

Ethics Advisory Opinion

26-01

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

S.C. Rule of Professional Conduct 5.5

Facts:

Lawyer has been contacted by an out of state title insurance company or a company who would otherwise conduct the entire closing in those states which do not require Lawyer supervision (Title States) to supervise the Closing of Home Equity Lines of Credit (HELOC). Lawyer represents the Lender. Lender's HELOC product does not require a title search, nor does it require title insurance for this product. Lender conveys this to Lawyer as a blanket representation in the form of an email or in the Closing Instructions.

Questions Presented:

1. May Lawyer attend the closing and supervise recordation and disbursement of funds in a manner consistent with Boone v. Quicken, et. al., without violating the SC Rules of Professional Conduct if Lawyer does not perform a Title Exam or render a Report on the Status of Title?
2. Same facts as #1, does Lawyer have an ethical duty to Lender or its successors and or assigns for any title defects which may have been discovered had a Title Search been performed in a manner consistent with SC Law and the SC Rules of Professional Conduct (assuming proper limitation of representation under Rule 1.2, SCRPC)?
3. Same facts as #1, does Lawyer have an ethical duty to Borrower for any title defects which may have been discovered had a Title Search been performed in a manner consistent with SC Law and Rules of Professional Conduct (assuming proper limitation of representation under Rule 1.2, SCRPC)?

Summary:

As to Question 1:

Yes, Lawyer may attend the closing and supervise recordation and disbursement of funds in a manner consistent with Boone v. Quicken, et. al., without violating the SC Rules of Professional Conduct regardless of whether Lawyer performs a Title Exam or renders a Report on the Status of Title.

As to Question 2:

The Committee declines to answer Question 2 because it raises a question as to the standard of care of Lawyer rather than the application of the SC Rules of Professional Conduct.

As to Question 3:

The Committee declines to answer Question 3 because it raises a question as to the standard of care of Lawyer rather than the application of the SC Rules of Professional Conduct.

Opinion:

In Boone v. Quicken Loans, Inc., 420 S.C. 452, 803 S.E.2d 707 (2017), the South Carolina Supreme Court reiterated and clarified what activities constitute the practice of law in the context of a residential real estate transaction (including HELOC transactions). The Court confirmed that there are five steps in a residential real estate transaction: “Title Search and Certification”, “Preparation of Instruments,” “Closing the Transaction,” and “Recording and Disbursement” (considered jointly as the final step). The Boone opinion makes clear that each of those steps entails the practice of law when done in connection with a residential real estate transaction, and must therefore be performed or supervised by a South Carolina licensed lawyer to avoid the unauthorized practice of law. Id., Rule 5.5, SC RPC.

There is no requirement that each step be performed by the same licensed lawyer. However, a lawyer involved at the closing step of the transaction has an obligation to confirm that the other steps in the same transaction were completed by a licensed South Carolina lawyer. *Matter of Pstrak*, 357 S.C. 1, 591 S.E.2d 623 (2004). Further, the closing lawyer may not rely on mere blanket assurances from a non-lawyer that all other aspects of the closing have the proper level of attorney involvement. *See* SC Ethics Advisory Opinion 09-01 and citations therein.

If the Lender included a Title Search and Certification component for the transaction, clearly that step would have to be done directly or under the supervision of a South Carolina licensed lawyer. Boone (citing Ex parte Watson, 356 S.C. 432, 436, 589 S.E.2d 760, 762 (2003) (“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.”)). Under the facts of the inquiry, however, Lender has decided that the transaction will not include a Title Search and Certification component. There is no risk of the unauthorized practice of law if there is a complete absence of the sort of activity that would constitute the practice of law when completed.

Here, Lender has engaged Lawyer to perform and/or supervise the steps of the transaction that will be completed: execution of documents at closing, recording, and disbursement. On these facts, the Committee does not believe that the Lender’s decision to forego the Title Search and Certification step implicates Rule 1.2(c).