THE RETURN OF HUMAN JUDGMENT
OR
LIFE IN THE POST-REAL-ESTATE-BUBBLE WORLD

I. INTRODUCTION

When Chicago Title asked me if I would do the ethics block for them this year, I was uneasy about saying yes. It wasn't that I was just too busy, Lord knows. But I was afraid at this point in the real estate world that I was too frustrated and too angered by our prospects to do much of a job. As I suspect many of you feel you have done, I have for many years uneasily witnessed the development of the fiasco that has now swamped the real estate world.

Over the past years I was bothered by many unresolved questions regarding some of the fixtures of my daily professional life:

-How would folks pay for all of these big houses being built everywhere, some of which I was closing (I saw their loan applications)?
-Why were "pre-payment penalties" legal?
-Why was it OK for a lender to give an eighty-year-old retiree an adjustable rate mortgage encumbering the title to his otherwise free and clear home?
-Is anyone ever going to read all of these documents I am spilling my life and worry into?
-Why companies whose business was the manufacture of automobiles in the mortgage business to begin with?
-Why was it fashionable for federal laws to "preempt" state laws which, to a fair- minded lawyer observer, seemed much more protective of the property rights of North Carolinians?
-Who were these mysterious "investors" lenders kept threatening me about (As in, *"Our investor penalizes us $1,000.00 for every day that package is late after tomorrow!")*
-And, how was I benefiting anyone by pushing these reams of paper out the door ever month?

Who had time to think about any of this during The Bubble Era? We were told, in fact, that we attorneys and our slothful ways were a part of the problem because we simply would not move fast enough in getting our work out. We were forced from turnaround times for work from one week to a couple of days, and then down to twenty-four hours and less. (*As I was once told by a particularly pushy mortgage broker, "I cannot understand why I can't get you to do a simply title search within a day!")* And do you remember "bundling" (the theory that the "consumer" would be benefited best if all property services were "bundled" together so that a single entity could control all of it)?

Many, many times since the 90's, I and my colleagues have only half-jokingly laughed about the pace and scale with which real estate was proceeding. Many times, I and others quipped that "when this baby comes apart it's really going to be bad". During 2008, our worst skepticisms become reality. One day I googled one of the news services on my computer and found a story that the United States Secretary of the Treasury had urgently stated that our system would "collapse" unless Congress did not appropriate $700,000,000,000 to prop up the banks before the following Monday. What! I was bitter about this for a few days, but I got all puffed up with the recognition that we lowly "settlement agents" (oh, how I hate that term passionately!) had been right all along: that the geniuses running the system we worked in really were driving it

like Casey Jones drove Old 97, right off the side of a mountain. Now we have learned that "paper" stock losses in The Crash of '08 totaled $6,900,000,000,000!

Well, you all know the rest. And what have we learned during these late gloomy days of discussions about TARP, derivatives, collateralized debt obligations, collapsing mutual fund accounts and SIV's (Securitized Investment Vehicles; perhaps more appropriately, SIV also and earlier was and is the acronym for Simian Immunodeficiency Virus, the precursor to AIDS.)? It now appears that we grunts down here on the ground in real-estate -closing-land might have been on to something in our skepticism. It turns out that the theories underlying the "securitization" of loans had a defect or two. It also appears that some bad things happen when a few mega financial entities assume too much control over too much of the process. It turns out that the fundamentals of very little were sound. And it turns out that our over-emphasis on speed and production sowed the seeds of destruction by charlatans and incompetents who had assumed control of the process.

Now, here we are at the beginning of 2009, in the midst of who knows what is happening in real estate. Anyone of any modest experience with a real estate practice must, like I am, be a little bewitched, bothered and bewildered by it all. Some days it seems like everyone is madly overturning all of the professional "furniture" at the same time. We have all heard enough distressing news of late, and, as I write this, prospects in our chosen field of endeavor are not so rosy as in the past.

But enough of that, we also have cause for hope. I think the change of economic circumstances affecting us all, and our practices, may provide an opportunity to re-inject professionalism into the parts of real estate transactions where we are involved. That reassertion must depend upon our practicing our trade, and being perceived as doing so, on the highest "ethical" level.

Well, how do we actually do this, and how do we convince the public that we are so doing? We have to do more than memorize the Rules. In this paper, I have cited some Rules of Professional Conduct and Formal Ethical Opinions. But my intention is not to parse the Rules and Canons. Rather, I want to address my proposition by sharing a few of thoughts about an always pertinent question. It is, in the heat of the business moment, with the currents and eddies of emotion, selfishness, greed and even distress swirling all around us, how may we best improve the odds of our consistently doing the "right thing?"

Before I go on, a bit about my personal context. I began my practice in 1983 with no background in real estate, other than what education I received in law school at Chapel Hill. I had to learn from the ground up. I certainly have had no special training in "ethics".

I learned the pleasure of helping people, of doing a job well, and the pain of rejection and of what I like to consider is only occasional ineffectiveness. I know well many of the daily problems that arise out of real estate practice because I have learned about them the hard way. I have run painfully upon the sharp rock of many obstacles that I might have avoided if I had known better, or had wit enough to know were ahead of me.

Nearly every day (or at least during the busier days of the recent past) I am confronted with some sort of ethical challenge. Luckily most of these are easily reasoned out. But I am often initially uncertain as to what the "correct" course of action should be. Certain I am that I have no chance at all of performing my duties ethically unless I begin with a full and complete understanding of my role in a transaction and of the culture that requires my help with real estate matters. I am equally sure that I also must come to the table with the courage necessary to act

upon my understanding of the proper course of action. The following is a bit of my perspective of the ethical environment we practice in, and at some of the lights I use in peering into the thickets.

II. HUMAN NATURE AND ESSENTIAL FACTS OF LIFE

Experience has taught me that to work through any transaction, and to behave as a professional should, the salient facts common to nearly all are as follows. Once I accepted these circumstances as fact, the process became a bit easier for me.

A. One disturbing notion I have consistently encountered is the apparent widely held, pernicious and ludicrous **fallacy that what we do actually requires very little thought**. Many folks believe that our world is now so statistic and document-oriented that transactions move forward primarily through the efforts of clerks choosing the correct form from banks of assorted, blank "legal documents". People must be forgiven for seeing things this way. All through life, in school, in doctors' offices, at job interviews, it seems that there has been a "form" with blanks on it for everything. I don't know how many times I have been asked how little I would charge for something, with a quick follow-up question of "Don't you just have a form for that?" Our culture does not seem to highly value deliberative thought, favoring instead decisive action, using as little time as possible so folks can get on to the next task.]

Oh, have we not lately seen examples of the harm done our economy by those who chose to substitute "models" of human behavior for their own practical and experience-based judgments about some set of facts. (For example, when a lender is attempting to answer the question as to whether Mr. Borrower sitting before him, will in fact pay back the money he is asking the bank to lend.)

B. People generally **do not like to read lengthy documents**, even when the documents memorialize promises requiring action of them far into the future. (Such as making loan repayments at a particular rate and term.) Again, we can look to the current economic fiasco for proof. I have read that many of the purchasers of hundreds of millions of dollars worth of "Collateral Debt Obligations" or "Credit Default Swaps" of "Derivatives" actually had very little understanding of how these financial entities really worked. I suppose some of the answers must have been somewhere there in all of that tedious paperwork.

C. Other folks involved in the transaction may believe that their jobs **do not include informing the buyer-borrower** of the details of the transaction, such as the borrower's loan terms. (They assume that the attorney will go over all of this.) Again, I have read that many borrowers who are today sitting on adjustable rate mortgages did not really understand how they worked. Based upon my own exposure to some folks in the money business, I would wager that many borrowers were misinformed.

D. I have seen other players **actively mislead buyer-borrowers**, informing them that their interest rate would be one percentage when in fact it was approved at a higher rate. More times than I would like to recall, a borrower has interrupted me, as I was reviewing a promissory note, with an excited query to the effect of, "Wait a second, they told me my interest rate would be such-and-such percent, and now you are saying it is such-and-such percent plus two!" Well, what can you say, someone was probably something less that truthful.

E. But, on the other hand, we all **hear what we want to hear**, and interpret ambiguities in our own favor to some extent. We are all natural optimists, so we all fall victim to this. It is a sometimes exasperating part of our jobs to be certain that a listener is hearing what we are saying.

F. Compounding the selective hearing problem, I have encountered folks who do **not even want to hear anything** I have to say. I have been told by real estate agents that the buyers do not want to come to their own closing meetings. And this without having ever met me or talked to me.

G. We will **not get rich** practicing transactional real estate law. If you are still entertaining such notions, get over them right now. We can make a decent living if we work hard at it, but money is tighter than ever, and it is hard earned. Fees for the tasks we are asked to perform are essentially where they were, or are lower than, where they were when I started in 1983. To be sure, technology has streamlined some parts of the practice, such as the ability to quickly manipulate numbers when preparing a settlement statement, but staff, rent, equipment leasing fees, and supplies all cost more. No one we will meet believes the law degree and license on the wall entitle us to a living.

H. When a transaction concludes, the attorney as settlement agent will be **the source of money** payments to all of the involved parties, from the guy who mowed the yard for the real estate agent, to the seller's mortgage company you are paying off. *See 99 FEO 5*. And you know that if you don't close the deal, nobody gets paid. There will therefore inevitably be a certain amount of pressure to see that the closing occurs. The uncharitable observer might conclude that some of this pressure is motivated by greed.

I. That is one way to look at it, but the point is that we may not be working with high moral principals so often as we will be **serving as referee or negotiator** in a dispute regarding chipped paint or a squeaky floor. ("Can't we just escrow money for the repairs?" we might be asked.) You will also find that few people who take the time to complain about such matters consider them petty concerns, even in the context of a several hundred thousand-dollar transaction.

J. At the end of the transaction, do not be surprised if **the gratitude** expressed to us is something less than that we believe is warranted by our efforts. Some folks are very thankful and are genuinely appreciative, but do not expect recognition for extra effort that we might have had to expend to represent our clients and close the transaction. No one, with the exception of brother and sister attorneys, understands just what we must do to complete our jobs.

K. Some people may, in fact, sincerely believe that **we are wasting their time** and money, and that we are there only because "the lawyers" have some kind of stranglehold on the system. These people are what I call **"lawyer haters"** and may hold a deep-seated prejudice against all of us. It could be that the only attorney they have ever met is their ex-wife's who took away their bass boat and Mustang in their equitable distribution squabble! You may have

legitimately needed information from them earlier in the transaction (such as requesting to see their title insurance policy) only to have been told as I have been, "Don't ask me. You're the lawyer!"

L. Some people we encounter see themselves as **knowing about as much as we** do. After all, these are just words and numbers we are dealing with, are they not? And everybody can read, right? Once, a real estate agent who did not like me very much believed she had found an error in the closing statement I had prepared. I very politely failed to acknowledge my error, as to have done so would have been dishonest of me. She looked at me intently as though I were the dumbest man she had seen that month. She then explained her point very slowly and deliberately, as she would have done in lecturing a small child who did not understand that he had done something wrong when he left the water running outdoors and flooded the backyard just before a Saturday night cookout. All I can say is persevere to the end and the right will generally prevail.

M. Some **folks may become frustrated** when we indicate that they have concluded erroneously. (For example, a widow may become frustrated when we have to point out that the deed by which she believes she holds title actually named only her late husband as a grantee, and that she now, after his death, holds some interest in the title together with his unfriendly children by a former marriage. The fact that "he intended otherwise" is now irrelevant.) Do not let their frustration in turn frustrate you, as it has me, but rather be proud that you have properly done your job and are fixing something that is broken. Again, if we all knew from the beginning that everything was correct, there would be no need for attorneys.

N. Many folks believe that the services attorneys provide in a real estate transaction are **fungible from lawyer to lawyer**, much as one bucket of paint being just like another. But is that really true? Of course it isn't. Just as there are different quality suits, some better looking and more durable and effective than others, so are there different "grades" of transactional attorneys. We may spend twice the time examining every document that may be in the chain of title as someone looking at a similar title may devote to the job. We may, as we are required to do, record before we disburse funds, while the shop down the street is recording once per week or every ten days (or even mailing in deeds of trust to be recorded). We may, as we are required to do, update before we record, to cover the gap period since we performed our title search, while our competitor's eighteen-year-old "runner" breezes into the Register's office and past us directly to the recording desk with their stack for the day. The two of us will likely be paid the same fee based on the prevailing rate in our geographical area. However, quality work does "pay" in the long run in the sense that if we do quality work we will live professionally to work another day, and we <u>will</u> be respected by our peers for our efforts. (And it's just the right thing to do.)

O. Be assured that many potential clients believe that **convenience and price are everything.** All that they see when choosing an attorney is that we all have law licenses, we are all insured (despite the fact that this is not true), and that a title insurance company is issuing a policy insuring the title to the closed-upon real estate; therefore, we are as similar as two peas in a pod. This is the way someone would view the purchase of a bulk staple product, which varies little from one lot to the next, such as potatoes or soybeans. But we must always remember that every service we perform is unique. Every set of circumstances requires the application of our unique judgment.

P. There is also a misconception regarding our **personal wealth**. Since many people hold the belief that we attorneys control just about everything (witness the extensive discussions regarding trial attorneys and their pernicious effects on society during political campaigns), they

also conclude that we all must therefore be wealthy. And, many folks believe that whatever fee we collect is far in excess of the value we add to a transaction.

Q. And always, always remember, now more than ever, that every party involved **will look to our malpractice coverage** in a heartbeat. Many do not realize that a claim against our coverage may have grave effects on our ability to continue that coverage! After a claim, a malpractice insurance carrier may raise our deductible or our premium to an uncomfortable level; and they have the right to cancel your policy. A claim is a financial loss to these companies and they do not like to pay claims.

III. THE GATEKEEPER

A. Work That Adds Value.

Before we can "do the right thing" professionally, I think we have to assure that we are adding value to the transaction we are working on. In its simplest terms, it seems that we do this by contributing expertise that protects the interests of our clients and facilitates the smooth completion of their transactions.

In a typical transaction, the attorney performs all of the following tasks:

1. performing a title examination for the buyer,
2. counseling the buyer throughout the process,
3. preparing and sending a title opinion to the title insurance company with his request for the issuance of a title insurance binder,
4. preparing documents for the lender providing the money for the transaction,
5. preparing a deed for the seller to sign,
6. paying off the seller's existing mortgage, and
7. disbursing funds to all who are to receive them at the conclusion of the execution and recording of the documents.

All of the information gathered through the course of the transaction is distilled and funneled to the closing attorney. Like the job superintendent on a construction site, the attorney is the only party with an overview of the entire process. The superintendent is not the carpenter or the ironworker or the concrete contractor, but he understands the tasks each of them is to perform and how the efforts of all fit together into what will be the final product. In the attorney's situation, the final product is a title that is and will remain marketable and a deed of trust on the client's property that will allow for a foreclosure upon default.
See CPR 101, RPC 210, 97 FEO 8 and 2004 FEO 3.

B. We Are The Clever Ones, And We Have the Knowledge.

Most people believe that lawyers know how to do a great many "things". They hold as true that we are intelligent and clever people who can fix just about anything that is broken in a legal way, just as they believe that the doctor ought to be able to fix just about any affliction to the body.

As the fixer of and prophylactic against legal maladies, and as the fabricator of documents that will stand the test of time, to the sophisticated and untutored alike, the attorney

assumes the role of **"gatekeeper."** Any transaction consists of a series of "gates" (loan application, appraisal, insurance and so forth) that an aspiring property owner must pass through before gaining legal title to a parcel of this earth, or the right to later foreclose on that parcel. We are the people who stand at the final series of "gates" and allow this person in to sign a deed and require that one to do so; that one in to sign a promissory note, and then that fellow over there to appear at our bank and tender a check representing the sale proceeds from the transaction.

One of the realities of our economy is that people move rapidly from job to job and industry to industry. In any given transaction, the attorney is likely to encounter someone who is new to the task for which they are responsible. With much of the "institutional memory" as to how things work wrung out of the system, the attorney may be required to assume the tasks of facilitator, coach, trainer, creator and overall guru.

At the conclusion of the transaction, everyone will assume our assurance that all has gone well. For example we must be certain that the borrower knows and understands his interest rate and his terms of payment; or that he knows that he has a prepayment penalty in his note that requires that he pay a two- percent penalty if he pays off his note early. Client expectations of our control of the information gate can run very high. (*I know of one attorney who was sued two years after he conducted the closing on his client's property. His client had failed to make <u>any</u> payment on the note for two years. When foreclosure began, he sued his attorney on grounds that the attorney had not told them **where** they were to make their payments!*) Be absolutely certain you are there with the folks to do the explaining, because the perception is that <u>you know everything</u> about the transaction you are facilitating. *See FEO 8 and 2002 FEO 9.*

C. <u>The Federal View</u>.

If you do not believe in the accuracy of my analogy, you only have to wait until something goes wrong with any part of the transaction. We will be among the first to then receive a telephone call. Our client, the seller, the lender, the local tax department, and yes, the federal government (read IRS and FBI) all believe that we were the "gatekeeper" of the transaction. The government believes that you, the closing attorney, are the only one in a position to see that the transaction is conducted between honest parties and that the numbers you have handled are consistent with the information previously presented to the lender. (See *2001 FEO 12* regarding affixing inaccurate excise tax stamps to a deed.)

What does this mean on the ground? *It means that if the purchaser pays for the closing with cash (and I mean currency) you may wind up testifying before a federal grand jury regarding your dealings with Mr. Currency and the contents of your file as the possessor of relevant evidence regarding his dealings with the drug business. Prior to this testimony you will have your rights read to you, just like on TV, as though you were the defendant. (This is assuming of course that you reported the receipt of cash as required by law, otherwise you have a bigger problem.)*

Everyone, justifiably or not, expects you to notice glaring inconsistencies in documents or situations. For example, months or even years after you have closed a file, you might be asked the following questions by federal agents.

1. Why did you continue with a closing where the buyer named on your Settlement Statement is different from that person named on the offer to purchase contract.

2. Did your mortgage broker or buyer at that closing tell you that "they had to do it this way in order to qualify for the loan?"

3. Why did you proceed with the closing of an FHA loan with a buyer who was buying his third house in the last six months, when one of the affidavits he had to sign in your office was that he intended to occupy the house as his primary residence? (The suspicion would be that that "buyer" was in fact really "brokering" the house to a third party, and it will be suspected that you knew of the third party.)

You should also assume that if your client is later arrested for federal loan fraud, he will at some point in his interrogation by federal agents recite that he ran the entire procedure by his attorney (you) and you said it was all OK! The local United States Attorney might conclude that you are a bad enough dude to warrant putting a wire on a mortgage broker, let's say, and sending her in to your next closing to gather a bit of evidence as to how you do things. (Yes, they will do this to lowly transactional residential closing attorneys.) One of the next visits you might then receive could be from an agent of the United States government (this would be the Federal Bureau of Investigation) who might have dropped by your office to ask you a few questions. This may have initially sounded rather unthreatening. If you answered questions at that interview, everything you said had better have been truthful, or you may later be charged with the federal crime of obstruction of justice for lying to a federal agent.

If the Justice Department is still interested in you after your chat, you may then receive a subpoena for a series of your files and a request that you testify under oath as outlined above. The assistant United States Attorney conducting the Grand Jury investigation may ask the jurors to impute knowledge to you based upon the perception that your superior training and perspective should have allowed you to recognize an illegal scam when you saw it, before you helped move it forward. If you are later indicted, you will be formally arrested by the federal marshals, generally by an invitation to appear immediately at the nearest federal courthouse. If you prefer, they will come and get you, and give you a ride.

You will be taken before the federal magistrate, where your pockets will be emptied and your belt taken and shoes removed before you are handcuffed and then led to a holding cell to sit with the government's other customers of the day awaiting arraignment before the magistrate. At your arraignment, if your release is allowed, you will be ordered to surrender your passport and to confine yourself to a narrowly defined geographic area on your promise to appear at your trial.

Some months later, if you have not already pled guilty to something, you will be tried. If you are found guilty, the Court will set a sentencing hearing to occur some months in the future. At the sentencing hearing, you will be formally sentenced. If active time is imposed, you may again be released and ordered to later surrender at such and such federal facility for transporting to federal prison. During the course of these months between sentencing and your surrender into incarceration, you will likely be unable to continue practicing law and may be unable to have any employment. The State Bar will most likely have begun disbarment proceedings.

On the mandated incarceration date, you will then surrender to the federal marshalls and you will be transported to a federal facility somewhere in the United States. I say somewhere, because you will be sent to whichever of those facilities that has room for you at the time. Service is typically at a minimum to medium security federal facility. Contrary to notions the public has about the incarceration of "white collar criminals", these are prisons and are not "campuses" in the sense of our undergraduate alma maters. The inmates do not study and play games all day. They stew about the raw deals life has given them; they curse the lousy jobs their

attorneys did; they tell each other just how much they despise the government that did this to them; they smoke lots of cigarettes.

You may be released early to a half-way house. In addition to the active time you got, some supervision of your activities after your sentence may have been mandated. So, your freedom is still restricted. You cannot vote, own firearms (or even be in a building where one is located) travel outside your local area, or drink alcohol. You are subject to random drug tests and visits from your parole officer. You must stay in regular communications with that officer. If your active sentence was for one year, this "supervision" may continue for another four.

It seems that an intelligent person could reasonably conclude that this fate could await only someone whom the government believes was very important to a transaction, the Gatekeeper, now upper-cased, as is consistent with his status.

IV. RISK MANAGER

As the Gatekeeper, it is clear that we, as the transactional attorneys in charge, are to some extent in the risk elimination and mitigation business. We have the benefit not only of an overview of facts particular to the title and parties before us but also of the precedents for our being involved to begin with. Armed with our understanding, we are in a position to assure parties of the acceptability of the risks inherent to holding any real estate title. Every buck has to stop somewhere, and the public says we are that point. That is what clients assume we get paid for.

Some of us may counter that, yes, what Ferguson says is all well and good, but most titles have a title insurance company standing behind them. And does the title insurance company not stand ready to indemnify our clients against loss in the event of a damaging encumbrance or failure of title? Doesn't that protect the attorney from being treated as the Gatekeeper? Well, no. Our houses may also be insured against loss by fire, but most people would not therefore be entirely indifferent to their house burning to the ground. The integrity of a title is no less important than the day to day maintenance of our houses to keep them habitable. What we do to assure that integrity is essentially the value that we bring to a transaction.

V. BAD THINGS, OR, ACTIVE ETHICAL CHALLENGES

I have found it helpful to identify some of the more corrosive elements of the practice in my efforts to avoid becoming someone's cellmate. To me, these elements represent the most fundamental and subtle ethical challenges I encounter. My awareness of their presence makes these obstacles surmountable.

A. Avoiding the I.B.G. Syndrome.

Some of us may have been tempted (as have I) to allow our judgment to affected as follows. We have to make a decision regarding some issue affecting title. It could be many things, but let's say we are aware that construction has begun on a property which our client is giving as security for a construction loan. Do we use the old short-form owner's affidavit, or the long form lien waiver affidavit? The evil voice inside our head whispers to us to forget about it, assuaging our conscience with the possibility that we may be gone by the time any bad comes of

this mess anyway. That's the "I.'ll B.e G.one Syndrome", telling us that a mess may be there, but we won't be around to be affected by it.

If you are lucky, and such thoughts have never crept into your head, well just recall that this bit of delusion has affected others in society, many of whom recently were hailed as geniuses on Wall Street. It's always there as a handy invitation to duck responsibility.

A. <u>Bullies.</u>

A bully is "one who is habitually cruel, especially to smaller or weaker people". These creatures are unfortunate facts of life in real estate practices. Real estate attorneys are in the position of being perceived as "smaller or weaker" because someone who is beyond our control is sending us the business that keeps us afloat. We have always been smart enough to counter these people throughout life. The good news is that we still are.

Avoidance for me begins with my recognition of my position as Gatekeeper. All of the money flows through my hands. I am the one who "makes it happen". No one gets paid until I say so. These simple facts make some players in the transaction very nervous. They may insist, adamantly, that you must do whatever it takes to make something happen right now. If a transaction collapses (perhaps because you insisted that the uncooperative estranged spouse of one of ten heirs sign a deed) they may blame you. Some of the more common bully-tactics I have encountered are as follows.

1. "**Nobody else makes me do this**!" or its slightly less common brother, "Everybody else does it this way!" I have found this to be universally untrue in my practice. Part of my job is to know the standard of care in my community. I know how things are done and how they are not done. (I know what the standard is by staying in touch with my peers--more on that later.)

2. "I have a **car payment/house payment due today** and I must get that check!" Of course we have to move as quickly as we can to complete a transaction and then disburse. But first we do have to have permission from our lender to fund the loan, and we must record, and deposit or confirm the receipt of the loan proceeds before we are allowed to disburse loan proceeds.

3. "**My office will not pay me** this month unless I turn in this commission check by 4PM!" Again, and I am not making light of the complainant's problem, but we must disburse money by the book, and bar rules require recording before disbursal. Sometimes, we simply cannot get to the courthouse and record on the day of closing.

4. "The **seller will not give the buyer the keys** until they have a check in their hand, and the moving truck is sitting at the curb, waiting to unload." This is a reasonable position and a real problem for the buyers, but see numbers 2 and 3. It's a bigger problem than in the past.

5. "Can't you just **give me my check and I will hold it** until you call me and tell me it is OK to deposit." This is a perennial problem and is unabated from previous years, in my experience. Don't do this. This constitutes disbursing money before recording, and depositing and is therefore a violation of bar rules. With your check now out of your control, you are expecting too much of human nature to presume that anyone will hold an undeposited check for very long. (See *Chapter 45A* of the North Carolina General Statutes, the *Good Funds Settlement Act*, and also *RPC 191* and *RPC 78*.)

6. "I want you to run **one closing statement for the borrower** and **another for the loan company.**" Illegal. They want you to hide something for them. Don't do it and become a party to loan fraud. The Settlement Statement is considered the final word on just what really happened at the closing and by preparing, signing and attesting to its accuracy, you are putting it into the national stream of commerce. Remember that we owe a fiduciary duty to the title insurance company whose money is at risk under our closing protection letter *and* a similar duty to our own malpractice insurance carrier. (See *RPC 44*)

People may at times get in our faces regarding these and other issues, but we have to stand firm on our procedures. They may call you slow and unprofessional and threaten that "if this is the way you do business then we cannot use you again." (An angry party once admonished me that I was so uncooperative that he wondered if I had started drinking!) OK. If you believe you are a professional, then you don't need to be "used" by people who have so little respect for our professionalism that they will ask you to break rules that they know you are required to follow.

All of this applies thrice-over for our staffs. I have found that one of the biggest causes of staff burnout is verbal abuse. Bullies may be guarded in what they say to us and then thirty minutes later become enraged at a staff person who does no more than repeat the content of directions we had earlier stated to a caller. If our assistants are valuable to you (and they should be, because good people are hard to find), you have to get creative and find a way to protect them from unreasonable verbal attacks.

B. <u>Isolation.</u>

Every year I am more certain that isolation from other attorneys is one of the biggest impediments to practicing ethically. I absolutely will not tolerate allowing the conditions we practice within to isolate me from legal associates and friends. Face it, the likelihood of any issue I encounter in practice being one of first impression to the legal community is remote. Why would we put ourselves in the position of having no professional friends who could at least serve as sounding boards for us? Make other attorneys your friends, find those you can talk to and use them freely. They will be happy to talk to you. They are not simply indulging us; they also instinctively know that by listening to us they may learn from our problems, and that by helping us think through an issue they may be better able to work through a similar problem when they encounter it. An experienced attorney may in fact know the parties involved in our issue or she may have been through circumstances similar to our own.

I have found that the advice I receive from lawyer friends **gives me a more balanced view of my world**. By exposing my own thoughts to the "fresh air" of their insight, I sometimes see that my own thinking was off base, or that I need to go in another direction. As a collateral benefit, I have found that the counsel from friends helps me to stay away from paranoia and cynicism. Collegial friendship is a great source of emotional and psychological support. There is no substitute for strength afforded by comradeship.

Joining your **local bar association** is a great way to begin to form these relationships. These are voluntary associations, and my own has been a constant source of friendship and support since I began going to meetings twenty years ago.

We should also cultivate our relationships with the attorneys employed by the **title insurance companies** we use. These people are our friends and are our allies in doing a good job and are eager to help us work through problems.

Another benefit of cultivating friendships with attorneys is that that man or woman you met at the last bar meeting may be **in a position to vouch for you** during some time of trouble. Having someone who knows you and can honestly attest that you are a reputable person of good faith, who seems to try to do the right thing most of the time, someday may prove invaluable in getting you through a scrape.

C. Anti-Social Behavior

If everyone did the right thing every time, there would be no need for us. Unfortunately, we all encounter some people of bad faith. This is one of the reasons our role as Gatekeeper is so important. Some of these miscreants are clever enough to know that if they are honest with us they will fail in their ends. As I mentioned above, some will attempt to include you as a part of their conspiracy to do wrong. The following are several of the more conspicuous types of "lying liars who lie to you" that I have encountered.

1. Identity Thieves. Yes, there are those out there with enough audacity to walk into a lawyer's office and pretend to be someone other than the person named on their birth certificate. Prime examples arise in domestic situations. For example, John Smith may be married to Jane Smith, but is now separated from her and has been kicked out of the marital home. Seeing that the real estate has equity in it, he convinces his girlfriend, Susie Jones, to go with him to the mortgage broker to apply for a loan secured by an equity line deed of trust on John and Jane's house. Susie of course will have to pass herself off as Jane Smith. This is easily enough done when John tells the mortgage broker that she, "Jane", cannot come to the office to sign the application because she has to work, and that he will simply take it "home" and have her sign it there. Believe me, if they get over the hurdle of the loan application, they are not going to confess in our offices when it comes time to sign the loan documents.

A variation on the theme is a son or daughter in desperate need of cash (perhaps to be used to purchase substances that are not currently legally available) doing the same thing, with the twist of representing himself or herself as a parent. How do we avoid this? Check identifications closely and keep your antennae up at all times. (See *Chapter 10B* of the *North Carolina General Statutes* requiring personal appearance before a notary)

2. Attorneys-In-Fact. On occasion, a person who has been given power-of-attorney, usually by an ailing or elderly parent, aunt or uncle, will attempt to overstep the bounds of their authority by committing some self-serving act such as deeding their principal's real estate to themselves. This is generally justified along the lines of something like "well, mama would have wanted me to have this anyway, since my no good brother never did anything for her." Well, maybe so, but be certain the recorded document granting the agency authority granted the authority the attorney-in-fact is claiming he now has. (See 2003 FEO 7, and the historical rules against self-dealing by a fiduciary.)

3. Free Men and Common Law Liens. This is a less common variation on the theme of shifting identities described above. During the Nineteen-Nineties, someone got the idea that they could execute and file a document that declared their intention of personally seceding from the United States and therefore no longer being subject to the laws that the rest of us live by, including the tax laws promulgated by the IRS. After execution and acknowledgement of their document, they file it in the office of the county Register of Deeds. They may also file another document declaring there to be a "common law lien" against their property declaring that the "lien" they have filed has priority against other liens on their own property or the property of others (such as that of judges or sheriffs!). These people are trouble, and I have found that and the best advice when we find one of their instruments in the chain of title is to walk away from the transaction. If that is not practical, they need to execute whatever documents work to clean up their titles.

4. Mortgage Cancellation Services. A couple of years back, I seemed to run into one of these every couple of months. These outfits proclaimed that for some reason, on giving his property as security for a loan was either unconstitutional or illegal. Therefore, all that the grantor of a deed of trust needed to do to remedy the illegality of encumbrance he had stumbled into was to hire the Service to cancel his deed of trust. They record cancelled a fair number of these by simply filing a document so stating in the relevant register of deeds office.

D. Surprises

During my first years of law practice I found myself often surprised human actions and reactions and by the way things seem to really work. Looking back, I probably shouldn't have been caught flat-footed as often as I seem to have been, but the experience was a good teacher. I learned that most of my surprises concerned facts and sets of circumstances that are quite common in our work place.

1. My biggest surprise was that people who held jobs that I assumed required a certain body of knowledge **did not always really understand those jobs**. That is, those in a position to know something may not in fact know it. For example, those who send us loan instructions may not understand that when those loan instructions forbid any deviation from their directions without subsequent written instruction, that is exactly what the instructions mean. We may be talking to someone who is unsophisticated or inexperienced, who just does not care, or who is working a notice. An oral OK to proceed contrary to written instructions will not do.

2. We all know that we cannot believe everything we hear, but we also **cannot always believe everything that we read**. Ink applied to paper does not create a fact. A set of loan instructions that has no details regarding fees to be paid to the bank very well could be in error in that regard. My rule is, if it doesn't look right, odds are it is not right. Read critically and if in doubt make a telephone call. I always document in some way the answer I receive.

3. Attorneys who do not involve themselves in real estate as a part of their practices **do not always understand real estate** law, just as I do not understand trademark and patent rules for example. (And, with all due respect, this sometimes includes judges.) In particular, they do not understand real estate closing procedures. Before I follow the advice of another attorney, I try to assure myself that knows what he is talking about. For example, be very careful regarding the opinion of some as to the necessary signatories to a deed conveying title to estate property.

4. Title insurance companies are not obligated to allow us to certify titles to them. In other words, they do not have to put you on their list of approved attorneys and, once there, they have absolutely no obligation to keep you there. They are generally too nice to tell us this, but we need to know this fact of life. Title insurance companies have a responsibility to their own shareholders and are in the business of making money. They do not enjoy paying claims for our mistakes. When we tell them something is so, they expect it to be the fact, and they may later hold us accountable for our representation. Remember, we are the companies' fiduciaries.

5. Malpractice insurance carriers do not have to cover us! There is no federal "bailout" plan if you lose your malpractice coverage. And if a malpractice carrier does cover you, they do not have to take into account your ability to pay the premium they set. They too have an understandable aversion to paying our claims, and will not tolerate it for long. This can be very inconvenient when we are asked by a lender to provide a copy of the endorsement page of your malpractice policy before they will send you a loan package. Most lenders now will deal only with covered attorneys.

For your own edification, call up a carrier different from your own and get a premium quote. You may be shocked.

VI. GOOD THINGS

In the environment I have described, there are many things I can do to help ME steer clear of the ethical pitfalls.

A. Amnesia Avoidance.

One way to keep ourselves clear of problems is to avoid assuming that people with whom we have dealt will later accurately recall our conversations. I call this is the "amnesia" problem. That is probably a little harsh, because again, people hear what they want to hear and they interpret ambiguities in their own favor. This is a primary reason why the attorney is well advised to, for example: (a) explain in detail all of the loan documents his clients are signing; later, after a borrower has complained at closing about the interest rate being two percent higher than that represented to him by his mortgage broker, the attorney will be able to testify that he has a strict procedure during which he always explains the interest rate and always makes copies of the documents for the client, even when they say they are in a hurry, or (b) explain in detail, and in this case perhaps express in writing, why the owner's title insurance policy the buyer has refused to purchase would protect him against a host of dangers against which there is no other protection.

B. <u>Recognizing Red Flags</u>.

The ability to recognize signs of trouble ahead is as important to the attorney working his way through a transaction as to a pilot who must keep an experienced eye on the weather. Some of the more common red flags I have seen follow.

1. A client may come to you **complaining about or who has recently fired his last attorney**. There may have indeed been some flaw in the first attorney's service that led to unhappiness. We all drop the ball sometimes. However, the individual or the institution now calling on you for assistance might also have been so unreasonable, pushy, arrogant or downright deceitful that the previous attorney could no longer tolerate him. I have found that if they were so before with another lawyer, they will likely be so with us and our staffs.

2. An **institution unfamiliar** to either you or your acquaintances probably is completely legitimate, but how do you know so? You have no points of reference with them. Raise your antennae extra high. This is particularly true now that some lending institutions are a bit short of cash. It is imperative now more than ever that we know a little bit about the institutions we are dealing with.

3. Big promises of forthcoming business, if we will just help them with this first deal, for a special price or for some other consideration, may blossom into something good, but generally lead to nothing but frustration.

4. Requests for a special low fee are of course a part of any business. We cannot blame someone for wanting to secure our services for the lowest possible fee, but they may not understand the degree of effort required to accomplish their goals. They may therefore also not understand why it takes so long to complete a task, or why we may be unavailable every time they call (when we are away at the courthouse working for them or doing the drafting work on their project).

5. The louder they yell, the ruder they are, the bigger the red flag. A little story about a top guy at one of the large financial companies now in dire financial straights is instructive. His company has now received billions in federal bailout and is far from out of the woods. This guy was the one of the inventors of a financial animal called "credit default swaps" (basically insurance policies protecting against the failure of a particular security). He was well known in his company for his screaming approach to subordinates who displeased him. His company's risk managers were therefore understandably reluctant to come to him with reports that the risks he was exposing their company to might not be prudent. The rest is history (well, history in the making anyway).

6. Be certain that requests for speedy work are reasonable and that they do not put you in the position of having to do something requiring more time or thought than the time allows. In the light of the unfolding financial distress, isn't it ironic that just a short while ago we attorneys were told that our tortoise-like pace of work was somehow stifling innovation and strangling efficiencies in the real estate finance world? How now, say you all?

S**peed, and the unreflective environment it generates,** has to be given a large measure of responsibility for the unhappy real estate world we now work in. Uncalled for speed has always killed in the practice of law as well as on the highway. We must allow ourselves the time to think things through. I am not aware of any studies that have concluded that the human brain

now processes information faster than in the past. Other information processing systems may have improved dramatically, but the mind is as plodding as ever.

7. Institutions that have **no "brick and mortar"** substance in your area, that operate only over vast distances via telephone lines or the internet are probably just fine and of no danger. Nonetheless, brick and mortar have always implied a commitment to continuity and permanence and reliability. At least they offer a proximity to you where there are human beings you can go see face to face if necessary.

8. Property values represented to you as being very different from those you would believe should be the case might represent an attempt to defraud a lender into lending more money on the property than its market value would justify. We are not appraisers and no one expects us to be such, but be sure there is no evidence in your files of a recent alternative valuation. Again, see yourself as the Gatekeeper.

9. Home-saver companies or foreclosure rescue specialists are a post Crash-of-'08 phenomenon, and many of these are nothing more than a new breed of swindler. You know how this goes. Homeowner is in financial trouble. "Scammer, LLC" claims in its TV commercials that it has helped thousands just like Homeowner and will save his house from foreclosure. Some of these companies have some pretty slick-looking web-sites. The nice man on the phone says his company can pay off your existing mortgage and arrange for a refinancing under better terms (for a fee that would make any of us blush, of course). There is an up front charge of between $1,000.00 and $3,000.00 to modify the loan terms for Homeowner.

We come in when Homeowner and Scammer, LLC come to us to effect some sort of "closing" that effectively converts Homeowner's equity into Scammer's profit and Homeowner's fee into a permanent leasehold. I am not sure how you do this, but before you allow this one by we've got to find some way to assure ourselves that Homeowner understands what he is doing, and that what he is doing is really in his best interests.

10. "Joint venture" arrangements have made me queasy since the first time I was asked to help form one. The obvious problem for us is to assure that two (or more) parties with possibly conflicting interests are adequately represented. If the joint venturers later fall out, one may attempt to sue us for failing to adequately apprise him of the risks or draft documents protecting his particular discreet interests.

11. **Elderly people** may need to raise cash by mortgaging their property when it was previously free and clear of liens. But we have to ask some questions when we see from the application that the payments are $750 per month and the borrower's sole income is a monthly social security check of $525.

C. <u>Credibility</u>

Establishing credibility cannot be underestimated. I believe that there is little I can do that will serve me as well as establishing credibility with my peers and business associates. Build good relationships by doing a good job day-in and day-out and by being one who can be trusted. Do not be someone your peers are afraid to turn their backs on, or about whom they believe they must reduce to writing everything oral representation you make. Even today, there remains much credit available to us if you are one who "lets her word be her bond".

And, when something goes wrong, and you need a hand, it will likely be there for you. At the very least we can rest easy in the knowledge that we have behaved with honor and dignity.

I have also noticed that those who have the reputation for "doing things the right way" are not generally the ones from whom work is requested by the more ethically and morally-challenged members of society. If a wheeler-dealer knows that my answer to him will be "no", he is not likely to ask me to begin with. Even the crooks will be straighter with me. I believe this is a great example of ethically "correct" conduct working directly in my own self-interest.

D. Community Awareness

There is no substitute for knowing what is going on in my local and professional community. I need to know who is doing what locally; who are the good guys and who are the bad guys. I need to know, now more than ever, what the big governmental and commercial institutions may be cooking up to drastically alter our professional landscapes. We have got to read the newspaper. We must talk to people. We need to know about business in our local community and not allow cable news to keep us distracted with the crisis of the day. A general awareness of your environment is also one of the best ways to know with whom we are working, and to know with whom we may not want to work. I cannot keep up with the game if I don't know the players.

E. Supervision

Proper supervision of staff is absolutely essential to our professional survival. (See *RPC 216, 2001 FEO 4, 2002 FEO 9* and the Bar's *Guidelines for Use of Non-Lawyers in Real Estate Practice.*) Staffers can make us and they can break us. Believe me, our clients will judge us as they judge our staffs. If our staffs are rude, incompetent or unhelpful, we will suffer the consequences of complaints, lost business and even malpractice. On the other hand, if they are professional, diligent, cheerful and competent my clients will love them, will enjoy coming to see me, and I will do a better job of serving clients. They will make me money not just by being efficient, but by being better than those who work in the other law offices my clients may encounter. Clients will be less likely to complain about my fees and much more relaxed and easy to work with when they enter my office. I believe the following are particularly important principles with regard to staff.

1. Hire as experienced a person as you can afford. If you cannot afford experience, at least hire someone who can read well, and who can spell. That's right, literacy is a problem in this country, and you will soon know what a problem it is if you make a bad hire. For example, someone has to read those loan instructions you receive, and someone has to put your words on paper for you. "Spell-check" will not always save them. (I once dictated a motion in a superior court action in which the word "validity" was to appear in the caption of my motion. I believe I speak fairly clearly, but when this document was typed my assistant had typed into my caption the word "virility". Words, schmurds; Spell-check recognized both words as proper. I had a bad habit then of not reading captions (because, I thought, who could get a caption wrong!) and only caught this in time by the grace of God.)

I have learned the hard way that a corollary to hiring experienced help is that I should run a criminal check on new hires. (Again, learn from me and don't hire someone only to have the

local police show up in your office the next day stating that they have just seen a car in your lot (her car) that has been reported stolen for some weeks. When I then checked my new assistant's name out down at the courthouse, I understood.)

2. We get what we inspect, not what we *e*xpect. Read staff's work product; it has your name on it and blaming errors on staff will get us nowhere. This is particularly applicable to deed descriptions. Don't give your imprimatur to a large commercial deed of trust your office drafted, only to later receive a call facetiously inquiring as to why you included in the body of the security agreement a lengthy bit of an at times obscene tirade addressed to someone's boyfriend, detailing assorted sexual and social grievances. (Thus the hazards of cut and paste while one multitasks.) Embarrassing.

3. Do not assume that a staffer knows more than (a) we have trained them to know and, (b) have confirmed that they do in fact know.

4. **Ask lots of questions**, be very specific (we can apologize later if they complain later that we were talking down to them) and listen skeptically to the answers we receive. Apply the truth test liberally. (My own experience provides a good example of a failure in this regard. I had just hired an assistant, on someone's recommendation, only to discover that her computer skills were not great. In my own example, I cheerfully pointed my new person to the computer and asked her to pull up the such and such folder for me from the desktop menu only to be told, "Lord, Mr. Ferguson, I've hardly seen one of these things before".) My bad, but what a sinking, horrifying feeling.

5. In a real estate practice, our staffs will routinely handle large numbers that represent large amounts of dollars. We have to be absolutely certain that staff **make the connection between numbers** manipulated within the computer **and real money.** Yes, I have discovered that, unbelievable as this sounds, when people are not personally responsible for the handling of money, they may not make this connection. (When your closing assistant walks into your office five days after you paid off a $350,000 mortgage, and cheerfully informs you that "the bank just called on the Johnson closing and said our payoff was short ten days interest, and they need a check by 2:00 P.M. today in the amount of $671.23 or they are going to send back your check", you know that the connection has not been made between the numbers and our wallets.) Routine is our enemy here, because staff handles so much paper and so many details so quickly that the papers and the numbers assume some kind of abstract reality of their own. Assistants must understand deep down that these numbers are real and represent real dollars that must come out of our pockets if their disposition is bungled.

6. With regard to the flow of money into and out of your office, here are several things I have learned.

(a) **When we disburse money, check one more time** to be certain that the money coming into our account equals the total amount of the checks we are writing on our trust account. Again, we can blame the staff for an error, but we will have to pay for it. (See *Chapter 45A* of the *North Carolina General Statutes* and *RPC 191*.)

(b) Be certain that the **checks we write are being sent out or picked up** in a timely way. Often folks who are being paid at closing will come by to pick up those checks personally. We have to be certain our people know who is coming by and who wants their check mailed. Do not allow them to place on the receptionist's desk for pickup a $75,000 check going to some company in Texas which doesn't even have a

representative in your town. Big companies sometimes do not realize for several months that they have not yet received a check for a sale in distant North Carolina. However, when they do they likely will ask us to pick up the interest for those several months.

(c) Be sure your **property tax payment and payoff checks** are sent out immediately. With payoffs the clock is running every day. Time equals money, and there is no forgiveness for tardiness, whatever the reason.

(d) **Do not allow others to sign your name on checks**. I know this is done (with ink stamps and otherwise), but doing so takes away some of your control over where the money goes.

(See The North Carolina State Bar's Trust Account Handbook.)

F. Sound Practices

There are a number of practice habits and procedures I have discovered over the years that have helped me to provide better client service, that have made my operations smoother, and have given me greater peace of mind. Incorporating these into my professional life has given me a better chance to achieve a higher standard.

1. Knowing How to Check Titles Ourselves. I know that many competent attorneys employ paralegals to perform the information gathering part of the title abstracting job. The proliferation of independent paralegals across the state has made it possible to find someone to do the work in nearly any county in the state. Nonetheless, we are required by state bar rules to supervise anyone who is doing work for us. I do not see how this can be done if I do not know how to do the job myself from start to finish. I believe that supervision in the context of title abstracting includes an understanding of the process our agents are working through and our ability to understand the documents and reports they present. And, as unbelievable as this might sound, there are differences and nuances from county system to county system--and there are 100 counties in North Carolina.

The situation in which a real estate attorney finds himself is similar to that of a pilot. Each has been trained to work the controls of his "machine" so that he can safely "fly"--law school has trained us in the nuts and bolts of the law and has trained us to think and analyze. To fly an airplane a pilot does not absolutely have to know how the systems work, he has only to know as a minimum how to activate and coordinate his craft's controls. Some of you may have heard of the American WWII, Korean War, and Vietnam War fighter pilot, and test pilot, Chuck Yeager. He gave much of the credit for his survival in combat and in testing state of the art aircraft to his in-depth knowledge of the mechanical systems of the planes he was flying. This gave him a sort of sixth sense, allowing him to both detect problems before they became uncorrectable and to correct serious problems before they had fatal consequences for him. He credited this "extra" knowledge with saving his life on several occasions. (See RPC 216.)

In the same way, to survive in practice for any length of time and to work competently, you must understand the mechanics of indexing, filing, docketing, tax listing and so forth. (For example, what are the indexing standards for grantors and grantees in effect in the office of the register of deeds in the county in which you are working?) There is no way we can do this unless we have learned to perform the task of title examination ourselves, from the initial receipt of a request, to the final opinion on title. If you are questioning someone who has abstracted a title for

you, how otherwise are you to know if they are providing accurate answers to our questions? A further benefit to a knowledge of the mechanics of the process is that you will become friends with the staff of the offices of the Register of Deeds and the Clerk of Superior Court. Treat them as friends. They will help you in times of need. When you need questions answered or need to get in to see an assistant clerk regarding a troublesome estate, for example, they will be much more likely to be there for you. They may even telephone you to correct an error before it has gone too far to be called back.

2. Serve One Master. This is really old agency law, but I am forever amazed at how often conflicts of interest arise. If we will ask ourselves the question, "Whom am I serving by performing this or that act?" many other ethical issues will begin to resolve themselves. So why do I see trustees advocating for lenders at foreclosure hearings? And why have I seen a residential sale where the attorney is acting as both the attorney and as the selling real estate agent, collecting a commission from the seller!?

3. Ask Questions. Remember what I said earlier about people respecting us for our intelligence and education? The down side of that is that they will sometimes assume that we know more than we do. For example, if we do not understand loan instruction, telephone someone at the lender and ask what the troublesome instruction means.

Go up the chain of supervision until you get an answer. Always remember that if we don't understand something, it probably either isn't very clearly written, or is intended to be obtuse. (And a caveat, instructions to us are at times intentionally ambiguous.) Have we not had the Wall Street example of unintelligible documents and agreements rubbed into our faces over the past months!? One of the lessons from the fiasco, we are told, is never to invest in something we don't understand. Well, the same goes for material we are asked to pass on. This has particular pertinence when we are asked to render an Attorney's Opinion of a package of loan documents. Any of you who have closed "conduit loans", for example, will know what I am talking about.

If you cannot get a satisfactory answer, ask to speak with the legal department of the lender. They <u>will</u> see that you get an answer. If there is no legal department, then, "May I speak to the President of the company, please." I'm serious. You would be surprised how effective this can be. Persevere until you get the answer you need. Do not let an ambiguity place on you a burden of decision that should not be yours.

4. The "Smell Test" is always of value. Trust your instincts. If something stinks, there is probably rot there. What a different economy we would be experiencing right now if more of us had smelled the rats within the easy money and liberal loan terms of recent years.

5. Take Care with Loan Payoffs, both before you preside at the closing meeting and after you have completed the execution and recording of closing documents. The buyer, the seller, the new lender and the lender we are paying off will each hold us personally responsible for seeing that an amount of money sufficient to the penny to satisfy an outstanding obligation reaches the "paid off" mortgage company.

This can be a tricky and exasperating process at several levels.

(a) When you have finally identified the company whose loan is to be satisfied, and have requested a payoff, be certain that that **payoff statement arrives in your office in writing**, and that it is arriving from the company that actually holds the note. Do not settle for a writing from the mortgage broker, the seller, or the real estate agent. This is a

big problem for your staff to grasp because time is so imperative to them. Their initial tendency is to get some kind of payoff and move on.

(b) Be certain your **payoff goes out immediately** after recording. Time equals money. Again, staff does not always realize this, and if we are late with a payoff, well a gracious seller may cover it, but if the tardiness lies at the feet of our office, we pay.

(c) Be certain your **payoff does indeed arrive** at its destination. The best way to do this is to either hand-deliver the check to the bank, if it is local, or use an express, next day delivery service that provides a receipt for delivery and has an easily checkable on-line delivery reporting system. We absolutely must be able to trace the route of payoff checks.

(d) **Do not allow clients to carry payoffs** of their own loans to the bank. We will have a problem if the following occurred. Our client purchases Lot 5 from a builder who owns, let's say, lots 1 through 10. After the closing, you cut a check to pay off the builder's construction loan on Lot 5, and, at his request, gave him the check to take to his bank. There, he presented the bank with the check and his request to apply the check to Lot 7. The bank duly honors his request and applies your check to Lot 7. (The builder is the bank's customer and the bank will likely apply a check he presents as he directs.)

(e) Take particular care with **equity lines of credit**. Be certain that your seller has requested the closing of his account and the satisfaction of the instrument you just paid down to zero. Otherwise, you are at risk that the seller's lender will allow him to draw the full amount of the equity line, which is now of course a lien against the buyer's title you have just certified as lien free. (See FEO 5 and N.C.G.S. 45-81(c)

(f) From time to time, we are likely to hear some complaining about our insistence that we **supervise the delivery of our own checks**. Generally this occurs in something like the following scenario. You have finished a transaction around midday, and finally may disburse at, let's say, 1:45 P. M. (Daily credit for loan payments received usually cuts off at 2:00 P. M.) It is Friday, and Monday may be a bank holiday. In other words, interest will continue to accrue on the loan until Tuesday morning! It's not your fault everyone wanted to close at an hour when it was impossible for you to disburse so that the payoff check could reach the bank by 2:00, but you may get the heat if you don't hand that check over.

6. Real Money. What a problem for us, now complicated by the shaky finances of some mortgage lenders. When you believe that you have loan proceeds in your possession sufficient to close a transaction and consistent with the amount specified in your loan instructions, be sure that whatever you have is **"real" money** that your bank will in fact credit you your account. The North Carolina Good Funds Settlement Act (N.C.G.S. Chapter 45) specifies what constitutes real money.

Of course, loan proceeds very often arrive in our trust accounts via a wire transfer from the lender. You must be positive beyond doubt, willing to bet the amount of those loan proceeds, payable from your personal resources, that the funds are indeed there. Do this by arranging to obtain from your bank some sort of immediate written confirmation of the receipt of a wire transfer in your trust account. Most commercial banks have an on-line facility that will accomplish this for you, either electronically or by fax. Do not ever accept an oral assurance from anyone that the money is there. Again, someone may become upset with you about questioning their word, but ask yourself: would they take your word that you had sent them say

$300,000.00 and in turn disburse from their account based upon your representation? Of course not.

7. The Trust Account. We all know that touching our trust accounts for any purpose other than disbursements for clients and fiduciaries is the "third rail" of real estate practice: instant and spectacular professional death, often with the entire community looking on. Follow the State Bar rules to the letter. Trust accounts are repositories of other people's money and it is disgraceful to mishandle sums on deposit with you. Account for funds there and send the funds to the parties to whom they belong, always.

8. Notaries Public. In most law offices, either you or someone in your office will be a notary public. Never acknowledge any signature that you have not been a witness to. Never allow staff to acknowledge any signature to which they have not been a witness. The ramifications of false acknowledgement are dire. I promise that you will be asked to do this and, in fact, you will be leaned on to do this. (Not long ago, a real estate agent brought several deeds by our office, handed them to one of our people, and turned to leave. I quickly flipped to the first acknowledgement page and noticed that there was no acknowledgement. I trotted through the door, hailed the agent and noted to her that the documents were not acknowledged. "Oh", she said, a little sarcastically, "I thought you would have a notary in your office." (I resisted the urge to remark that I guess we are not a "full-service" outfit.)

Make it a habit to acknowledge only when we witness and they will soon stop asking otherwise. And remember, an attorney acting as notary must follow the law regarding acknowledgments. (See Chapter N.C.G.S. Chapter 10B and 2000 FEO 8)

9. Engagement Letters. Even in the most mundane residential transaction, an engagement letter specifying exactly who the lawyer represents and what she will and will not be responsible for so clears the air. See my comments above regarding amnesia.

10. Patience. Be patient with others and with yourselves. I consider it high praise to be complimented for being professionally patient with others. When I hear this, I believe I have brought compassion and a willingness to help to the transaction. Give ourselves time to think and to be resourceful. Remember what I said earlier about the human thinking process being no speedier than it has been for thousands of years. Hold your temper, hard as that may at times be. We will make fewer enemies that way.

11. Manners. As our mothers always told us, good manners and kindness will take us places nothing else can. (Even if we are incompetent, we will get credit for being a "nice guy" who is struggling to do the right thing!)

12. **Sound Office Procedures.** Develop and use with office procedures. See the above regarding payoffs and notary acknowledgments. When something goes wrong we have add credibility to our explanations if we can point to a correct procedure we always employ when performing some task. A third party may tend to believe you when weighing the conflicting statements of two individuals. And, we won't have to think quite as much. Our procedures will take over in times of stress.

G. Knowledge of Our Limitations

Go ahead and accept (and find some self-deprecating humor in) the fact that we can never know it all, that we will fail from time to time, and that we can be wrong occasionally. This is so hard for me to do. We have all of this schooling, we have all been successful to this point in life, but will we always be undefeated? None of the great athletic teams have ever won all of their games. No pitcher ever strikes out everybody; no hitter ever bats 1000.

We cannot know it all and we cannot do it all. One of my late partners told me years ago that "the more we do, the more we will be asked to do". That's great when we are getting started, as we may have nothing yet to keep us occupied. But you can see that with the immutable limits to a day being twenty-four hours, and the requirements for rest and sustenance fixed by biology, you can only do so much. We have to somehow discover where our limits are and work within them. None of us is Superman. Learn when enough is enough because our bodies and our minds have their limits. I now know of too many situations where attorneys who have been unable to walk away from business, unable to say "no", have finally professionally and even physically collapsed. One poor comrade stated to me that "I am relieved that it is finally all over." Resist the temptation of becoming a martyr to your own cause, always sacrificing to the detriment of everything and everyone else. Our clients will not cease doing business just because you are physically or legally unable to continue; they will move on down the street to the next office.

VI. SOUND ATTITUDES.

I will close with a few words regarding perspectives I see as components of a kind of "daily shield" against ethical adversity, protecting me against errors in judgment, and against the temptation to put my own self-interest above that of my clients.

1. Above all I must be **honest with myself** and others to recognize the right path to take when confronted with options. In a busy practice, every day may contain ethical challenges. Many people I will deal with have ethical muscles that, let's just say, have withered from lack of use. They will challenge me in making the proper choices.

2. Always remember that **thought takes time**. When I began practicing, I was shocked that I was often asked to come to quick conclusions regarding matters I considered complex and nuanced in their details. Again, ours is at its foundation an intellectual pursuit. Non-attorneys often do not understand that the answers to all of the questions lawyers are asked are not contained in some priestly book to which only we have access. This profession remains at bottom intellectually grounded, despite the blizzard of documents and forms that seem sometimes to entirely compose the practice. Contemplation and review of facts and issues are not always strait-line processes. I need time to sort things out and let the details germinate a little. A collateral benefit is that our deliberations may also allow other parties to a transaction to more fully consider their best course of action, smoothing out some of the bumps for you.

3. One caveat comes to mind here. When we are asked questions that are difficult to answer, our instincts automatically kick on and tell us to proceed with caution. Of course we need time to analyze and come to the best solution to a problem. But do **not procrastinate**. Lawyers are regularly accused of delay, and I have been guilty of my own share, but I have to be aware

that undue delay is a problem and serves neither me nor my client. Do come to a decision and put the problem to rest. Move on.

4. I must have the **courage** to take the correct path when I see it, even though it may cost me business or fee when I may really need it. Be prepared when necessary to "just say no", politely and firmly, with humor if you can. I have to remember that every time I disregard my ethical compass, I am effectively giving someone a "mortgage" on my future, or on my license, which matures upon their needing some additional favor from me.

5. Trusting myself. I know that most of us are intelligent, and that we are trained to understand how the system is supposed to work. I have learned that our instincts are nearly always correct, until we impair them with deception or self-interest.

6. Because we know how the law is supposed to work, we must employ a healthy portion of **skepticism** when analyzing information delivered to us orally and in writing. With the explosion of information today threatening to inundate us all, it has never been truer that we cannot believe all that we hear or read. (Weren't real estate prices supposed to continue increasing forever?) We must be a rapt observer of human nature to grope our way through to the "truth" to the facts of a matter.

7. From time to time, we may be a source of frustration to some folks. If we have, on that rare occasion erred, we have to own up to it and get it over with. If we made no mistake, don't do what I have sometimes done and pule and equivocate; tell your accuser to look elsewhere if they are in the fault business. Whatever the case, **do not tolerate rudeness and disrespect** directed toward you or your staff. This is corrosive to you personally and is very hard on your staff. In our business, staff burnout is a big enough problem without allowing abusive and unwarranted behavior to be directed at your assistants. They will look to you to protect them.

8. Be a good listener, and when you listen and respond, do so with **humility**. As is the case with good manners, this will pay dividends you cannot earn by any other means. Despite all that we hear about lawyer jokes and public attitudes regarding our profession, I have found that most lay people expect us to have an extra measure of dignity and believe we are possessed of powers beyond their own. Folks appreciate a little humility in return.

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