property which was the subject of the transaction or reviewed any title abstract, that no lawyer prepared the closing documents, that no lawyer saw to the recordation of documents in the public records or to the completion of the transaction in accordance with the wishes of the clients and the instructions from the lender, and that, had the transaction been closed, the disposition of the proceeds of the transaction would not have been made by a licensed attorney but would have been made by CTS using McMillian's IOLTA account.

Respondent now recognizes that, by his limited participation in the closing, he assisted Cook in the unauthorized practice of law, albeit unwittingly. Respondent further acknowledges that it was his professional responsibility upon serving as closing attorney, to ensure that the other aspects of the closing required to be handled by an attorney were handled or properly supervised by a person licensed to practice law in South Carolina.

III. Mitigation

Disciplinary Counsel reports that respondent has been fully cooperative in the conclusion of this matter, has been forthright in acknowledging his misconduct and addressing the matter, and had no involvement whatsoever in, or knowledge of, the subsequent shortages in McMillian's IOLTA account until after his participation in the two closings. Respondent now recognizes that he should have been more diligent in insuring that an attorney was acting at each stage of the transactions, for which he became responsible upon serving as the closing attorney, and that client funds from the transactions should not have been left in the hands of a non-lawyer. Finally, it appears that respondent's relationship with CTS was short lived and only involved two transactions.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 5.3(b) (a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer); Rule 5.5(b) (a lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law); and Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct). We also find he has violated the following provisions of the Rules of Professional Conduct: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.2(a) (a lawyer shall abide by a client's decisions concerning the objectives of representation, except in limited circumstances, and shall consult with the client as to the means by which they are to be pursued); and Rule 1.2(c) (a lawyer may limit the objectives of the representation if the client consents after consultation).

Respondent's misconduct constitutes grounds for discipline under Rule 7(a)(1) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct).

Conclusion

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his actions.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

[1] In January 2003, respondent received an eight month suspension for misconduct unrelated to that set forth in this opinion. In the Matter of Pstrak, 352 S.C. 505, 575 S.E.2d 559 (2003).

[2] Respondent discussed the matter with Arsi's paralegal, but did not speak directly with Arsi.

[3] By separate opinion of this same date, Arsi has been disbarred due, in part, to his participation in this closing arrangement with CTS and McMillian.

[4] The settlement statement showed McMillian as the settlement agent.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of H. Brent Fortson, Respondent.

Opinion No. 25898
Submitted October 26, 2004 – Filed November 22, 2004

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Susan M. Johnston, Deputy Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

R. Davis Howser, of Howser Newman & Besley, LLC, and Elizabeth Van Doren Gray, of Sowell Gray Stepp & Laffitte, LLC, both of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a sixty (60) day suspension from the practice of law. See Rule 7(b), RLDE, Rule 413, SCACR. We accept the Agreement and definitely suspend respondent from the practice of law in this state for a sixty (60) day period. The facts, as set forth in the Agreement, are as follows.

FACTS

Respondent engaged in a business relationship with South Carolina Real Estate Services, LLC, (RES), a company managed by Cathy Pittman, daughter of Anna Knox (Knox), and Attorney Support, Inc., (ASI), a company owned and managed by Knox. These two companies provided services to assist attorneys in the closing of real estate transactions.

Neither Knox nor Pittman were employees of respondent or his law firm during the period relevant to the Agreement. Neither Knox nor Pittman have ever been admitted to the practice of law. At no time relevant to the facts in the Agreement were any persons employed by ASI or RES licensed to practice law. Respondent had no interest in either ASI or RES and paid them as independent contractors for their services on a case-by-case basis.

The functions provided by RES and ASI included communication with lenders, realtors, buyers and sellers, title abstract searches, the preparation and review of legal documents for closings, attendance at closings, issuance of title insurance, the receipt and disbursement of funds for the transaction, and completion of follow up tasks, including but not limited to recording documents in the public records. In connection with the handling of the funds for real estate closings for respondent, ASI provided an "escrow service." All of these functions took place at the offices of RES and/or ASI with the exception of the actual closings which usually took place at respondent's office. Almost all U.S. mail, facsimiles, and other communications and deliveries related to these functions were directed to the offices of RES and/or ASI, as were almost all telephonic communications concerning real estate closings by respondent.

In real estate closings, RES and/or ASI utilized computer generated stationary with respondent's law office letterhead. Use of respondent's letterhead in this fashion was with respondent's knowledge and consent. By using respondent's letterhead and through other means which were known to respondent and to which respondent consented, Knox represented herself as and caused others to believe that she was an employee of respondent or respondent's law firm when, in fact, she was not respondent's employee during the period relevant to the Agreement.

In completing the functions described above, neither RES nor ASI's owners or employees were supervised by a licensed attorney. Respondent did not supervise the work of either RES or ASI, except to review the closing documents and title abstract prior to closings. Generally, all communications concerning ASI's services were directly between respondent and Knox and any services needed from RES were obtained by Knox. Likewise, most communications with lenders and parties to the real estate transactions were handled by Knox, not respondent.

Respondent caused or permitted all funds for these real estate transactions assisted by RES and ASI to be deposited or wired into the ASI "Real Estate Account" which was maintained by ASI at its office. Respondent directed funds being transferred by wire to be wired by lenders directly to the ASI account managed by Knox at ASI's office. When respondent received checks made payable to his order or the order of his law firm, respondent endorsed the checks and delivered them to Knox. ASI's bank account was not an IOLTA account and it was solely controlled by ASI owner and manager Knox. Bank statements and cancelled checks were sent directly to ASI. Knox had exclusive signatory authority over this bank account and controlled all aspects of it, including deposits, disbursements, possession of checks and deposit slips, and the receipt of monthly bank statements, cancelled checks, and other documents propagated by the bank concerning account activity, all of which was maintained by and in custody and control of Knox at ASI's office. With the exception of a review of the ledger accounts for each closing prepared by Knox, which respondent represents he performed, respondent never inspected or audited the ASI account used by Knox to deposit and thereafter disburse the proceeds of respondent's real estate closings handled by ASI and RES.

The arrangement between respondent and ASI (utilizing the services of RES) was in effect for approximately four years. Either during or after each of the numerous transactions involving RES/ASI, respondent signed the HUD-1 Settlement Statement attesting to the representation printed on the Settlement Statement that respondent certified the funds itemized were an "accurate account of the funds which were received and have been or will be disbursed by the undersigned . . ." (emphasis added) or words of similar import or effect. The term "undersigned" on each of these HUD-1 Settlement Statements refers to respondent. In fact, respondent made no disbursements in connection with the RES/ASI assisted real estate transactions and, instead, entrusted the disbursements to be made by Knox from ASI's bank account, the checks and records of which were maintained by Knox at ASI's office. Respondent estimates he consummated approximately 1051 real estate closings by using the services of ASI and/or RES under the foregoing arrangement with Knox making disbursement of the proceeds from the ASI bank account controlled by Knox.

In or around February 2004, respondent learned from Knox's attorney that approximately twelve mortgage payoffs related to real estate closings for respondent's clients handed by ASI and RES had not been paid. Thereafter, respondent made inquiries to Knox about these open and unpaid mortgages which should have been paid in full out of the proceeds of the closings. When confronted, Knox acknowledged to respondent that she had misappropriated funds from the ASI account related to closings for respondent's clients. Knox then produced a document itemizing the transactions in which there were shortages and the amounts thereof. From the documentation submitted in support of the Agreement, it appears the total amount of funds from respondent's clients misappropriated by Knox was approximately $1,151,075.04. These

misappropriated monies were funds that had been deposited in the ASI real estate account from closings ASI handled for respondent. These missing funds represent monies allocated for payoffs of mortgages from twelve of respondent's clients. Each of the HUD-1 Settlement Statements from the twelve closings from which money was appropriated bears respondent's signature as "Settlement Agent." One million one hundred fifty one thousand seventy five dollars and four cents remains missing.

After learning of Knox's misappropriation, respondent immediately filed a self-report with Disciplinary Counsel and with his errors and omissions carrier and subsequently paid all amounts due on the mortgages. Knox was indicted and subsequently pled guilty to the misappropriation of $1,151,075.04. Knox admitted to perpetrating an ongoing scheme of retaining mortgage payoffs from respondent's closings over a period of approximately four years. It is now known to respondent that Knox had been regularly misappropriating funds from closings she handled for respondent and was replacing monies previously misappropriated with monies from subsequent closings until her scheme became known.

Respondent did not at any time relevant to the foregoing advise any of his clients of any limitations on his representation in connection with real estate closings. He did not advise his clients that unsupervised non-lawyers were entrusted with the disbursement and accounting of all closing funds, as well as the preparation and completion of closing documents and recording of the same.

Before Knox's misappropriation scheme was discovered, respondent became concerned about liability related to his arrangement with Knox due to certain problems that arose with closings using ASI and/or RES services. These problems were unrelated to and not indicative of Knox's misappropriations. Thereafter, respondent required Knox to present him with evidence of errors and omission insurance policies related to the services being provided. Respondent now recognizes that ASI/RES' insurance policies covered only errors and omissions and that the policies did not provide coverage for misappropriation.

During the period of respondent's foregoing arrangement with RES/ASI, respondent maintained the closing documents but did not maintain the related disbursement records as required by Rule 417, SCACR. Furthermore, during this period, respondent failed to reconcile or even inspect ASI's bank account used for deposits and disbursements of the funds of respondent's clients as required by Rule 417, SCACR. Additionally, respondent never inspected or audited the "Real Estate Account" of ASI. As a result, respondent failed to safekeep the funds of his clients and others and, in so doing, assisted Knox in the unauthorized practice of law.

Respondent now recognizes that allowing non-employees to have access to and control over money which belongs to clients and others and was entrusted to

respondent as a result of real estate closings constituted misconduct regardless of whether there were shortages in the "escrow service" account provided by ASI. Respondent now recognizes and acknowledges that the use of an "escrow service" as provided by Knox constitutes lawyer misconduct, regardless of whether the funds were missing and whether the recordkeeping requirements of Rule 417, SCACR, were conducted by respondent.

To ODC's best knowledge and belief, respondent fully cooperated with ODC's inquiries into this matter.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.2(c) (lawyer may limit objectives of representation with client consent after consultation); Rule 1.4 (lawyer shall keep client reasonably informed about status of a matter); Rule 1.15 (lawyer shall safeguard property of client; lawyer shall maintain complete records of account funds); Rule 5.3 (lawyer shall make reasonable efforts to ensure firm has in effect measures giving reasonable assurance conduct of non-lawyer retained by lawyer is compatible with professional obligations of lawyer; lawyer shall be responsible for conduct of non-lawyer retained by the lawyer if that conduct would be a violation of the Rules of Professional Conduct if engaged in by lawyer and lawyer ratifies the conduct); Rule 5.5(b) (lawyer shall not assist a person who is not a member of the bar in the unauthorized practice of law); **Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice).** In addition, respondent admits he failed to comply with the recordkeeping provisions of Rule 417, SCACR. Finally, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for a sixty (60) day period. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., MOORE, WALLER and BURNETT, JJ., concur. PLEICONES, J., not participating.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Hattie E. Boyce, Respondent.

Opinion No. 25985
Submitted April 26, 2005 – Filed May 23, 2005

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Hattie E. Boyce, of Spartanburg, pro se.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to either an admonition or a public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

On or about July 9, 2004, respondent was the closing attorney in a real estate transaction. Respondent represented Borrower. Borrower and his wife had obtained approval for an equity credit line loan from Wells Fargo; the loan was to be secured by Borrower's residence. Borrower had contacted respondent and requested she assist in a "witness only" closing of the line of credit from Wells Fargo.

Respondent did not prepare a deed, mortgage, note, or other legal instrument related to the closing of the real estate transaction; she did not ensure that another attorney did so. Neither respondent nor someone under her supervision conducted a title examination or prepared abstracts; respondent did not ensure another attorney or someone under another attorney's supervision did so. Neither respondent nor someone under her supervision recorded documents at

the Register of Deeds; respondent did not ensure that another attorney or someone under another attorney's supervision did so.

Respondent signed the HUD-1 statement certifying thereon that she had prepared the statement, that it was a true and accurate account of the transaction, and that she had or would cause funds or be disbursed in accordance with the statement. Despite signing the HUD-1 statement that she had or would disburse the funds, respondent acknowledges she did not do so.

Despite certifying on the HUD-1 statement that her fee was $100.00 and that the HUD-1 statement was a true and accurate account of the transaction, respondent sought to collect $150.00. The $150.00 fee had been set by respondent's secretary.

Borrower told respondent that the attorney's fee was to be paid by Wells Fargo. When Wells Fargo did not pay the $150.00 fee, respondent faxed a letter to Borrower and to Borrower's employer at their place of business. The letter threatened to sue both Borrower individually and the employer's business and to send a copy of the lawsuit to both the Attorney General and the Better Business Bureau so as to gain an advantage in the collection of her civil debt. Respondent's letter threatened treble damages even though she would not be entitled to treble damages under South Carolina law.

Neither Borrower's employer nor the employer's business were a party to the loan. Neither Borrower's employer nor his business were clients of respondent. Despite this fact, respondent revealed information relating to her representation of Borrower to his employer without Borrower's consent.

Respondent states she was under the mistaken impression that Borrower's place of employment was a party to the loan. Respondent's fee of $150.00 was ultimately paid by Wells Fargo Bank.

Respondent represents her practice is primarily devoted to family law. She submits this is the only real estate closing she has conducted in her thirteen years of practice and that she was unaware of the requirements imposed upon attorneys in the closing of real estate transactions. Respondent further submits she did not fully understand the concept of treble damages.

After discussing this matter and previous Court decisions with ODC, respondent now recognizes that participating in "witness only" closings when no other South Carolina licensed attorney is involved has the effect of assisting in the unauthorized practice of law and constitutes a failure to carry out the responsibilities of a closing attorney as provided by previous directives of this Court. She further recognizes she did not provide her client with competent representation. Respondent agrees that her actions constitute misconduct under the Rules of Professional Conduct, Rule 407, SCACR.

Respondent now recognizes that by signing the HUD-1 settlement statement, she represented that a licensed attorney had disbursed the funds and completed the other steps required of a closing attorney by published directives of the Court when in fact she did not do so. Respondent acknowledges this was misconduct. Respondent further recognizes that the threat of criminal prosecution and collection of civil damages not available under the circumstances constitutes misconduct.

Respondent states her misconduct was unintentional. She represents that, in the future, she will make every effort not to handle matters without first making herself familiar with the applicable guidelines and law.

Respondent has no prior disciplinary history and submits that her conduct in this matter was uncharacteristic. ODC asserts respondent has been very cooperative and forthright during the course of its investigation.

LAW

Respondent admits that by her misconduct she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.6 (lawyer shall not reveal information relating to representation of a client unless client consents after consultation); Rule 4.5 (lawyer shall not threaten to present criminal charges solely to obtain an advantage in a civil matter); Rule 5.5(b) (lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Processional Conduct); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice). Respondent acknowledges her misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the legal profession into disrepute).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for her misconduct.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte: Charles M. Watson, Jr., County Attorney for Greenwood County, Petitioner.

In Re: The Unauthorized Practice of Law

ORIGINAL JURISDICTION

Opinion No. 25757
Submitted October 22, 2003 - Filed December 1, 2003

Charles M. Watson, Jr., of Greenwood, for Petitioner.

A.J. Tothacer, Jr., of Greenville, Alexander Cruikshanks, IV, of Clinton, Charles Heath Ruffner, of Cheraw, D'Anne Haydel, of Orangeburg, Hubbard W. McDonald, Jr., of Bennettsville, Kelly Jean Golden, of Beaufort, Robert M. Bell, of Langley, Thomas L. Martin, of Anderson, for Respondents.

PER CURIAM: Charles M. Watson, Jr., County Attorney for Greenwood County, ("Petitioner"), seeks a declaratory judgment as to whether nonlawyer title abstractors engage in the unauthorized practice of law when they conduct a title search and report the title status in connection with a tax foreclosure sale. We hold that such activities constitute the unauthorized practice of law and must either be conducted or supervised by an attorney.

Factual/Procedural Background

Before selling a property at a tax foreclosure sale, tax collectors must provide notice of the sale to the property owner and any lien holders. In order to determine who is entitled to notice, tax collectors often hire title abstractors—who generally are not licensed attorneys—to examine the public records and report the status of title.

Tax collectors and County Attorneys throughout this state disagree as to whether such title abstractors, when performing their duties without an attorney's supervision, are engaged in the unauthorized practice of law. Because of this disagreement, Petitioner sought a declaratory judgment pursuant to this Court's original jurisdiction under *In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar*, 309 S.C. 304, 307, 422 S.E.2d 123, 125 (1992). On April 11, 2003, this Court granted the petition and directed Petitioner to file a brief and serve it on every County Attorney in this state. Eight County Attorneys [1] ("Respondents") responded.

Law/Analysis

Petitioner contends that when a nonlawyer title abstractor examines public records and reports the status of a title, without the supervision of a licensed attorney, the title abstractor is engaged in the unauthorized practice of law. We agree.

This Court has addressed the unauthorized practice of law in the real estate context on at least three occasions. In the first case, this Court held that the preparation of title abstracts by title companies for buyers constituted the unauthorized practice of law. *State v. Buyers Serv. Co., Inc.*, 292 S.C. 426, 357 S.E.2d 15 (1987). The Court found that "[t]he examination of titles requires expert legal knowledge and skill." *Id.* at 432, 357 S.E.2d at 19. As a result, the Court established a requirement that title examinations and abstract preparation be conducted "under the supervision of a licensed attorney." *Id.* at 432-33, 357 S.E.2d at 19.

Similarly, in another case, this Court considered whether a title search performed by a title company for a lender constituted the unauthorized practice of law. *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003). As in *Buyers*, this Court held that:

Title Company's title search and preparation of title documents for the Lender, without direct attorney supervision, constitutes the unauthorized practice of law. The title search and subsequent preparation of related documentation is permissible only when a licensed attorney supervises the process. In order to comply with this Court's ruling Doe must ensure the title search and preparation of loan documents are supervised by an attorney.

Id. at 313, 585 S.E.2d at 776.

In the third case, this Court disciplined an attorney for authorizing his paralegal to conduct a real estate closing in the attorney's absence. *Matter of Lester*, 353 S.C. 246, 247, 578 S.E.2d 7 (2003). The Court found, and the attorney later acknowledged, that an attorney should have been physically present at the closing. *Id.* at 247, 578 S.E.2d at 7. In addition to publicly reprimanding the attorney, the Court delivered a message to all attorneys, cautioning them against delegating functions that should be performed by attorneys to support staff. *Id.* at 248, 578 S.E.2d at 8.

Based on the foregoing precedent, we find that examining titles and preparing title abstracts constitute practicing law. Therefore, we require that licensed attorneys either conduct or supervise such activities. This requirement was established in *Buyers* and continues today for the purpose of protecting the public. 292 S.C. at 432-33, 357 S.E.2d at 19.

In the present case, property owners, buyers, lien holders, and counties depend on the tax collector to notify all those statutorily entitled to notice. If the title abstractor's report contains errors, a tax sale may be invalidated, and the county may be subject to due process claims from those who did not receive notice.

Further, that the title abstractor is not, by the report, guaranteeing title or certifying that the title is marketable is of little consequence. Although the tax title is of a quitclaim-deed nature, it still has a legal effect: it signifies that title has been conveyed. Therefore, the title abstractor's report must either be generated or approved by a licensed attorney.

Finally, we recognize that expenses associated with the tax-sale process will increase if counties are required to involve attorneys in either the performance or oversight of title examination and abstract preparation. But we believe that mistakes, such as failing to notify the proper parties, may prove more costly. On balance, the consequences of relying on a defective report may expend more county resources than the costs associated with taking proper measures from the outset.

Conclusion

Based on the foregoing analysis, we hold that when nonlawyer title abstractors examine public records and then render an opinion as to the content of those records, they are engaged in the unauthorized practice of law. But if a licensed attorney reviews the title abstractor's report and vouches for its legal sufficiency by signing the report, title abstractors would not be engaged in the unauthorized practice of law.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

---

[1] The responding County Attorneys are from Aiken, Anderson, Beaufort, Chesterfield, Greenville, Laurens, Marlboro, and Orangeburg counties.

Closings in South Carolina are the province of a licensed South Carolina attorney. South Carolina's Supreme Court has issued a number of opinions recently which appear to build higher the fence of protection of the South Carolina real estate bar as having an exclusive reign over matters affecting land in South Carolina. At the same time, they are continuing to enforce the yoke of responsibility which they place on South Carolina attorneys. Our case law has really not changed that much, though. Since 1987, pursuant to the "Buyers Service" decision the Court held South Carolina attorneys must be involved in closings affecting South Carolina land. As more and more out of state lenders and sellers began to come into the state the issues began to be blurred in everyone's mind (except our Supreme Court.)

- **Buyers Service** (1987) detailed that a SC lawyer must be involved in four specific areas of a real estate transaction-document preparation (deeds, mortgages, etc..), title abstract(conducting the search and review), closing(at the table instructing how to execute) and recordation(instructing as to the manner of recording).
- **Doe v. McMaster** (2003) basically restated Buyers Service and added that the rules apply even to refinances, though it implicitly allowed title companies to disburse.

Post Doe v. McMaster the decisions affecting real estate closings have been coming down as attorney disciplinary actions, basically our Court saying we give you full reign over closings but you have full responsibility for every aspect of the closing AND you better be AT the table and IF you help anyone else (give an opinion to an out of state company who will be doing a "witness only" closing), then you are facilitating the unauthorized practice of law and we will take your law license. Needless to say, our attorneys do not want to help unless they are handling all aspects of the closing. Our Attorney General recently explained it as, "if you (South Carolina attorney) take a bite out of the apple you better eat the whole thing."
While more of the cases are included in this file. of particular interest are:

- **Matter of Lester** (2003) held a lawyer and not non-lawyer personnel must be physically present at the closing table, not just available by phone or down the hall if questions arise.
- **Matter of Pstrak** (2004) said lawyer can not put client money in non-lawyer hands.
- **Matter of Fortson** (2004) prohibited use of an outside escrow, required funds go through account reconciled monthly by South Carolina attorney.
- **Matter of Boyce** (2005) reiterated the problems of witness only closings.
- **Ex Parte Watson** (2003) necessitates title examinations be performed under the supervision of an SC attorney.
- **Matter of Hall** (2006) reiterated the requirements of attorney presence, South Carolina lawyer dispersal and proper witnessing.

There are also individual lawsuits arising such as a case recently filed against an attorney handling timeshares (but not attending the closing.) Some jurisdictions have even invalidated the effect of a mortgage for failure to comply with South Carolina law.

STATE V. BUYERS SERVICE CO., INC. 357 S.E.2d 15, 292 S.C. 426 (S.C. 1987)

Headnotes • Opinion • Cases Citing This Case

Supreme Court of South Carolina.
STATE of South Carolina, Appellant-Respondent,
v.
BUYERS SERVICE COMPANY, INC., Respondent-Appellant.
No. 22730.
Heard Jan. 20, 1987.
Decided June 1, 1987.

SYNOPSIS

The State brought action alleging that commercial title company which assisted homeowners in purchasing residential real estate had engaged in the unauthorized practice of law. The Richland County Court of Common Pleas, George M. Stuckey, Special Circuit Judge, found that the company had illegally engaged in the practice of law and enjoined it from performing future acts constituting the practice of law. Company appealed. The Supreme Court held that: (1) company's conduct in providing reports, opinions or certificate as to status of titles to real estate and mortgage liens constituted unauthorized practice of law; (2) action of preparing documents affecting title to real property constituted unauthorized practice of law; (3) handling of real estate closings and mortgage loan closings constituted unauthorized practice of law; and (4) physical transportation or mailing of documents, when occurring as part of real estate transfer, constituted the unauthorized practice of law. Affirmed in part and reversed in part.

HEADNOTES

[1] Attorney and Client 11(3)

45 ---- 45I The Office of Attorney 45I(A) Admission to Practice 45k11 Practitioners Not Admitted or Not Licensed 45k11(2) Acts Constituting Practice of Law in General 45k11(3) Drafting or Preparation of Documents.

A commercial title company which also assisted homeowners in purchasing residential real estate performed acts constituting the practice of law in preparing deeds, notes and other instruments relating to mortgage loans and transfers of real property, notwithstanding fact that forms were standard and did not require creative drafting. Code 1976, § 40-5-320.

[2] Attorney and Client

11(2.1)

45 ---- 45I The Office of Attorney 45I(A) Admission to Practice 45k11 Practitioners Not Admitted or Not Licensed 45k11(2) Acts Constituting Practice of Law in General 45k11(2.1) In General. (Formerly 45k11(2))

The practice of law is not confined to litigation, but extends to activities in other fields which entail specialized legal knowledge and ability.

[3] Attorney and Client 11(3)

45 ---- 45I The Office of Attorney 45I(A) Admission to Practice 45k11 Practitioners Not Admitted or Not Licensed 45k11(2) Acts Constituting Practice of Law in General 45k11(3) Drafting or Preparation of Documents.

Preparation of instruments by lay persons is prohibited as the unauthorized practice of law in order to protect the public from potentially severe economic and emotional consequences which could flow from erroneous advice given by persons untrained in the law.

[4] Attorney and Client 11(3)

45 ---- 45I The Office of Attorney 45I(A) Admission to Practice 45k11 Practitioners Not Admitted or Not Licensed 45k11(2) Acts Constituting Practice of Law in General 45k11(3) Drafting or Preparation of Documents.

The fact that a commercial title company which assisted homeowners in purchasing residential real estate had retained attorneys to review the closing documents, did not save its activities of preparing deeds, mortgages, notes and other legal instruments related to mortgage loans and transfers of real property, from constituting the unauthorized practice of law. Code 1976, § 40-5-320.

[5] Attorney and Client 11(5)

45 ---- 45I The Office of Attorney 45I(A) Admission to Practice 45k11 Practitioners Not Admitted or Not Licensed 45k11(5) Banks and Trust Companies; Title Companies.

The preparation of title abstracts for persons other than attorneys constituted the unauthorized practice of law notwithstanding fact that the title abstract was furnished to the mortgagee rather than the purchaser, as the purchaser relied upon the title abstract to

determine he was receiving good, marketable title.

[6] Attorney and Client 11(2.1)

45 ---- 45I The Office of Attorney 45I(A) Admission to Practice 45k11 Practitioners Not Admitted or Not Licensed 45k11(2) Acts Constituting Practice of Law in General 45k11(2.1) In General. (Formerly 45k11(2))

The conduct of a commercial title company which assisted homeowners in purchasing residential real estate, in instructing clients on the manner in which to execute legal documents, constituted the unauthorized practice of law. Code 1976, §§ 27-7-10, 30-5-30.

[7] Attorney and Client 11(2.1)

45 ---- 45I The Office of Attorney 45I(A) Admission to Practice 45k11 Practitioners Not Admitted or Not Licensed 45k11(2) Acts Constituting Practice of Law in General 45k11(2.1) In General.

(Formerly 45k11(2))

Real estate and mortgage loan closing should be conducted only under the supervision of attorneys, who have the ability to furnish their clients legal advice should the need arise and who fall under the regulatory rules of the Supreme Court, rather than laypersons. Code 1976, §§ 27-7-10, 30-5-30.

[8] Attorney and Client 11(2.1)

45 ---- 45I The Office of Attorney 45I(A) Admission to Practice 45k11 Practitioners Not Admitted or Not Licensed 45k11(2) Acts Constituting Practice of Law in General 45k11(2.1) In General. (Formerly 45k11(2))

Although the physical transportation or mailing of documents to the courthouse did not in itself constitute the practice of law, when it took place as part of a real estate transfer it fell within the definition of activity constituting the practice of law as an aspect of conveyancing which affected legal rights.

[9] Attorney and Client 11(2.1)

45 ---- 45I The Office of Attorney

45I(A) Admission to Practice 45k11 Practitioners Not Admitted or Not Licensed 45k11(2) Acts Constituting Practice of Law in General 45k11(2.1) In General. (Formerly 45k11(2))

Instructions to the clerk of court or register of mesne conveyances as to the manner of recording title to real property, if given by a layperson for the benefit of another, must be given under the supervision of an attorney.

COUNSEL

[*16] [**427] Atty. Gen. T. Travis Medlock and Sr. Asst. Atty. Gen. Richard B. Kale, Jr., Columbia, for appellant-respondent.

Ray L. Derrick, of Funderburk and Derrick, Columbia, for respondent-appellant.

Edward G. Menzie, of Nexsen, Pruet, Jacobs and Pollard, Columbia, amicus curiae for South Carolina Bar.

OPINION

PER CURIAM:

In this action the circuit court issued a declaratory judgment that Buyers Service Company, Inc. (Buyers Service) has illegally engaged in the practice of law. Additionally, Buyers Service was enjoined from performing future acts [**428] deemed to constitute the practice of law. We affirm in part and reverse in part.

FACTS

Buyers Service is a commercial title company which also assists homeowners in purchasing residential real estate. Its principal place of business is Hilton Head Island.

The State brought this action alleging Buyers Service has engaged in the unauthorized practice of law by: (1) providing reports, opinions or certificates as to the status of titles to

real estate and mortgage liens; (2) preparing documents affecting title to real property; (3) handling real estate closings; (4) recording legal documents at the courthouse; and (5) advertising to the public that it may handle conveyancing and real estate closings.

Buyers Service's clients are usually prospective home purchasers referred by local real estate agents. Its general procedures for handling a real estate transaction are as follows:

After a client is referred, Buyers Service receives an executed contract of sale from the realtor. If the sale involves a mortgage, the buyer makes an application to a local lender. If the lender approves the loan, it notifies Buyers Service and sends a letter of commitment to the buyer stating the terms. Buyers Service then orders the loan package from the lender. This consists of a set of instructions, a note and mortgage, truth in lending statement, HUD-1 Statement, miscellaneous affidavits regarding employment, and other forms. The documents arrive in various degrees of completion depending upon the particular lender. Buyers Service fills in the mortgagor-mortgagee on the mortgage, the grantor-grantee on the deed, consideration, the legal description and other blank spaces.

Buyers Service sends the completed forms to the purchaser for his examination and signature. Thereafter, the lender examines the loan package and funds the loan. Buyers Service deposits the loan proceeds check in its escrow account and disburses the funds

according to the HUD-1 Statement and the closing instructions. Buyers Service also prepares settlement statements after loans are closed.

When a title search is necessary, Buyers Service sends an [**429] employee to the courthouse to abstract the title. The purchaser pays $50 for this service. The abstract is reviewed by a non-attorney employee who determines if the seller has fee simple title to the property. Buyers Service gives purchasers a fact sheet describing three ways to hold fee simple title in South Carolina. If a purchaser has questions, an employee of Buyers Service elaborates. The purchasers then tell Buyers Service how they wish to hold title.

Subsequent to the commencement of the litigation, Buyers Service retained an attorney to review its closing documents. The **[*17]** attorney, whose name and charges appear on the settlement sheet, receives $35 for this service. Buyers Service pays this fee and passes it on to the purchaser. There is no direct contact between the attorney and the purchaser.

Buyers Service conducts closings without any attorney present. The majority are handled by mail. For these, Buyers Service sends written instructions to the parties as to the manner of signing the legal documents. When the purchaser comes to Buyers Service's office for the closing, an employee supervises the signing of the legal documents. If the purchaser has any questions, the employee answers them or refers the purchaser to the mortgage lender.

Buyers Service has legal instruments hand-carried or mailed to the courthouse for recording. It sends a form instruction letter with each set of documents but does not take responsibility for ensuring proper recording, which it maintains is the responsibility of the clerk of court.

The circuit court's order enjoins Buyers Service from the following activities:

"1. Providing reports, opinions or certificates as to the status of real estate titles to persons other than attorneys licensed to practice law in the State of South Carolina and seeking separate compensation for performing title work in connection with [Buyers Service's] title insurance business.

2. Preparing deeds, mortgages, notes and other legal instruments related to transfer of real property or mortgage loans.

3. Giving legal advice during the closing of real estate transfers or real estate mortgage loan transactions.

4. Advertising to the general public that the Defendant is [**430] a full-service closing company and may handle complete real estate closings, practice law, or perform any activity constituting the practice of law."

Both Buyers Service and the State have appealed.

DISCUSSION

This court in *In re Duncan,* 83 S.C. 186, 189, 65 S.E. 210, 211 (1909) held the practice of law includes "... conveyancing, the preparation of legal instruments of all kinds, and, in general, all advice to clients, and all action for them in matters connected with the law." *See also State v. Wells,* 191 S.C. 468, 5 S.E.2d 181 (1939); *Matter of Easler,* 275 S.C. 400, 272 S.E.2d 32 (1980). Additionally, S.C. Code Ann. § 40-5-320 (1986) strictly prohibits corporations from the practice of law.

A. *Preparation of Instruments*

[1] Buyers Service contends the circuit court erred in holding it may not prepare deeds, notes and other instruments related to mortgage loans and transfers of real

property. It argues the forms are standard and require no creative drafting. The State counters that preparation of instruments falls within the definition of the practice of law of *In re Duncan,* and that Buyers Service acts as more than a mere scrivener in the process. We agree.

[2] The practice of law is not confined to litigation, but extends to activities in other fields which entail specialized legal knowledge and ability. Often, the line between such activities and permissible business conduct by non-attorneys is unclear. However, courts of other jurisdictions considering the issue of whether preparation of instruments involves the practice of law have held that it does.

In *Pioneer Title Ins. & Trust Co. v. State Bar of Nev.,* 74 Nev. 186, 326 P.2d 408 (1958) escrow agents were enjoined from preparation of instruments necessary to effectuate real estate sales transactions. The court reasoned that preparation of instruments, even with *preprinted forms,* involves more than a mere scrivener's duties. By necessity, the agents pass upon the legal sufficiency of the instruments to accomplish the contractual agreement of the parties. *See also Arkansas Bar Ass'n v. Block,* 230 Ark. 430, 323 S.W.2d 912, [**431] *cert. denied,* 361 U.S. 836, 80 S.Ct. 87, 4 L.Ed.2d 76 (1959).

[*18] [3] The reason preparation of instruments by lay persons must be held to constitute the unauthorized practice of law is not for the economic protection of the legal profession. Rather, it is for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law. This principle was stated by the Supreme Court of Washington in *Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc.,* 96 Wash.2d 443, 635 P.2d 730 (1981). There, the legislature had enacted a statute authorizing escrow agents to perform services such as selection, preparation and completion of instruments in real estate transactions. The court previously had held these activities to constitute the unauthorized practice of law. *See Washington State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n,* 91 Wash.2d 48, 586 P.2d 870 (1978). The statute was held unconstitutional on the ground it violated the court's exclusive power to regulate the practice of law:

The statute fails to consider who is to determine whether such agents and employees of banks, etc., are possessed of the requisite skill, competence and ethics. Only the Supreme Court has the power to make that determination through a bar examination, yearly Continuing Legal Education requirements, and the Code of Professional Responsibility. The public is also protected against unethical attorneys by a client's security fund maintained by the Washington State Bar Association.
635 P.2d at 734.

Similar protections are afforded to the public in South Carolina through this Court's regulation of attorneys' competency and conduct.

[4] As noted in the statement of facts, Buyers Service has retained attorneys to review the closing documents. This does not save its activities from constituting the unauthorized practice of law. In *State Bar of Ariz. v. Arizona Land Title & Trust Co.,* 90 Ariz. 76, 366 P.2d 1, *reheard,* 91 Ariz. 293, 371 P.2d 1020 (1962), a title company employed staff counsel to prepare legal instruments. The [**432] court cited the Arizona prohibition against a corporation's practice of law similar to that in S.C. Code Ann. § 40-5-320 (1986). The court then noted the conflicts of interest inherent in such an

arrangement, reasoning that the adverse interests in real estate transactions make it extremely difficult for the attorney to maintain a proper professional posture toward each party.

We agree and hold the circuit court properly enjoined Buyers Service from the preparation of deeds, mortgages, notes and other legal instruments related to mortgage loans and transfers of real property.

B. *Title Abstracts*

Buyers Service next contends the circuit court erred in holding that preparation of title abstracts for persons other than attorneys constitutes the unauthorized practice of law. As noted in the statement of facts, the buyer pays Buyers Service $50 for title searches. However, the resulting title abstract is furnished not to the buyer, but to the mortgagee to certify that fee simple title will be vested in the buyer.

[5] The State argues that even though the buyer does not see the title abstract, he nevertheless relies upon it to determine if he receives good, marketable title. That is, because the buyer knows a title search has been conducted, he reasonably assumes title is good if nothing adverse is reported. We agree.

The same principles which render the preparation of instruments the practice of law apply equally to the preparation of title abstracts. In *Beach Abstract & Guar. Co. v. Bar Ass'n of Ark.,* 230 Ark. 494, 326 S.W.2d 900 (1959), the court relied upon its earlier holding in *Arkansas Bar Ass'n v. Block, supra,* in holding that title examination, when done for another, constitutes the practice of law. The court rejected the title insurance company's arguments that the examinations were performed only incidentally to its own business and that no separate fee was charged.

We affirm the circuit court's injunction which provides Buyers Service may conduct**[*19]** title examinations and prepare abstracts only for the benefit of attorneys. The examination of titles requires expert legal knowledge and skill. For the protection of the public such activities, if conducted by lay [**433] persons, must be under the supervision of a licensed attorney.

C. *Real Estate Closings*

The terms of the circuit court's injunction permit Buyers Service to continue its practice of handling real estate and mortgage loan closings with the restriction that no legal advice be given to the parties during the closing sessions.

[6] The State contends instructing clients in the manner in which to execute legal documents is itself the practice of law and requires a legal knowledge of statutes and case law. *See, e.g.,* S.C. Code Ann. §§ 27-7-10 and 30-5-30 (1976). We agree.

Courts of other jurisdictions have recognized dangers in allowing lay persons to handle real estate closings. *See, e.g., Bowers v. Transamerica Title Ins. Co.,* 100 Wash.2d 581, 675 P.2d 193 (1983); *Coffee County Abstract and Title Co. v. State ex rel. Norwood,* 445 So.2d 852 (Ala.1984); *Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n,* 135 Colo. 398, 312 P.2d 998 (1957); *Oregon State Bar v. Security Escrows, Inc.,* 233 Or. 80, 377 P.2d 334 (1962); *New Jersey State Bar Ass'n v. Northern N.J. Mortgage Assocs.,* 32 N.J. 430, 161 A.2d 257 (1960).

While some of these cases hold that lay persons may conduct closings, they note that giving advice as to the effect of the various instruments required to be executed constitutes the unauthorized practice of law. Thus, in *Coffee County Abstract and Title Co., supra,* the title company was permitted to conduct real estate closings with the

restriction that no legal advice or opinions be given. Chief Justice Torbert, concurring, gave instructions as to how such a closing should be handled: "If the parties to the transaction raise a legal question at the closing, the title company should stop the proceeding and instruct them to consult their attorneys." 445 So.2d at 857.

We agree this approach, in theory, would protect the public from receiving improper legal advice. However, there is in practice no way of assuring that lay persons conducting a closing will adhere to the restrictions. One handling a closing might easily be tempted to offer a few words of [**434] explanation, however innocent, rather than risk losing a fee for his or her employer.

[7] We are convinced that real estate and mortgage loan closings should be conducted only under the supervision of attorneys, who have the ability to furnish their clients legal advice should the need arise and fall under the regulatory rules of this court. Again, protection of the public is of paramount concern.

D. *Recording Instruments*

The circuit court's order permits Buyers Service to continue its practice of mailing or hand-carrying instruments to the courthouse for recording. The State contends this activity is the practice of law. We agree.

[8] We do not consider the physical transportation or mailing of documents to the courthouse to be the practice of law. However, when this step takes place as part of a real estate transfer it falls under the definition of the practice of law as formulated by this court in *In re Duncan, supra.* It is an aspect of conveyancing and affects legal rights. The appropriate sequence of recording is critical in order to protect a purchaser's title to property.

[9] We conclude that instructions to the Clerk of Court or Register of Mesne Conveyances as to the manner of recording, if given by a lay person for the benefit of another, must be given under the supervision of an attorney.

Both parties' remaining exceptions relating to evidentiary rulings are without merit, and we affirm pursuant to Supreme Court Rule 23.

AFFIRMED IN PART AND REVERSED IN PART.

[*20] NESS, C.J., GREGORY and FINNEY, JJ., and RICHTER, Acting Associate J., concur.

CHANDLER, J., not participating.

THE STATE OF SOUTH CAROLINA In The Supreme Court

John Doe, Alias, Petitioner,

v.

Henry D. McMaster, Attorney General for the State of South Carolina, Respondent,

And

South Carolina Bankers Association and South Carolina Bar, Intervenors.

IN THE ORIGINAL JURISDICTION

Opinion No. 25508 Reheard April 2, 2003 - Refiled August 18, 2003

David A. Wilson, of Horton, Drawdy, Ward & Jenkins, of Greenville, for petitioner.

Attorney General Henry D. McMaster, Deputy Attorney General Treva G. Ashworth, and Assistant Deputy Attorney General J. Emory Smith, Jr., all of Columbia, for respondent.

John T. Moore, C. Mitchell Brown and B. Rush Smith, III, all of Nelson, Mullins, Riley & Scarborough, of Columbia, for Intervenor South Carolina Bankers Association.

John S. Nichols, of Bluestein & Nichols, of Columbia; and F. Earl Ellis, Jr., of Ellis, Lawhorne & Sims, of Columbia, for Intervenor South Carolina Bar.

Edward G. Menzie and Brian C. Bonner, both of Nexsen, Pruet, Jacobs & Pollard, of Columbia, for Amicus Curiae American Financial Services Associates.

JUSTICE BURNETT: John Doe ("Doe"), a lawyer, petitioned this Court in its original jurisdiction to determine whether his business association with a lender bank ("Lender") and a title insurance company ("Title Company") constitutes the unauthorized practice of law in violation of Rule 5.5 (b), of Rule 407 SCACR. [1] This Court granted the petition to provide declaratory judgment and appointed the Honorable Edward B. Cottingham as referee. We conclude Doe's business association, when conducted as herein below prescribed, is proper.

FACTS

The parties have stipulated Lender contacted Doe to supervise the execution and recordation of loan documents under the following scenario:

1. Borrower contracts with Lender to **refinance** an existing first mortgage loan previously obtained from the same Lender.
2. Lender notifies Title Insurance Company of refinance transaction and provides relevant Borrower information.

3. Out of state office of Title Insurance Company licensed to do business in South Carolina orders title search from an independent contractor of its choosing.
4. Upon receipt of title search, Title Insurance Company prepares a title commitment for the benefit of the Lender.
5. Title Insurance Company orders pay-off of existing mortgage.
6. Title Insurance Company orders endorsement for Borrower's existing homeowners insurance policy, if requested by Lender.
7. Lender prepares loan documents including a set of instructions, a note and mortgage, Truth-in-Lending Statement, HUD-1 settlement statement, miscellaneous affidavits regarding employment and other forms and forwards to Attorney.
8. Attorney reviews loan documents and title commitment and performs any necessary curative work on the loan documents or regarding the title.
9. Attorney meets with Borrower to explain legal ramifications of loan documents and answer any questions Borrower may have regarding the documents or the refinancing process.
10. Attorney supervises execution of loan documents.
11. Attorney forwards properly executed loan documents to Title Insurance Company with specific instructions regarding how, when and where to satisfy the existing first mortgage and to record the new mortgage and any assignments, if applicable. Attorney also authorizes the disbursement of funds if the Borrower does not rescind during the three-day period set forth in the Truth-In-Lending Act, 15 U.S.C. § 1601, et seq. (1997).
12. In accordance with the Attorney's instructions, Title Insurance Company satisfies the existing first mortgage and transmits for recording the new mortgage and any assignments, if applicable, and disburses funds pursuant to the HUD-1 settlement statement.
13. The Lender or, in accordance with the Attorney's instructions, the Title Insurance Company transmits documents evidencing the satisfaction of the paid-off mortgage to the appropriate Register of Deeds for recording.
14. Title Insurance Company issues final title insurance policy to Lender.
15. For representing the Borrower, Attorney receives a fee consistent with the fee typically charged in a South Carolina refinance transaction. [2]

DISCUSSION

The issue of unauthorized practice of law in the area of real estate closings is a prolonged legal issue assuming growing national prominence. [3] The South Carolina Constitution provides the Supreme Court with the duty to regulate the practice of law in the state. See

S.C. Const. art. V, § 4; In re Unauthorized Practice of Law Rules, supra; see also S.C. Code Ann. § 40-5-10 (1986).

"The generally understood definition of the practice of law 'embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts.'" State v. Despain, 319 S.C. 317, 319, 460 S.E.2d 576, 577 (1995) (quoting In re Duncan, 83 S.C. 186, 189, 65 S.E. 210, 211 (1909)). The practice of law, however, "is not confined to litigation, but extends to activities in other fields which entail specialized legal knowledge and ability." State v. Buyers Service Co., Inc., 292 S.C. 426, 430, 357 S.E.2d 15, 17 (1987). For this reason, this Court has consistently refrained from adopting a specific rule to define the practice of law. In re Unauthorized Practice of Law Rules, 309 S.C. at 305, 422 S.E.2d at 124 (stating "it is neither practicable nor wise" to formulate a comprehensive definition of what the practice of law is). Instead, the definition of what constitutes the practice of law turns on the facts of each specific case. Id.

This Court last addressed the unauthorized practice of law in the context of real estate closings in State v. Buyers Service Co., Inc., supra. Buyers Service divided the purchase of residential real estate into four steps: 1) title search; 2) preparation of loan documents; 3) closing; and 4) recording title and mortgage.

Initially, Doe suggests the present case is different from Buyers Service because the buyer and Lender are attempting to refinance an existing mortgage and not to purchase new property. This distinction is without significance.

In refinancing a real estate mortgage the four steps in the initial purchase situations still exist. A title examination is conducted to determine the current status of the title and any new encumbrances; new loan documents and instruments must be crafted to ensure buyer obtains funds to pay off an existing mortgage and Lender receives a mortgage to protect its interest; buyer and Lender must close on the loan; and the settlement of the old mortgage and recordation of the new mortgage must be perfected. In sum, refinancing affects identical legal rights of the buyer and Lender as initial financing and protection of these rights is the crux of the practice of law.

A. Title Search

The title search portion of the present case encompasses stipulated facts 2 through 6. Doe asserts Title Company has a right to furnish title because it is incidental to its business.

In Buyers Service, this Court addressed a commercial title company's preparation of title abstracts for persons other than attorneys or themselves. The State in the case argued the buyer relies on the title search to determine if he receives good, marketable title. We agreed and rejected the title company's argument that it did not need attorney supervision because the title search was merely incidental to their own business. Instead, we found the title search company could conduct title examinations only under the supervision of a licensed attorney because the "examination of titles requires expert legal knowledge and skill" and the search affected the rights of buyers. Id. at 432, 357 S.E.2d at 18.

According to the stipulated facts it appears Title Company conducts a title search and prepares a commitment, for the benefit of the Lender, without supervision by a licensed attorney. While Doe notes the Title Company is licensed to do business in South Carolina, we rejected the incidental-to-business approach in Buyers Service.

Title Company's title search and preparation of title documents for the Lender, without direct attorney supervision, constitutes the unauthorized practice of law. The title search and subsequent preparation of related documentation is permissible only when a licensed attorney supervises the process. In order to comply with this Court's ruling Doe must ensure the title search and preparation of loan documents are supervised by an attorney.

B. Preparation of Loan Documents

Stipulated facts 7 and 8 concern Lender's preparation of loan documents as well as the attorney's review of the documents and subsequent curative work, if needed. Doe argues the preparation of real estate documents constitutes the practice of law, but Lender has a *pro se* right to prepare documents where it is a party. We disagree.

South Carolina law recognizes an individual's ability to appear *pro se* with leave of the court. See S.C. Code Ann. § 40-5-80 (Supp. 2002). Corporations, which are artificial creatures of state law, do not have a right to appear *pro se* in all instances. See S.C. Code Ann. § 40-5-320 (1986). We granted corporations the ability to appear *pro se*, with leave of the court, in civil magistrate's court. See In re Unauthorized Practice of Law, supra. We explicitly rejected a corporation's ability to appear *pro se* in a state circuit or appellate court. Renaissance Enterprises, Inc. v. Summit Teleservices, Inc., 334 S.C. 649, 515 S.E.2d 257 (1999).

The right of a corporation to practice law by completing real estate loan documents is not co-extensive with an individual's right. Doe's citation to this Court's previous holdings to suggest otherwise is misplaced. [4] In Buyers Service we specifically held the preparation of real estate instruments by lay persons constituted the unauthorized practice of law. See Buyers Service, 292 S.C. at 430-31, 357 S.E.2d at 17-18. Without the presence of Doe, acting as an independent supervising attorney, Lender could not prepare such instruments.

Doe correctly differentiates this case from Buyers Service because an independent attorney will review the documents and correct them, if needed. Lender may prepare legal documents for use in refinancing a loan for real property as long as an independent attorney reviews and corrects, if needed, the documents to ensure their compliance with law.

C. Closing

Stipulated facts 9 and 10 describe the closing process. We held in Buyers Service "real estate and mortgage loan closings should be conducted only under the supervision of attorneys." Id. at 434, 357 S.E.2d at 19.

Doe differentiates the present case from Buyers Service because an attorney is actively involved in the closing and answers any questions the buyer may have. The purchaser in Buyers Service never spoke with an attorney and any questions were answered by non-attorney employees of the title company. Additionally, in Buyers Service the title company employed attorneys to review the closing documents. Yet, we concluded the presence of

attorneys, acting as employees, did not save the company from unauthorized practice of law. This Court cited to an Arizona case [5] and approved its rationale that "adverse interests in real estate transactions make it extremely difficult for the attorney to maintain a proper professional posture toward each party." Id. at 431-32, 357 S.E.2d at 18.

Here Lender employs Doe as an attorney to supervise the preparation of legal documents, then supervise the loan's closing and provide legal advice to the buyer. Doe is an independent attorney unlike the attorneys in Buyers Service who were employees of the title company. Doe's activities may still pose an ethical dilemma, however, because a lawyer may not represent a client whose interests may be adverse to another client unless the lawyer believes the representation will not adversely affect the relationship with the other client and the client consents after consultation. [6] See Rule 407, SCACR (Rule 1.7 Conflict of Interest).

Under the stipulated facts Lender retains Doe to supervise its own legal work as well as provide advice to the buyer at closing. Although the Lender and Buyer have adverse interests, there is no consultation with the buyer to waive any potential conflict. Because real estate closings present a unique situation regarding dual representation we do not believe it to be in the public's interest to create a *per se* rule barring an attorney under the stipulated facts from representing Lender and borrower. Instead, Doe may participate in the closing after giving full disclosure of his role to both parties and obtaining consent from both parties to continue.

D. Recording Instruments

The final phase of the real estate loan process is recordation of the new mortgage and related documents, shown in stipulated facts 11 through 13. Buyers Service clarified the mailing of documents to the courthouse occurs as part of a real estate transfer, which is an aspect of conveyancing affecting legal rights, is the practice of law. We held "instructions to the Clerk of Court or Register of Mesne Conveyances as to the manner of recording, if given by a lay person for the benefit of another, must be given under the supervision of an attorney." Buyers Service, 292 S.C. at 434, 357 S.E.2d at 19.

The recordation process in the stipulation of facts establishes attorney supervision of the process. As such, Doe's supervisory activities do not constitute the unauthorized practice of law.

CONCLUSION

We conclude Doe's association as discussed is not violative of the proscription against the unauthorized practice of law, as long as the association is conducted as herein prescribed.

TOAL, C.J., MOORE, WALLER and PLEICONES, JJ., concur.

[1] Rule 5.5 (b), SCACR prohibits an attorney from assisting "a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."

[2] Due to the nature and procedural posture of this case, this opinion is limited to the stipulated facts outlined above. See In re Unauthorized Practice of Law Rules, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992).

[3] Disputes between attorneys and real estate service providers consistently appear in cases since 1917. See, e.g., Title Guar. & Trust Co. v. Maloney, 165 N.Y.S. 280 (N.Y. Sup. Ct. 1917); see generally Joyce Palomar, The War Between Attorneys and Lay Conveyancers Empirical Evidence Says "Cease Fire!", 31 Conn. L. Rev. 423, 471-74 (1999). The issue is attracting attention from the Federal Trade Commission and the Anti-Trust Division of the United States Department of Justice. The FTC and USDOJ have taken a greater interest in the monopolistic effects of state's unauthorized practice of law rules in the real estate context. See John Gibeaut, Real Estate Closing Tussle in Tarheel State, 1 No. 3 ABA J. E-Report 7 (2002). However, state limitations in the area are exempt from federal antitrust liability under the Sherman Act's state action exception. See Lender's Serv., Inc. v. Dayton Bar Ass'n, 758 F. Supp. 429, 434-41 (S.D. Ohio 1991). Further, this Court grounds its unauthorized practice rules in the State's ability to protect consumers in the state and not as a method to enhance the business opportunities for lawyers. See In re Unauthorized Practice of Law Rules, supra.

[4] Doe cites to In re Easler, 275 S.C. 400, 272 S.E.2d 32 (1980) (holding that the preparation of a deed for another constitutes the unauthorized practice of law); State v. Despain, 319 S.C. 317, 460 S.E.2d 576 (1995) (holding that the preparation of legal documents for others to present in family court constitutes the practice of law). Doe argues these cases imply a corporation engages in unauthorized practice of law **only** where it seeks to act on behalf of others and not solely itself. We disagree.

In re Easler and State v. Despain concerned an individual attempting to provide legal advice or services to other individuals. The fact-specific holdings involved individuals providing legal services to others for a fee, therefore, the individual was not acting within the *pro se* exception. As previously stated, the *pro se* exception for corporations is strictly limited.

[5] State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1, reheard, 91 Ariz. 293, 371 P.2d 1020 (1962).

[6] These ethical concerns are only applicable when there is a business relationship between Lender and the attorney. At oral argument, Doe made clear that there is no formal business arrangement between himself and Lender. Doe is chosen, as is often the case, by Borrower from a list of attorneys provided by Lender. Doe affirmed Lender informs Borrower of her right to employ an attorney not on the list.

THE STATE OF SOUTH CAROLINA In The Supreme Court

In the Matter of Stephen M. Pstrak, Respondent.

Opinion No. 25767 Submitted December 8, 2003 – Filed January 12, 2004

PUBLIC REPRIMAND

Henry B. Richardson, Jr., of Columbia, for Office of Disciplinary Counsel.

Stephen M. Pstrak, of Lexington, Pro Se.

PER CURIAM: Respondent and Disciplinary Counsel have entered into an agreement pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and

agrees to accept an admonition or a public reprimand. We accept the agreement and issue a public reprimand. [1] The facts, as set forth in the agreement, are as follows.

Facts

I. Real Estate Closing Matter I

Respondent attended a real estate closing in place of attorney J. Wendell Arsi, who had a conflict and could not attend. [2] The closing involved the purchase of a mobile home from a mobile home dealer and real property from a developer. The transaction was being financed by a lender. Respondent was only asked to attend the closing and be responsible for the review and execution of the closing documents. Respondent was "under the good faith impression" that Arsi had examined, or would be examining, or at least reviewing, the abstract of title and had drafted, or at least reviewed, the closing documents.

Respondent attended the closing at the offices of Carolina Title Services, Inc. (CTS). The HUD-1 Settlement Statement reflected that attorney William J.

McMillian, III, was the settlement agent. Respondent gathered from that information that the proceeds from the transaction would be disbursed by McMillian in accordance with the Settlement Statement. It was unclear to respondent whether Arsi or McMillian was to be responsible for updating the title and seeing to the recordation of documents in connection with this transaction, but respondent incorrectly assumed that one of those attorneys would do so.

Respondent is now advised, and does not dispute, that the loan documents were prepared by CTS, that Amy Cook, the owner and manager of CTS, advised Arsi that the funds from this transaction would be disbursed by McMillian, and that Arsi was under the impression that he was only expected to attend the closing and that other aspects of the transaction required by applicable rules to be handled by an attorney would be handled by McMillian. [3] Respondent did not confirm any of the foregoing with Arsi or McMillian and respondent is advised, and does not dispute, that Arsi did not confirm any of the foregoing with McMillian. It is now known and acknowledged that McMillian had no involvement with the transaction whatsoever, that McMillian had previously opened an IOLTA account with BB&T on which he allowed Cook to be a signatory, that the checkbooks for that IOLTA account were kept by Cook at CTS, that the cancelled checks and bank statements concerning real estate transactions were returned to and maintained by Cook, that McMillian was not reconciling or even reviewing the bank statements and cancelled checks pursuant to Rule 417, SCACR, and that McMillian's only involvement with transactions such as the instant transaction was to allow CTS to use his IOLTA account and show McMillian as settlement agent.

Subsequently, there was a substantial shortage discovered in McMillian's IOLTA account. It is reported that BB&T placed a "sweep" on the account at the direction of Cook and would "sweep" the funds from the account into Cook's account on a daily basis. After the shortage of funds in McMillian's IOLTA account was discovered, McMillian was placed on interim suspension. In the Matter of McMillian, 350 S.C. 216, 565 S.E.2d 765 (2002).

The closing appeared to be a relatively simple matter. Respondent had no file in connection with the transaction when he arrived for the closing. Respondent questioned Cook about getting a file to Arsi. Respondent later checked with Arsi's office, which confirmed that it had received a file in connection with the closing, which, in turn, "triggered" the firm to compensate respondent for standing in for Arsi at the closing. At the time, respondent was under the impression that his involvement in the transaction ended upon the review and execution of the closing documents and the file being sent to Arsi.

As a result of delays and the subsequent suspension of McMillian, the transaction was not completed. The mobile home dealer received payment for the mobile home, but the developer did not receive payment for the real estate. Respondent subsequently received a telephone call from an attorney

representing the developer advising that the transaction had not been completed. Respondent left a message on the attorney's answering machine relating his limited involvement in the transaction and advising her to contact Arsi.

When the purchaser became aware that the transaction had not been completed in a timely manner, he filed a complaint with the Commission on Lawyer Conduct. He maintained he had expended funds to clear the real property and to have the driveway installed, but was not able to register his mobile home or get connections for water or electricity or a permit for a septic tank because the transaction had not been completed. The purchaser was under the impression that respondent was standing in for McMillian at the closing and was unaware of Arsi having any involvement in the matter.

Respondent now recognizes that, pursuant to State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987) and Doe v. McMaster, 351 S.C. 158, 568 S.E.2d 356 (2003), Cook was engaged in the unauthorized practice of law and that respondent, albeit unintentionally, assisted Cook in doing so. Respondent now acknowledges that when he served as the closing attorney in connection with the transaction it was his responsibility to see that an attorney had been involved in all other aspects of the transaction requiring attorney participation under the aforementioned cases, that it was his responsibility to either see to the proper disbursement of the funds or see that an attorney approved by the client was going to handle or oversee the recordation of documents and proper disbursement of the funds.

In mitigation, Disciplinary Counsel states respondent was under the good-faith impression that either Arsi or McMillian were to see to the other aspects of the closing that required attorney participation, that respondent was unaware that Cook was engaging in the unauthorized practice of law, that respondent was unaware Cook had unsupervised access to and use of McMillian's IOLTA account and that respondent in no way contributed to the subsequent defalcations in the transaction. Furthermore, Disciplinary Counsel has been advised by the attorney subsequently retained by the developer that the matters set forth herein were resolved to the satisfaction of the purchaser within a few months after the closing.

II. Real Estate Closing Matter II

Respondent was contacted by a paralegal in Arsi's office to attend a second closing in Arsi's place. The paralegal asked only that respondent attend the closing and perform as closing attorney at the closing. Respondent attended the closing, reviewed the closing documents with the clients and supervised the execution of the closing documents. Respondent did not undertake any further work on the transaction after attending the closing and, instead, left the executed

documents and the proceeds from the transaction in the hands of Cook or another employee of CTS.

Respondent was under the impression that either Arsi or McMillian had conducted the title examination or reviewed a title abstract in connection with the property, had prepared and reviewed the closing documents, and would see to the finalization of the transaction, including updating the title prior to recordation, recordation of the necessary documents in the public records, and disbursement of the proceeds in accordance with the HUD-1 Settlement Statement presented and executed at closing. [4]

It was respondent's understanding, from his conversation with Arsi's paralegal, that his sole function at the closing was to review the closing documents, see to the proper execution of the documents, and answer any questions that the clients might have concerning the closing documents and the closing. Respondent did not advise the clients of the limited scope of his representation.

Due to McMillian being placed on interim suspension and his IOLTA account being frozen, the transaction could not be closed. The clients called respondent's office to discuss the impediments to closing the transaction. Respondent instructed his secretary to tell the clients that respondent's involvement was limited to attending the closing and they should contact Arsi about the problems they were having getting the transaction closed. Respondent tried to contact the clients directly on two occasions, but was unable to reach them. He left a message on their answering machine to contact Arsi since respondent was only at the closing to assist Arsi and that he understood Arsi to be the actual closing attorney. The clients were able to remove the impediments to the transaction a year later after hiring counsel to assist them.

Arsi reported that had he been able to attend the closing, his participation would have been limited to the same participation respondent had in the transaction, that no lawyer examined the title to the real property which was the subject of the transaction or reviewed any title abstract, that no lawyer prepared the closing documents, that no lawyer saw to the recordation of documents in the public records or to the completion of the transaction in accordance with the wishes of the clients and the instructions from the lender, and that, had the transaction been closed, the disposition of the proceeds of the transaction would not have been made by a licensed attorney but would have been made by CTS using McMillian's IOLTA account.

Respondent now recognizes that, by his limited participation in the closing, he assisted Cook in the unauthorized practice of law, albeit unwittingly. Respondent further acknowledges that it was his professional responsibility upon serving as closing attorney, to ensure that the

other aspects of the closing required to be handled by an attorney were handled or properly supervised by a person licensed to practice law in South Carolina.

III. Mitigation

Disciplinary Counsel reports that respondent has been fully cooperative in the conclusion of this matter, has been forthright in acknowledging his misconduct and addressing the matter, and had no involvement whatsoever in, or knowledge of, the subsequent shortages in McMillian's IOLTA account until after his participation in the two closings. Respondent now recognizes that he should have been more diligent in insuring that an attorney was acting at each stage of the transactions, for which he became responsible upon serving as the closing attorney, and that client funds from the transactions should not have been left in the hands of a non-lawyer. Finally, it appears that respondent's relationship with CTS was short lived and only involved two transactions.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 5.3(b) (a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer); Rule 5.5(b) (a lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law); and Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct). We also find he has violated the following provisions of the Rules of Professional Conduct: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.2(a) (a lawyer shall abide by a client's decisions concerning the objectives of representation, except in limited circumstances, and shall consult with the client as to the means by which they are to be pursued); and Rule 1.2(c) (a lawyer may limit the objectives of the representation if the client consents after consultation).

Respondent's misconduct constitutes grounds for discipline under Rule 7(a)(1) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct).

Conclusion

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his actions.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

[1] In January 2003, respondent received an eight month suspension for misconduct unrelated to that set forth in this opinion. In the Matter of Pstrak, 352 S.C. 505, 575 S.E.2d 559 (2003).

[2] Respondent discussed the matter with Arsi's paralegal, but did not speak directly with Arsi.

[3] By separate opinion of this same date, Arsi has been disbarred due, in part, to his participation in this closing arrangement with CTS and McMillian.

[4] The settlement statement showed McMillian as the settlement agent.

THE STATE OF SOUTH CAROLINA In The Supreme Court

In the Matter of Joseph Wendell Arsi, Respondent.

Opinion No. 25766 Submitted December 9, 2003 – Filed January 12, 2004

DISBARRED

Henry B. Richardson, Jr., of Columbia, for the Office of Disciplinary Counsel.

Desa Ballard, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the sanction of disbarment. We accept the agreement and disbar respondent from the practice of law in this state. The facts, as set forth in the agreement, are as follows.

Facts

I. Trust Account Matter

From September 2002 through July 2003, respondent, who had a large real estate practice, issued approximately 750 checks from his trust account to his operating account. The checks were not, on the occasions issued, payment for earned fees, but were from monies belonging to clients and/or lenders involved in pending real estate transactions. Respondent began this misappropriation in an effort to maintain his law practice after there was a dramatic reduction in the number of closings he was handling.

The checks at issue were usually written in amounts of $500, $550, or $600. Respondent wrote anywhere from ten to thirty-five checks at a time. The checks were written to appear like and replicate checks for fees respondent was regularly paid out of his trust account for real estate transactions. Respondent

maintained a ledger of the checks which showed the check number, date of issuance and amount of money owed to the trust account due to the issuance of the checks. As real estate transactions were closed, respondent would use the check number of a previously written

check listed on the ledger as the fee due respondent for that transaction so as to balance respondent's records for that particular transaction. Respondent would then delete that check number from the ledger.

As of February 2003, respondent had repaid all amounts previously misappropriated using the foregoing arrangement. Respondent repaid the misappropriated funds by not issuing checks for fees for real estate closings and instead using check numbers of checks already on the ledger to balance the trust account records for a particular real estate transaction.

However, beginning in March 2003, respondent resumed issuing checks from his trust account to his operating account pursuant to the foregoing arrangement, but was unable to repay those amounts due to a further downturn in the number of real estate closings his firm was handling.

Respondent misappropriated approximately $412,000 under the foregoing arrangement. After deducting the amount repaid from the total amount misappropriated, there was, and presently remains, a shortage in respondent's trust account of approximately $327,000.

Respondent self-reported his misconduct to the Office of Disciplinary Counsel and consented to being placed on interim suspension. In the Matter of Arsi, 355 S.C. 411, 585 S.E.2d 778 (2003). Respondent has fully cooperated with the Office of Disciplinary Counsel as well as the attorney appointed to protect the interests of respondent's clients.

II. Refinancing Matter

Respondent represented clients who refinanced a mortgage. The closing documents indicated the existing mortgage was to be paid from the proceeds of the refinancing transaction. The new mortgage was recorded and forwarded to the new lender along with a final loan policy of title insurance. A condition for the issuance of the loan policy of title insurance was that the existing mortgage be paid off and satisfied of record. The loan policy indicated the new mortgage was a first mortgage on the public records when, in fact, the existing mortgage had not been satisfied. Several months after the closing, respondent's clients were contacted by the holder of the existing mortgage and discovered the existing mortgage had not been paid. The clients attempted to contact respondent but for several months were only able to talk to respondent's staff. After the clients were finally able to talk directly with respondent, respondent caused the existing mortgage to be paid off and satisfied of record.

Respondent maintains the check to pay off the existing mortgage was issued at closing and was hand delivered to the holder of the mortgage on the day of closing, the original check has never been located, and respondent has not been able to discover any explanation as to what happened to the check after it reached the holder of the existing mortgage. Respondent contends the funds to pay the existing mortgage remained secure in respondent's trust account from the time they were received until paid by way of a new check to the holder of the existing mortgage.

Respondent acknowledges he did not provide competent representation to the clients, that he was not diligent in handling the matter, and that he gave incorrect information to the new

lender when he represented that the new mortgage constituted a first lien of record on the secured property when, in fact the existing mortgage constituted a first lien on the property.

Respondent maintains he was utilizing a computer program that he thought was reconciling his trust account on a monthly basis. However, respondent recognizes that the system he was using was inadequate to meet the requirements of Rule 417, SCACR, inasmuch as respondent failed to recognize the funds in this matter had been retained and undisbursed in his trust account for over a one-year period. Approximately fourteen months elapsed from the date of the closing of the refinanced transaction until the existing mortgage was paid off and satisfied of record. As a result of the foregoing, foreclosure proceedings were initiated against the clients by the holder of the existing mortgage, but were eventually resolved. In addition, the clients filed a civil action against respondent which was settled.

III. Title Insurance Matter

Respondent, directly and/or through a title insurance agency, was a title insurance agent for, and obtained title insurance from, a title insurance company from 1999 through December 2001. Respondent was the owner of or had a substantial interest in the title insurance agency. On numerous occasions there was an undue delay in the issuance of final title insurance policies after the related loan transaction had been closed, which resulted in the title insurance company terminating its agency relationship with respondent and the title insurance agency. Thereafter, the title insurance company spent over a year preparing final title insurance policies on transactions closed by respondent while an agent for the company. Respondent acknowledges that on numerous occasions related to loan closings involving title insurance from the title insurance company, respondent did not provide competent representation, was not diligent, and did not properly supervise his non-lawyer staff.

The title insurance company maintains it is owed, by respondent and/or the title insurance agency, $4,353.23 for title insurance premiums collected by respondent and/or the title insurance agency but not forwarded to the title

insurance company. Respondent contends the failure to pay the amount due was not a result of misappropriation of funds by respondent, but was instead due to respondent's failure to supervise his non-lawyer staff and his failure to comply with Rule 417, SCACR. However, respondent does not believe he owes any money to the title insurance company and maintains he has never received a statement or claim from the company for the amount it claims it is due. Regardless, respondent acknowledges he did not provide competent representation in connection with the related real estate transactions, was not diligent in the completion of work undertaken in connection with the transactions, and did not properly see to the safekeeping of funds belonging to the company that were deducted from proceeds of the real estate transactions.

IV. Title Agency Matter

Respondent entered into a business arrangement with a non-lawyer to form the above-referenced title insurance agency in which both respondent and the non-lawyer were principles. The agency entered into a title insurance underwriting agreement with a title insurance company. Under the terms of the agreement, respondent was required to maintain

a separate escrow account for all funds received in connection with the title insurance company's title insurance policies and to remit premiums collected, and copies of all policies and commitments issued, to the company on a monthly basis. Respondent, acting as closing attorney, and the agency began closing real estate loans. Thereafter, differences arose between respondent and the non-lawyer, the agency ceased operations and the business arrangement between respondent and the non-lawyer was dissolved. Because it appeared that all title insurance premiums due the title insurance company had not been paid by the agency, and that there was a shortage in excess of $66,000, the title insurance company initiated a civil action against respondent. That action is still pending.

Respondent maintains he did not withhold any of the funds due the title insurance company, [1] but acknowledges he failed to properly supervise the non-lawyer employee of the agency and failed to oversee the safekeeping of the title insurance premiums collected by the agency in real estate closings handled by respondent in contravention of the procedures established by this Court for the operation of trust accounts and the handling of monies of others and in violation of the agreement between respondent and the title insurance company. Respondent contends any shortage in funds owed to the company is not due to any acts committed on the part of respondent or to misappropriation of funds.

V. Carolina Title Services Matter

Respondent closed approximately five real estate transactions in a two-week period for Carolina Title Services (CTS). There were no licensed attorneys employed by CTS. Pursuant to an arrangement between respondent and CTS, CTS prepared the closing documents and respondent reviewed the title abstract

and closing documents and attended the closings as attorney for the borrowers. The HUD-1 Settlement Statements showed respondent as the "settlement agent" and respondent signed the settlement statements in that capacity. However, respondent represents his signature was added without his knowledge by non-lawyer staff of CTS.

For a period of time, respondent left disbursement of the proceeds from the transactions to be completed by the non-lawyer staff of CTS. During this period, respondent was under the impression, from discussions with the manager of CTS, that another attorney, William J. McMillian, III, was overseeing the disbursement of the proceeds of the transactions, the recordation of documents, and any other aspects of the closings required to be performed by an attorney. Respondent relied on those representations from the manager, but did not discuss the arrangement with McMillian. McMillian did, in fact, have a close working relationship concerning the closing of real estate transactions with CTS and respondent was aware of that relationship. Respondent was paid by way of checks drafted on McMillian's trust account, signed by the manager of CTS, and transmitted to respondent by CTS rather than McMillian. All of the checks were returned due to insufficient funds; therefore, respondent was not paid for his services in the transactions.

Respondent later learned that McMillian was not involved in the transactions, that the manager of CTS had signature authority on McMillian's trust account, and that disbursements were being made by CTS without supervision by a licensed attorney. Thereafter, respondent insisted that all disbursements on real estate transactions with CTS

be made by respondent through respondent's trust account. Respondent is now aware that the manager of CTS had directed the bank to "sweep" all funds out of McMillian's IOLTA trust account each day into the manager's personal bank account, which later resulted in a considerable shortage of funds in McMillian's trust account; however, respondent was unaware of that arrangement during the time respondent allowed CTS to handle the disbursement of funds from real estate transactions. Respondent now recognizes that, as a result of his reliance on incorrect information from the manager of CTS, respondent assisted one or more of the non-lawyer employees of CTS to engage in the unauthorized practice of law. Respondent maintains he discontinued participating in the "closing only" arrangement with CTS when he learned that representations made to him regarding the involvement of McMillian in other aspects of the transactions were incorrect.

In one case, respondent reviewed the closing documents but was unable to attend the closing due to a scheduling conflict. Respondent retained attorney Stephen M. Pstrak to attend the closing in his place. However, respondent did not advise the clients of the limited scope of Pstrak's representation. Neither respondent nor Pstrak did any further work on the matter after the closing. Shortly thereafter, McMillian was placed on interim suspension by this Court and his trust account, used by CTS for disbursement of funds from the transaction,

was frozen by the attorney appointed to protect the interests of McMillian's clients. In the Matter of McMillian, 350 S.C. 216, 565 S.E.2d 765 (2002). Some time later, respondent was advised that the transaction had not been completed. The clients had to retain another attorney to complete the closing, which took approximately one year. Respondent was never paid for the closing, but paid Pstrak for his participation.

Respondent contends he was under the mistaken impression on the occasion of the closing that McMillian would be handling the disbursement of the funds and recordation of the closing documents when, in fact, he now knows McMillian was not involved in the transaction and it was, instead, being handled by non-lawyer employees of CTS without the supervision of a licensed attorney. Respondent now recognizes that it was his responsibility to see that the transaction was properly closed and that the proceeds from the transaction were disbursed in accordance with the settlement statement since Pstrak, as his designee, signed as "settlement agent" under respondent's authorization and direction, and that it was his further responsibility to have assisted the clients in removing the impediments to closing once respondent was advised that the transaction had not been completed. However, due to respondent not supervising the non-lawyer employees of CTS after closing, respondent was unaware that the transaction had not been completed until some time later by the new attorney for the clients.

VI. Cooperation With Disciplinary Counsel

Disciplinary Counsel states that, to the best of his knowledge and belief, respondent has fully cooperated with the inquiries of Disciplinary Counsel into the above-referenced matters and that respondent has been forthright in acknowledging the misconduct set forth herein. Disciplinary Counsel states further that respondent maintained he did not realize some of his

actions constituted misconduct at the time, but now recognizes as much with the advice of counsel and the advantage of hindsight.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.2(a) (a lawyer shall abide by a client's decisions concerning the objectives of representation, except in limited circumstances, and shall consult with the client as to the means by which they are to be pursued); Rule 1.2(c) (a lawyer may limit the objectives of the representation if the client consents after consultation); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4(a) (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 1.15(a) (a lawyer shall hold property of clients that is in the lawyer's possession

in connection with a representation separate from the lawyer's own property); Rule 1.15(b) (a lawyer shall promptly deliver to the client any funds that the client is entitled to receive); Rule 5.3(b) (a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer); Rule 5.3(c) (a lawyer shall be responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved or the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action); Rule 5.4(c) (a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services); Rule 5.4(d) (a lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration, a nonlawyer is a corporate director or officer thereof or a nonlawyer has the right to direct or control the professional judgment of a lawyer); Rule 5.5(b) (a lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Rule 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving moral turpitude); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent also acknowledges that his misconduct constitutes grounds for discipline under the following provisions of Rule 7, RLDE, Rule 413, SCACR: Rule 7(a)(1) (it shall be a

ground for discipline for a lawyer to violate the Rules of Professional Conduct); Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute); and Rule 7(a)(7) (it shall be a ground for discipline for a lawyer to violate a valid court order issued by a court of this state).

Finally, respondent admits that he failed to comply with the record keeping and money handling procedures set forth in Rule 417, SCACR.

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent. Respondent's request that the disbarment be made retroactive to the date he was placed on interim suspension is denied.

Within thirty days of the date of this opinion, Disciplinary Counsel and respondent shall establish a restitution plan pursuant to which respondent shall pay restitution to all persons and entities who have incurred losses as a result of respondent's misconduct in connection with this matter. Respondent shall also reimburse the Lawyers' Fund for Client Protection for any claims paid as a result of his misconduct in connection with this matter. Failure to make restitution in accordance with this opinion and the restitution plan may result in respondent being held in contempt of this Court. Moreover, respondent shall not apply for readmission unless and until all such restitution has been paid in full.

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

[1] Respondent also believes the shortage to be considerably less than that claimed by the title insurance company due to the fact that the company's audit was based on commitments instead of policies actually issued.

IN THE STATE OF SOUTH CAROLINA

In The Supreme Court

In the Matter of Sabine S. Boulware, Respondent.

Opinion No. 26082 Submitted October 25, 2005 - Filed December 19, 2005

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Michael J. Virzi, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

J. Steedley Bogan, of Columbia, for respondent.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to imposition of an admonition, public reprimand, or definite suspension not to exceed thirty (30) days. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

In February 2002, respondent approached Amy Cook, the principal of Carolina Title Services, Inc., (CTS) in hopes of obtaining some of its real estate business.[1] CTS was an agent for Chicago Title Insurance Company (Chicago Title) and had an ongoing business relationship with attorney William J. McMillian, III, for the closing of real estate transactions. Respondent sought to be a closing attorney for CTS, but Cook only needed a lawyer to fill in for McMillian at closings when he was unavailable. After seeking and obtaining Chicago Title's approval and speaking with McMillian by telephone, respondent agreed to the arrangement.

Respondent represents that, during her telephone conversation with McMillian, he assured her that, other than attending the actual closing, he would be supervising all aspects of the transactions.[2] Respondent never met McMillian and did not communicate with him again until after terminating her relationship with CTS.

From February through April 2002, respondent attended approximately twenty-four real estate closings. Respondent was asked only to attend the closings and be responsible for the review and execution of the closing documents. Respondent represents she was under the good faith impression that McMillan would attend to or supervise all other aspects of the real estate transactions; however, McMillian did not do so and it is now known that he took no part in these transactions.

The closings took places at CTS' offices. Respondent received all files and instructions from Cook or her employees and, after the closing, she left all closing documents and monies with Cook or her employees. Most of the closings at issue were relatively uncomplicated. On the few occasions when a question or problem arose, respondent stopped the closing and Cook rescheduled it for a later date. Respondent is now advised and does not dispute that the title abstracts and closing documents were prepared by Cook and CTS employees without the supervision of any lawyer, that disbursement of funds and recordation of documents were handled by Cook and CTS employees without the supervision of any lawyer, and that McMillian's only involvement in the transactions consisted of allowing Cook unlimited and unsupervised use of his trust accounts.[3]

Respondent represents she verbally informed the parties to each closing that her role was limited to explaining and executing the documents and that CTS and its lawyer were responsible for all other aspects of the closing. However, on several occasions, respondent supervised the buyer's execution of an attorney preference form during which buyers selected respondent to represent them in all aspects of the transaction. [4] On these occasions, respondent filled in her own name as the selected attorney on the form prior to its execution by the buyer.

On thirteen occasions, the HUD-1 Settlement Statements included a $12 wire fee payable to respondent even though respondent never incurred a wire fee in any transaction with CTS. ODC is informed and believes that, in each of these closings, a wire fee was incurred by CTS or McMillian's trust account under Cook's control. Because respondent had requested Cook increase her fee, Cook offered to give respondent the $12 wire fee as a way to increase her fee without turning away clients who might object to an overt fee increase. Respondent consented to this arrangement. Respondent now recognizes that the HUD-1 statement was not completely accurate and that the arrangement resulted in respondent receiving a portion of her fee from someone other than her client.

On one occasion, respondent closed a transaction in which the buyers were personal friends of Cook. Cook had agreed not to charge the buyers an attorney fee and the HUD-1 Settlement Statement reflected no fee to any lawyer. However, Cook and respondent agreed that Cook would pay respondent a fee outside the closing and not disclose the fee to anyone. Respondent now recognizes that closing the transaction in this manner and accepting an undisclosed fee violated the Rules of Professional Conduct and federal law.

In most of the transactions respondent closed, respondent's name or her firm name were shown on the HUD-1 as "Settlement Agent," but respondent did not act as settlement agent as she neither held nor disbursed the closing proceeds. Due to her inexperience, respondent was not aware of all the implications made by the statements on the HUD-1 form. Respondent now recognizes that, by forwarding inaccurate HUD-1 forms to clients and other parties, she misrepresented her role to all parties relying on the HUD-1 Settlement Statements, particularly lenders who were not present at the closings. Her misrepresentation is most pronounced in those closings in which the HUD-1 Settlement Statements indicated that respondent incurred a wire fee, as the statements implied to lenders and subsequent assignees that respondent was disbursing the loan proceeds, including making payoffs of prior mortgages and liens.

On two occasions, a lender delivered closing funds to respondent's trust account rather than to McMillian's trust account for transactions in which respondent was to act as closing attorney for CTS. Respondent endorsed the first check to CTS based on information from Cook that the lender wanted Cook to disburse the money. The second check was a wire transfer into respondent's trust account which respondent initially refused to endorse to Cook but, when a CTS employee refused to give respondent a disbursement summary, respondent relented and wrote a trust account check to CTS for the funds so that the transaction could close without the borrower losing a favorable interest rate.

On one occasion, a buyer brought funds to the closing in the form of a check payable to respondent. Due to a title issue, the closing was delayed until a time when respondent would not be available. As a result, respondent endorsed the buyer's check to CTS and gave it to Cook. Respondent now recognizes she should not have given the client funds to a non-lawyer.

On two occasions, respondent signed a loan confirmation or "First Lien Letter" several days after closing. These letters advised the lender and title insurance company that the transaction was closed and completely disbursed, that all prior liens were satisfied, and that the lender's mortgage was a valid first lien on the property. Respondent represents she believed those statements were true but admits that such a belief was merely an assumption, that she had no actual knowledge of the truth or falsity of the statements, and that she did not verify the information with anyone outside of CTS before executing the letters.

It is now known that in most, if not all, of the transactions closed by respondent for CTS, Cook diverted closing proceeds from McMillian's trust accounts to her personal accounts and did not disburse money to the parties as indicated on the HUD-1 Settlement Statements. Respondent had no knowledge of this activity at the time.

Since 2002, Chicago Title and its counsel have worked to correct the title problems caused by Cook's defalcation in transactions involving respondent and other lawyers. Chicago Title has spent approximately $250,000 to resolve title issues in closings in which respondent was involved. In addition, several holders of unpaid prior mortgages compromised their debts in settling with Chicago Title and, therefore, remain financially prejudiced; Chicago Title denied coverage in several other cases, leaving the holders of those unpaid prior liens and mortgages with no recourse but foreclosure. Respondent has resolved through settlement each lawsuit in which she was a named defendant.

In addition to the transactions in which respondent served as closing attorney, on numerous occasions respondent received checks written on McMillian's trust account and signed by Cook as payment of attorney fees for closing in which respondent had no involvement. In at least three of these transactions, Cook had used respondent's name as the settlement agent on closing documents but, as with other transactions, Cook had stolen the lender's money and did not make the disbursements as indicated in the HUD-1 Settlement Statements. Respondent had no knowledge of these transactions or of Cook's defalcations until being so advised by ODC. Nevertheless, respondent and her staff deposited these fee checks into respondent's operating account, incorrectly assuming that they related to transactions in which she had served as closing attorney. Respondent maintained no office procedure for matching incoming payments to closing work performed and, therefore, unwittingly received payments for the use of her name and law license by a non-lawyer.

On three occasions in March 2002, a lender wired closing funds totaling $197, 285.99 to respondent's trust account. Respondent closed two of those transactions, not knowing funds were wired to her account, but assuming they were wired to McMillian's account as usual. Cook closed the third transaction without respondent's knowledge. In all three of the transactions, the funds were not disbursed as indicated in the HUD-1 Settlement Statements. Respondent attempted to reconcile her trust account on a monthly basis, but her reconciliations did not alert her to the excess funds in her trust account.

Several months after respondent terminated her relationship with CTS she sought an agency relationship with Stewart Title Company pursuant to which Stewart Title conducted an audit of respondent's trust account. The audit alerted respondent to the excess funds in July 2002 and respondent immediately took steps that resulted in delivery of those funds to the appropriate parties. Until the audit, respondent had no knowledge of the three wires into her trust account. Respondent now recognizes that, in order to comply with Rule 417, SCACR, on a monthly basis she must reconcile the trust account balance according to the bank's records with the balance according to her records of account activity and that, if she had complied with Rule 417, she would have been immediately alerted to the improper deposits.

After closing approximately two dozen transactions between February and April 2002, respondent became aware that Cook or a CTS employee had forged her name on a HUD-1

Settlement Statement and on a closing proceeds check from a lender and that checks written by CTS were being dishonored for insufficient funds. Upon learning this information, respondent severed her relationship with CTS. Respondent then sent a letter to the Commission on Lawyer Conduct (Commission) purporting to be an anonymous report of Cook's and McMillian's actions. The letter sought the advice of the Commission and offered respondent's assistance in stopping the ongoing defalcation.

In mitigation, respondent states she was under the good faith impression that McMillian was performing or supervising all aspects of the real estate transaction that required attorney participation. She further states she was unaware that Cook was engaged in the unauthorized practice of law, that she was unaware that Cook had unsupervised access to and use of McMillian's trust accounts, and that she in no way intentionally contributed to the defalcations in these transactions.

LAW

Respondent admits that, by her misconduct, she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.4(b) (lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); Rule 1.8(f) (lawyer shall not accept compensation for representing a client from one other than the client unless the client consents after consultation); Rule 1.15 (lawyer shall safe keep client funds); Rule 4.1(a) (in course of representing a client, lawyer shall not make a false statement of material fact to a third person); Rule 5.5(b) (lawyer shall not assist a person in the unauthorized practice of law); Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct); and Rule 8.4(d) (it is professional misconduct for lawyer to engage in dishonesty, fraud, deceit, or misrepresentation).[5] Respondent acknowledges that her misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for her misconduct.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur. WALLER, J., not participating.

[1] Respondent was admitted to the Bar in November 1999. At the time she contacted Cook, respondent had recently opened her own office and was seeking to build her practice.

[2] McMillan's statements to ODC contradict respondent's representation.

[3] See In the Matter of McMillian, 359 S.C. 52, 596 S.E.2d 494 (2004).

[4] See S.C. Code Ann. § 37-10-102 (2002).

[5] Respondent's misconduct occurred before the effective date of the Amendments to the Rules of Professional Conduct. See Court Order dated June 20, 2005. The Rules cited in this opinion are those which were in effect at the time of respondent's misconduct.

THE STATE OF SOUTH CAROLINA In The Supreme Court

In the Matter of H. Brent Fortson, Respondent.

Opinion No. 25898 Submitted October 26, 2004 – Filed November 22, 2004

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Susan M. Johnston, Deputy Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

R. Davis Howser, of Howser Newman & Besley, LLC, and Elizabeth Van Doren Gray, of Sowell Gray Stepp & Laffitte, LLC, both of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a sixty (60) day suspension from the practice of law. See Rule 7(b), RLDE, Rule 413, SCACR. We accept the Agreement and definitely suspend respondent from the practice of law in this state for a sixty (60) day period. The facts, as set forth in the Agreement, are as follows.

FACTS

Respondent engaged in a business relationship with South Carolina Real Estate Services, LLC, (RES), a company managed by Cathy Pittman, daughter of Anna Knox (Knox), and Attorney Support, Inc., (ASI), a company owned and managed by Knox. These two companies provided services to assist attorneys in the closing of real estate transactions.

Neither Knox nor Pittman were employees of respondent or his law firm during the period relevant to the Agreement. Neither Knox nor Pittman have ever been admitted to the practice of law. At no time relevant to the facts in the Agreement were any persons employed by ASI or RES licensed to practice law. Respondent had no interest in either ASI or RES and paid them as independent contractors for their services on a case-by-case basis.

The functions provided by RES and ASI included communication with lenders, realtors, buyers and sellers, title abstract searches, the preparation and review of legal documents for closings, attendance at closings, issuance of title insurance, the receipt and disbursement of funds for the transaction, and completion of follow up tasks, including but not limited to recording documents in the public records. In connection with the handling of the funds for real estate closings for respondent, ASI provided an "escrow service." All of these functions took place at the offices of RES and/or ASI with the exception of the actual closings which usually took place at respondent's office. Almost all U.S. mail, facsimiles, and other communications and deliveries related to these functions were directed to the offices of RES and/or ASI, as were almost all telephonic communications concerning real estate closings by respondent.

In real estate closings, RES and/or ASI utilized computer generated stationary with respondent's law office letterhead. Use of respondent's letterhead in this fashion was with respondent's knowledge and consent. By using respondent's letterhead and through other means which were known to respondent and to which respondent consented, Knox represented herself as and caused others to believe that she was an employee of respondent or respondent's law firm when, in fact, she was not respondent's employee during the period relevant to the Agreement.

In completing the functions described above, neither RES nor ASI's owners or employees were supervised by a licensed attorney. Respondent did not supervise the work of either RES or ASI, except to review the closing documents and title abstract prior to closings. Generally, all communications concerning ASI's services were directly between respondent and Knox and any services needed from RES were obtained by Knox. Likewise, most communications with lenders and parties to the real estate transactions were handled by Knox, not respondent.

Respondent caused or permitted all funds for these real estate transactions assisted by RES and ASI to be deposited or wired into the ASI "Real Estate

Account" which was maintained by ASI at its office. Respondent directed funds being transferred by wire to be wired by lenders directly to the ASI account managed by Knox at ASI's office. When respondent received checks made payable to his order or the order of his law firm, respondent endorsed the checks and delivered them to Knox. ASI's bank account was not an IOLTA account and it was solely controlled by ASI owner and manager Knox. Bank statements and cancelled checks were sent directly to ASI. Knox had exclusive signatory authority over this bank account and controlled all aspects of it, including deposits, disbursements, possession of checks and deposit slips, and the receipt of monthly bank statements, cancelled checks, and other documents propagated by the bank concerning account activity, all of which was maintained by and in custody and control of Knox at ASI's office. With the exception of a review of the ledger accounts for each closing prepared by Knox, which respondent represents he performed, respondent never inspected or audited the ASI account used by Knox to deposit and thereafter disburse the proceeds of respondent's real estate closings handled by ASI and RES.

The arrangement between respondent and ASI (utilizing the services of RES) was in effect for approximately four years. Either during or after each of the numerous transactions involving RES/ASI, respondent signed the HUD-1 Settlement Statement attesting to the representation printed on the Settlement Statement that respondent certified the funds itemized were an "accurate account of the funds which were received and have been or will be disbursed by the undersigned . . ." (emphasis added) or words of similar import or effect. The term "undersigned" on each of these HUD-1 Settlement Statements refers to respondent. In fact, respondent made no disbursements in connection with the RES/ASI assisted real estate transactions and, instead, entrusted the disbursements to be made by Knox from ASI's bank account, the checks and records of which were maintained by Knox at ASI's office. Respondent estimates he consummated approximately 1051 real estate

closings by using the services of ASI and/or RES under the foregoing arrangement with Knox making disbursement of the proceeds from the ASI bank account controlled by Knox.

In or around February 2004, respondent learned from Knox's attorney that approximately twelve mortgage payoffs related to real estate closings for respondent's clients handed by ASI and RES had not been paid. Thereafter, respondent made inquiries to Knox about these open and unpaid mortgages which should have been paid in full out of the proceeds of the closings. When confronted, Knox acknowledged to respondent that she had misappropriated funds from the ASI account related to closings for respondent's clients. Knox then produced a document itemizing the transactions in which there were shortages and the amounts thereof. From the documentation submitted in support of the Agreement, it appears the total amount of funds from respondent's clients misappropriated by Knox was approximately $1,151,075.04. These misappropriated monies were funds that had been deposited in the ASI real estate account from closings ASI handled for respondent. These missing funds

represent monies allocated for payoffs of mortgages from twelve of respondent's clients. Each of the HUD-1 Settlement Statements from the twelve closings from which money was appropriated bears respondent's signature as "Settlement Agent." One million one hundred fifty one thousand seventy five dollars and four cents remains missing.

After learning of Knox's misappropriation, respondent immediately filed a self-report with Disciplinary Counsel and with his errors and omissions carrier and subsequently paid all amounts due on the mortgages. Knox was indicted and subsequently pled guilty to the misappropriation of $1,151,075.04. Knox admitted to perpetrating an ongoing scheme of retaining mortgage payoffs from respondent's closings over a period of approximately four years. It is now known to respondent that Knox had been regularly misappropriating funds from closings she handled for respondent and was replacing monies previously misappropriated with monies from subsequent closings until her scheme became known.

Respondent did not at any time relevant to the foregoing advise any of his clients of any limitations on his representation in connection with real estate closings. He did not advise his clients that unsupervised non-lawyers were entrusted with the disbursement and accounting of all closing funds, as well as the preparation and completion of closing documents and recording of the same.

Before Knox's misappropriation scheme was discovered, respondent became concerned about liability related to his arrangement with Knox due to certain problems that arose with closings using ASI and/or RES services. These problems were unrelated to and not indicative of Knox's misappropriations. Thereafter, respondent required Knox to present him with evidence of errors and omission insurance policies related to the services being provided. Respondent now recognizes that ASI/RES' insurance policies covered only errors and omissions and that the policies did not provide coverage for misappropriation.

During the period of respondent's foregoing arrangement with RES/ASI, respondent maintained the closing documents but did not maintain the related disbursement records as required by Rule 417, SCACR. Furthermore, during this period, respondent failed to reconcile or even inspect ASI's bank account used for deposits and disbursements of the

funds of respondent's clients as required by Rule 417, SCACR. Additionally, respondent never inspected or audited the "Real Estate Account" of ASI. As a result, respondent failed to safekeep the funds of his clients and others and, in so doing, assisted Knox in the unauthorized practice of law.

Respondent now recognizes that allowing non-employees to have access to and control over money which belongs to clients and others and was entrusted to respondent as a result of real estate closings constituted misconduct regardless of whether there were shortages in the "escrow service" account provided by

ASI. Respondent now recognizes and acknowledges that the use of an "escrow service" as provided by Knox constitutes lawyer misconduct, regardless of whether the funds were missing and whether the recordkeeping requirements of Rule 417, SCACR, were conducted by respondent.

To ODC's best knowledge and belief, respondent fully cooperated with ODC's inquiries into this matter.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.2(c) (lawyer may limit objectives of representation with client consent after consultation); Rule 1.4 (lawyer shall keep client reasonably informed about status of a matter); Rule 1.15 (lawyer shall safeguard property of client; lawyer shall maintain complete records of account funds); Rule 5.3 (lawyer shall make reasonable efforts to ensure firm has in effect measures giving reasonable assurance conduct of non-lawyer retained by lawyer is compatible with professional obligations of lawyer; lawyer shall be responsible for conduct of non-lawyer retained by the lawyer if that conduct would be a violation of the Rules of Professional Conduct if engaged in by lawyer and lawyer ratifies the conduct); Rule 5.5(b) (lawyer shall not assist a person who is not a member of the bar in the unauthorized practice of law); **Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice).** In addition, respondent admits he failed to comply with the recordkeeping provisions of Rule 417, SCACR. Finally, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for a sixty (60) day period. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., MOORE, WALLER and BURNETT, JJ., concur. PLEICONES, J., not participating.

THE STATE OF SOUTH CAROLINA In The Supreme Court

In the Matter of Richard E. Lester, Respondent.

Opinion No. 25605 Submitted February 11, 2003 - Filed March 10, 2003

PUBLIC REPRIMAND

Henry B. Richardson, Jr. and Michael S. Pauley, both of Columbia, for the Office of Disciplinary Counsel.

George M. Hearn, Jr., of Hearn, Brittain & Martin, P.A., of Conway; and Sally Wiggins Speth, of Columbia, for Respondent.

PER CURIAM: Respondent and Disciplinary Counsel have entered into an agreement pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to accept an admonition or a public reprimand. We accept the agreement and issue a public reprimand.

According to the facts stated in the agreement, respondent represented the purchaser in a real estate transaction. Respondent was out of town on the date of the closing.

Prior to leaving town, respondent caused to be prepared a HUD-1 settlement statement, as well as several other closing documents, which he personally reviewed. However, the HUD-1 statement was actually signed for him by a paralegal, who signed at respondent's direction and with his permission, on the date of the closing. The paralegal did not include a notation adjacent to respondent's signature indicating her authority to sign on his behalf.

The closing was conducted by the paralegal without respondent or another attorney present. Respondent maintains he remained accessible to the paralegal by telephone throughout the closing. He also maintains other attorneys in his law firm were available and could have responded to any inquiries that may have arisen at the closing.

Respondent admits that he has allowed other real estate transactions or closings to be conducted outside his presence and that the transactions and closings were conducted by non-lawyer personnel who were instructed to contact respondent by telephone if necessary. Respondent now recognizes that either he or another licensed attorney should have been physically present to conduct the actual real estate transactions and closings. Respondent states he has modified the methods employed in his law practice to institute such a policy.

As a result of his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.2(a) (a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued); Rule 5.3(a) (a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that a non-lawyer assistant's conduct is compatible with the professional obligations of the lawyer); Rule 5.3(b) (a lawyer having direct supervisory authority over a non-lawyer assistant shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer); Rule 5.5(b) (a lawyer shall not assist a person who is not a member of the bar in the performance of an activity that constitutes the unauthorized practice of law); and Rule 8.4(a) (it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of others). By violating the Rules of Professional Conduct, respondent has also violated Rule 7(a)(1) of Rule 413, SCACR.

We agree with the finding of improper conduct and find that a public reprimand is the appropriate sanction. Accordingly, respondent is hereby reprimanded for the conduct detailed above.

We also take this opportunity to state that we view with alarm the growing tendency of attorneys to allow support staff to perform functions which should be performed by attorneys. We caution members of the Bar that this practice dilutes the attorney-client relationship and diminishes the attorney's ability to monitor all aspects of a case for which the attorney is ultimately responsible. We further direct the Bar's attention, once again, to In re Easler, 275 S.C. 400, 272 S.E.2d 32 (1980), in which this Court set forth guidelines with regard to the role of paralegals in assisting attorneys, and to State v. Buyer's Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987), in which this Court held that real estate closings should be conducted only under the supervision of attorneys. We encourage members of the Bar to review these cases as well as the provisions of the Rules of Professional Conduct cited above which address the delegation of functions to support staff.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

IN THE STATE OF SOUTH CAROLINA In The Supreme Court

In the Matter of Hattie E. Boyce, Respondent.

Opinion No. 25985 Submitted April 26, 2005 – Filed May 23, 2005

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Hattie E. Boyce, of Spartanburg, pro se.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to either an admonition or a public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

On or about July 9, 2004, respondent was the closing attorney in a real estate transaction. Respondent represented Borrower. Borrower and his wife had obtained approval for an equity credit line loan from Wells Fargo; the loan was to be secured by Borrower's residence. Borrower had contacted respondent and requested she assist in a "witness only" closing of the line of credit from Wells Fargo.

Respondent did not prepare a deed, mortgage, note, or other legal instrument related to the closing of the real estate transaction; she did not ensure that another attorney did so. Neither respondent nor someone under her supervision conducted a title examination or prepared abstracts; respondent did not ensure another attorney or someone under another attorney's supervision did so. Neither respondent nor someone under her supervision recorded documents at

the Register of Deeds; respondent did not ensure that another attorney or someone under another attorney's supervision did so.

Respondent signed the HUD-1 statement certifying thereon that she had prepared the statement, that it was a true and accurate account of the transaction, and that she had or would cause funds or be disbursed in accordance with the statement. Despite signing the HUD-1 statement that she had or would disburse the funds, respondent acknowledges she did not do so.

Despite certifying on the HUD-1 statement that her fee was $100.00 and that the HUD-1 statement was a true and accurate account of the transaction, respondent sought to collect $150.00. The $150.00 fee had been set by respondent's secretary.

Borrower told respondent that the attorney's fee was to be paid by Wells Fargo. When Wells Fargo did not pay the $150.00 fee, respondent faxed a letter to Borrower and to Borrower's employer at their place of business. The letter threatened to sue both Borrower individually and the employer's business and to send a copy of the lawsuit to both the Attorney General and the Better Business Bureau so as to gain an advantage in the collection of her civil debt. Respondent's letter threatened treble damages even though she would not be entitled to treble damages under South Carolina law.

Neither Borrower's employer nor the employer's business were a party to the loan. Neither Borrower's employer nor his business were clients of respondent. Despite this fact, respondent revealed information relating to her representation of Borrower to his employer without Borrower's consent.

Respondent states she was under the mistaken impression that Borrower's place of employment was a party to the loan. Respondent's fee of $150.00 was ultimately paid by Wells Fargo Bank.

Respondent represents her practice is primarily devoted to family law. She submits this is the only real estate closing she has conducted in her thirteen years of practice and that she was unaware of the requirements imposed upon attorneys in the closing of real estate transactions. Respondent further submits she did not fully understand the concept of treble damages.

After discussing this matter and previous Court decisions with ODC, respondent now recognizes that participating in "witness only" closings when no other South Carolina licensed attorney is involved has the effect of assisting in the unauthorized practice of law and constitutes a failure to carry out the responsibilities of a closing attorney as provided by previous directives of this Court. She further recognizes she did not provide her client with competent representation. Respondent agrees that her actions constitute misconduct under the Rules of Professional Conduct, Rule 407, SCACR.

Respondent now recognizes that by signing the HUD-1 settlement statement, she represented that a licensed attorney had disbursed the funds and completed the other steps required of a closing attorney by published directives of the Court when in fact she did not do so. Respondent acknowledges this was misconduct. Respondent further recognizes that the threat of criminal prosecution and collection of civil damages not available under the circumstances constitutes misconduct.

Respondent states her misconduct was unintentional. She represents that, in the future, she will make every effort not to handle matters without first making herself familiar with the applicable guidelines and law.

Respondent has no prior disciplinary history and submits that her conduct in this matter was uncharacteristic. ODC asserts respondent has been very cooperative and forthright during the course of its investigation.

LAW

Respondent admits that by her misconduct she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.6 (lawyer shall not reveal information relating to representation of a client unless client consents after consultation); Rule 4.5 (lawyer shall not threaten to present criminal charges solely to obtain an advantage in a civil matter); Rule 5.5(b) (lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Processional Conduct); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice). Respondent acknowledges her misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for

discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the legal profession into disrepute).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for her misconduct.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA In The Supreme Court

Ex Parte: Charles M. Watson, Jr., County Attorney for Greenwood County, Petitioner.

In Re: The Unauthorized Practice of Law

ORIGINAL JURISDICTION

Opinion No. 25757 Submitted October 22, 2003 - Filed December 1, 2003

Charles M. Watson, Jr., of Greenwood, for Petitioner.

A.J. Tothacer, Jr., of Greenville, Alexander Cruikshanks, IV, of Clinton, Charles Heath Ruffner, of Cheraw, D'Anne Haydel, of Orangeburg, Hubbard W. McDonald, Jr., of Bennettsville, Kelly Jean Golden, of Beaufort, Robert M. Bell, of Langley, Thomas L. Martin, of Anderson, for Respondents.

PER CURIAM: Charles M. Watson, Jr., County Attorney for Greenwood County, ("Petitioner"), seeks a declaratory judgment as to whether nonlawyer title abstractors engage in the unauthorized practice of law when they conduct a title search and report the title status in connection with a tax foreclosure sale. We hold that such activities constitute the unauthorized practice of law and must either be conducted or supervised by an attorney.

Factual/Procedural Background

Before selling a property at a tax foreclosure sale, tax collectors must provide notice of the sale to the property owner and any lien holders. In order to determine who is entitled to notice, tax collectors often hire title abstractors—who generally are not licensed attorneys—to examine the public records and report the status of title.

Tax collectors and County Attorneys throughout this state disagree as to whether such title abstractors, when performing their duties without an attorney's supervision, are engaged in the unauthorized practice of law. Because of this disagreement, Petitioner sought a declaratory judgment pursuant to this Court's original jurisdiction under *In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar*, 309 S.C. 304, 307, 422 S.E.2d 123, 125 (1992). On April 11, 2003, this Court granted the petition and directed Petitioner to file a brief and serve it on every County Attorney in this state. Eight County Attorneys [1] ("Respondents") responded.

Law/Analysis

Petitioner contends that when a nonlawyer title abstractor examines public records and reports the status of a title, without the supervision of a licensed attorney, the title abstractor is engaged in the unauthorized practice of law. We agree.

This Court has addressed the unauthorized practice of law in the real estate context on at least three occasions. In the first case, this Court held that the preparation of title abstracts by title companies for buyers constituted the unauthorized practice of law. *State v. Buyers Serv. Co., Inc.*, 292 S.C. 426, 357 S.E.2d 15 (1987). The Court found that "[t]he examination of titles requires expert legal knowledge and skill." *Id.* at 432, 357 S.E.2d at 19. As a result, the

Court established a requirement that title examinations and abstract preparation be conducted "under the supervision of a licensed attorney." *Id.* at 432-33, 357 S.E.2d at 19.

Similarly, in another case, this Court considered whether a title search performed by a title company for a lender constituted the unauthorized practice of law. *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003). As in *Buyers*, this Court held that:

> Title Company's title search and preparation of title documents for the Lender, without direct attorney supervision, constitutes the unauthorized practice of law. The title search and subsequent preparation of related documentation is permissible only when a licensed attorney supervises the process. In order to comply with this Court's ruling Doe must ensure the title search and preparation of loan documents are supervised by an attorney.

Id. at 313, 585 S.E.2d at 776.

In the third case, this Court disciplined an attorney for authorizing his paralegal to conduct a real estate closing in the attorney's absence. *Matter of Lester*, 353 S.C. 246, 247, 578 S.E.2d 7 (2003). The Court found, and the attorney later acknowledged, that an attorney should have been physically present at the closing. *Id.* at 247, 578 S.E.2d at 7. In addition to publicly reprimanding the attorney, the Court delivered a message to all attorneys, cautioning them against delegating functions that should be performed by attorneys to support staff. *Id.* at 248, 578 S.E.2d at 8.

Based on the foregoing precedent, we find that examining titles and preparing title abstracts constitute practicing law. Therefore, we require that licensed attorneys either conduct or supervise such activities. This requirement was established in *Buyers* and continues today for the purpose of protecting the public. 292 S.C. at 432-33, 357 S.E.2d at 19.

In the present case, property owners, buyers, lien holders, and counties depend on the tax collector to notify all those statutorily entitled to notice. If the title abstractor's report contains errors, a tax sale may be invalidated, and the county may be subject to due process claims from those who did not receive notice.

Further, that the title abstractor is not, by the report, guaranteeing title or certifying that the title is marketable is of little consequence. Although the tax title is of a quitclaim-deed nature, it still has a legal effect: it signifies that title has been conveyed. Therefore, the title abstractor's report must either be generated or approved by a licensed attorney.

Finally, we recognize that expenses associated with the tax-sale process will increase if counties are required to involve attorneys in either the performance or oversight of title examination and abstract preparation. But we believe that mistakes, such as failing to notify the proper parties, may prove more costly. On balance, the consequences of relying on a defective report may expend more county resources than the costs associated with taking proper measures from the outset.

Conclusion

Based on the foregoing analysis, we hold that when nonlawyer title abstractors examine public records and then render an opinion as to the content of those records, they are engaged in the unauthorized practice of law. But if a licensed attorney reviews the title

abstractor's report and vouches for its legal sufficiency by signing the report, title abstractors would not be engaged in the unauthorized practice of law.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

[1] The responding County Attorneys are from Aiken, Anderson, Beaufort, Chesterfield, Greenville, Laurens, Marlboro, and Orangeburg counties.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Thomas B. Hall, Respondent.

Opinion No. 26212
Submitted August 29, 2006 – Filed October 9, 2006

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Michael J. Virzi, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Desa Ballard, of West Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to a definite suspension from the practice of law not to exceed nine (9) months. We accept the Agreement and impose a nine (9) month suspension. The facts, as set forth in the Agreement, are as follows.

FACTS

In 1999, respondent began practicing law in the area of real estate transactions. By the end of 2001, he was conducting approximately two hundred closings per month and employed five lawyers as full-time employees and many more as independent contracting attorneys. The Hall Law Firm was located in Columbia and the closings took place in Columbia and other areas of the state. Approximately eighty percent of respondent's closings were refinancings conducted at borrowers' residences.

In April 2002, respondent sold the assets of the Hall Law Firm to Nations Holding, a Kansas corporation. Nations Holding is not a law firm but is affiliated with the Kansas law firm Likens & Blomquist. Upon selling the firm's assets, respondent became an employee of Nations Title Agency of the Carolinas, a North Carolina corporation which is a subsidiary of Nations Holding; Nations Title is not a law firm. Respondent was hired as a marketing executive with no intention of practicing law.

After the sale, Likens & Blomquist began doing business in South Carolina in association with Nations Title. All of the Hall Law Firm's non-lawyer employees became employees of Nations Title and all lawyers employed by the Hall Law Firm, except respondent, became employees of Likens & Blomquist. In Columbia, Likens & Blomquist shared office space with Nations Title and, until early 2004, the office door and exterior signs read only "Nations Title" with no indication of the law firm's presence.

While employed by Nations Title, the volume of business required respondent to act as supervising attorney for some closings. By supervising the closings, respondent recognizes he assisted Nations Title, a non-lawyer corporation, in the unauthorized practice of law. Following one such transaction, the borrower defaulted and the lender foreclosed, but the presiding Master-in-Equity declared the mortgage null and void and dismissed the foreclosure on the grounds that the transaction was tainted with illegality due to respondent engaging in the unauthorized practice of law by closing the transaction as a title company employee.[1]

Nations Title's procedures for closing refinancing transactions included sending a lawyer to close the loan at the borrower's home when a lawyer was available and sending a non-lawyer notary to close the loan at the borrower's home when a lawyer was not available. When a non-lawyer conducted a closing, a lawyer in Columbia was available by telephone and the borrower would sign a form disclosing that the closing was performed by a non-lawyer and that a lawyer was available by telephone if needed.[2]

Nations Title's closing procedures also included instructing borrowers to provide a person to serve as the second witness to the closing, as only one lawyer (or non-lawyer "closer") would be sent to conduct the closing. In cases where no second witness appeared at the closing, the lawyer or closer would sign as the first witness to the execution of the mortgage then return it to Nations Title's office where an employee who was not present at closing and did not witness the execution of the mortgage would falsely sign the mortgage as the second witness.[3]

Approximately two months after the sale of his firm's assets to Nations Holding, respondent became an employee of Likens & Blomquist. He continued closing loans and supervising the Likens & Blomquist lawyers who closed loans. [4]

Nations Title and Likens & Blomquist employed several non-lawyers to perform title work and other closing-related work. In addition to their regular salary, they were paid $75 per closing performed outside the office. Respondent now acknowledges that many borrowers received inadequate legal advice as a result of this practice.

In response to In the Matter of Lester, 353 S.C. 246, 578 S.E.2d 7 (2003), issued in March 2003, respondent attempted to bring office procedures into conformity with the requirement of attorney presence at all closings. Respondent admits it took several months for these efforts to be successful and approximately two hundred refinancings were conducted in borrowers' homes by non-lawyer employees during April, May, and June of 2003 with no lawyer present.

Respondent's immediate response to the Lester opinion was to require any non-lawyer closer to telephone a lawyer during the closing to explain the HUD-1, note, mortgage, and three-day right of rescission to the borrower. The borrower's disclosure was altered to reflect the telephone call. In the weeks following the Lester opinion, respondent sought advice from colleagues and ethics experts regarding his procedures and the impact of the Lester opinion, but obtained no definitive advice. By the summer of 2003, respondent states he had eliminated the practice of non-lawyer closings.

Likens & Blomquist experienced a high turnover rate for lawyer employees, with many leaving due to dissatisfaction with the lack of conformity with the requirements of the Rule of Professional Conduct and this Court's pronouncements regarding real estate transactions. In early 2004, in response to complaints from departing attorneys and threats of reporting Likens & Blomquist to the Commission on Lawyer Conduct, respondent again attempted to bring office procedures in conformity with applicable ethical rules, this time including ending the practices of false witnessing and in-house unsupervised out-of-state disbursement. Respondent obtained counsel to review his procedures. Respondent implemented the recommended changes, including physically separating the facilities of Nations Title from those of Likens & Blomquist. By way of mitigation and not as a defense, respondent states that he was not aware of all of the shortcomings or the extent of the problems, but he nonetheless accepts responsibility for them.

Respondent represents, and ODC does not dispute, that after June 2004, respondent made massive efforts to take control of Likens & Blomquist and wrestle authority from the Nations Title managers and from the partners and managers in Kansas. Ultimately, respondent left Likens & Blomquist in 2005 due to his inability to force the firm to conform to the Rules of Professional Conduct and the Court's pronouncements regarding real estate transactions.

Respondent recognizes that the actions of Nations Title and Likens & Blomquist constituted the unauthorized practice of law and that, as the senior South Carolina attorney in the combined offices, he was responsible. Nevertheless, although he was an employee of Likens

& Blomquist, the most senior South Carolina lawyer, and the supervisor of all other firm lawyers in South Carolina, respondent remained a subordinate of the non-lawyer managers of Nations Title. As such, respondent did not have authority to countermand decisions regarding Likens & Blomquist's policies and procedures, including the closing procedures described above.

Respondent has fully cooperated with ODC's investigation into this matter.

LAW

Respondent admits that, by his misconduct, he has violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.4 (lawyer shall explain matter to extent reasonably necessary to permit client to make informed decisions regarding representation); Rule 5.3 (lawyer shall be responsible for conduct of non-lawyer associates that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer); Rule 5.5 (lawyer shall not assist others in performing activities which constitute the unauthorized practice of law); and Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct). In addition, respondent admits that his actions constitute grounds for discipline under the Rule 7 (a)(1), RLDE, Rule 413, SCACR (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct).

CONCLUSION

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for nine (9) months. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court demonstrating that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

---

[1] The case settled, accordingly, no issues were decided on appeal. Respondent was not a party to the foreclosure action.

[2] This had also become the Hall Law Firm's practice shortly before its sale to Nations Title.

[3] Respondent had disseminated an official office policy requiring a second witness at every closing, but admits this policy was generally disregarded until mid-2004.

[4] It is unclear if Likens & Blomquist's closing procedures were exactly the same as those of Nations Title. Nevertheless, respondent fully accepts responsibility for real estate

transactions which were conducted in violation of the Rules of Professional Conduct and the Court's precedent while he was employed by Likens & Blomquist.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Joseph Wendell Arsi, Respondent.

Opinion No. 25766
Submitted December 9, 2003 – Filed January 12, 2004

DISBARRED

Henry B. Richardson, Jr., of Columbia, for the Office of Disciplinary Counsel.

Desa Ballard, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the sanction of disbarment. We accept the agreement and disbar respondent from the practice of law in this state. The facts, as set forth in the agreement, are as follows.

Facts

I. Trust Account Matter

From September 2002 through July 2003, respondent, who had a large real estate practice, issued approximately 750 checks from his trust account to his operating account. The checks were not, on the occasions issued, payment for earned fees, but were from monies belonging to clients and/or lenders involved in pending real estate transactions. Respondent began this misappropriation in an effort to maintain his law practice after there was a dramatic reduction in the number of closings he was handling.

The checks at issue were usually written in amounts of $500, $550, or $600. Respondent wrote anywhere from ten to thirty-five checks at a time. The checks were written to appear like and replicate checks for fees respondent was regularly paid out of his trust account for real estate transactions. Respondent

maintained a ledger of the checks which showed the check number, date of issuance and amount of money owed to the trust account due to the issuance of the checks. As real estate transactions were closed, respondent would use the check number of a previously written check listed on the ledger as the fee due respondent for that transaction so as to balance respondent's records for that particular transaction. Respondent would then delete that check number from the ledger.

As of February 2003, respondent had repaid all amounts previously misappropriated using the foregoing arrangement. Respondent repaid the misappropriated funds by not issuing checks for fees for real estate closings and instead using check numbers of checks already on the ledger to balance the trust account records for a particular real estate transaction.

However, beginning in March 2003, respondent resumed issuing checks from his trust account to his operating account pursuant to the foregoing arrangement, but was unable to repay those amounts due to a further downturn in the number of real estate closings his firm was handling.

Respondent misappropriated approximately $412,000 under the foregoing arrangement. After deducting the amount repaid from the total amount misappropriated, there was, and presently remains, a shortage in respondent's trust account of approximately $327,000.

Respondent self-reported his misconduct to the Office of Disciplinary Counsel and consented to being placed on interim suspension. In the Matter of Arsi, 355 S.C. 411, 585 S.E.2d 778 (2003). Respondent has fully cooperated with the Office of Disciplinary Counsel as well as the attorney appointed to protect the interests of respondent's clients.

II. Refinancing Matter

Respondent represented clients who refinanced a mortgage. The closing documents indicated the existing mortgage was to be paid from the proceeds of the refinancing transaction. The new mortgage was recorded and forwarded to the new lender along with a final loan policy of title insurance. A condition for the issuance of the loan policy of title insurance was that the existing mortgage be paid off and satisfied of record. The loan policy indicated the new mortgage was a first mortgage on the public records when, in fact, the existing mortgage had not been satisfied. Several months after the closing, respondent's clients were contacted by the holder of the existing mortgage and discovered the existing mortgage had not been paid. The clients attempted to contact respondent but for several months were only able to talk to respondent's staff. After the clients were finally able to talk directly with respondent, respondent caused the existing mortgage to be paid off and satisfied of record.

Respondent maintains the check to pay off the existing mortgage was issued at closing and was hand delivered to the holder of the mortgage on the day of closing, the original check has never been located, and respondent has not been able to discover any explanation as to what happened to the check after it reached the holder of the existing mortgage. Respondent contends the funds to pay the existing mortgage remained secure in respondent's trust account from the time they were received until paid by way of a new check to the holder of the existing mortgage.

Respondent acknowledges he did not provide competent representation to the clients, that he was not diligent in handling the matter, and that he gave incorrect information to the new lender when he represented that the new mortgage constituted a first lien of record on the secured property when, in fact the existing mortgage constituted a first lien on the property.

Respondent maintains he was utilizing a computer program that he thought was reconciling his trust account on a monthly basis. However, respondent recognizes that the system he was using was inadequate to meet the requirements of Rule 417, SCACR, inasmuch as respondent failed to recognize the funds in this matter had been retained and undisbursed in his trust account for over a one-year period. Approximately fourteen months elapsed from the date of the closing of the refinanced transaction until the existing mortgage was paid off and satisfied of record. As a result of the foregoing, foreclosure proceedings were initiated against the clients by the holder of the existing mortgage, but were eventually resolved. In addition, the clients filed a civil action against respondent which was settled.

III. Title Insurance Matter

Respondent, directly and/or through a title insurance agency, was a title insurance agent for, and obtained title insurance from, a title insurance company from 1999 through December 2001. Respondent was the owner of or had a substantial interest in the title insurance agency. On numerous occasions there was an undue delay in the issuance of final title insurance policies after the related loan transaction had been closed, which resulted in the title insurance company terminating its agency relationship with respondent and the title insurance agency. Thereafter, the title insurance company spent over a year preparing final title insurance policies on transactions closed by respondent while an agent for the company. Respondent acknowledges that on numerous occasions related to loan closings involving title insurance from the title insurance company, respondent did not provide competent representation, was not diligent, and did not properly supervise his non-lawyer staff.

The title insurance company maintains it is owed, by respondent and/or the title insurance agency, $4,353.23 for title insurance premiums collected by respondent and/or the title insurance agency but not forwarded to the title

insurance company. Respondent contends the failure to pay the amount due was not a result of misappropriation of funds by respondent, but was instead due to respondent's failure to supervise his non-lawyer staff and his failure to comply with Rule 417, SCACR. However, respondent does not believe he owes any money to the title insurance company and maintains he has never received a statement or claim from the company for the amount it claims it is due. Regardless, respondent acknowledges he did not provide competent representation in connection with the related real estate transactions, was not diligent in the completion of work undertaken in connection with the transactions, and did not properly see to the safekeeping of funds belonging to the company that were deducted from proceeds of the real estate transactions.

IV. Title Agency Matter

Respondent entered into a business arrangement with a non-lawyer to form the above-referenced title insurance agency in which both respondent and the non-lawyer were principles. The agency entered into a title insurance underwriting agreement with a title insurance company. Under the terms of the agreement, respondent was required to maintain a separate escrow account for all funds received in connection with the title insurance company's title insurance policies and to remit premiums collected, and copies of all policies and commitments issued, to the company on a monthly basis. Respondent, acting as closing attorney, and the agency began closing real estate loans. Thereafter, differences arose between respondent and the non-lawyer, the agency ceased operations and the business arrangement between respondent and the non-lawyer was dissolved. Because it appeared that all title insurance premiums due the title insurance company had not been paid by the agency, and that there was a shortage in excess of $66,000, the title insurance company initiated a civil action against respondent. That action is still pending.

Respondent maintains he did not withhold any of the funds due the title insurance company, [1] but acknowledges he failed to properly supervise the non-lawyer employee of the agency and failed to oversee the safekeeping of the title insurance premiums collected by the agency in real estate closings handled by respondent in contravention of the procedures established by this Court for the operation of trust accounts and the handling of monies of others and in violation of the agreement between respondent and the title insurance company. Respondent contends any shortage in funds owed to the company is not due to any acts committed on the part of respondent or to misappropriation of funds.

V. Carolina Title Services Matter

Respondent closed approximately five real estate transactions in a two-week period for Carolina Title Services (CTS). There were no licensed attorneys employed by CTS. Pursuant to an arrangement between respondent and CTS, CTS prepared the closing documents and respondent reviewed the title abstract

and closing documents and attended the closings as attorney for the borrowers. The HUD-1 Settlement Statements showed respondent as the "settlement agent" and respondent signed the settlement statements in that capacity. However, respondent represents his signature was added without his knowledge by non-lawyer staff of CTS.

For a period of time, respondent left disbursement of the proceeds from the transactions to be completed by the non-lawyer staff of CTS. During this period, respondent was under the impression, from discussions with the manager of CTS, that another attorney, William J. McMillian, III, was overseeing the disbursement of the proceeds of the transactions, the recordation of documents, and any other aspects of the closings required to be performed by an attorney. Respondent relied on those representations from the manager, but did not discuss the arrangement with McMillian. McMillian did, in fact, have a close working relationship concerning the closing of real estate transactions with CTS and respondent was aware of that relationship. Respondent was paid by way of checks drafted on McMillian's trust account, signed by the manager of CTS, and transmitted to respondent by CTS rather than McMillian. All of the checks were returned due to insufficient funds; therefore, respondent was not paid for his services in the transactions.

Respondent later learned that McMillian was not involved in the transactions, that the manager of CTS had signature authority on McMillian's trust account, and that disbursements were being made by CTS without supervision by a licensed attorney. Thereafter, respondent insisted that all disbursements on real estate transactions with CTS be made by respondent through respondent's trust account. Respondent is now aware that the manager of CTS had directed the bank to "sweep" all funds out of McMillian's IOLTA trust account each day into the manager's personal bank account, which later resulted in a considerable shortage of funds in McMillian's trust account; however, respondent was unaware of that arrangement during the time respondent allowed CTS to handle the disbursement of funds from real estate transactions. Respondent now recognizes that, as a result of his reliance on incorrect information from the manager of CTS, respondent assisted one or more of the non-lawyer employees of CTS to engage in the unauthorized practice of law. Respondent maintains he discontinued participating in the "closing only" arrangement with CTS when he learned that representations made to him regarding the involvement of McMillian in other aspects of the transactions were incorrect.

In one case, respondent reviewed the closing documents but was unable to attend the closing due to a scheduling conflict. Respondent retained attorney Stephen M. Pstrak to attend the closing in his place. However, respondent did not advise the clients of the limited scope of Pstrak's representation. Neither respondent nor Pstrak did any further work on the matter after the closing. Shortly thereafter, McMillian was placed on interim suspension by this Court and his trust account, used by CTS for disbursement of funds from the transaction,

was frozen by the attorney appointed to protect the interests of McMillian's clients. In the Matter of McMillian, 350 S.C. 216, 565 S.E.2d 765 (2002). Some time later, respondent was advised that the transaction had not been completed. The clients had to retain another attorney to complete the closing, which took approximately one year. Respondent was never paid for the closing, but paid Pstrak for his participation.

Respondent contends he was under the mistaken impression on the occasion of the closing that McMillian would be handling the disbursement of the funds and recordation of the closing documents when, in fact, he now knows McMillian was not involved in the transaction and it was, instead, being handled by non-lawyer employees of CTS without the supervision of a licensed attorney. Respondent now recognizes that it was his responsibility to see that the transaction was properly closed and that the proceeds from the transaction were disbursed in accordance with the settlement statement since Pstrak, as his designee, signed as "settlement agent" under respondent's authorization and direction, and that it was his further responsibility to have assisted the clients in removing the impediments to closing once respondent was advised that the transaction had not been completed. However, due to respondent not supervising the non-lawyer employees of CTS after closing, respondent was unaware that the transaction had not been completed until some time later by the new attorney for the clients.

VI. Cooperation With Disciplinary Counsel

Disciplinary Counsel states that, to the best of his knowledge and belief, respondent has fully cooperated with the inquiries of Disciplinary Counsel into the above-referenced matters and that respondent has been forthright in acknowledging the misconduct set forth herein. Disciplinary Counsel states further that respondent maintained he did not realize some of his actions constituted misconduct at the time, but now recognizes as much with the advice of counsel and the advantage of hindsight.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.2(a) (a lawyer shall abide by a client's decisions concerning the objectives of representation, except in limited circumstances, and shall consult with the client as to the means by which they are to be pursued); Rule 1.2(c) (a lawyer may limit the objectives of the representation if the client consents after consultation); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4(a) (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 1.15(a) (a lawyer shall hold property of clients that is in the lawyer's possession

in connection with a representation separate from the lawyer's own property); Rule 1.15(b) (a lawyer shall promptly deliver to the client any funds that the client is entitled to receive); Rule 5.3(b) (a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer); Rule 5.3(c) (a lawyer shall be responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved or the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action); Rule 5.4(c) (a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services); Rule 5.4(d) (a lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration, a nonlawyer is a corporate director or officer thereof or a nonlawyer has the right to direct or control the professional judgment of a lawyer); Rule 5.5(b) (a lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Rule 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving moral turpitude); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent also acknowledges that his misconduct constitutes grounds for discipline under the following provisions of Rule 7, RLDE, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct); Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute); and Rule 7(a)(7) (it shall be a ground for discipline for a lawyer to violate a valid court order issued by a court of this state).

Finally, respondent admits that he failed to comply with the record keeping and money handling procedures set forth in Rule 417, SCACR.

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent. Respondent's request that the disbarment be made retroactive to the date he was placed on interim suspension is denied.

Within thirty days of the date of this opinion, Disciplinary Counsel and respondent shall establish a restitution plan pursuant to which respondent shall pay restitution to all persons and entities who have incurred losses as a result of respondent's misconduct in connection with this matter. Respondent shall also reimburse the Lawyers' Fund for Client Protection for any claims paid as a result of his misconduct in connection with this matter. Failure to make restitution in accordance with this opinion and the restitution plan may result in respondent being held in contempt of this Court. Moreover, respondent shall not apply for readmission unless and until all such restitution has been paid in full.

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

---

[1] Respondent also believes the shortage to be considerably less than that claimed by the title insurance company due to the fact that the company's audit was based on commitments instead of policies actually issued.

IN THE STATE OF SOUTH CAROLINA

In The Supreme Court

In the Matter of Sabine S. Boulware, Respondent.

Opinion No. 26082
Submitted October 25, 2005 - Filed December 19, 2005

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Michael J. Virzi, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

J. Steedley Bogan, of Columbia, for respondent.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to imposition of an admonition, public reprimand, or definite suspension not to exceed thirty (30) days. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

In February 2002, respondent approached Amy Cook, the principal of Carolina Title Services, Inc., (CTS) in hopes of obtaining some of its real estate business.[1] CTS was an agent for Chicago Title Insurance Company (Chicago Title) and had an ongoing business relationship with attorney William J. McMillian, III, for the closing of real estate transactions. Respondent sought to be a closing attorney for CTS, but Cook only needed a lawyer to fill in for McMillian at closings when he was unavailable. After seeking and obtaining Chicago Title's approval and speaking with McMillian by telephone, respondent agreed to the arrangement.

Respondent represents that, during her telephone conversation with McMillian, he assured her that, other than attending the actual closing, he would be supervising all aspects of the transactions.[2] Respondent never met McMillian and did not communicate with him again until after terminating her relationship with CTS.

From February through April 2002, respondent attended approximately twenty-four real estate closings. Respondent was asked only to attend the closings and be responsible for the review and execution of the closing documents. Respondent represents she was under the good faith impression that McMillan would attend to or supervise all other aspects of the real estate transactions; however, McMillian did not do so and it is now known that he took no part in these transactions.

The closings took places at CTS' offices. Respondent received all files and instructions from Cook or her employees and, after the closing, she left all closing documents and monies with Cook or her employees. Most of the closings at issue were relatively uncomplicated. On the few occasions when a question or problem arose, respondent stopped the closing and Cook rescheduled it for a later date. Respondent is now advised and does not dispute that the title abstracts and closing documents were prepared by Cook and CTS employees without the supervision of any lawyer, that disbursement of funds and recordation of documents were handled by Cook and CTS employees without the supervision of any lawyer, and that McMillian's only involvement in the transactions consisted of allowing Cook unlimited and unsupervised use of his trust accounts.[3]

Respondent represents she verbally informed the parties to each closing that her role was limited to explaining and executing the documents and that CTS and its lawyer were responsible for all other aspects of the closing. However, on several occasions, respondent supervised the buyer's execution of an attorney preference form during which buyers selected respondent to represent them in all aspects of the transaction. [4] On these occasions, respondent filled in her own name as the selected attorney on the form prior to its execution by the buyer.

On thirteen occasions, the HUD-1 Settlement Statements included a $12 wire fee payable to respondent even though respondent never incurred a wire fee in any transaction with CTS. ODC is informed and believes that, in each of these closings, a wire fee was incurred by CTS or McMillian's trust account under Cook's control. Because respondent had requested Cook increase her fee, Cook offered to give respondent the $12 wire fee as a way to increase her fee without turning away clients who might object to an overt fee increase. Respondent consented to this arrangement. Respondent now recognizes that the HUD-1 statement was not completely accurate and that the arrangement resulted in respondent receiving a portion of her fee from someone other than her client.

On one occasion, respondent closed a transaction in which the buyers were personal friends of Cook. Cook had agreed not to charge the buyers an attorney fee and the HUD-1 Settlement Statement reflected no fee to any lawyer. However, Cook and respondent agreed that Cook would pay respondent a fee outside the closing and not disclose the fee to anyone. Respondent now recognizes that closing the transaction in this manner and accepting an undisclosed fee violated the Rules of Professional Conduct and federal law.

In most of the transactions respondent closed, respondent's name or her firm name were shown on the HUD-1 as "Settlement Agent," but respondent did not act as settlement agent as she neither held nor disbursed the closing proceeds. Due to her inexperience, respondent was not aware of all the implications made by the statements on the HUD-1 form. Respondent now recognizes that, by forwarding inaccurate HUD-1 forms to clients and other parties, she misrepresented her role to all parties relying on the HUD-1 Settlement Statements, particularly lenders who were not present at the closings. Her misrepresentation is most pronounced in those closings in which the HUD-1 Settlement Statements indicated that respondent incurred a wire fee, as the statements implied to lenders and subsequent assignees that respondent was disbursing the loan proceeds, including making payoffs of prior mortgages and liens.

On two occasions, a lender delivered closing funds to respondent's trust account rather than to McMillian's trust account for transactions in which respondent was to act as closing attorney for CTS. Respondent endorsed the first check to CTS based on information from Cook that the lender wanted Cook to disburse the money. The second check was a wire transfer into respondent's trust account which respondent initially refused to endorse to Cook but, when a CTS employee refused to give respondent a disbursement summary, respondent relented and wrote a trust account check to CTS for the funds so that the transaction could close without the borrower losing a favorable interest rate.

On one occasion, a buyer brought funds to the closing in the form of a check payable to respondent. Due to a title issue, the closing was delayed until a time when respondent would not be available. As a result, respondent endorsed the buyer's check to CTS and gave it to Cook. Respondent now recognizes she should not have given the client funds to a non-lawyer.

On two occasions, respondent signed a loan confirmation or "First Lien Letter" several days after closing. These letters advised the lender and title insurance company that the transaction was closed and completely disbursed, that all prior liens were satisfied, and that the lender's mortgage was a valid first lien on the property. Respondent represents she believed those statements were true but admits that such a belief was merely an assumption, that she had no actual knowledge of the truth or falsity of the statements, and that she did not verify the information with anyone outside of CTS before executing the letters.

It is now known that in most, if not all, of the transactions closed by respondent for CTS, Cook diverted closing proceeds from McMillian's trust accounts to her personal accounts and did not disburse money to the parties as indicated on the HUD-1 Settlement Statements. Respondent had no knowledge of this activity at the time.

Since 2002, Chicago Title and its counsel have worked to correct the title problems caused by Cook's defalcation in transactions involving respondent and other lawyers. Chicago Title has spent approximately $250,000 to resolve title issues in closings in which respondent was involved. In addition, several holders of unpaid prior mortgages compromised their debts in settling with Chicago Title and, therefore, remain financially prejudiced; Chicago Title denied coverage in several other cases, leaving the holders of those unpaid prior liens and mortgages with no recourse but foreclosure. Respondent has resolved through settlement each lawsuit in which she was a named defendant.

In addition to the transactions in which respondent served as closing attorney, on numerous occasions respondent received checks written on McMillian's trust account and signed by Cook as payment of attorney fees for closing in which respondent had no involvement. In at least three of these transactions, Cook had used respondent's name as the settlement agent on closing documents but, as with other transactions, Cook had stolen the lender's money and did not make the disbursements as indicated in the HUD-1 Settlement Statements. Respondent had no knowledge of these transactions or of Cook's defalcations until being so advised by ODC. Nevertheless, respondent and her staff deposited these fee checks into respondent's operating account, incorrectly assuming that they related to transactions in which she had served as closing attorney. Respondent maintained no office procedure for matching incoming payments to closing work performed and, therefore, unwittingly received payments for the use of her name and law license by a non-lawyer.

On three occasions in March 2002, a lender wired closing funds totaling $197, 285.99 to respondent's trust account. Respondent closed two of those transactions, not knowing funds were wired to her account, but assuming they were wired to McMillian's account as usual. Cook closed the third transaction without respondent's knowledge. In all three of the transactions, the funds were not disbursed as indicated in the HUD-1 Settlement Statements. Respondent attempted to reconcile her trust account on a monthly basis, but her reconciliations did not alert her to the excess funds in her trust account.

Several months after respondent terminated her relationship with CTS she sought an agency relationship with Stewart Title Company pursuant to which Stewart Title conducted an audit of respondent's trust account. The audit alerted respondent to the excess funds in July 2002 and respondent immediately took steps that resulted in delivery of those funds to the appropriate parties. Until the audit, respondent had no knowledge of the three wires into her trust account. Respondent now recognizes that, in order to comply with Rule 417, SCACR, on a monthly basis she must reconcile the trust account balance according to the bank's records with the balance according to her records of account activity and that, if she had complied with Rule 417, she would have been immediately alerted to the improper deposits.

After closing approximately two dozen transactions between February and April 2002, respondent became aware that Cook or a CTS employee had forged her name on a HUD-1 Settlement Statement and on a closing proceeds check from a lender and that checks written by CTS were being dishonored for insufficient funds. Upon learning this information, respondent severed her relationship with CTS. Respondent then sent a letter to the Commission on Lawyer Conduct (Commission) purporting to be an anonymous report of Cook's and McMillian's actions. The letter sought the advice of the Commission and offered respondent's assistance in stopping the ongoing defalcation.

In mitigation, respondent states she was under the good faith impression that McMillian was performing or supervising all aspects of the real estate transaction that required attorney participation. She further states she was unaware that Cook was engaged in the unauthorized practice of law, that she was unaware that Cook had unsupervised access to and use of McMillian's trust accounts, and that she in no way intentionally contributed to the defalcations in these transactions.

LAW

Respondent admits that, by her misconduct, she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.4(b) (lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); Rule 1.8(f) (lawyer shall not accept compensation for representing a client from one other than the client unless the client consents after consultation); Rule 1.15 (lawyer shall safe keep client funds); Rule 4.1(a) (in course of representing a client, lawyer shall not make a false statement of material fact to a third person); Rule 5.5(b) (lawyer shall not assist a person in the unauthorized practice of law); Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct); and Rule 8.4(d) (it is professional misconduct for lawyer to engage in dishonesty, fraud, deceit, or misrepresentation).[5] Respondent acknowledges that her misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for her misconduct.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur. WALLER, J., not participating.

---

[1] Respondent was admitted to the Bar in November 1999. At the time she contacted Cook, respondent had recently opened her own office and was seeking to build her practice.

[2] McMillan's statements to ODC contradict respondent's representation.

[3] See In the Matter of McMillian, 359 S.C. 52, 596 S.E.2d 494 (2004).

[4] See S.C. Code Ann. § 37-10-102 (2002).

[5] Respondent's misconduct occurred before the effective date of the Amendments to the Rules of Professional Conduct. See Court Order dated June 20, 2005. The Rules cited in this opinion are those which were in effect at the time of respondent's misconduct.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Janis B. Powell, Respondent.

Opinion No. 26561
Submitted October 9, 2008 – Filed November 10, 2008

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Irby E. Walker, Jr., of Conway, for respondent.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to either an admonition or a public reprimand. In addition, respondent agrees to pay the costs associated with the prosecution of this matter. We accept the agreement and issue a public reprimand. Within thirty (30) days of the date of this opinion, respondent shall pay costs of $535.98 to the Commission on Lawyer Conduct. The facts, as set forth in the agreement, are as follows.

FACTS

On March 16, 2006, respondent was retained by National Real Estate Information Services (NREIS) to serve as closing attorney for a home equity line of credit for Clients. The lender for the home equity line of credit was Countrywide Bank. Respondent did not prepare the closing documents and she took no affirmative action to verify the closing documents were prepared by or under the supervision of a licensed South Carolina attorney. Respondent did not conduct the title search; however, she represents that a licensed South Carolina attorney did conduct the title search for the closing. Respondent represents that,

prior to the closing, she reviewed each and every document in the closing package.

Respondent represents that, at the closing, she advised Clients that she was neither representing Clients nor Countrywide. Respondent further explained to Clients that she did not examine the title to the property, that she did not prepare any of the closing documents, that she would not be supervising the disbursement of funds or the recording of documents, and that Clients could request the services of an attorney of their choice at their own expense to review the documents and/or attend the closing. After making these oral disclosures to Clients, respondent presented a document entitled "Hold Harmless Agreement" to Clients. Clients executed the document. Prior to the closing, Clients had no notice that the execution of the Hold Harmless Agreement would be a condition to proceeding with the closing and Clients did not consult with independent legal counsel. Respondent now recognizes that she was the closing attorney for the transaction involving Clients and she owed certain duties and responsibilities to Clients, in spite of the Hold Harmless Agreement executed by Clients.

At the closing, respondent ensured the necessary documents were properly executed per Countrywide's instructions. Afterwards, respondent shipped the closing documents by FedEx to NREIS. Respondent represents that she was subsequently notified by NREIS that the mortgage had been recorded in the appropriate office in Beaufort County, however, respondent did not take any affirmative action to verify this assertion by NREIS nor did she ensure that the recording of the mortgage had been supervised by a licensed South Carolina attorney. Respondent further represents that she was subsequently notified by NREIS that the disbursements set forth in the HUD-1A Settlement Statement had been made in accordance with the Settlement Statement, however she did not take any affirmative action to verify this assertion by NREIS nor did she ensure that the disbursement of funds had been supervised by a licensed South Carolina attorney. Respondent admits that she received payment for her services from NREIS. The HUD-1A Settlement Statement lists NREIS as the Settlement Agent and reflects a charge of $400.00 to NREIS for settlement or closing fee.

The closing took place in Clients' home in South Carolina. According to the HUD-1A Settlement Statement, however, the place of settlement was Pittsburgh, Pennsylvania.

There is no evidence that anyone in Clients' closing suffered any harm as a result of respondent's conduct. However, respondent acknowledges she may not have provided Clients with competent representation. She agrees her actions constitute misconduct under the Rules of Professional Conduct, Rule 407, SCACR. Respondent represents that, in the future, she will make every effort not to handle matters without first making herself familiar with the applicable guidelines and law.

Respondent has been forthright and cooperative throughout this investigation. Respondent has no prior disciplinary history.

LAW

Respondent admits that, by her misconduct, she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.8(h) (lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement); Rule 5.5(a) (lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so); and Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct). Respondent acknowledges that her misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for her misconduct. Within thirty (30) days of the date of this opinion, respondent shall pay costs of $535.98 to the Commission on Lawyer Conduct.

PUBLIC REPRIMAND.

TOAL, C.J., WALLER, PLEICONES, BEATTY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Matrix Financial Services Corporation, Respondent,

v.

Louis M. Frazer, Linda S. Frazer, Matthew Kundinger, and Parks Grove Homeowners Association, Inc., Defendants,

of whom Matthew Kundinger is the Appellant.

Appeal from Greenville County
Charles B. Simmons, Jr., Master-in-Equity

Opinion No. 26859
Heard April 21, 2009 - Re-filed August 8, 2011

REVERSED

David Alan Wilson, of Horton Drawdy Ward & Jenkins, of Greenville, and Edward Scott Sanders, of Greenville, for Appellant.

Earle G. Prevost and Michael J. Giese, both of Leatherwood Walker Todd & Mann, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: Matthew Kundinger (Appellant) enrolled a default judgment against Louis and Linda Frazer (the Frazers) before the Frazers closed a refinance mortgage with Matrix Financial Services Corporation (Matrix). In Matrix's foreclosure action, the master-in-equity granted Matrix equitable subrogation, giving the refinance mortgage priority over Appellant's judgment lien. We certified the case pursuant to Rule 204(b), SCACR, and reversed in *Matrix Financial Services Corp. v. Frazer*, No. 26859, 2010 WL 3219472 (S.C. Sup. Ct. Aug. 16, 2010). This Court granted a petition for rehearing and we now withdraw that opinion and substitute this opinion, which also reverses the master-in-equity's grant of equitable subrogation.

FACTS/PROCEDURAL BACKGROUND

In 1998, Appellant brought suit against the Frazers in California. In 2000, the Frazers moved to South Carolina, and defaulted in Appellant's California lawsuit.

In January 2001, the Frazers purchased a home in Greenville County. That mortgage was assigned to Matrix in June 2001. In September 2001, Matrix and the Frazers entered into a loan commitment to refinance the January 2001 mortgage. A title search was conducted on September 18, 2001. The parties closed the refinance loan on November 26, 2001, but the new mortgage was not recorded until April 3, 2002.

Meanwhile, on September 4, 2001, Appellant obtained a default judgment against the Frazers in California, and enrolled that judgment in Greenville County on October 31, 2001.

The Frazers filed bankruptcy, and Matrix sought to foreclose its November 2001 refinance mortgage. Appellant counterclaimed, alleging his judgment had priority over Matrix's mortgage because it had been recorded first. Matrix, attempting to gain the primary priority position, then sought to have the refinance mortgage equitably subrogated to the rights of the January 2001 mortgage. The master-in-equity granted Matrix's request, and Appellant appeals that order.

ISSUES

I. Did the master-in-equity err in granting Matrix equitable subrogation to the rights of the January 2001 mortgage, giving Matrix priority over Appellant's judgment lien?

II. Does the doctrine of unclean hands prevent Matrix from receiving the remedy of equitable subrogation?

ANALYSIS

I. Equitable Subrogation

Appellant argues the master-in-equity erred in holding Matrix was entitled to equitable subrogation. We agree.

The requirements a mortgagee must meet to qualify for equitable subrogation are: (1) the party claiming subrogation has paid the debt; (2) the party was not a volunteer, but had a direct interest in the discharge of the debt or lien; (3) the party was secondarily liable for the debt or for the discharge of the lien; (4) no injustice will be done to the other party by the allowance of equitable subrogation; and (5) the party asserting the doctrine did not have actual notice of the prior mortgage. *Dedes v. Strickland*, 307 S.C. 155, 158, 414 S.E.2d 134, 136 (1992).

In *Dedes*, a bank refinanced its initial mortgage and sought to be equitably subrogated to the rights of that mortgage to gain priority over the rights of an intervening mortgagee. The Court held that the bank could not meet the elements of equitable subrogation because it merely paid

"itself [the] outstanding debt by refinancing the balance owed" and had no "direct interest necessitating discharge of the debt . . . ." *Id.* at 159, 414 S.E.2d at 136. The Court further stated, "The record is silent as to what secondary liability [the bank] could have had for [the mortgagor's] debt secured by its own first mortgage lien." *Id.* While the *Dedes* Court appears to have conflated the requirements of secondary liability and a direct interest in discharging the debt,[1] the heart of its reasoning was that the bank could not be subrogated to the rights of its own prior mortgage. This conclusion comports with the general view that equitable subrogation contemplates a third party satisfying the original mortgage, not the same party to whom the original debt is owed. *See* Restatement (Third) of Property (Mortgages) § 7.6 cmt. e (1995) ("Obviously subrogation cannot be involved unless the second loan is made by a different lender than the holder of the first mortgage; one cannot be subrogated to one's own previous mortgage."); Black's Law Dictionary (9th ed. 2009) ("Subrogation: The substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor.").

Thus, equitable subrogation is simply not a remedy available to a lender that refinances the original debt owed to it. This seems to yield the proper result, as opposed to the mangled logic that comes about when reasoning that a lender refinancing the original debt owed to it cannot prove secondary liability or a direct interest in discharging the debt. Matrix is not asserting priority under a theory of replacement and modification. Matrix expressly pled equitable subrogation in its reply to Appellant's counterclaim. Both *Dedes*, controlling South Carolina precedent, and section 7.6 of the Restatement stand for the proposition that a lender that refinances its own debt is not entitled to equitable subrogation. We do not decide whether a lender that refinances its own debt could attain priority under the theory of replacement and modification illustrated in section 7.3 of the Restatement (Third) of Property (Mortgages).

II. Unclean Hands

Appellant also argues Matrix is not entitled to an equitable remedy because it closed the refinance loan unlawfully, and thus has unclean hands. We do not believe the doctrine of unclean hands is the appropriate basis for resolution of this case. However, we do agree that even if Matrix met the requirements for equitable subrogation, Matrix would be precluded from receiving that remedy because of its unauthorized practice of law.

All real estate and mortgage loan closings must be supervised by an attorney. *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003); *State v. Buyers Serv. Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987). Performing a title search, preparing title and loan documents, and closing a loan without the supervision of an attorney constitutes the unauthorized practice of law. *Buyers Serv.*, 292 S.C. at 430-34, 357 S.E.2d at 17-19.

In *Wachovia Bank v. Coffey*, 398 S.C. 76, 698 S.E.2d 244 (Ct. App. 2010), Wachovia closed a home equity loan without the supervision of an attorney and later instituted foreclosure proceedings. Our court of appeals held that Wachovia, having committed the unauthorized practice of law in closing the loan without attorney supervision, came to the court with unclean hands and thus was barred from seeking equitable relief. In so holding, the court of appeals said:

The unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also to the public at large for the reason so cogently stated in *Buyers*:

The reason preparation of instruments by lay persons must be held to constitute the unauthorized practice of law is not for the economic protection of the legal profession. Rather, it is for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law.

Coffey, 389 S.C. at 76, 698 S.E.2d at 248 (*citing State v. Buyers Serv. Co.*, 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987)).

Similarly, in this case Matrix hired LandAmerica OneStop to perform the title search, prepare the documents, and close the refinance loan—all admittedly without the supervision of a licensed attorney. Thus, Matrix committed the unauthorized practice of law in closing the refinance mortgage, clearly violating South Carolina law.[2] Matrix now comes to this Court, seeking equitable relief, based upon a mortgage contract it entered into in violation of the laws of this state.

This Court has previously held the presence of attorneys in real estate loan closings is for the protection of the public and that "protection of the public is of paramount concern" in loan closings. *Buyers Serv.*, 292 S.C. at 433, 357 S.E.2d at 19. Enforcing this requirement will come as no surprise to any lender. Lenders cannot ignore established laws of this state and yet expect this Court to overlook their unlawful disregard. We take this opportunity to definitively state that a lender may not enjoy the benefit of equitable remedies when that lender failed to have attorney supervision during the loan process as required by our law. We apply this ruling to all filing dates after the issuance of this opinion.

CONCLUSION

For the above reasons, we hold Matrix is not entitled to equitable subrogation. The master-in-equity's order is

REVERSED.

BEATTY, J., and Acting Justice John H. Waller, Jr., concur. KITTREDGE, J., concurring in result in a separate opinion. PLEICONES, J., dissenting in a separate opinion.

JUSTICE KITTREDGE: I concur in result. I join Chief Justice Toal and vote to reverse due to Matrix's unauthorized practice of law. I would not reach the issue of whether Matrix otherwise satisfied the requirements of equitable subrogation. Concerning the majority's broader holding voiding a real estate mortgage secured through the unauthorized practice of law, I join today's result because of its prospective-only application.

JUSTICE PLEICONES: I respectfully dissent. I would affirm the master's order equitably subrogating Matrix's refinanced mortgage to its original mortgage, and would not impose the

draconian remedy of denying equitable relief to lenders who "fail[…]to have attorney supervision during the loan process as required by law."

A. Equitable Subrogation

Equitable subrogation is a remedy favored by the courts, and it is to be liberally and expansively applied. So. Bank and Trust Co. v. Harrison Sales Co., Inc., 285 S.C. 50, 328 S.E.2d 60 (1985). The doctrine:

is founded on the fictional premise that an obligation extinguished by a payment made by a third person is to be treated as still subsisting for the benefit of such third person, whereby he is substituted to the rights of the creditor when he has made such payment.

St. Paul - Mercury Indem. Co. v. Donaldson, 225 S.C. 476, 83 S.E.2d 159 (1954) citing Aetna Life Ins. Co. of Hartford v. Town of Middleport, 124 U.S. 534 (1888).

"The purpose of subrogation is to prevent a junior lien holder from converting the mistake of the lender into a magical gift for himself." United States v. Baron, 996 F.2d. 25 (2nd Cir. 1993) (internal citation omitted).

It appears that the majority would agree with me that a refinancer has a right to lien priority, if that refinancer uses the theory of "replacement and modification" rather than equitable subrogation. Heretofore, South Carolina has used the doctrine of equitable subrogation to restore a refinancer's lien to priority, and I would not reverse this order because it used this theory rather than the newly announced "replacement and modification" rule.

In 1927, this Court held that a lender who pays the original mortgage itself, or furnishes money to the mortgagor to pay off an existing mortgage, pursuant to an agreement by which the lender will give a new mortgage, has the equitable right to be subrogated to the paid-off mortgage. Enterprise Bank v. Fed. Land Bank, 139 S.C. 397, 138 S.E. 146 (1927). In this situation, the lender furnishing the money is not a volunteer, and becomes secondarily liable for the discharge of the first mortgage under the instruments creating the new mortgage which require the satisfaction of the first mortgage as a condition of the giving of the second. Id.;[3] see also James v. Martin, 150 S.C. 75, 147 S.E. 752 (1929) (applying Enterprise Bank and quoting: "One satisfying a lien note at the request of the property owner, upon the understanding that he is to have new security upon the property released, acting in ignorance of a second mortgage lien upon the property, although it is on record, is entitled to subrogation to the rights of the first lien holder").

As the Washington Supreme Court explained, several considerations support a rule that, absent material prejudice to a junior lienholder, equitable subrogation should be automatically available to a mortgage refinancer who can show it expected to have first priority:

1) Equitable subrogation preserves priorities by keeping mortgages and other liens in their proper recordation order;

2) Equitable subrogation accomplishes substantial justice and rests on the maxim that no one (here, the junior lienholder) should be enriched by another's loss;

3) Facilitating refinancing helps prevent foreclosures; and

4) A liberal equitable subrogation policy reduces title insurance premiums.[4]

Bank of America v. Prestance Corp., 160 Wash. 2d 560, 160 P.3d 17 (2007).

The majority would punish the respondent in this case for failing to anticipate the majority's decision to alter the theory under which respondent pled, proved, and obtained the result it sought below. I would affirm the master's decision to equitably subrogate Matrix's second mortgage to its first, a result which is consistent with both our existing law and sound public policy. Cf. Rule 220(c), SCACR (court may affirm for any reason appearing in the record).

B. Unclean Hands

The majority also would expand the relief afforded by the Court of Appeals to a mortgagor who has been the "victim of the unauthorized practice of law" to all lienholders of that mortgagor. See Wachovia Bank v. Coffey, 398 S.C. 76, 698 S.E.2d 244 (Ct. App. 2010) *cert. pending* (mortgagee cannot foreclose mortgage where loan closed without attorney supervision); compare Hambrick v. GMAC Mort. Corp., 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006) *cert. dismissed* April 5, 2007 (mortgagor has no private right of action against mortgagee for the unauthorized practice of law). The purpose of equitable subrogation/replacement and modification is to prevent a windfall to a junior lienholder. I cannot square the policy underlying this purpose with the Court's proclamation that refusing equitable relief to "bad" lenders will somehow protect the public at loan closings. I see only detriment to the borrowing public[5] and a windfall to junior lienholders in this decision which would deny all equitable relief to any "lender who fail[s] to have attorney supervision during the loan process as required by our law…[in] all filing dates[6] after the issuance of this opinion."

CONCLUSION

I respectfully dissent and would affirm the Master's order.

---

[1] The logic surrounding the elements of secondary liability and direct interest has been tortured in our case law because the current definition does not distinguish between a party who pays off the prior debt and a party who advances funds to the debtor for the purpose of paying off the prior debt. Judge Howard's concurrence in *Dodge City of Spartanburg, Inc. v. Jones*, 317 S.C. 491, 454 S.E.2d 918 (Ct. App. 1995), explains the difficulties our courts have encountered concerning this issue. While we disagree with Judge Howard's conclusion that the lender in *Dodge City* could receive equitable subrogation when it refinanced the debt already owed to it, we agree with his analysis that a lender who either pays the debt itself or provides the debtor

funds with the understanding the debtor will satisfy the obligation may seek equitable subrogation.

[2] *Buyers Service* established in 1987 that attorney supervision is required for the four steps in the residential real estate loan and mortgage process: preparation of deeds, notes, and other instruments; preparation of title abstracts; the closing; and recording the instruments. 292 S.C. at 430-34, 357 S.E.2d at 17-19. No language, analysis, or discussion in *Buyers Service* indicates the Court intended to limit the holding to purchase money mortgages. In *Doe v. McMaster*, the petitioner suggested to the Court that *Buyers Service*'s holding did not apply because the buyer and lender were refinancing an existing mortgage rather than purchasing new property. 355 S.C. at 312, 585 S.E.2d at 776. The Court said, "This distinction is without significance" because "[i]n refinancing a real estate mortgage the four steps in the initial purchase still exist." *Id.* *Doe v. McMaster* did not change the landscape regarding refinance loans, but simply stated the existing law.

[3] It appears that the lender in Dedes v. Strickland, 307 S.C. 155, 414 S.E.2d 134 (1992) was denied equitable subrogation because it failed to present evidence that its refinancing was conditioned upon the repayment of the first loan. Id. at 159, 414 S.E.2d at 136.

[4] Citing Nelson & Whitman, *Adopting Restatement Mortgage Subrogation Principles: Saving Billions of Dollars for Refinancing Homeowners*, 2006 BYU L.Rev. 305.

[5] I suspect that many mortgagees, denied hope of equitable relief, including the ability to foreclose if an attorney should fail to supervise any of the acts required of him in a loan closing, will choose not to do business in South Carolina, or choose to increase fees to cover potential unrecoverable liabilities.

[6] I am unsure what filing date the majority is referring to in this passage.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wachovia Bank, N.A., Appellant,

v.

Ann T. Coffey and

Bank of America, N.A., Respondents.

Appeal From Beaufort County
Marvin H. Dukes, III, Master-in-Equity

Opinion No. 4685
Heard February 9, 2010 – Filed May 6, 2010

AFFIRMED

James Y. Becker and R. David Proffitt, of Columbia, for Appellant.

Gregory M. Alford, of Hilton Head Island, for Respondent Ann. T. Coffey.

Steven R. Anderson, of Columbia, for Respondent Bank of America, N.A.

GEATHERS, J.: Appellant Wachovia Bank, N.A. (Wachovia), brought this mortgage foreclosure action against Respondents Ann T. Coffey (Mrs. Coffey) and Bank of America, N.A., seeking relief from Mrs. Coffey's default on a home equity loan made to her late husband for the purchase of a sailboat. The master-in-equity granted Mrs. Coffey's summary judgment motion and denied Wachovia's summary judgment motion. Wachovia challenges both the grant of summary judgment to Mrs. Coffey and the denial of its summary judgment motion on its unjust enrichment, equitable lien, and prejudgment interest causes of action on the ground that it proved the required elements of these causes of action. Wachovia also challenges the grant of summary judgment to Mrs. Coffey on its ratification and foreclosure causes of action on the ground that there were material factual issues preventing summary judgment. We affirm.

FACTS/PROCEDURAL HISTORY

On January 27, 2001, Dr. Michael D. Coffey (Dr. Coffey), a Hilton Head obstetrician, was diagnosed with terminal lung cancer and was told that he had six months to live. On July 23, 2001, Dr. Coffey took out a $125,000 home equity line of credit with Wachovia. Mrs. Coffey was not aware of the transaction, and Wachovia's employees failed to verify Dr. Coffey's authority to mortgage the couple's home. Dr. Coffey signed a mortgage document purporting to secure the loan with the couple's home, which was titled in Mrs. Coffey's name only. On July 30, 2001, at Dr. Coffey's request, Wachovia wired the loan proceeds to the Hilton Head branch of Carolina First Bank to be deposited in the account of Hilton Head Yachts, Ltd., a business that had sold to Dr. Coffey a thirty-six-foot Beneteau sailboat (the boat). The boat was then titled in the name of A&M Partners, Inc., a Delaware corporation in which Dr. Coffey and Mrs. Coffey were the only shareholders. Dr. Coffey told Mrs. Coffey that the boat was "paid for." Dr. Coffey, who handled virtually all of the couple's financial transactions, used the couple's joint checking account to make payments on the loan until his death in March 2005.

Soon after Dr. Coffey's death, Mrs. Coffey began a months-long effort to sell the boat. She continued the payments on the loan from Wachovia, but for several months she was unaware that the loan was for the boat purchase. She testified that by the fall of 2005, she realized that these payments related to Dr. Coffey's boat purchase but that she was under the impression that the loan was secured by a lien on the boat, rather than a mortgage on their home, and that the amount of the loan was much smaller than it actually was.

In September 2005, Mrs. Coffey hired a broker to locate a buyer for the boat. By late November 2005, the broker located a buyer, and on January 5, 2006, the broker prepared an initial seller's disbursement summary showing the balance of Wachovia's boat loan to Dr. Coffey. However, the final seller's disbursement summary did not reflect the debt owed to Wachovia. According to Mrs. Coffey, she had given the boat loan information to the broker, but the broker contacted Wachovia and learned that there was "no lien" on the boat and that the sale proceeds could be transferred to A&M Partners, Inc., the corporation in which she and Dr. Coffey held stock. Ultimately, Mrs. Coffey received the net proceeds of the sale, and she deposited them into one of her bank accounts.

Mrs. Coffey also stated that shortly after the closing of the boat sale in January 2006, she realized that Dr. Coffey had purchased the boat with loan proceeds from a home equity line of credit and that he had signed a mortgage purportedly securing the debt with their home. Mrs. Coffey indicated that she became angry at Wachovia's employees about the transaction taking place without her knowledge and refused to make any further payments on the loan.

Wachovia later filed this mortgage foreclosure action against Mrs. Coffey. In its initial complaint filed on June 30, 2006, Wachovia originally named as defendants Dr. Coffey's estate, Mrs. Coffey, both individually and as personal representative of Dr. Coffey's estate, and three of the couple's five children. Wachovia filed an amended complaint on May 9, 2008, to name as defendants only Mrs. Coffey and Bank of America, N.A. In the meantime, Mrs. Coffey had filed with the Beaufort County Probate Court an inventory and appraisement of Dr. Coffey's estate in September 2006. The inventory and appraisement acknowledged Dr. Coffey's and Mrs. Coffey's joint ownership of the boat. The inventory and appraisement also indicated that Dr. Coffey's probate estate had a negative value. Mrs. Coffey admitted that most of Dr. Coffey's assets had

been transferred to her and other family members outside the probate estate through a marital trust.

In its amended complaint, Wachovia sought to foreclose on the mortgage signed by Dr. Coffey and asserted additional causes of action for ratification, prejudgment interest, unjust enrichment, equitable lien, and equitable mortgage. Wachovia filed a motion for summary judgment on the unjust enrichment, equitable lien, and prejudgment interest causes of action, and Mrs. Coffey filed a cross-motion for summary judgment on all of Wachovia's causes of action. The master granted Mrs. Coffey's summary judgment motion and denied Wachovia's summary judgment motion. This appeal followed.

ISSUE ON APPEAL

Is Wachovia barred from seeking relief in the courts due to its unauthorized practice of law in the loan transaction with Dr. Coffey ?

STANDARD OF REVIEW

On appeal from the grant of a summary judgment motion, this Court applies the same standard as that required for the circuit court under Rule 56(c), SCRCP. Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). "'Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.'" Adamson v. Richland County Sch. Dist. One, 332 S.C. 121, 124, 503 S.E.2d 752, 753 (Ct. App. 1998) (quoting Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997)).

LAW/ANALYSIS

Wachovia assigns error to the master's granting of summary judgment to Mrs. Coffey on the claim that she ratified the note and mortgage signed by Dr. Coffey. Wachovia argues that there was a genuine dispute about the inferences to be drawn from the evidence pertaining to this claim. Wachovia also assigns error to the master's grant of Mrs. Coffey's summary judgment motion and denial of its summary judgment motion on its causes of action for unjust enrichment, equitable lien, and prejudgment interest.

However, Mrs. Coffey asserts that the doctrine of unclean hands bars Wachovia from seeking equitable relief from our courts.[1] She argues that Wachovia committed the unauthorized practice of law, and, therefore, Wachovia came into court with unclean hands. We agree.[2]

"The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998). "The expression 'clean hands' means a clean record with respect to the transaction with the defendants themselves and not with respect to others." Arnold v. City of Spartanburg, 201 S.C. 523, 532, 23 S.E.2d 735, 738 (1943). The rule must be understood to refer to some misconduct concerning the matter in litigation of which the opposing party can, in good conscience, complain in a court of equity. Id.

As early as 1987, lending institutions doing business in South Carolina were on notice that they could not prepare legal documents in connection with a mortgage loan without review by an independent attorney and that the loan closing had to be supervised by an attorney. See State v. Buyers Serv. Co., 292 S.C. 426, 431-434, 357 S.E.2d 15, 18-19 (1987) (holding that a commercial title company's employment of attorneys to review mortgage loan closing documents did not save the company's preparation of those documents from constituting the unauthorized practice of law and that the closings should be conducted only under an attorney's supervision), modified by Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773 (2003); see also Doe Law Firm v. Richardson, 371 S.C. 14, 17, 636 S.E.2d 866, 868 (2006) (citing Buyers and McMaster) (clarifying that a lender may prepare legal documents for use in financing or refinancing a real property loan as long as an independent attorney reviews them and makes any corrections necessary to ensure their compliance with the law and reaffirming that mortgage loan closings should be conducted only under an attorney's supervision).[3]

Here, on July 23, 2001, Wachovia's employees processed the home equity loan to Dr. Coffey without the supervision of an attorney. Their unauthorized practice of law resulted in prejudice to Mrs. Coffey when the mortgage signed by Dr. Coffey was recorded and when Wachovia filed this foreclosure action against Mrs. Coffey. While Mrs. Coffey could have applied the proceeds from the sale of the boat to the balance due on the boat loan, we cannot allow her failure to do so to obscure the misconduct of Wachovia's employees. The unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also to the public at large for the reason so cogently stated in Buyers:

The reason preparation of instruments by lay persons must be held to constitute the unauthorized practice of law is not for the economic protection of the legal profession. Rather, it is for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law.

Buyers, 292 S.C. at 431, 357 S.E.2d at 18. We therefore reach the inescapable conclusion that Wachovia has come to court with unclean hands and is barred from seeking equitable relief.

Wachovia's legal causes of action are barred as well. In Linder v. Ins. Claims Consultants, Inc., 348 S.C. 477, 560 S.E.2d 612 (2002), our supreme court refused to allow a public insurance-adjusting business to be compensated for the value of its performance attributable to the unauthorized practice of law. Linder, 348 S.C. at 496, 560 S.E.2d at 622. This is consistent with South Carolina precedent asserting that no person be permitted to acquire a right of action from their own unlawful act and that one who participates in an unlawful act cannot recover damages for the consequence of that act. See Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 276-77, 437 S.E.2d 168, 170-71 (Ct. App. 1993) (applying this policy to a contract secured and maintained by bribery). "This rule applies at both law and in equity and whether the cause of action is in contract or in tort." Jackson, 313 S.C. at 276, 437 S.E.2d at 170.

Based on the foregoing, Mrs. Coffey was entitled to judgment as a matter of law. Therefore, the master properly granted her summary judgment motion. In no way do we condone the actions of either Dr. Coffey or Mrs. Coffey in relation to this loan. However, we are bound by precedent and must therefore deny Wachovia's request for relief. In view of our disposition of this issue,

we need not address Wachovia's remaining arguments. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that the appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

Accordingly, the order of the master-in-equity is

AFFIRMED.

PIEPER, J., and CURETON, A.J., concur.

---

[1] One of Wachovia's grounds for challenging the master's reliance on the unclean hands doctrine is that Coffey was barred from raising this affirmative defense because she failed to raise it in her answer. The master did not address this procedural issue when he ruled that Wachovia had unclean hands, and Wachovia failed to file a motion to alter or amend pursuant to Rule 59(e), SCRCP. Therefore, the issue is not preserved for our review. See Hancock v. Wal-Mart Stores, Inc., 355 S.C. 168, 171, 584 S.E.2d 398, 399 (Ct. App. 2003) (holding that an argument raised to the trial judge but not addressed in the final order is not preserved for appellate review when the appellant fails to file a motion to alter or amend). Further, Wachovia did not include Coffey's answer in the Record on Appeal. Because we are unable to review the answer to determine whether the defense of unclean hands was adequately pled, we will not consider this procedural challenge to the master's order. See Rule 210(h), SCACR (the appellate court will not consider any fact which does not appear in the Record on Appeal); Germain v. Nichol, 278 S.C. 508, 509, 299 S.E.2d 335 (1983) ("Appellant has the burden of providing this Court with a sufficient record upon which this Court can make its decision.").

[2] In no way do we purport to regulate the practice of law by addressing the unauthorized practice of law in this opinion. The regulation of the practice of law is within the exclusive province of our supreme court. See S.C. Const. art. V, § 4 ("The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."); S.C. Code Ann. § 40-5-10 (2001) ("The inherent power of the Supreme Court with respect to regulating the practice of law, determining the qualifications for admission to the bar and disciplining, suspending and disbarring attorneys at law is hereby recognized and declared."). Rather, we address Wachovia's unauthorized practice of law as it affects the merits of this action against Mrs. Coffey.

[3] The attorney supervising the loan closing may represent both the lender and the borrower after full disclosure and with each party's consent. Richardson, 371 S.C. at 17, 636 S.E.2d at 868.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

BAC Home Loan Servicing, L.P., f/k/a Countrywide Home Loan Servicing, L.P., successor in interest to Defendant Mortgage Electronic Registration Systems, Inc., MIN #: 100039032108093192, Appellant,

v.

Debra Kinder, Personal Representative of the Estate of George William Brelsford, IV a/k/a George W. Brelsford, and Debra Kinder, Personal Representative of the Estate of Patricia M. Brelsford, Respondents.

Appellate Case No. 2011-191086

Appeal From Aiken County
Robert A. Smoak, Jr., Master-in-Equity

Opinion No. 27146
Heard June 6, 2012 – Filed July 25, 2012

REVERSED

Sean A. O'Connor, of Finkel Law Firm, LLC, of Charleston, for Appellant.

James L. Verenes, of Fox & Verenes, of Aiken, for Respondent.

JUSTICE HEARN: This case presents us with two issues: (1) whether an assignee of a note and mortgage has a right to surplus funds generated by the

foreclosure of a prior mortgage on the property, and (2) whether that assignee is barred from recovering the surplus funds because the note and mortgage assigned to it allegedly were closed without attorney participation. We hold the assignee may recover the surplus funds even though it was not a lienholder of record at the time of the sale. We also clarify our decision in *Matrix Financial Services Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011), and hold because the mortgage was filed before *Matrix*, whether it was closed without the services of an attorney would not bar the assignee from receiving the surplus funds.

FACTUAL/PROCEDURAL BACKGROUND

George Brelsford executed and delivered a promissory note and mortgage (Mortgage 1) for $30,000 to Citizens Bank of Effingham (Bank) on July 2, 2004. Mortgage 1 was secured by real property in Aiken County and recorded in the Aiken County Register of Mesne Conveyance on July 6, 2004. Brelsford executed and delivered a second promissory note to Quicken Loans, Inc. on March 21, 2007, for the sum of $149,000 and secured payment of this note with a mortgage (Mortgage 2) in favor of Mortgage Electronic Registration Systems, Inc. (Systems) as nominee for Quicken. Mortgage 2 was secured by the same real property as Mortgage 1 and was duly recorded on April 20, 2007.

Brelsford died on August 11, 2009. After determining its loan was in default, Bank foreclosed on the property. Brelsford's estate as well as Systems were named as defendants and properly served, but neither responded nor were present at the sale, and they were therefore held in default. The property was sold on July 6, 2010 to a third party for the sum of $116,000, which, after satisfying the debt to Bank, left $79,405.25 in surplus funds.

On July 30, 2010, Systems assigned its note and mortgage to BAC Home Loan Servicing, L.P., and BAC recorded this assignment on August 20, 2010. BAC then filed a claim for the surplus funds pursuant to Rule 71(c), SCRCP, and a hearing was held on October 28, 2010. In the master's original order, he found that BAC did not have standing to claim the surplusage under Rule 71(c) because it did not have "a lien on the mortgaged premises at the time of sale," specifically noting that BAC did not have a recorded interest until August 20, 2010, well after the July 6, 2010 sale date. Although arguments were also made that Mortgage 2 was closed without attorney participation in contravention of the law, the master held he did not have sufficient evidence to make a ruling on the issue and invited the submission of additional evidence in a Rule 59(e), SCRCP, motion. Pending the

submission of a Rule 59(e) motion, the master awarded the surplus funds to Brelsford's estate.

BAC made a Rule 59(e) motion arguing that the master erred in barring its recovery of the funds because, as an assignee, it was not required to record its assignment to have a valid claim. Similarly, BAC argued that as an assignee it received all the rights Systems would have had, including the right to request the surplus funds. It further contended whether Mortgage 2 was closed by an attorney was irrelevant because BAC was not a party to that closing. Finally, BAC argued that as a holder in due course of the note underlying the mortgage, it took free from the defense that the transaction was illegal.

The master disagreed and again held BAC could not claim the surplus funds, reasoning that Rule 71(c) only allowed claims by those who had a "lien" at the time of the sale and because the lien on the property was extinguished by the sale, Systems' assignment of the mortgage to BAC was "an empty shell, since the lien no longer existed." Also, although no additional evidence was presented, the master concluded that the HUD-1 closing statement, which had been the only evidence before him at the initial hearing, was proof that no attorney participated in the closing of Mortgage 2. He therefore held that even if BAC were a holder in due course, because Systems would be barred from recovery because of this illegality, so would BAC. He therefore denied BAC's motion. This appeal followed.

ISSUES PRESENTED

I. Did the master err in holding BAC could not recover surplus funds because it was not a lienholder of record at the time of the sale?

II. Did the master err in holding BAC was barred from recovering surplus funds because he found no attorney participated in the closing of Mortgage 2?

LAW/ANALYSIS

I. STATUS AS LIENHOLDER

BAC first argues the master erred in holding that it could not recover the surplus funds from the foreclosure sale because it was not a lienholder of record at the time of the sale. We agree.

Rule 71 states, in part, that "[i]n the event of a surplus fund resulting from the sale [on foreclosure], . . . [a]ny party to the action, or any person who had a lien on the mortgaged premises at the time of the sale, . . . may have a hearing to determine [entitlement to the surplus fund]." Rule 71(c), SCRCP. In the master's original order, he found that because the assignment was not recorded until after the sale, BAC did not have a valid "lien on the mortgaged premises at the time of sale." However, the assignment of a mortgage does not need to be recorded, and failure to do so has no effect on the rights of the assignee. *Singleton v. Singleton*, 60 S.C. 216, 235, 38 S.E. 462, 469 (1901). Therefore the date of recordation of the assignment has no effect on the transfer of Systems' rights to BAC.

Additionally, although the master noted that Systems was a party to the foreclosure action and had a lien on the subject property, he concluded that the lien was terminated by the foreclosure sale and thus the subsequent assignment to BAC "was an empty shell, since the lien no longer existed." *See* S.C. Code Ann. § 29-3-780 (2007) ("Upon . . . a sale of lands pursuant to decree of foreclosure, the officer of the court making the sale shall cause to be recorded in the office where the foreclosed mortgage is recorded a release, cancellation, and satisfaction of the lien."). He also found no evidence Systems had "specifically assigned its right to pursue the surplus funds under Rule 71(c), SCRCP." However, the extinguishment of the lien has no bearing on this case because BAC is not claiming it still has a lien over the property. Instead, it merely claims an interest in the proceeds from the foreclosure sale. The master's ruling ignores the fact that Systems retained the right to claim the surplus funds pursuant to its original lien and the underlying note, and it is this right Systems assigned to BAC. Moreover, in assigning the note and mortgage, we see no reason why Systems would be required to explicitly assign the right to surplus funds for BAC to exercise it. An assignee stands in the shoes of the assignor. *Moore v. Weinberg*, 373 S.C. 209, 220, 644 S.E.2d 740, 745 (Ct. App. 2007). Thus, an innocent assignee receives all the rights of his assignor. *Singleton*, 60 S.C. at 234-35, 38 S.E. at 469. Because Systems could have made this claim under Rule 71(c), BAC is entitled to make the same claim. To hold otherwise would ignore settled principles governing assignments.

II. ATTORNEY PARTICIPATION IN CLOSING

BAC also argues the master erred in finding Mortgage 2 was closed without attorney supervision which should bar BAC's claims. We find it unnecessary to address the factual issue of whether an attorney was present at the closing because even if one had not been present, our holding in *Matrix* would allow BAC's claims to proceed.

In *Matrix* we reiterated that the closing of a loan without attorney supervision constitutes the unauthorized practice of law. Furthermore, we held that engaging in this unlawful behavior would preclude a lender from obtaining equitable relief. *Id.* at 140, 714 S.E.2d at 535. However, in a substitute opinion issued on rehearing, we explained that this holding would be prospective only, stating we would "apply this ruling to all filing dates after the issuance of this opinion," which was August 8, 2011. *Id.* To the extent some confusion apparently exists as to what filing date *Matrix* referred to, we clarify now that it is the date the document a party seeks to enforce was filed. Here, Systems' mortgage was recorded on April 20, 2007, well before the issuance of *Matrix*. Thus, regardless of whether an attorney participated in the closing of Mortgage 2, BAC would not be barred from recovery by the illegality.

CONCLUSION

Based on the foregoing, we reverse the master's order and award the surplus funds to BAC.

TOAL, C.J., PLEICONES, BEATTY and KITTREDGE, JJ., concur.