Greetings! 2019 is off to a busy start for the Real Property Section, and I hope that it has begun well for you. For the Real Property Section, this is a time to step back, take stock of our strengths and challenges, measure our progress on goals for the year, refocus on our priorities, and, most importantly, evaluate whether our section is providing services and resources that meet the needs of our membership. That’s a tall task. Real property practice encompasses a broad range of substantive law and procedure. The needs of a residential closing attorney in a small firm or small communities are vastly different from the concerns of an attorney who represents a commercial or residential developer, or an attorney who represents lenders on commercial loans. It’s a challenge and a balancing act to meet the needs of our membership.

One of the best benefits that our section provides is the listserv – a forum to ask for advice or forms, to discuss current topics, to alert other lawyers about potential scams, and to raise issues. I read the listserv every day – to keep up current issues, make sure I get early warnings about potential scams – but mostly to learn from the collective knowledge and wisdom of RPS members. One posting stands out for me, one from Jessica Wilkie, shortly after Thanksgiving:

Every year around this time I am reminded again how thankful I am for this...
not raise this issue. It is reasonable for a lawyer to assume that the project managers, acquisition specialists, leasing agents and other persons working for or on behalf of commercial enterprises with whom the lawyer is negotiating on behalf of his/her client are in no danger of misunderstanding the lawyer’s role.

One area where this issue can arise is when the lawyer is representing a commercial developer in the acquisition of real property from an unrepresented landowner. Unless the landowner/seller is the biggest real estate investor in the community, it is a good idea for the lawyer representing the purchaser to have some written correspondence with the seller in which the lawyer reminds the seller that he/she represents the buyer, cannot give legal advice to the seller, and that it would be a really good idea for the seller to retain counsel.

Unrepresented parties can also present issues under Rule 4.2 if they subsequently retain or engage counsel. Rule 4.2 (a) prohibits a lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented by counsel in the matter without the consent of the other lawyer. If the lawyer has been working directly with an unrepresented party who subsequently advises the lawyer that they have retained counsel, Rule 4.2(a) would require that any future communication with the unrepresented party by the lawyer be predicated on consent from that party’s newly engaged counsel. This is a violation of the Rules of Professional Conduct that commercial real estate lawyers can stumble into easily. This is particularly true with electronic communications.

Courtesy Is Appreciated
Just this past week I had a shopping center owner client call me about an estoppel certificate request he had received from a lawyer for an adjoining landowner regarding the landowner’s compliance with certain restrictive covenants. My client had talked to the other lawyer on several occasions and then sent the estoppel form to me for review and asked that I respond to the other lawyer directly with my revisions. I sent the revised version via email to the other lawyer in which I advised him that I had been retained to represent the shopping center owner. I did not copy my client on this email. The other lawyer responded via email proposing compromise language, expressing his need to move quickly, and copying my client requesting execution of an attached clean copy. This was very likely a violation of Rule 4.2(a) because the other lawyer had notice that my client was now represented by counsel, his email communication was about the subject of the representation, and he had neither my express nor my implied consent to communicate directly with my client.

The North Carolina State Bar issued a Formal Ethics Opinion (2012 FEO 7), in which it determined consent from the lawyer of a represented party must be obtained prior to copying the represented party on any electronic communications. Consent to a “reply all” response can be implied in certain very limited circumstances; but if the lawyer for a previously unrepresented party has not copied his or her client on the email, consent to direct communication would seem to be hard to imply. The fact that you or your client are in a hurry does not constitute a basis on which to imply that the other lawyer has consented to your direct communication with his or her client.

As commercial real estate lawyers, there are many circumstances where we find ourselves working with unrepresented parties who engage counsel at some point in the process. No matter how much direct communication the lawyer has had with the previously unrepresented party, the prudent course of action when faced with this issue is to simply ask the other lawyer if it is acceptable to copy his or her client on whatever you are sending out in the way of communications. If the lawyer representing the landowner in the matter described above had sent me an email asking for my consent to copy my client on his email response to me I would have gladly done so and responded immediately. Making that request would not only have been prudent, it would have been courteous.

Notice of Settlement Act: A View From the Trenches

By Randy Herman

When I started with my current firm in December 2016 the firm, which is in Durham, was in the process of conducting a series of closings in Mecklenburg County. For each closing a paralegal, would drive the 2.5 hours down to Charlotte to update and record, then drive the 2.5 hours back to the office. This seemed to me like an inefficient use of time. I have since convinced the firm to record electronically, at least on routine transactions. E-recording has given all of us who perform closings the opportunity to be more efficient, to expand the reach of our practice and to give clients all over the state access to more choices than ever before. It also helps us to meet the expectations of our clients, who are increasingly impatient with recording delays. But there is no escaping the fact that the rise of e-recording has also increased the risk of a title gap, which could impair the interest of the client and create liability for the closing attorney. Nancy Ferguson covered the cause of the problem perfectly in her October 2018 article.

The Notice of Settlement Act is an attempt to preserve the advantages of e-recording while reducing the risk of title gaps. Over the course of the past two years, since Nancy first introduced the idea in December of 2016, I have been involved in numerous stakeholder meetings to refine the proposed act. The current proposal reflects input from the Bar, NCBA (both real property and litigation sections), NCLTA, RELANC, registers of deeds, lenders, the building industry and many others. It represents the collective insight derived from many hours of discussion and debate among some of the brightest advocates in the state (and I was there too).

I don’t think anybody can tell you that the current draft is the ultimate answer to the time gap problem. Additional input is always welcome, especially from practitioners who, like me, see recording issues as they manifest on the ground every day. But I do believe that the current draft would represent a huge step forward in protecting the integrity of title records and giving the parties to transactions confidence that they are getting the property interest they bargained for, even when the transaction is recorded electronically. It helps preserve all of the advantages of the old in-person recording practice, while also giving practitioners access to the benefits of e-recording.

The author is the RELANC representative to the North Carolina Land Records Task Force and a candidate for the RELANC Board of Directors. This article represents the author’s own views and not the views of RELANC or its Board of Directors.