



## UNDERWRITING MEMORANDUM 06-02

**To: All South Carolina Agents**  
**From: South Carolina State Office**  
**Date: February 8, 2006**  
**Re: Recent South Carolina real estate authorities**

---

Please note the following recent opinions that affect real estate South Carolina practice:

1. **Smith v. Cutler** (South Carolina Supreme Court Opinion No. 26085, December 19, 2005). This is a rather baffling case discussing two forms of ownership: joint tenancy with right of survivorship and "tenancy in common with an indestructible right of survivorship". Our Supreme Court has apparently now held that the language "as joint tenants with right of survivorship and not as tenancy in common" creates a form of joint ownership that can be severed by the act of either joint tenant and may also be partitioned by either party. But the language "for and during their joint lives and upon the death of either of them, then to the survivor of them, his or her heirs and assigns forever in fee simple" creates a tenancy in common with an indestructible right of survivorship that cannot be severed by one of the owners acting alone and may not be partitioned. It appears that both forms of ownership should now be explained to clients who desire to hold their properties in a form that will avoid probate.
2. **South Carolina Bar Ethics Opinion 06-01**. This opinion states that a closing attorney who represents a lender or mortgage broker either by express agreement or by implication must obtain the informed consent of the lender or mortgage broker in writing if the attorney will also be representing other parties at the closing. The opinion states that if the attorney cannot obtain that consent, the attorney should not proceed with the closing. However, the attorney may obtain a general, advance consent from the lender or mortgage broker to engage in such multiple representation, so long as no actual conflict of interest arises.
3. **South Carolina Bar Ethics Opinion 06-02**. This opinion fields questions from a law firm with a residential closing practice that desires to establish a "recording account". The law firm wishes to estimate overnight fees, courier fees and recording fees (marking them up by \$2.00 to \$15.00 per closing) with the written approval of clients, and to transfer funds from the trust account to the recording account prior to disbursement. The opinion states that it is improper for a closing attorney to transfer client funds to a "recording account" that is not maintained as a trust account. Client funds to be used for recording must be maintained in a trust account and segregated from the lawyer's funds and deposited and disbursed pursuant to trust accounting rules. An alternative scenario was approved by the opinion. The law firm can maintain a "recording account" that contains only funds of the law firm (not client funds). Under this scenario, client funds are only transferred to the recording account after recording to reimburse the law firm for expenses incurred to record documents. Under this scenario, the opinion states that the "recording account" need not be maintained as a trust account. Keeping the overcharges as profit must pass a difficult test, according to the opinion. The law firm may retain the overcharges as profit **provided** this practice is not prohibited by law, disclosure is made to the lender as well as the other clients, the overcharges are not in violation of Rule 1.5(a) and the clients are not misled in violation of Rule 8.4(c) about the fact that the overcharges will be kept as profit.
4. **South Carolina Bar Ethics Opinion 06-03**. This opinion states that it is ethical for an attorney to disburse a portion of the closing funds (for example, the lender's proceeds that are wired and collected at the time of closing) without disbursing remaining funds that are not collected at the time of the closing. Stated differently, an attorney may "table funds" the transaction to the extent the attorney has received and deposited collected funds and may wait to disburse the remainder of the closing funds after those funds are received and deposited.

Please read these authorities in their entirety and conduct your practices accordingly. As always, please call our office if you have questions about these issues or if you need copies of these authorities.