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Austin: Doe v. McMaster and the Lawyer's Role in Real Estate Transactions
**DOE V. MCMASTER AND THE LAWYER'S ROLE IN
REAL ESTATE TRANSACTIONS**

I. INTRODUCTION

Economic pressure to close real estate loans in a cost-effective manner has caused both lawyers and lenders to seek ways to minimize the expense of legal services. Some of these efforts, however, collide with legal and ethical requirements that mandate a lawyer's involvement in the transactions. South Carolina courts have made it clear that an attorney must supervise several stages of the real estate transaction and be present at the closing.¹ The required extent of the lawyer's involvement at each stage has, until recently, been less clear. Recent cases have shed some light on who must have legal counsel and on what is meant by being "present" at a closing.² There are still some situations, however, in which it is not clear whether the court would approve of the transaction.

The issue of unauthorized practice of law in real estate closings is gaining national prominence. Many jurisdictions have pondered the topic, and most courts have been less hostile to the idea of nonlawyers conducting real estate closings than the courts of South Carolina.³ Some states have passed legislation barring laypersons from conducting real estate closings, although such efforts have drawn negative attention from federal agencies, including the Federal Trade Commission and the Antitrust Division of the United States Department of Justice.⁴

South Carolina continues to require the presence of an attorney at real estate closings through statutes, disciplinary rules, and case law. One of the most recent South Carolina cases dealing with this issue is *Doe v. McMaster*.⁵ This decision further elaborated on the role of lawyers and laypersons in real estate transactions,

1. See *infra* Part II.

2. See *infra* Parts III–IV.

3. See *Countrywide Home Loans, Inc. v. Ky. Bar Ass'n*, 113 S.W.3d 105, 128 (Ky. 2003) (holding that nonlawyers may conduct real estate closings but may not answer legal questions concerning the closing or provide legal guidance to the parties); *Fears v. Va. State Bar*, No. LE-1283-3, 2000 WL 249247, at *11 (Va. Cir. Ct. Mar. 1, 2000) (acknowledging legislation "authorizing certain qualified nonlawyers . . . to provide escrow, closing and settlement services in transactions involving the purchase and financing of real estate containing not more than four residential dwelling units"); In re Opinion 26 of Comm. on Unauthorized Practice of Law, 654 A.2d 1344, 1361 (N.J. 1995) (holding that closings may be conducted without separate counsel for each of the parties as long as they are "made aware of the conflicting interests of brokers and title companies in these matters and of the general risks involved in not being represented by counsel").

4. See generally John Gibeaut, *Real Estate Closing Tussle in Tarheel State*, 1 A.B.A. J. 7 (Jan. 25, 2002) (discussing the FTC and DOJ's response to two recent bar ethics opinions concerning lawyers' involvement in real estate closings).

5. 355 S.C. 306, 585 S.E.2d 773 (2003).

addressing the difference between initial financing transactions and refinancing transactions, the supervision of the title search process, and the party that the handling attorney is required to represent.⁶

In re Lester,⁷ a case decided since the *Doe v. McMaster* decision, separately addressed the requirement of a lawyer's presence at a closing, specifying that it is not sufficient merely for a lawyer to be available if needed at the closing. This Note examines the lawyer's role in real estate transactions in light of both decisions. Part II of this Note considers the statutes, rules, and cases that preceded the *Doe v. McMaster* opinion. Part III discusses the issues addressed by the *Doe v. McMaster* case. Part IV details the issues raised by *In re Lester* and future potential developments.

II. HISTORY

The South Carolina Constitution provides the Supreme Court of South Carolina with the duty of regulating the practice of law in South Carolina.⁸ In 1980, the state supreme court addressed the unauthorized practice of law in real estate transactions in *In re Easler*.⁹ The court held that a layperson who prepares, executes, and files a deed for another engages in the unauthorized practice of law unless the final work product is "subject to the approval of a licensed attorney before recordation or . . . the parties to the deed conferred with a licensed attorney concerning the deed."¹⁰

Subsequently, in *State v. Buyers Service Co.*,¹¹ the court held that a title company engaged in the unauthorized practice of law when it provided title information, prepared loan documents, conducted closings, and transferred documents as part of a real estate transaction without the supervision of an attorney.¹² The court emphasized the importance of lawyers supervising real estate and mortgage closings and expressed a deep concern for the protection of consumers in these transactions.¹³

In response to these and other decisions, in 1991 the Unauthorized Practice of Law Committee of the South Carolina Bar submitted to the Supreme Court of South Carolina a set of proposed rules governing the unauthorized practice of law.¹⁴ The proposed rules attempted "to define and delineate the practice of law, and to

6. *Id.*

7. 353 S.C. 246, 578 S.E.2d 7 (2003).

8. S.C. CONST. art. V, § 4. *See also* S.C. CODE ANN. § 40-5-10 (West 2001) (recognizing the "inherent power of the Supreme Court with respect to regulating the practice of law").

9. 275 S.C. 400, 272 S.E.2d 32 (1980).

10. *Id.* at 402, 272 S.E.2d at 33.

11. 292 S.C. 426, 357 S.E.2d 15 (1987).

12. *Id.* *See also* S.C. CODE ANN. § 40-5-320 (West 2001) (strictly prohibiting corporations from practicing law).

13. 292 S.C. 434, 357 S.E.2d at 19.

14. *In re* Unauthorized Practice of Law Rules Proposed by the S.C. Bar, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992).

establish clear guidelines so that professionals other than attorneys can ensure they do not inadvertently engage in the practice of law.”¹⁵ The supreme court declined to adopt the rules and stated that what is and what is not the unauthorized practice of law should be decided in the context of individual cases.¹⁶

On several occasions, the supreme court has publicly reprimanded an attorney who facilitated the unauthorized practice of law in violation of the Rules of Professional Conduct, specifically Rule 5.5 of South Carolina Appellate Court Rule 407, by allowing laypersons to conduct closings without an attorney present.¹⁷ These decisions provide a backdrop for the issues raised in *Doe v. McMaster*.

III. *DOE V. MCMASTER*

A. Background

In *Doe v. McMaster*, a lawyer, John Doe, petitioned the Supreme Court of South Carolina in its original jurisdiction to provide a declaratory judgment as to whether his involvement in certain real estate transactions amounted to assisting a nonlawyer in the unauthorized practice of law in violation of Rule 5.5(b) of South Carolina Appellate Court Rule 407.¹⁸ The court granted the petition and heard the case as *Doe v. Condon* on May 16, 2002; it issued a decision on August 5, 2002.¹⁹ The court then reheard the case as *Doe v. McMaster* on April 2, 2003 and issued a new decision, with only minor changes, on August 18, 2003.²⁰

In the typical transaction at issue in *Doe v. McMaster*, a borrower would contract with a lender to “refinance an existing first mortgage loan previously obtained from the same [l]ender.”²¹ The lender would then notify a title insurance company about the transaction and provide it with information about the borrower.²²

15. *Id.*

16. *Id.* See also Candy M. Kern-Fuller, Note, *Lawyers Beware—This Unauthorized-Practice-of-Law Case May Affect You!*, 53 S.C. L. REV. 661 (2002) (discussing the proposed rules and several unauthorized practice of law cases in the context of a 2000 court decision in which the Supreme Court of South Carolina held that a paralegal may not conduct legal education seminars for the general public without an attorney present, that a nonlawyer may not meet privately with clients in a law office and answer questions without an attorney present, and that a law firm may not share profits with a paralegal based on the volume and types of cases handled).

17. See *In re Edens*, 344 S.C. 394, 544 S.E.2d 627 (2001) (publicly reprimanding an attorney for allowing his office manager to conduct refinancing closings in his absence); *In re Konohia*, 346 S.C. 2, 550 S.E.2d 318 (2001) (suspending an attorney for allowing a paralegal to close real estate transactions in his absence, among other misconduct); *In re Reeve*, 335 S.C. 169, 516 S.E.2d 200 (1999) (reprimanding an attorney publicly who collected attorney’s fees in connection with three real estate closings at which he was not present).

18. 355 S.C. 306, 309, 585 S.E.2d 773, 774 (2003).

19. 351 S.C. 158, 568 S.E.2d 356 (2002).

20. *McMaster*, 355 S.C. at 306, 585 S.E.2d at 773.

21. *Id.* at 309, 585 S.E.2d at 774.

22. *Id.*

The title insurance company would hire an independent contractor to perform a title search, after which the company would prepare a title commitment for the lender.²³ The title company would then order the “pay-off of [the] existing mortgage” and the “endorsement for [the] [b]orrower’s existing homeowners insurance policy, if requested by [the] [l]ender.”²⁴

The lender would “prepar[e] loan documents including a set of instructions, a note and mortgage, [a] Truth-in-Lending Statement, [a] HUD-1 settlement statement, [and] miscellaneous affidavits regarding employment” and then give the documents to Doe.²⁵ Doe would review the loan documents and title commitment, make any required changes, and then meet with the borrower “to explain [the] legal ramifications of [the] loan documents and answer any questions [the] [b]orrower may have regarding the documents or the refinancing process.”²⁶ Doe would “supervis[e] [t]he execution of [the] loan documents” and send them to the title insurance company with “specific instructions regarding how, when and where to satisfy the existing mortgage and to record the new mortgage.”²⁷ Doe would also “authoriz[e] the disbursement of funds if the [b]orrower [did] not rescind” the transaction.²⁸

The title company would then satisfy the existing mortgage, transfer the new mortgage for recording, and pay out funds in accordance with the HUD-1 settlement statement.²⁹ The lender or the title insurance company would “transmi[t] documents evidencing the satisfaction of the paid-off mortgage to the Register of Deeds for recording,” and then the title company would “issu[e] [a] final title insurance policy to the lender.”³⁰ Doe would collect a fee for representing the borrower that was consistent with the fee typically charged in a South Carolina refinance transaction.³¹

B. Discussion

The supreme court concluded that Doe’s business association was not the unauthorized practice of law as long as the association was conducted as prescribed in the opinion.³² *Doe v. McMaster* is the Supreme Court of South Carolina’s latest attempt to clarify what is required of an attorney involved in a real estate closing. In both *State v. Buyers Service Co.* and *Doe v. McMaster*, the court discussed the purchase of residential real estate and the refinancing of residential real estate in four distinct steps: (1) the title search; (2) the preparation of loan documents; (3)

23. *Id.* at 309, 585 S.E.2d at 774–75.

24. *Id.* at 309–10, 585 S.E.2d at 775.

25. *Id.* at 310, 585 S.E.2d at 775.

26. *Doe v. McMaster*, 355 S.C. 306, 310, 585 S.E.2d 773, 775 (2003).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 311, 585 S.E.2d at 775.

32. *Doe v. McMaster*, 355 S.C. 306, 316, 585 S.E.2d 773, 778 (2003).

the closing; and (4) the recording of the title and mortgage.³³

At first, Doe tried to distinguish his case from *Buyers Service* on the ground that his case involved refinancing an existing mortgage, while *Buyers Service* involved the purchase of new property.³⁴ The court rejected this argument and emphasized that the standards are the same for the refinancing and purchasing of property.³⁵

With respect to the title search, Doe argued that the title company “has a right to furnish title because it is incidental to its business.”³⁶ However, in accordance with *Buyers Service*, the court held that “because the ‘examination of titles requires expert legal knowledge and skill,’” the search must be conducted under the supervision of a licensed attorney.³⁷

Although in Doe’s scenario he would serve in some supervisory capacity by looking over the title commitment, the court made it clear that an attorney looking over the title commitment is not sufficient to satisfy the requirement of attorney supervision of this process.³⁸ However, it is doubtful that the court meant to require a lawyer to go down to the courthouse and supervise the title search process. Rather, the requirements of *Doe* would appear to be satisfied if the attorney reviews the title abstract to ensure the accuracy of the title commitment.³⁹ The reasoning for this requirement was best explained in the *Buyers Service* decision, in which the court stated that although a “buyer does not see the title abstract, he nevertheless relies upon it to determine if he receives good, marketable title.”⁴⁰

The court identified the preparation of loan documents as the second phase of the real estate transaction. After *Buyers Service*, it was clear that a third-party nonlawyer could not prepare documents on behalf of the parties to a real estate transaction.⁴¹ Doe argued, however, that the lender has a right to prepare its own loan documents when it is a party.⁴² The court disagreed, stating that corporations do not have the same rights as individuals to appear *pro se* in all instances.⁴³ The court relied on both a statute which forbids corporations to practice law on behalf of others and a case which explicitly rejects a corporation’s ability to appear *pro se*

33. *Id.* at 312, 585 S.E.2d at 776; *State v. Buyers Serv. Co.*, 292 S.C. 426, 430–34, 357 S.E.2d 15, 17–19 (1987).

34. *McMaster*, 355 S.C. at 312, 585 S.E.2d at 776.

35. *Id.*

36. *Id.* at 312, 585 S.E.2d at 776.

37. *Id.* at 313, 585 S.E.2d at 776 (quoting *Buyers Serv.*, 292 S.C. at 432, 357 S.E.2d at 18).

38. *Id.*

39. See also *Ex parte Watson*, No. 25757, 2003 WL 22843587 (S.C. Dec. 1, 2003) (holding that if a licensed attorney reviews the title abstractor’s report and vouches for its legal sufficiency by signing the report, the title abstractor will not be engaged in the unauthorized practice of law).

40. *Buyers Serv.*, 292 S.C. at 432, 357 S.E.2d at 18.

41. *Id.* at 431, 357 S.E.2d at 18.

42. *McMaster*, 355 S.C. at 313, 585 S.E.2d at 776.

43. *Id.* at 313, 585 S.E.2d at 776–77.

in a state circuit or appellate court,⁴⁴ and applied this restriction on a corporation's ability to litigate on its own behalf to document preparation in a transactional setting.⁴⁵

This principle, if logically extended beyond loan documentation, could have significant ramifications on commercial transactions. The court has never previously suggested that it would prohibit companies from drafting their own documents, including documents governing relationships with others, such as employee handbooks and other business contracts. Although it is unlikely that the court intended *Doe* to have such a far-reaching effect, it is now less clear when a business may draft its own documents for use in dealing with customers.

Although the court in part couched its limitation on the drafting of loan documents in terms of a bar on the lender acting *pro se*, it also wrote of the need for "independent" counsel.⁴⁶ The court did not define the term "independent," but the context of the opinion suggests the court was particularly concerned with the potential harm to an unrepresented borrower dealing with a well-counseled lender. The real concern may not have been the issue of whether the lender could act *pro se* but with whether the borrower should have legal counsel.

Although the court rejected *Doe's pro se* argument, it differentiated between *Doe v. McMaster* and *Buyers Service* on the grounds that *Doe* would review all of the documents and correct them, if needed, to ensure their compliance with the law.⁴⁷ In the proposed scenario, *Doe* would provide adequate supervision by an attorney, and there would be no unauthorized practice of law in regard to the preparation of loan documents.⁴⁸

When dealing with the closing aspect of the transaction, the court differentiated *Doe's* case from *Buyers Service* because an attorney was "actively involved in the closing" and was available to answer any questions from the buyer.⁴⁹ Again, the court emphasized that the attorney involved in the closing must be an "independent" attorney, apparently meaning a lawyer unassociated with the lender to protect the adverse interests of each party. The rationale behind this limitation is that "adverse interests in real estate transactions make it extremely difficult for the attorney to maintain a proper professional posture toward each party."⁵⁰ In order to prevent overreaching by the lender, an attorney representing the borrower must be present. The court concluded that *Doe* met these standards because he was not an employee of the title company; rather, he would be chosen from a list of attorneys provided

44. *Id.* (citing S.C. CODE ANN. § 40-5-320 (Law. Co-op. 1976); Renaissance Enters, Inc. v. Summit Teleservices, Inc., 334 S.C. 649, 515 S.E.2d 257 (1999)).

45. *Id.* at 314, 585 S.E.2d at 777.

46. *Id.* at 314-15, 585 S.E.2d at 777.

47. *Id.* at 314, 585 S.E.2d at 777.

48. *Doe v. McMaster*, 355 S.C. 306, 314, 585 S.E.2d 773, 777 (2003).

49. *Id.*

50. *Id.* at 315, 585 S.E.2d at 777 (quoting *State v. Buyers Serv. Co.*, 292 S.C. 426, 431-32, 357 S.E.2d 15, 18 (1987)).

by the lender to the borrower.⁵¹ However, Doe must give “full disclosure of his role to both parties and obtain[] consent” to participate in the closing.⁵²

Finally, the court stated that Doe’s instructions, written on the loan documents that he would forward to the title company, would constitute sufficient attorney supervision over the recordation process.⁵³ The court therefore held that under the circumstances outlined in the opinion, Doe’s business association would not constitute the unauthorized practice of law.⁵⁴

IV. THE DEFINITION OF “PRESENCE” AND THE FUTURE OF REAL ESTATE TRANSACTIONS IN SOUTH CAROLINA

The court in *Doe v. McMaster* affirmed other previous decisions by requiring that an attorney be present at the closing to conduct the transaction and “answer[] any questions the buyer may have.”⁵⁵ However, *Doe v. McMaster* went a step further by indicating that the attorney present must be the borrower’s representative.⁵⁶ In the 2003 *In re Lester* decision, the court elucidated this “presence” requirement by finding it insufficient for a layperson to conduct the closing while the handling attorney was merely accessible by telephone or while other attorneys were available in the office.⁵⁷ The court held that either “[the respondent] or another licensed attorney should have been *physically* present to conduct the actual real estate transactions and closings.”⁵⁸

One practice not specifically addressed by the court thus far is the extent to which a lawyer may advise a client or supervise a closing by electronic means. Modern technology allows lawyers to be electronically present for depositions or court hearings. When the lawyer is “virtually” present at a closing, with the ability for the lawyer and client to communicate in real time, the borrower would still be free to ask any questions related to the transaction. The concern for the borrower’s protection from overreaching by the lender would be nonexistent, as the borrower would still be represented by an independent attorney.

Nevertheless, doubt remains as to the legal viability of this option, given the court’s specific mandate that a lawyer be “physically present” at closing. A literal reading of the physical presence requirement as precluding virtual presence may

51. *Id.*

52. *Id.* at 315, 585 S.E.2d at 778.

53. *Id.* at 316, 585 S.E.2d at 778.

54. *Doe v. McMaster*, 355 S.C. 306, 316, 585 S.E.2d 773, 778 (2003).

55. *Id.* at 314, 585 S.E.2d 777.

56. *Id.* at 315, 585 S.E.2d at 777 (“[A]dverse interests in real estate transactions make it extremely difficult for the attorney to maintain a proper professional posture toward each party.”).

57. *In re Lester*, 353 S.C. 246, 247, 578 S.E.2d 7, 7 (2003).

58. *Id.* (emphasis added) *See also In re Pstrak* 357 S.C. 1, 4, 591 S.E.2d 623, 625 (2004) (holding that different attorneys may supervise different parts of the real estate transaction but each has a responsibility to see that another attorney has been involved in all other aspects of the transaction requiring attorney participation).

have a significant impact upon South Carolina real estate transactions involving out-of-state buyers or sellers. For example, an out-of-state buyer who wants to purchase or refinance property (such as a summer home) in South Carolina may retain a member of the South Carolina Bar to handle the transaction. A literal reading of *Lester* would suggest that either the purchaser must come to the state to be present with the lawyer at the closing or the attorney must go to the purchaser's location to conduct the closing. If the lawyer must be physically present when all the parties are within the state, should it matter that a client lives, instead, in New York? It is a question that remains unanswered for now.

The Professional Responsibility Committee of the South Carolina Bar has drafted a new rule in response to confusion among the bar as to the obligations of attorneys in these situations. A draft proposed on August 29, 2003 states that "[n]otwithstanding any other provision of these Rules, when any client is physically present at a real estate closing, an attorney responsible for the closing shall also be physically present with that client throughout the closing."⁵⁹ Comments appended to the proposed rule state that presence through video conference or teleconference is sufficient and if the client is unable to be present at the closing, the attorney may explain the documents in writing and obtain the client's informed consent in writing prior to the closing.⁶⁰ The latter proposal, however, has not been formally submitted to the supreme court.

V. CONCLUSION

The Supreme Court of South Carolina has made it clear that the unauthorized practice of law in the context of real estate closings is an issue that is not taken lightly. Under current law, an independent attorney must properly supervise all of the steps of the transaction and be *physically* present at the closing. Differing opinions still exist as to the intended meaning of physical presence. Further rule additions and supreme court decisions may be necessary to clarify this complex and evolving area of the law in South Carolina.

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59. S.C. APP. CT. R. 407, R. 1.19 (drafted Aug. 29, 2003).

60. *Id.*