



## NORTH CAROLINA LAND TITLE ASSOCIATION

May 5, 2010

To the North Carolina Real Property Attorneys:

The North Carolina Land Title Association (“NCLTA”) has been working with the North Carolina State Bar and the North Carolina Bar Association Real Property Section Council on the topic of audit of lawyers’ trust accounts by title insurance companies. This effort was brought on by the need to mitigate losses due to thefts (whether by individual lawyers, their partners, associates or staff members) and the desire to assist lawyers in maintaining good trust accounting practices. It is paramount that this be achieved through the means least burdensome for attorneys, most effective for all parties, and in compliance with attorneys’ ethical obligations to their clients. As a first step, the three groups engaged in an active discussion about the need to audit, which ultimately led to the adoption of 2008 Formal Ethics Opinion 13. The ethics opinion sets out the limitations on disclosure of information by a lawyer to title insurance companies for the purpose of conducting an audit.

First, only dedicated real estate trust accounts may be audited. A lawyer may not disclose confidential information contained in a general trust account.

Second, a client whose transaction was insured by a title insurance company gives *implied consent* to disclose such information as may be necessary to prevent defalcations including information necessary for a title insurer to perform an audit of the lawyer’s real estate trust account, limited as follows:

- a. Records on the trust account: bank statements and deposit tickets for three months (not including copies of checks); reconciliation reports for three months (confidential client information redacted); and the general ledger for six months (names of payees redacted).
- b. Records of real estate transactions insured by the title insurer: copies of cancelled checks; copies of deposited checks; cash receipts (if any); disbursement receipts; closing instructions; settlement statements (all drafts and final versions); pay-off statements; wiring instructions and wire confirmations; all recorded documents; the client-specific ledger; and the bank statement from any open interest-bearing account used for the transaction.

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Third, *express consent* from the client must be obtained for the following:

- a. For an audit by title insurance companies of records including transactions insured by other title insurance companies.
- b. For the attorney to avoid the need to remove any documentation from the files audited and to redact information from trust account records provided to an auditing title insurance company, other than the above listed items, even if that company is only auditing transactions insured by that company.

The goal of all title insurance companies is to facilitate audits using the most constructive and the least disruptive means possible. The simplest path to achieving this goal is for the attorney to maintain a dedicated real estate trust account and to obtain the express written consent to audit from all real estate clients. NCLTA, at the request of and with input from the Real Property Section Council, created the **attached Consent to Audit form** for your use in obtaining client consent. The form will alleviate the need for redaction of information and runs in favor of all title insurance companies authorized by the Department of Insurance to issue title insurance policies in this state. It will allow any title insurance company to which a lawyer certifies title to conduct a full trust account audit, *without redaction or removal of documents*. This is especially important because a limited audit may not provide title insurance companies and lawyers with sufficient information to identify potential problems.

NCLTA is committed to working with real property lawyers to create a workable solution to the challenges of auditing and welcomes your feedback. It is our hope that audits will prove to be useful to lawyers and title insurance companies alike. We appreciate a continuing dialogue with the real property bar as we work together to strengthen the integrity of our system.

Respectfully,

North Carolina Land Title Association



## CONSENT TO AUDIT

Name: \_\_\_\_\_

Property Address: \_\_\_\_\_

The undersigned is a party to a real estate transaction (the "Transaction") in which \_\_\_\_\_ is the closing attorney ("Closing Attorney"). To facilitate the Transaction and to better protect the parties, the Closing Attorney applied for title insurance, and a title insurance underwriter issued a title insurance commitment to issue a title insurance policy upon satisfaction of certain requirements and a closing protection letter as part of the Transaction.

Title insurance underwriters authorized to do business in the State of North Carolina by the Department of Insurance ("Underwriters") desire a way to verify the proper disbursement of the funds received by the Closing Attorney in connection with the Transaction, possibly including an audit of the Closing Attorney's trust account, performed in compliance with the rules and opinions of the North Carolina State Bar.

In order to further assure the parties to the Transaction as to the safety of all of the parties' funds, and to allow Underwriters a way to verify the proper disbursement of the funds received by the Closing Attorney in connection with the Transaction, the Closing Attorney is willing to allow all Underwriters to periodically audit the Closing Attorney's real estate trust account, provided the Underwriters give the Closing Attorney the following assurances:

1. The information disclosed in the audit will be used for no other purposes than to confirm the proper use of funds and the Closing Attorney's compliance with State Bar trust accounting requirements.
2. The information will not be used by the Underwriters for marketing or business purposes other than risk management.
3. Access to the information will be limited to those employees of the Underwriters who need the information to make risk management decisions.
4. The disclosed information will not be shared with any third party except the State Bar or other appropriate authorities, unless otherwise required by applicable law (such as the State Bar's Rules of Professional Conduct).
5. Any information reviewed in the audit will be handled in compliance with applicable privacy regulations such as the Federal Trade Commission's Safeguards Rule, enacted under the Gramm-Leach-Bliley Act, and the Underwriter's own federally mandated privacy policy statement, regarding confidentiality, protection of and destruction of records.

The undersigned acknowledges the foregoing, consents to the audit of the Closing Attorney's real estate trust account and hereby authorizes the Underwriters to access such information held by the Closing Attorney that may be necessary to conduct such audit. The undersigned further waives any claim of attorney-client privilege of confidentiality, if any, in such information for the purpose of the audit.

Dated: \_\_\_\_\_  
\_\_\_\_\_