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 at 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*

Continued on pages 2 and 3

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Please Hire a Lawyer: Ethical Issues in Working with Unrepresented Parties

**By Jerry Eatman**

Commercial real estate has always been a practice in which lawyers are frequently placed in the position of working with unrepresented parties. Many local and national developers use non-lawyer staff to negotiate purchase agreements and many national and regional retailers use in-house real estate professionals to negotiate leases. This has only become more common as the torrid pace of population growth experienced by many urban areas of North Carolina has fueled a corresponding explosion of real estate investment by out-of-state investors. North Carolina lawyers are increasingly having to represent their local clients in transaction in which the other side is either an unrepresented party or a lawyer who is not licensed to practice in North Carolina. This presents certain issues for North Carolina lawyers.

Rule 4 of the North Carolina Rules of Professional Conduct deals generally with the requirements of lawyers in dealing with persons other than clients. Rule 4.1 prohibits a lawyer from knowingly making a false statement of a material fact or law to a third person. When allegations of this sort of violation are made, it frequently involves a lawyer representing a client in a transaction where the other side is not represented by counsel. Professionalism dictates that care be taken when dealing with unrepresented parties no matter how sophisticated they may appear. The argument that a lawyer’s zealous advocacy of a client’s legal position constituted a misstatement of the law to a third person is inherently more compelling when that third person is not represented by counsel.

Rule 4.3 states that, in dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not give legal advice or imply that the lawyer is disinterested. While these requirements can appear simple in the course of civil litigation, in the course of a transaction between commercial parties where the lawyer for a North Carolina seller is negotiating with the non-lawyer owner of an out of state development company, the lawyer’s obligations are not as clear. These are typically sophisticated commercial transactions with, presumably, sophisticated investors on the other side. Is the North Carolina lawyer required to advise the purchaser that he/she does not represent them, and that it would be a good idea for the purchaser to obtain local counsel?

Unrepresented Landowners

While I believe it is always a good idea to encourage unrepresented parties to seek the advice of a good North Carolina lawyer, Comment [1] to Rule 4.3 focuses on whether the circumstances would suggest to the lawyer that the unrepresented party may be under the impression that the lawyer is disinterested. The circumstances in which commercial real estate lawyers deal with unrepresented parties generally do
The Chair’s Comments, continued from the front page

listserv. I appreciate the fact that people take time to really investigate matters and send out questions so that others can learn too; I appreciate the folks who give freely of their advice and wisdom; I appreciate the often-hilarious anecdotes and even the horror stories; and I appreciate the fact that everyone remains kind and courteous.

This posting captures the sense of community and professionalism that exists within the real estate bar and which is most evident in the listserv. I add my thanks to all who ask questions and to all who provide answers and advice.

Staying Alert

One of the recurring issues discussed on the listserv is the ever-increasing incidence of fraud. Over the past few months, new schemes have emerged. The fake wiring instructions scheme has now spread from residential to commercial closings – not surprising – but terrifying, especially if your firm does not have a robust and mandatory wire transfer protocol. Troy Crawford recently shared information about a new type of scheme: a fraudulent deed for vacant property owned by an out of state individual. The fraudulent deed was recorded shortly after property taxes were paid and was promptly listed with a broker for sale. There was nothing suspicious on the face of the deed. The fraud was uncovered when the fraudster lost nerve and stopped communicating with the broker. This same kind of scheme, with variations, is occurring throughout the country. We live in a dangerous world, and we all need to be on the alert, or as Mad-Eye Moody from the Harry Potter series would say, “Constant vigilance!” The listserv is an essential method of communicating, quickly and efficiently, about these risks. If you don’t read it regularly – you should.

The Real Property Section has been busy on its plan of work for the year. I am happy to report that we will soon have a Forms Manual Coordinator in place for our new and improved Real Property Forms Manual. The Forms Manual Committee, consisting of Chad Brown, Jeff Johnson, Robbie Lawson and Ryan Rhodenhiser, has been diligent and thorough in the search for the coordinator, and we look forward to getting the project underway. The new manual will be a complete overhaul and will have current forms that are relevant to our practice which will be available for download in Word format to make our lives easier. Even though we will have a paid coordinator, we need volunteers to help determine what should/shouldn’t be included, to provide samples of forms, and to review and edit. Please consider volunteering for this project. It’s easy to do. Just click the Committee Sign-Up link on the right side of the RPS home page. We need your help.

We will also soon have a new Consumer Protection Counsel in place. Committee Chair John Overfield and RPS Vice Chair Brian Taylor are in the process of interviewing candidates. The Consumer Protection Counsel will continue to respond to reports of unauthorized practice in the residential real estate area and will take on the added responsibility of monitoring and providing input on inquiries to the N.C. State Bar about matters that involve real property practice.

Legislative Agenda

2019 also brings the start of a new legislative session. The RPS legislative agenda for this year includes technical corrections to statutes regarding the name of the preparer on a deed but also includes a new legislative proposal – the Notice of Settlement Act. This proposed legislation was drafted by a committee that included lawyers in private practice, title attorneys, and registers of deeds. Our own Nancy Ferguson spearheaded the project. With the ever-increasing demands to close more quickly and efficiently, and the use of e-recording, lawyers need a reliable method for recording and ensuring priority of the documents. The proposed Notice of Settlement authorizes the recordation of a notice of upcoming closing in the Register of Deeds up to 60 days in advance of the closing date. The closing attorney is required to do an online title update five days before the planned closing. Any matters disclosed in the online update will have priority, but matters recorded after the online update (or not discoverable on record) do not have priority.

The technical corrections bill supplies a missing effective date for last year’s technical corrections and makes clear that the mandatory “prepared by” statement on deeds and deeds does not require that those instruments be prepared by an attorney. For additional information, I have included
links to the full text of the proposed bills:

Notice of Settlement: ncbar.org/media/915647/real-property-settlement-act.pdf

Technical Corrections: ncbar.org/media/915648/real-property-technical-corrections.pdf

On the CLE front, September’s Advanced Topics seminar received high marks from attendees. The seminar included presentations on negotiating commercial purchase and sale agreements, a guide to reviewing ALTA surveys and working with surveyors, negotiation of a title commitment, and a discussion of ALTA endorsements. If you need CLE hours for 2018, this seminar is available online and is an excellent choice. The February Hot Topics seminar includes an update on recent legislation and an overview of proposed legislation for 2019, including a rewrite of the zoning laws, common malpractice errors, a discussion about “aging” restrictive covenants, commercial title issues and a discussion of condominium law and practice.

Plans are well underway for our Annual Meeting and CLE and 40th anniversary celebration on May 16 and 17 at Kiawah Island Resort, Kiawah, SC. Paula Murray and Peter Kanipe have done a terrific job of lining up interesting speakers and topics. In addition to the customary case law update and ethics segments, there will be presentations on 1031 exchanges, declarant rights, and blockchain technology. If, like me, you know nothing about blockchain technology or how it may affect real estate practice, you should come and learn about this topic. One of the highlights of the program will be a panel of past chairs who will discuss the history and milestones of our section and the outlook for the future of the Real Property Section and its members. Kiawah is a lovely resort with plenty of activities for the entire family – beach, tennis, golf, nature walks – you name it, they have it. The accommodations are condominiums which are convenient to the beach and the conference center. Mark your calendars now and plan to attend – for great CLE, to connect with other dirt lawyer, and to celebrate the 40th anniversary of the Real Property Section.

As you can see, this is a busy year for our section. We welcome your feedback and your participation.
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 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 in-