



UNDERWRITING MEMORANDUM 05-18

To: All South Carolina Agents
From: South Carolina State Office
Date: July 11, 2005
Re: **Amendment of Rules of Professional Conduct**

On June 20, 2005 The Supreme Court of South Carolina amended the Rules of Professional Conduct, Rule 407, SCACR. The amended Rules become effective October 1, 2005.

Real estate practitioners will be impacted in three very significant ways:

- (1) These Rules codify a collected or "good funds" rule and establish when a lawyer will not be guilty of misconduct in handling other people's money and what funds are to be considered as good or collected funds that can be disbursed upon their deposit in the trust account;
- (2) All Lawyers must notify their banks to notify the Commission on Lawyer Conduct when checks from a trust account are presented for payment against insufficient funds; and
- (3) Informed consent from clients must be in writing. For example when a lawyer represents multiply parties in a closing, each client must give informed consent in writing.

This Memo is a brief outline of some of the pertinent parts of the rules that affect real estate practitioners. They are as follows:

Rule 1.0 gives the definition of terms that are used in the Rules. Among those terms are: "confirmed in writing"; "consult" or "consultation"; "informed consent" and "writing" or "written".

"Confirmed in writing" means the lawyer must obtain from the client a writing of their informed consent at the time of the consent or in a reasonable time afterwards.

"Consult" or "consultation" means the lawyer must give the client sufficient information for them to "appreciate the significance of the matter in question."

"Informed consent" means the lawyer must give the client reasonably adequate information and explain it so that they agree to the proposed course and agree to it rather than alternatives. The consent is confirmed in writing and usually requires an affirmative act by the client.

"Writing" or "written" means a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Rule 1.1 on competence remains the same except for the recognition that the scope of representation can be limited as to the lawyer's thoroughness and preparation.

Rule 1.2 (c) permits limiting the scope of representation if the limitation is reasonable and the client gives **informed consent which must be in writing**.

Rule 1.3 Diligence requires diligence and promptness in handling a client's matter.

Rule 1.4 Communication has been expanded. The client is to be promptly informed where their informed consent is required. The lawyer must consult about the means by which the client's objective is to be accomplished. The lawyer

must keep the client informed, comply with information requests and the lawyer must consult when the Rules do not permit the requested legal assistance. The lawyer must explain matters so the client can participate in decisions.

Rule 1.7 Conflict of Interest A lawyer can not represent a client if it creates a conflict with another client unless the lawyer believes he or she can represent both, is not prohibited by law, is not in litigation and each client gives **informed consent, confirmed in writing.**

Rule 1.15 Safekeeping property This rule has been expanded from three to eight paragraphs. Paragraph (a) is the same requirement to keep property of another separate. Money is to be held separate in an account in the same state where the lawyer's office is located or elsewhere with consent. Records are to be maintained for 6 years. Paragraph (b), states the lawyer can deposit the lawyer's own money to cover any service charges on the account and (c) requires depositing any unearned legal fees and expenses until they become due to the lawyer. Paragraph (d) is the former (b) requiring notice upon receipt, prompt delivery and rendering an accounting upon request. Paragraph (e) broadens the circumstances that disputed funds are held to include when the lawyer is not a claimant. Funds not in dispute are to be promptly delivered.

Paragraph (f) is the new good or collected funds rule. It recognizes that disbursements can be made only on collected funds which have been deposited and are:

- cash,
- verified and documented electronic fund transfers, or other deposits treated by the depository bank as equivalent to cash,
- properly endorsed government checks,
- certified checks, cashiers checks or other checks drawn by a bank,
- and any other instrument payable at or through a bank, if the amount of such other instrument does not exceed \$5,000 and the lawyer has reasonable and prudent belief that the deposit of such other instrument will be collected promptly.

If the actual collection of deposits treated as the equivalent of collected funds does not occur, the lawyer shall, as soon as practical but in no event more than five working days after notice of noncollection, deposit replacement funds in the account.

Under Paragraph (g) the lawyer can not use trust funds to obtain credit or personal benefits. By Paragraph (h) all trust accounts may only be in institutions that will notify the Commission on Lawyer Conduct when checks are presented for payment against insufficient funds. All lawyers having a trust account must direct their institution to report NSF notices to the Commission on Lawyer Conduct.

Rule 2.3 Evaluation for use by third persons. This rule remains basically the same, but the clients informed consent is only required if the evaluation adversely affects the client.

Rule 5.5 Unauthorized Practice of Law Rule 5.5 substantially revises current Rule 5.5 with the addition of extensive regulations regarding multi-jurisdictional practice of law. The Rule effectively prohibits a lawyer from establishing a continuous presence within the state unless the lawyer is admitted to the South Carolina Bar, except in the limited exceptions of paragraph (d), but does not require admission of a lawyer in many situations where the lawyer's presence in the state is truly temporary. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work.