

*Approved by Va. Supreme Court
October 1, 2001*

UPL Opinion No. 198.
**Activities of a Business Composed of Non-Lawyers and Offering Residential
Foreclosure Services to Mortgage Lenders Acting as Trustees.**

You have been requested by a client (the “Company”) to assist in establishing a business in the Commonwealth of Virginia. Based upon your review of Virginia law, you have some concern regarding whether the proposed business constitutes unauthorized practice of law.

The principals of the Company are *non-attorneys* who are experienced in the mortgage lending industry but otherwise have no legal experience, background or qualifications to offer legal advice. The Company would offer residential foreclosure services to local, regional and national mortgage lenders and servicers (the “Lender”). The foreclosure services offered would be limited to Virginia properties. The business would be incorporated in the Commonwealth of Virginia and would operate from a sole location within the state.

Revenue for the Company would be generated by fees charged to the Lender for prosecuting the foreclosure action. Fees would be characterized as trustee fees rather than as legal fees. The fee would be a flat rate per the Fannie Mae and Freddie Mac residential foreclosure fee schedules. In addition, the Company would seek payment of trustee commissions where the property was sold to a third party bidder and where such commission was contemplated and allowed by the Deed of Trust. The services provided by the Company for its fee and/or commission would include all of the following:

1. Review of the referral package and loan documents to assure that the Lender had sent proper notice of default as required by applicable law.
2. Issue, as necessary, such notice on behalf of the Lender, as may be required to accelerate the balance due under the loan documents.
3. Draft instruments for execution by the Lender to appoint the company as substitute trustee under the Deed of Trust.
4. Review and file among the land records of the appropriate county, the executed substitution of trustee document.
5. Coordinate and handle requests by Debtors/Borrowers for amounts needed to reinstate and/or payoff the loan.
6. Draft forbearance agreements and coordinate execution of the same between the Lender and the borrower.
7. Draft Deed in Lieu of Foreclosure documents and coordinate execution of the same between the Lender and the borrower.

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8. Order and examine title to the properties subject of foreclosure and report to the lender at to matters of record.
9. Issue notice of possible claims under title insurance policies to insurer on behalf of the parties.
10. Schedule and appear at non-judicial trustee sales on the courthouse steps of the county in which the property is located.
11. Receive any instructions in connection with a bid the lender will make at the foreclosure sale and submit the bid on behalf of the Lender at such sale.
12. Draft, issue and dispatch owner and lienholder notices required by section 55 of the Virginia Code.
13. Draft and place for publication the advertisement of sale required by section 55 of the Virginia Code.
14. Field calls from parties interested in the scheduled foreclosure sales.
15. Report the results of the foreclosure sale to the Lender.
16. Accept deposits from third party bidders at the sale and collect and disburse proceeds derived from such sales.
17. Issue notice of default to such third party bidders who may not timely complete the settlement of their purchase.
18. Draft, execute and record trustee deeds conveying ownership to purchasers of the foreclosed properties.
19. Prepare and submit commissioner reports on each completed foreclosure to the appropriate county commissioner.
20. Prepare and submit to FHA and VA final title packages per federal regulations.
21. Provide final accountings to the lender clients.

The Company would *not* do any of the following tasks any of which would be referred to a licensed Virginia attorney (the "Attorney") for completion:

- a. Represent the Lender in connection with any contested proceedings initiated by the borrower/debtor in state or federal court.

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- b. Represent the Lender in connection with any bankruptcy proceedings in United States Bankruptcy Court.
- c. Represent the Lender in connection with any eviction proceedings authorized by the Lender.
- d. Represent the Lender in connection with any suits on the note or deficiency proceedings.
- e. Draft documents required to be prepared by an Attorney under applicable Virginia law.

The committee considered your inquiry at its meeting on December 14, 2000, and asked me to communicate its conclusions to you.

The committee begins its analysis of your inquiry with the observation that it is unlawful for a person to engage in the *unauthorized* practice of law. Va. Code § 54.1-3904 (Repl. Vol. 1998); Va. S. Ct. R., pt. 6, § I(A). To determine whether a person is *illegally* engaged in the practice of law, one must examine not only the definition of the practice of law, but also any relevant Rules of Court, statutes, and opinions applying such rules or statutes. In some situations, a non-lawyer may be *authorized* by law to perform activities that would appear to fall within the definition of the practice of law. For example, a corporation cannot be represented by a lay person in circuit court, however, a lay employee may file a warrant in debt or motion for judgment and appear in a limited capacity on behalf of the corporate employer in general district court. UPR 1-101; UPC 1-3; Va. Code ' 16.1-88.03 (Repl. Vol. 1999); UPL Op. 154 (1993). Real estate brokers, title agents, title companies and financial institutions are authorized by law in their capacity as licensed settlement agents to provide escrow, settlement and closing services on real estate. Va. Code §§ 6.1-2.19-2.29, *et seq.* (Repl. Vol. 1999). It should be noted that the statute governing trustees do not indicate a requirement that trustees be attorneys and in fact they have historically not been in the Commonwealth of Virginia.

The committee believes that Virginia law authorizes, if not requires, the Company to undertake most of those tasks described in your inquiry. Typically, a purchase money deed of trust is given concurrently with a conveyance of real estate by the grantor/borrower to secure the balance of the unpaid purchase price. The trustee is a party to the instrument. 13A Mich. Jur. *Mortgages and Deeds of Trust* § 6 (1991). Legal title to the subject property conveyed by the deed of trust is vested in the trustee or trustees named therein. *Larchmont Homes, Inc., v. Annandale Water Co.*, 201 Va. 178, 110 S.E.2d 249 (1959). In the event of a default by the grantor/borrower, the trustee can act only in a manner authorized by the expressed or implied terms of the trust¹, or in a manner expressly authorized by statute. Virginia Code Sections 55-59 through 55-59.4 create specific duties, rights and obligations for the trustee. Significantly, Virginia law does not require that a lawyer serve as the trustee on a deed of trust and a non-lawyer appears authorized to serve in this capacity. Virginia Code Section 55-58.1 (2) requires only that a *person* named as trustee be a Virginia resident:

¹ *Powell v. Adams*, 179 Va. 170, 18 S.E.2d 261 (1942).

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No *person* not a resident of this Commonwealth may be named or act, in person or by agent or attorney, as the trustee of a security trust², either individually or as one of several trustees, the other or others of which are residents of this Commonwealth.

Virginia Code § 55-58.1 (Cum. Supp. 1999) (emphasis added). A party secured by a deed of trust has the right and power to appoint a substitute trustee. Va. Code §55-59 (9). Virginia Code Section 26-55, addressing the rights, duties and responsibilities of substituted trustees states:

Any person appointed trustee by virtue of this chapter shall be substituted to all the rights, powers, duties, and responsibilities of the trustee named in such will, deed, or other writing. Any such substituted trustee may, in like manner, be removed or required to give bond with sureties, or give a new bond when one has already been given and be proceeded against in every respect as an original trustee.

Virginia Code § 26-55 (Repl. Vol. 1997) (emphasis added). The trustee under a deed of trust is a fiduciary for both the borrower and noteholder and must act impartially between them. *Whitlow v. Mountain Trust Bank*, 215 Va. 149, 152, 207 S.E.2d 837 (1974). Indeed, the trustee's noncompliance with particular statutory obligations may have adverse legal consequences. *Deep v. Rose*, 234 Va. 631, 364 S.E.2d 228 (1988)(trustee's failure to comply with advertising requirement of Va. Code § 55-59.2 renders foreclosure sale void). However, merely because the trustee's failure to discharge his statutory obligations may have legal consequences does not mean that a nonlawyer is not authorized to serve in this capacity.

Assuming then, as we must, that a non-lawyer is authorized by law to serve as a trustee on a deed of trust, we next turn to the appropriate provisions in the Virginia Code to examine what powers, duties, rights and responsibilities are conferred by law on the trustee. The trustee's primary duty is set forth in Virginia Code Section 55-59 (7):

In the event of default in the payment of the debt secured, or any part thereof, at maturity, or in the payment of interest when due, or of the breach of any of the covenants entered into or imposed upon the grantor, then at the request of any beneficiary the trustee shall forthwith declare all the debts and obligations secured by the deed of trust at once due and payable and may take possession of the property and proceed to sell the same at auction at the premises or in the front of the circuit court building or at such other place in the city or county in which the property or the greater part thereof lies, or in the corporate limits of any city surrounded by or contiguous to such county, or in the case of annexed land, in the county of which the land was formerly a part, as the trustee may select upon such terms and conditions as the trustee may deem best.

² The term "security trust" is a defined term in the statute which includes a deed of trust.

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Virginia Code § 55-59 (7) (Repl. Vol. 1995). Before the trustee can sell the property, the trustee has tasks to perform and judgments to make, some of which undoubtedly require the exercise of legal knowledge, judgment and skill. For example, Virginia Code Section 55-59.1 requires notice of foreclosure to junior lienholders. The trustee must determine the priority of all liens, encumbrances, and taxes and the balances due thereon. This is necessary because the Virginia Code requires the trustee to advertise the foreclosure sale setting forth all liens and encumbrances (including leases, if any) having priority over the trust being foreclosed.³ In addition, the trustee must comply with federal law regarding notice of sale to discharge the foreclosed property from a federal tax lien, if one exists.⁴ If a FHA or VA loan is involved, the trustee must comply with applicable regulations of those agencies.⁵ The trustee is authorized by statute to deliver the trustee's deed to the purchaser following the foreclosure sale. Va. Code § 55-59 (8). Since the trustee is a party to the deed, the trustee is authorized to prepare this legal instrument. *See, e.g.*, UPL Op. 183 (app'd by the Supreme Court, September 25, 1998, to be effective July 1, 2000). The trustee must also be aware that unpaid real estate tax, water and sewer liens on the subject property have priority over the deed of trust and the trustee is to pay these charges out of the foreclosure sale proceeds.⁶

The trustee must be aware of all encumbrances on the property in order to exercise properly his statutory discretion as to whether a fair sale can be held and to disburse properly the proceeds of sale.⁷ *Residential Real Estate Transactions in Virginia*, & 4.705 (5th Ed. 1995). Where there are disputed liens or possible mechanics= liens that could take priority or place a cloud on the title, the trustee has the responsibility of determining how to advertise the property for sale in light of such circumstances. *Id.*

Also, the trustee must be mindful of the legal requirements should the lender exercise the right to

³ Va. Code §§ 55-59, 55-59.1 to -59.4, 55-62 and -63.

⁴ I.R.C. § 7425, *et seq.*

⁵ 24 C.F.R. § 203.600 *et seq.* (FHA requirements); *Residential Real Estate Transactions in Virginia*, & 4.712 (5th Ed. 1995).

⁶ Va. Code §§ 55-59.4 and 58.1-3340.

⁷ The trustee shall receive and receipt for the proceeds of sale, no purchaser being required to see to the application of the proceeds, account for the same to the commissioner of accounts pursuant to ' 26-15 and apply the same, first, to discharge the expenses of executing the trust, including a reasonable commission to the trustee; secondly, to discharge all taxes, levies, and assessment, with costs and interest if they have priority over the lien of the deed of trust, including the due pro rata thereof for the current year; thirdly, to discharge in the order of their priority, if any, the remaining debts and obligations secured by the deed, and any liens of record inferior to the deed of trust under which sale is made, with lawful interest; and, fourthly, the residue of the proceeds shall be paid to the grantor or his assigns; provided, however, that the trustee as to such residue shall not be bound by any inheritance, devise, conveyance, assignment or lien of or upon the grantor's equity, without actual notice thereof prior to distribution; provided further that such order of priorities shall not be changed or varied by the deed of trust. The trustee's deed shall show the trustee's mailing address. Virginia Code ' 55-59.4.

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accelerate the entire indebtedness. These requirements are set forth in two Virginia Supreme Court decisions.⁸

In view of the trustee=s obligations and responsibilities under the terms of the deed of trust and the law along with the oversight provided by the Commissioner of Accounts and the fiduciary responsibilities under common law, the committee concludes that all but two, drafting Forbearance Agreements (Item 6) and drafting Deeds in Lieu of Foreclosure (Item 7), of the twenty-one (21) enumerated tasks are within the scope of the Company=s authority as trustee. Moreover, the Company has the right to draft any legal instruments in which it is a necessary party and does not need to hire an attorney to prepare these documents. UPL Op. 183, *supra*. This would include drafting instruments for execution by the Lender to appoint the company as substitute trustee under the Deed of Trust (Item 3) but not the Deed in Lieu of Foreclosure (Item 7). However, the Company cannot charge a separate fee to Lender for preparation of legal documents. *See, e.g.*, UPR 6-103 (A) (4); UPL Op. 112 (1990) (lender may prepare deed of trust to secure its own loan but must do so without imposing separate charge for preparation).

The committee does not believe, however, that Virginia law authorizes the trustee to prepare forbearance agreements executed by the Lender and Borrower (Item 6) or the Deed in Lieu of Foreclosure (Item 7). Such activity involves the preparation of a legal document to which the Company is not a party. The parties to such legal instruments can prepare them or an attorney must do so.

With regard to your final inquiries concerning billing and invoices, the committee opines:

1. Charging the Attorney for an administrative fee for Apackaging the matter@ does not raise any unauthorized practice of law issue. Therefore, since the matter is beyond the committee=s purview, the committee cannot advise you on that matter.
2. The committee believes the Company may not invoice the Lender for legal services performed by Attorney. Since the Company is not authorized to perform such legal services, Company should not undertake to charge or collect fees for such services. UPL Op. 141 (1990) (fees for closing services by lay settlement company cannot include fees for preparation of legal instruments such as deed, deed of trust, etc.). In the five situations you describe, the Attorney would be representing the Lender not the Company. Any billing arrangements should therefore be between the Attorney and Lender.

Committee Opinion
January 22, 2001
Approved by Council
June 14, 2001

⁸ *Florance v. Friedlander*, 209 Va. 520, 165 S.E.2d 388 (1969)(written notice must reach the maker to be effective); *Sharpe v. Talley*, 215 Va. 615, 212 S.E.2d 273 (1975) (lender cannot rely solely on acceleration provisions in deed of trust and some further affirmative action is required; notice of acceleration must be unconditional)