ETHICS ADVISORY OPINION

09-01

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.

Factual Background:

Lawyer has been contacted by an out-of-state real estate closing coordinating company to perform certain limited functions in residential real estate closings.

Questions Presented:

1. If the lawyer's only role in a transaction is to attend closing, can the lawyer rely on a non-lawyer closing coordinator's representations that proper instructions for recordation were given to the person recording documents?
2. If the lawyer's only role in a transaction is to attend closing, can the lawyer rely on a non-lawyer closing coordinator's representations that loan proceeds have been properly disbursed?
3. Would the answers to 1 and 2 above change if another South Carolina lawyer provided the assurances?
4. Can a lawyer rely on blanket assurances regarding proper recordation and disbursement, or must they be obtained for each closing?
5. If the lawyer's only role in a transaction is to review and certify title work, does the lawyer incur any responsibility for the remaining steps of the transaction if one or more of the other steps are not properly supervised?

Summary:

As to Questions 1 and 2, a lawyer may not rely solely on a non-lawyer's representations that the conduct of a transaction is ethically proper. As to Question 3, a lawyer may rely to some extent on another South Carolina lawyer's representations in this circumstance but nevertheless takes some responsibility for the conduct of the entire transaction. As to Question 4, a lawyer may not rely on blanket assurances. As to Question 5, a lawyer may properly limit the scope of representation to title abstracting and take no further responsibility, unless the lawyer knows that his work will be used to facilitate illegal conduct.

Opinion:

The South Carolina Supreme Court requires lawyer supervision of five components of a residential real estate transaction: abstracting title, preparing documents, closing, recording, and disbursing. *See State v. Buyers Service Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987)(identifying the four steps of a sale transaction that are the practice of law); *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003)(holding *Buyers Service* applicable to refinance transactions); *Doe Law Firm v. Richardson*, 371 S.C. 14, 636 S.E.2d 866 (2006)(holding that disbursement is an integral part of the entire transaction and must be performed or supervised by a lawyer). Lawyers who fail to supervise any of these steps have been sanctioned under Rule 5.5 for assisting in the unauthorized practice of law. *See, e.g., In re Matthews*, 371 S.C. 262, 639 S.E.2d 45 (2006)(sanction for, *inter alia*, failure to review staff-prepared documents); *In re Pincelli*, 375 S.C. 495, 654 S.E.2d 522 (2007)(sanction for, *inter alia*, failing to supervise recordation); *In re Wilkes*, 359 S.C. 540, 598 S.E.2d 272 (2004)(sanction for, *inter alia*, failure to review and correct mistakes on deed); *In re Hanna*, 376 S.C. 511, 657 S.E.2d 766 (2008)(sanction for, *inter alia*, failing to supervise disbursement). The Court has not specified what actions must be taken to supervise each step of a real estate transaction. However, from the above-cited disciplinary opinions and the *Doe* opinions, it appears that supervision generally entails instruction, review, and (when necessary) correction of a non-lawyer's work. Inherent in the idea of correction is the power to direct corrective action and have final authority over the details of performance. *See* Black's Law Dictionary (defining Supervision as "[t]he act of managing, directing, or overseeing persons or projects").

In the Committee's view, when a particular activity is the practice of law, a lawyer cannot rely upon mere representations by a non-lawyer that the activity was or is being performed correctly. Generally, a lawyer cannot rely on the advice of a non-lawyer regarding the ethical propriety of the lawyer's own conduct. *See In re Feely*, 354 S.C. 427, 581 S.E.2d 487 (2003)(disbarment for, *inter alia*, following client's instructions resulting in drafting fraudulent checks). It would defy both this proposition and the plain meaning of "supervision" to allow a non-lawyer to make the final determination whether the lawyer's Rule 5.5 obligations are being met. *See In re Arsi*, 357 S.C. 8, 591 S.E.2d 627 (2004)(closing lawyer sanctioned under Rule 5.5 after relying on title company's non-lawyer employee's false representations that another lawyer was supervising the other steps); *In re Pstrak*, 357 S.C. 1, 591 S.E.2d 623 (2004)(closing lawyer sanctioned under Rule 5.5 after relying on another lawyer's paralegal's false representations that the other lawyer was supervising the other steps).

Questions 1 & 2

The notion of review, inherent in supervision, is meaningless if it can be accomplished with a mere review of a non-lawyer's representations regarding the work performed. Supervisory review must be a review of the work itself. Questions 1 and 2 deal specifically with recordation and disbursement. The Committee advises that a lawyer's supervision of recordation should include review of recorded documents themselves, or copies, to determine whether they were

recorded in the proper place and in the proper order. A closing lawyer should not rely on a non-lawyer's categorical assertion that supervision properly occurred. Rather, the closing lawyer should ensure that the detailed acts of supervision were conducted by a South Carolina lawyer. *See Pstrak*, 357 S.C. at 6, 591 S.E.2d at 626 (closing lawyer must "ensure" that the other steps are properly supervised).

The specific actions that satisfy the supervision requirement as to disbursement are more difficult to ascertain authoritatively. In *Doe Law Firm*, the Court stated "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." 371 S.C. at 18, 636 S.E.2d at 868. Many read this statement to specifically allow disbursement by an outside non-lawyer entity. Others read it merely as an acknowledgement (by a court that historically has declined every invitation to micro-manage the practice of law) that supervision over an outside entity's disbursement is possible, without addressing whether it is realistic or practicable. The Committee takes no position on this question but concludes that a lawyer's obligation to inquire beyond a non-lawyer's representations into the details of supervision is even greater with respect to disbursement because of the uncertainty surrounding the subject.

Questions 3 & 4

Question 3 asks whether a closing lawyer may rely on another lawyer's representation that recordation and disbursement were properly supervised. As tempting as it may be to believe that, as professionals, lawyers should be able to rely on the representations of fellow Bar members, the Committee recognizes that our profession is not immune from the temptation to cut corners. Specifically, the Committee directs the inquirer to *In re Boulware*, 366 S.C. 561, 623 S.E.2d 652 (2005), in which a lawyer attended a closing on behalf of a second lawyer who had represented that he was supervising all other steps of the transaction, which were being performed by a title company's non-lawyer employees. In fact, the second lawyer was not supervising those employees, and the closing lawyer was publicly reprimanded under Rule 5.5 for unknowingly assisting the unsupervised title company employees in the unauthorized practice of law. The Committee advises that a closing lawyer should not rely solely upon another lawyer's representations without some amount of first-hand knowledge of the other lawyer's practices. For these same reasons, in response to Question 4, the Committee further advises that a closing lawyer not accept blanket assurances but instead ensure proper supervision in individual transactions. A closing-only lawyer may limit civil liability for the other attorney's work by limiting the scope of representation in accordance with Rule 1.2. It is not clear whether a Rule 1.2 limitation will absolve the lawyer of accountability under Rule 5.5 if the other lawyer is in fact not supervising one or more of the other steps.

Question 5

The Committee advises that a lawyer may limit the scope of representation in a real estate transaction to searching and abstracting title. A lawyer is responsible for the misconduct of non-

lawyers "employed or retained by or associated with" the lawyer when the lawyer orders, ratifies or fails to mitigate the misconduct. Rule 5.3. In cases where a lawyer's only role in a transaction was to attend closing (a "closing-only" lawyer), the Supreme Court has held the closing-only lawyer responsible for all other steps of the transaction requiring lawyer supervision. *See Boulware*; *Arsi*; *Pstrak*. These opinions do not appear to preclude a closing-only lawyer from avoiding civil liability for the other steps of a transaction if the lawyer limits the scope of representation in accordance with Rule 1.2. Therefore, the Committee believes a lawyer could do likewise in searching title. Furthermore, the Court has not held that the lawyer performing any other step of a transaction (outside the closing) is assisting in the unauthorized practice of law where one or more of the remaining steps is unsupervised. The Committee believes that, because a closing is typically a party's only contact with a lawyer in the transaction, the same considerations of responsibility that led the Court to sanction closing-only lawyers under Rule 5.5 would not apply to a lawyer that performs on of the other steps without any client contact and with a reasonable belief that the other steps are properly supervised. However, a lawyer who has knowledge that a title abstract or opinion will be used in an illegal way—including but not limited to the unauthorized (i.e., unsupervised) practice of law in a real estate transaction—would be knowingly facilitating misconduct and therefore would be required by Rule 5.3 to decline the work.

The Committee offers no opinion on the applicability of this Advisory Opinion outside the context of residential real estate transactions.