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PRACTICE TIPS FOR COMMERCIAL REAL ESTATE CLOSINGS



Presented to

North Carolina Land Title Association

September 14, 2019

By Margaret Shea Burnham
Nexsen Pruet, PLLC

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PRACTICE TIPS FOR COMMERCIAL REAL ESTATE CLOSINGS: A CHECKLIST OF CHECKLISTS

Often “more experienced” real estate attorneys are asked to share practice tips to ensure commercial real estate closings run smoothly for “less experienced” attorneys. This article is a summary of 35 years of lessons learned by the author.

1. Checklists

Do not close a commercial transaction without using checklists. There are checklists for everything.¹ If you don’t use a checklist, chances are you will overlook something critical.

2. Deadlines.

One of the first things you need to do is verify all deadlines. As soon as you are given a signed contract to close, check the due-diligence deadline, the closing deadline and any other deadlines (such as a deadline for title objections). “Tickle” these deadlines. Verify with your client sufficiently before the expiration of the due-diligence period that the client desires to proceed to close. If you don’t, and the earnest money “goes hard” after the expiration of the due-diligence period, your client will likely be unhappy at the loss of non-refundable earnest money (and, worse, maybe unhappy with you).

For each deadline, check to see if there is a “time of the essence” provision. If the due-diligence deadline and the closing deadline do not provide that “time is of the essence,” is there a catch all “time is of the essence” provision in the boiler-plate provisions? In NC, a “time is of the essence” provision means the deadline is firm. Do not assume it will be waived!

If your client asks you to amend the contract to extend the due-diligence deadline and/or closing deadline, should you include a “time is of the essence” provision for each of the new dates? Make sure you consider this in drafting the amendment.

3. Documents.

Before preparing any documents for closing, check to make sure the contract did not include pre-negotiated forms as exhibits. If so, you need to use those.

Also, the contract may include required terms to include in the closing documents, such as an “AS IS” clause. Make sure you comply with all custom provisions included in the contract.

In preparing documents that are “fill in the blank,” beware of careless mistakes. For example, if using a form Deed of Trust to secure a Guaranty, be sure to modify the language in the form that presumes the Deed of Trust would secure a Note.

¹ For a variety of checklists, [see](http://www.nexsenpruet.com/professionals/margaret-burnham) Margaret Shea Burnham and Erin Cowan Mosley, “Commercial Real Estate Purchase Agreements: Agreeing to Disagree” (NCBA, August 2016) [copy available at www.nexsenpruet.com/professionals/margaret-burnham].

Also, remember what you learned in law school – the Rule Against Perpetuities (“RAP”) is alive and well in NC.² Be sure to take the RAP (both statutory and common law) into account when drafting options and rights of first refusal.

In preparing documents for recording, pay attention to the “prepared by” block required for recording.³ First, if you are local counsel, consider adding your firm’s information below out-of-state counsel’s information with a notation along the lines of “[serving as NC local counsel].” Second, consider a notation to make it clear, where appropriate, which party you are representing. For example, if you are preparing an easement for the Grantee’s benefit, consider adding the following after your firm’s information: “[prepared as counsel for Grantee].” This might eliminate a claim later that you also owed a duty to the Grantor. Third, be aware of recent amendments to NCGS §47-17.1 (Session Law 2018-80 effective 6/25/18).⁴

As seller’s counsel, two issues will arise before you begin drafting the Deed. First, is the deed a General Warranty Deed or a Special Warranty Deed? Second, will the exceptions be “general” (such as easements, restrictions and rights of way of record, if any) or limited to “permitted exceptions” (typically being the list from the buyer’s title commitment). Hopefully, these issues have been addressed in either the purchase contract or the form Deed attached as an exhibit to the purchase contract. If not, these are issues to be discussed/negotiated with buyer’s counsel *prior to* closing to avoid a dispute *at* closing. What if the parties cannot agree on the form of the Deed?

Also, as seller’s counsel, it is customary to add qualifying language that “no title search was performed” on the first page of the Deed after the drafter’s name. In preparing a Deed for the seller as *buyer’s counsel*, be familiar with 2004 FEO 10.

Besides the Deed, consult a closing checklist for all other documents needed (and consult the purchase contract for all necessary and appropriate custom documents). At a minimum, you will need the applicable lien affidavit, the IRS 1099-S (and possibly the NC-1099NRS for non-resident sellers), and the FIRPTA certificate.⁵ Be aware that completion of the 1099 and FIRPTA involves an inquiry as to any “disregarded entity” status.⁶ Frequently, the contract provides for the seller (and maybe the buyer) to sign a certificate that the representations and warranties contained in the purchase contract are still true and correct.

On occasion, you will need a Hypothecation Agreement for a commercial closing. This is a simple, one-page form used to document consideration when applicable. For example, if a third party is pledging collateral, the Hypothecation Agreement would be used to set forth the relationship of the pledgor to the borrower to document consideration for the pledge of collateral.

When drafting any closing document, professional courtesy dictates that you provide counsel for the other side a “redline” to call out any changes from prior drafts.⁷

4. Dating documents.

² To refresh your memory on the RAP, watch Kathleen Turner and William Hurt in the 1981 movie “Body Heat.”

³ See NCGS §47-17.1 (amended effective 6/25/18).

⁴ The recent amendment to NCGS §47-17.1 provides: “For the purposes of this section, the register of deeds shall accept the written representation of the individual presenting the deed or deed of trust for registration, or any individual reasonably related to the transaction, including, but not limited to, any employee of a title insurance company or agency purporting to be involved with the transaction, that the individual or law firm listed on the first page is a validly licensed attorney or validly existing law firm in this State or another jurisdiction within the United States.”

⁵ For recent changes on FIRPTA regulations, see Chris Burti, “FIRPTA Requirements Changed February 16, 2016,” *Statewide Title New sletter and Legal Memorandum* (Vol. 22, No. 2, February 25, 2016).

⁶ See 26 CFR §301.7701-3(a).

⁷ See *Lefever v. Taylor*, No. COA08-1278, 2009 WL 2177323 (N.C. Ct. App. Jul. 21, 2009).

It is essential in NC to make sure the Note and Deed of Trust have matching dates.⁸ If your Deed of Trust says it secures a Note “of even date herewith,” it is your responsibility to make sure the Note and Deed of Trust are dated the same date.

If you are giving an opinion that the loan documents are valid, binding and enforceable, have you taken into account whether the documents have all been dated the same date? What if the lender (and not you as borrower’s counsel) will be dating the documents after you rendered your opinion? If you are not personally dating the documents, add an “assumption” to the opinion letter that you assume the loan documents will be dated the same date by the lender or lender’s counsel. See Section 15 below for more tips on opinion letters.

5. Executing documents.

Don’t assume the parties executing the closing documents are authorized to do so. The easiest way for you to gauge your responsibility is to review the execution of the documents as though you were being asked to render an opinion to the lender. For example, if you were issuing an opinion letter, you would verify that each party was duly authorized to sign, backed up by the appropriate entity consents and good-standing certificates.

For a foreign entity, also check that the entity is in good standing in its home state and whether the entity is required to qualify to do business in North Carolina.

It gets a bit more complex when there are multiple entities in one signature block. In this event, it is wise to verify the authority and good-standing status for each entity. And, carefully proof all signature blocks and notary acknowledgements to make sure they match the authorized signatories. Also, the notary acknowledgements need to be in a form acceptable to record in North Carolina, complying with NC notary laws or satisfying the requirements for a notary acknowledgment in a sister state.⁹

6. Escrow closings.

If you are the closing attorney, you are *de facto* in charge. Make sure all parties know what they have to sign and when. Make sure when documents are returned they have been properly completed (with all exhibits attached), dated (the same date), signed (by all), and notarized. Be familiar with North Carolina State Bar ethics opinions when serving as escrow agent. See 2008 FEO 7, 99 FEO 8 and 98 FEO 11.

7. Escrow closing instruction letters.

If you are conducting the closing and you receive an escrow closing instruction letter, read it carefully. What are the conditions before you can record? Can you comply? If not, what modifications are necessary?

If you have prepared the seller documents and you are forwarding originals to the buyer’s counsel for a closing, and neither you nor your client plans to attend, what will be your closing instructions as seller’s counsel to buyer’s counsel to protect your client? Have you ensured the closing instruction letter has been signed before you forward originals?

Likewise, what do you need to have signed before you transfer the earnest-money deposit to buyer’s counsel (to ensure its safe and timely return if closing does not occur for some reason)?

⁸ See In re Head Grading Co., Inc. (Beaman v. Head), 353 B.R. 122 (E.D.N.C. 2006).

⁹ See NCGS §47-2.2 for requirements of notary acknowledgements taken in a sister state.

8. Closing statement and addendum.

Of course it is up to you as the closing attorney to make sure the closing statement is accurate in all respects and that it balances. Likewise, it is up to you as the closing attorney to verify you have “good funds.”¹⁰ This is obvious and not new. What is new is the practice of some law firms to add an “addendum” to the closing statement. The addendum might cover some or all of the following:

- receipt of “good funds” as a closing contingency;
- accuracy of the wire instructions;
- accuracy of the closing figures;
- calculations of prorations and whether or not the parties will re-calculate prorations when “final” figures are available (or accept the estimated prorations);
- whether or not the parties will agree to correct the closing statement with regard to inadvertent errors;
- representations and warranties;
- any open issues (such as an escrow or punch-list items)
- execution formalities (execution by counterparts, execution by facsimile or electronic signatures, etc.); and
- authority of closing attorney to disburse.

If you are seller’s counsel and you receive a closing-statement addendum from buyer’s counsel, read the addendum (usually with a host of footnotes) carefully. Are the terms redundant of provisions already in the purchase contract? Do the terms effectively modify the purchase contract? Are the terms fair and appropriate? Are the terms self-serving? Would you ask the other party to sign the same? You are not obligated to agree to new terms in a closing-statement addendum that are not in the purchase contract. The only obligation in the (typical) purchase contract is to have a closing statement signed by the buyer, the seller, and the closing attorney. On the flip side, have you considered drafting a closing-statement addendum when you are buyer’s counsel? What terms would you include?

9. Scams.

It is your responsibility to stay on top of the latest scams.¹¹ The most recent scams have involved interception of wires via falsified wire instructions and falsified payoff statements. Protect yourself, your firm and your client. At a bare minimum, you will need to verify the wire instructions and the payoff statement. Consider the standard of care for such verification. If the email has been intercepted, you obviously cannot rely on the contact information in the intercepted email to verify this information. Also, have your firm use encrypted email to safeguard your emails.

10. On-line title searches and e-recording.

The advent of on-line title searches and e-recording raise new issues for closing attorneys. Some of the emerging issues to consider are:

- what documents are available on line in the subject jurisdiction?
- how current and complete are the on-line records?
- how are you searching records that are not available on-line through the office of the Register of Deeds, such as judgments, special proceedings, taxes, water liens (if applicable), etc.?
- are you doing just the initial search on line or also your update?
- for the update, what additional issues do you need to consider?

¹⁰ See NCGS §45A-1 et seq.; see also RPC 191 and 2013 FEO 13.

¹¹ See, for example, T. Crawford, *Warning: New Twists In Fraud – Interception Of Incoming Wires*, The Property Line, Vol. 38, No. 2 (N.C.B.A. Real Property Section, April 2017).

- do you need to make a disclosure to your client that you are relying upon on-line records (and e-recording)?¹²
- do you need to make a disclosure to the title company in your preliminary/final opinion on title that you are relying upon on-line records (and e-recording)?¹³
- Is the document you are submitting as the “original” an exact duplicate of the signed “original?”

If you plan on e-recording, have you checked to make sure the applicable Register of Deeds where you are e-recording is set up for e-recording? Some are not! And have you checked to see if a particular county has tacked on an e-recording fee (apart from the service provider’s e-recording fee) to collect on the closing statement? Learning about the fee after the closing statement has been signed is too late! *You are now paying the fee!*

Once you have e-recorded, what steps are you taking to preserve the “original” that you scanned to the Register of Deeds? There does not seem to be a clear answer as to what constitutes the “original” when e-recording. Even if you assume the “original” is the recorded version, the lender will (typically) require in its loan instructions that the “original” loan documents be returned to the lender. Suggestion: Print the recorded version of the e-recorded document and take the first page showing the book and page where/when recorded, and clip that to the “wet ink” original. Invest in a (red) stamp that says **“ORIGINAL/E-recording”** and stamp the “wet ink” original. Decide which party will be entrusted with that “original” just as you would other originals that have been recorded the traditional way at the Register of Deeds.

In e-recording, also consider whether there are contractual terms imposed on you by the service provider (that takes your scanned “copy” of the original and then uploads it to the Register of Deeds). Are there also contractual terms imposed by the Register of Deeds? Are all such terms acceptable?

11. Loan documents.

First of all, read the loan commitment. Do the loan terms (interest rate, term of loan, etc.) comply with the commitment letter?

Second, read the loan documents OR get a waiver from your client that your client is satisfied with the lender’s standard loan documents and does not desire that you to read them, verify them, explain them or negotiate them!

In reviewing loan documents, do not assume that the loan documents are non-negotiable! There are certain provisions that “most” lenders will agree to modify. For example, if your client is a small family company where there are anticipated family transfers of membership interests from time to time, the lender may agree to modify the “due on sale” provision to exempt certain family transfers. Often times, these approved modifications are documented in the form of an addendum to the standard-form loan documents.

¹² See sample client disclosure form attached hereto as Exhibit A.

¹³ Examples of possible disclosures to include in your preliminary/final title opinion:

(a) “Any inaccuracies in the public records obtained for this opinion via online access.”

(b) “Any inaccuracies in the judgment search through the automated civil case processing system (“VCAP”) provided by the NC Administrative Office of the Courts.”

(c) “Any inaccuracies in the public records as a result of (i) original documents being electronically recorded, or (ii) delays in recording caused by the e-recording process.”

12. Due diligence.

This article primarily focuses on the closing itself. However, when you are given a contract to close, make a due-diligence checklist. Verify with the client which portions of the due diligence the client will conduct and which the client wants you to conduct.¹⁴ Some clients will do the vast majority of their due diligence themselves, looking for you just to do the title search/UCC search and to order the zoning letter. Other clients will have you do everything. The important thing is to make sure nothing slips through the cracks. Always keep in mind that NC is a *caveat emptor* state.¹⁵

If a client decides to waive certain due diligence inspections, against your recommendation, document the waiver in a signed writing that you advised that the due diligence be conducted. The better practice in using such a waiver would be to have it signed at the commencement of the due diligence period and not to wait until closing (when it is too late to persuade your client to undertake the missing due diligence inspections).

A thorough review of due diligence is beyond the scope of these practice tips for closings; however, surveys and environmental due diligence deserve special mention.

Surveys, and proper drafting of metes and bounds legal descriptions, require attention to detail. It is your responsibility to make sure the new legal description can be located on the ground (with a proper “beginning point”) and “closes.” Drafting a legal description is really an art form.¹⁶ In reviewing the survey, carefully study each item shown on the survey and read each “note.” Matters shown on the survey need to be listed on your title opinion. Look for gaps, encroachments, discrepancies from the legal description in your chain, discrepancies in acreage, etc.

Environmental due diligence is especially important. Suffice it to say that no commercial property should be purchased without a Phase I environmental site assessment which conforms to “all appropriate inquiry” regulations promulgated by the U.S. Environmental Protection Agency. Verify the party responsible for ordering the report and that it can be completed prior to the expiration of the due diligence period. If the report identifies any “Recognized Environmental Conditions,” you should recommend that your client review and discuss with an environmental attorney (or at least with the environmental consultant who prepared the Phase I report). The Phase I must be completed before closing to preserve the bona fide prospective purchaser defense under federal law. Additionally, certain components of the Phase I environmental site assessment must be conducted within 180 days of closing and the entire assessment must be conducted within one year of closing. Also make sure the Phase I report is in the name of the party taking title. Frequently, a Phase I report is ordered before a “special purpose entity” is formed to take title. That means the Phase I may be in the name of the party ordering the report and not necessarily in the name of the party taking title at closing. If so, the environmental consultant can provide a reliance letter for the entity taking title. Depending on the nature of the property and any proposed redevelopment, environmental due diligence may also include a wetlands determination, asbestos survey, lead paint inspection, radon inspection and other inspections to determine the suitability of the property for use and redevelopment.¹⁷

¹⁴ For an example of what can go wrong with due diligence inspections, see Clouse v. Gordon, 115 N.C. App. 500, 445 S.E.2d 428 (1994).

¹⁵ See Margaret Burnham, “Caveat Emptor and the Disgruntled Buyer” (updated April 2008)[copy available at www.nexsenpruet.com/professionals/margaret-burnham]

¹⁶ Ann M. Cantrell, NCCP, “Preparing Efficient and Effective Legal Descriptions,” Paralegal Perspectives (Vol. 12, No. 4, NCBA Legal Assistants Division, June 2009).

¹⁷ The author is grateful for the input from her law partner, Joan Hartley, Esq., for the update to the environmental due diligence provisions.

13. Insurance.

Insurance is a good example of why you need a checklist. If there is no lender to require evidence of insurance as part of the closing instructions, don't you still want to make sure it is in place? Will your buyer remember? Keep Murphy's Law in mind: If there is no insurance in place, something calamitous will happen. When reviewing evidence of insurance, you obviously won't be the expert on the amount of coverage that is appropriate. However, you can verify the stated coverage is appropriate with the client (and lender if there is one). You can easily verify the proper name of the insured (and, in a loan closing, adding the lender as an additional insured), the effective date of coverage, the property description, etc.

14. Title insurance.

Title insurance is a topic unto itself. Keep in mind a couple of beginner tips:

- check with your client for consent to "tack" (see RPC 99);
- consider the standard of care in updating from an owner's policy versus a mortgagee's policy (see 2009 FEO 17, modifying a portion of RPC 99);
- if there is a loan, check to see if your client desires additional coverage for the delta between the loan amount and the purchase price;
- consider appropriate standard endorsements to the policy (checklists for available endorsements are readily available from title insurance companies);
- consider any appropriate "custom" endorsements;
- check LIENSNC.com for any MLA filings; and
- check for any broker liens.¹⁸

15. Opinion letters.

A lot has been written about opinion letters, and you must become totally familiar with this area of practice before issuing your first opinion.¹⁹ In fact, if you are in a law firm, you may be prohibited from signing an opinion letter without it being reviewed by a partner or an opinion- letter committee.

In issuing an opinion, consider what is different about your transaction and modify the opinion letter accordingly. For example, if your opinion involves a foreign lender, and you are not giving an opinion as to whether the lender needs to be licensed or qualified in NC to do business, carve that out. If you are only NC counsel and there are issues involving something out of state, carve that out also.

Have you properly included all necessary assumptions and qualifications? Have you read all of the documents listed in the opinion (or, in some cases, the documents incorporated by reference into other documents)? If you are only giving an opinion on a Deed of Trust, don't include other documents in the list of documents "reviewed." Did you see all parties execute the loan documents? If not, you need to carve out the parties you did not personally see sign. Did you date all of the loan documents yourself so that you can verify they are all the same date? If not, you need to add an assumption that the lender or lender's counsel will date all documents the same date. These are just a few examples of the types of issues that arise with opinion letters to give you a flavor of the issues involved.

¹⁸ NCGS §44A-24.1, et seq..

¹⁹ Margaret Shea Burnham, "Opinion Letter Do's and Don'ts" (NCBA, Real Property Section, Vol. 34, No. 1, September 2012).

16. Shared document sites.

There are many commercial closings in which some type of on-line document-sharing system is utilized. Make sure the site is secure. If you don't know, check with an IT professional. Your duty to safeguard client confidentiality means this matters to you before you upload documents.

17. Conflicts.

Many conflicts arise in the context of a commercial closing because of the number of parties, and the fact that many law firms do work for lenders that in turn make loans to other clients of the law firm.²⁰ Make sure you have identified all parties to the transaction. For example, if there is a new limited liability company being formed, who owns it? Should each "member" of the limited liability company be listed in the conflicts check?

If there is a conflict, the parties may be agreeable to waiving the conflict. Typically, a conflict letter provides that the conflict waiver is for this transaction only and that if the parties later have a dispute, the law firm will not handle litigation against the lender. Make sure to get the conflict waiver in writing from both parties.

Note that the North Carolina State Bar has issued an ethics opinion that an attorney may not generally represent both a lender and a borrower in a commercial real estate closing (absent satisfaction of an eight-part test).²¹

Even when there is no conflict, you may be well served to have a conflicts disclosure signed by any party not represented by counsel clarifying what party you represent and what party you do not represent.²²

²⁰ See, e.g., Kingsdown, Inc. v. Hinshaw, No. 14 CVS 1701, 2015 WL 1406311 (N.C. Ct. App. Mar. 25, 2015)(see also multiple related references to this opinion).

²¹ See 2013 FEO 14.

²² See Broyhill v. Aycocock & Spence, 102 N.C. App. 382, 402 S.E.2d 167, aff'd per curiam, 330 N.C. 438, 410 S.E.2d 392 (1991).

EXHIBIT A
Sample client disclosure form

*Disclosure regarding [insert law firm]'s practices concerning
on-line title searches and e-recording*

Traditionally, title searches were conducted in person at the applicable offices where public records are located, including the Register of Deeds, the Clerk of Court (judgments and pending civil actions if applicable), Special Proceedings (foreclosures, incompetency and guardianships, etc.), Tax Department, and applicable City services (such as water liens if applicable). Much of this information is now available on line. For example, many Registers of Deeds provide on-line access to all of the same deeds, deeds of trust, easements, etc. that are available at the Register of Deeds. Likewise, judgments may now be checked by an online database provided by the Administrative Office of the Courts. These services provide comparable data but may not be considered the "official" version. In an effort to reduce attorney time and to practice law efficiently, we have incorporated on-line searches when available and when we believe the on-line search to be the reasonable equivalent of the public records available in a traditional title search.

Similarly, North Carolina now permits e-recording in counties which have implemented this service. Electronic recording ("e-recording") means that original documents previously recorded by presentation at each applicable Register of Deeds office (in person or by mail) can now be scanned and uploaded for e- recording. The "original" (wet signature) remains at the law firm since the scanned copy (an exact duplicate of the "wet signature" original) is what is uploaded and then recorded. Our firm's practice is to print a copy of the front page of the recorded document to attach to the "wet signature" original, which we then stamp "Original – E-recording" to identify and preserve the "wet signature" original to distribute to the appropriate party (lender, buyer, seller, tenant, etc.).

We have considered the issues regarding on-line title searches and e-recording and it is our opinion that on-line searches and e-recording protect client interests at the same time as lowering client costs.

If you have any questions about our practices, please let us know. If you prefer that title searches be performed only in the traditional manner, that can be arranged. If you prefer that actual originals be recorded by traditional presentation to the Register of Deeds (in person or by mail), that also can be arranged. In the absence of your objection, we will continue to use on-line title searches and e-recording when available.

Acknowledgement by Client:

| | |
|---------------------|---------------------|
| Individual: | Company: |
| By: _____ | Name: _____ |
| Printed name: _____ | By: _____ |
| Date: _____ | Printed name: _____ |
| | Date: _____ |

So You're Thinking About Economic Incentives for Your NC Real Estate Project?

Economic Incentives 101 for the Entrepreneur

By Margaret Shea Burnham and Ernest Pearson

April 2019

So you're thinking about starting a new project or expanding your existing project in NC? What should you be thinking about to qualify for economic incentives?

For starters, your questions about economic incentives should be on the top of your list, not an afterthought. Your recommended first step is to engage an economic incentives specialist. Short of that, at a bare minimum, be sure that your request for proposal/letter of intent/purchase contract/lease contains words to the effect of an economic incentives qualifier:

[Your company name] is considering multiple sites, in NC and in other states. This [Request for Proposal/Letter of Intent/Purchase Contract/Lease] is contingent upon final approvals of adequate economic incentives at the State and local level in amounts to be negotiated, in the sole discretion of [your company name].

Why does it matter? If your investment in NC is of a size to warrant an award of economic incentives, you want to make sure you qualify to receive them.

How big does your investment need to be to qualify for incentives? There is no "one size fits all" test for what projects will qualify for incentives at each level. Typically, governmental jurisdictions awarding incentives are looking at both capital investment and job creation, as well as wage levels. It is safe to say the greater the capital investment and the greater the number of jobs, the more incentives will be offered to you. We have participated in negotiating attractive incentive arrangements for projects ranging from two to three million dollars in capital investments and twenty employees, up to \$1.2 billion in capital investments and 700 employees.

How do you qualify for incentives? North Carolina employs a "**but for**" test to qualify for economic incentives. In other words, "but for" the award of incentives, you would not have chosen the particular site. If you've already decided to come to NC or expand in NC, you obviously would not qualify for state incentives. In such a case, there would be no consideration for the incentives.

By adding an economic incentives qualifier, such as the phrase set forth above, to your request for proposal/letter of intent/ purchase contract/lease, you have at least protected your right to negotiate for incentives. Once you are under contract, without first negotiating for incentives, you would be hard pressed to later argue that "but for" the incentives, you would not have chosen the site (that you are already obligated to purchase/lease)... Ditto for a building you have already purchased or improvements you have already constructed. The "but for" test is a prerequisite for state level incentives. For local government incentives, the "but for" test is interpreted by some local government lawyers as a condition to qualify for incentives. Other local government lawyers do not interpret this as a requirement. But at the very least, maintaining a competitive posture for the project enhances one's negotiating leverage.

Why protect your right to negotiate incentives? Incentives are a way to entice your business to come to, or expand in, NC. Likewise, on the local level, incentives also entice the business to a particular locale within NC. If you protect your rights, you may qualify for incentives at state, county and city levels. Why leave money on the table?

Incentive grants are based on jobs (and to a degree wage levels) and the amount of capital investments in real estate improvements and equipment which will result in increased property tax valuations and property tax payments.

Because the local tax base depends upon the value of real estate improvements and personal property, a typical award of economic incentives at the local level will be based largely upon a projection of new property taxes to be generated. This is the source of funding for local government incentives. This type of incentive is calculated based upon the verifiable capital improvements to be constructed (new building, together with new machinery and equipment). If your project is going to add hypothetically \$10,000,000 to the tax base, the increase in tax benefits to the applicable local jurisdiction(s) can be quantified based upon tax rates. This may result in a cash grants calculated or certain percentages of anticipated future, new property taxes each year for a stated number of years. For example, the calculation might be along the lines of 60% of new property taxes each year for six years. In that the incentive grants will be less than the property taxes that will be paid, the local government still realizes a tax benefit in the excess over the incentives awarded to your company.

In addition to ad valorem tax calculations, in some projects there are monetary incentives based upon other taxes, such as the increase in the sales tax that will be generated from the project.

Apart from capital investment in real estate, incentive awards will look at the number of jobs your investment will bring. Job creation will look at the number of jobs (sometimes using “full time” and sometimes even using “full time equivalent,” depending upon the criteria), the wages to be paid, and, in some cases, the job field. Incentives will be based upon a matrix taking into account all of the job creation figures. Local incentive grants will most often require a certain level of job creation as a condition of the incentive grants. But at the state level, the number of new jobs to be created is the primary basis upon which incentive grants are calculated and paid. The reason is that the increase in income taxes is the source of funding from which grants are paid.

North Carolina state economic incentive grant programs include two types:

- Job Development Investment Grants (“JDIG”) – a discretionary incentive program providing annual grants to new and expanding businesses relative to a percentage of withholding taxes paid by new employees each year for stated number of years.
- One North Carolina Fund – non-recurring appropriations by the NC General Assembly to help recruit targeted jobs, which provides grants based upon a negotiated amount for each new job.

Another incentive that adds value is the community college training programs to make sure your new project has the type of employees you will need for your business to thrive. These programs are administered by the North Carolina Community College System. These incentives are work force development programs which cover a broad array of workforce screening, job fairs, and training for new and incumbent employees.

There are a number of programs which provide funding for infrastructure improvements such as Utility Fund grants, Rural Infrastructure grants, Golden LEAF Foundation grants, DOT road improvements grants, DOT rail improvement grants, and others.

Although most grant programs are geared to state and local governmental agencies, there are also some federal infrastructure grant programs available, such as EDA grants.

By being creative there are a number of ways that incentive and infrastructure grants can be used for the benefit of a company, which might include:

- site preparation
- expansion of utility infrastructure, such as water and sewer lines to the site
- other utility benefits, such as a generator
- specialized wastewater systems for manufacturing facilities
- expansion of roads/road improvements/traffic signals
- fire suppression systems
- access to railway
- access to an airport runway
- acquisition, construction, conveyance or lease of buildings for industrial or commercial use; and
- grants or loans for rehabilitation of historic structures.

Besides direct grants, the governmental agency making the grants will be in a position to aid with zoning, permits, and other regulatory hurdles to getting your project off the ground. Remember, with the award of incentives, the governmental agency has already determined that your project will bring needed capital improvements and/or jobs to the locale, so the governmental agency has a vested interest in helping you make that happen.

To summarize, the number one goal to protect your right to incentives is to make sure you don't lose them by failing to take the necessary steps to qualify for them. Lost incentives are a lost opportunity. Look for incentives at every available level and from every available source. If you think it may not be worth your while, talk to an economic development specialist before you lose out. You may not qualify for the reported **\$1.6 billion** economic incentives package recently offered in an effort to entice Toyota/Mazda to NC, but you may qualify for enough to make your project economically feasible. Don't leave money on the table!



Margaret Burnham

336.387.5116

mburnham@nexsenpruet.com

Margaret concentrates her practice in the areas of commercial real estate transactions and litigation. She is a Board Certified Specialist in Real Property Law: Business, Commercial, and Industrial Transactions by the North Carolina State Bar and is a member of the American College of Real Estate Lawyers. She is also a Real Estate Broker and a certified NCDRC Superior Court mediator.



Ernie Pearson

919.755.1800

epearson@nexsenpruet.com

Ernie has unparalleled experience in economic development matters. As Assistant Secretary for Economic Development during one of North Carolina's most successful periods of economic growth, he worked with scores of economic development projects and understands matters from that perspective. Having worked for over one hundred companies in site selection and incentive negotiation projects he has seen the process from that side and understands the company's point of view. His work with numerous local and regional economic development programs gives him an understanding of economic development from that side of the table.

Escrow Outgoing Wire Form

Date: _____

Client/Matter No. _____

Firm Bank Name & Account No. Wire is Being Debiting From:

Purpose Of Wire: _____

Examples: Settlement Funds, Earnest Money, Net Proceeds And Etc.

Amount OF Wire: _____

Beneficiary Account Name: _____

Beneficiary Address: _____

Beneficiary Bank Account Number: _____

ABA/Routing #: _____

Swift Code For International Wires: _____

Bank Name And Address: _____

Reference:

(Examples) Loan Payoff With Client Info, Invoice No., Settlement, Seller Proceeds And Etc.

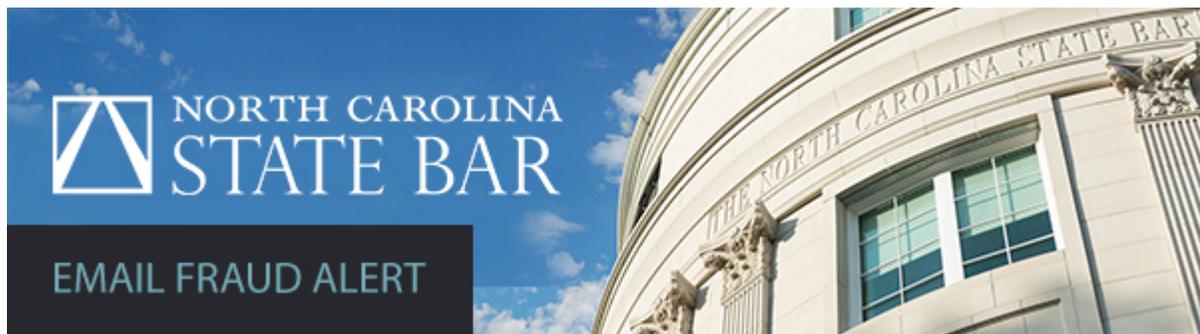
Contact Information for Verification of Wire Instructions and Wire Received:

Please Confirm Above Wiring Instructions By Signing Below:

Attorney, Paralegal Or Secretary Signature:

Signed By: _____ **Print Name:** _____

Please Attach Your Signed Escrow Check Request(Must Be Signed By A Partner) And Any Other Forms Or Information Pertaining To This Outgoing Wire.



ALERT: COMPROMISED EMAIL/WIRE INSTRUCTIONS FRAUD CONTINUES TO TARGET NORTH CAROLINA LAWYERS

The **State Bar** first alerted **North Carolina lawyers** to the compromised email wire instructions fraud scheme in April 2015. Unfortunately, over two years later, North Carolina lawyers continue to fall prey to this scam, causing millions of dollars of losses to clients and law firms. Information about this scam is available through title insurance companies (such as Investors Title's W.I.R.E. **brochure** and **checklist**), malpractice insurance carriers (Lawyers Mutual has published **numerous articles** and **videos**), and other cyber security websites. **Here is a recent article about the scam** and how it affected a couple in North Carolina. **This video** is a chilling reminder of the devastation this scam can bring to your clients.

In **2011 FEO 7**, the State Bar's Ethics Committee opined that a lawyer has "affirmative duties to educate himself regularly as to the security risks of online banking; to actively maintain end-user security at the law firm through safety practices such as strong password policies and procedures, the use of encryption and security software, and the hiring of an information technology consultant to advise the lawyer or firm employees; and to insure that all staff members who assist with the management of the trust account receive training on and abide by the security measures adopted by the firm."

The opinion specifies that lawyers must stay educated on current cyber security risks to prevent client harm and avoid potential disciplinary action. Failure to implement reasonable security measures to protect entrusted funds can cost **a lawyer financially and professionally**. In fact, the State Bar is aware of numerous instances where lawyers spent hundreds of thousands of dollars of their own money reimbursing clients for losses caused by this scam, instantly wiping out a career's worth of retirement savings.

If your firm has been the subject of an attempted or successful fraud, please contact the State Bar at pbolac@ncbar.gov or (919) 828-4620.



NCBAR.GOV

WARNING: NEW TWISTS IN FRAUD – INTERCEPTION OF INCOMING WIRES

By now, you are familiar with wire instruction scams which are sweeping across North Carolina and the country. Lawyers Mutual, the State Bar and numerous others have issued alerts detailing the scams and best practices to avoid falling victim.

Since our latest alert, we have received multiple reports of fraudulent wiring instructions being delivered to cash purchasers or buyers providing a significant down payment on real estate purchases. Like other versions of these scams, a hacker will gain access to the email account to a party in the transaction – potentially the client themselves, the closing attorney or most frequently, a realtor. The account is monitored, potentially for months, and near the closing date of a large transaction, fraudulent instructions are sent to the buyer attached to an email purporting to be from the closing attorney.

We know of over \$1 million in wires which were diverted from the trust accounts of North Carolina attorneys, and the frequency of this version of the scam appears to be increasing.

IF YOU ARE CONDUCTING TRANSACTIONS IN WHICH A BUYER IS PROVIDING FUNDS FOR A PURCHASE, YOU NEED TO TAKE ACTION IMMEDIATELY TO EDUCATE YOUR CLIENTS ABOUT PROPER SECURITY AND VERIFICATION PROCEDURES

Best Practices to prevent these claims.

- 1. It is our strongest recommendation that all parties in the transaction be notified of proper wiring procedures as early in the closing process as possible, preferably in an engagement letter. This notice should be not be sent with the wiring instructions. Suggested language to include in your engagement letter:**

Pursuant to the N.C. Gen. Stat. §45, ALTA Best Practices, State Bar Rules and in order to protect your funds, all funds in excess of \$500 must be received by wire to XYZ Law Office. For this transaction, the only bank account we will be using is our IOLTA Trust Account, described and partially redacted below:

XYZ Law Office IOLTA Trust Account
Bank of America
123 Main Street
Raleigh, NC 27603
Partial ABA # *****72
Partial Account # *****184

BEFORE SENDING ANY WIRE, CALL OUR OFFICE AT (919)555-5309 TO VERIFY THE INSTRUCTIONS. WE WILL NOT CHANGE WIRING INSTRUCTIONS. IF YOU RECEIVE WIRING INSTRUCTIONS FOR A DIFFERENT BANK, BRANCH LOCATION, ACCOUNT NAME OR

ACCOUNT NUMBER, THEY SHOULD BE PRESUMED FRAUDULENT. DO NOT SEND ANY FUNDS AND CONTACT OUR OFFICE IMMEDIATELY.

FAILURE TO FOLLOW THIS PROCEDURE ENDANGERS YOUR FUNDS.

2. Have the client sign and return the notice to your office. If it is part of a larger engagement letter, this section should be initialed.
3. Wiring instructions should only be sent to the buyer/intended recipient. Allowing wiring instructions to be forwarded through a Realtor or other party allows an additional point of interception, adds to the delay of their receipt, and prevents other security measures.
4. The full wiring instructions should be sent in an as secured manner as possible when the recipient is expecting their delivery. Ideally, the client would call your office for the wiring instructions, the client's identity would be verified and they would wait on the open line until the instructions are received via secured email or facsimile.
5. Wire receipts should be verified either through calling the bank directly or securely logging into the banking portal. Do not rely upon an email or fax verification of receipt of the wire from your bank. We know of situations in which fraudsters sent 'confirmation of wire' or 'advice of credit' notices with the intent of delaying discovery of the theft. Failing to properly verify receipt could result in a closing attorney disbursing non-existent funds from the trust account –increasing the attorneys' liability and creating ethical problems with the State Bar.
6. Take every opportunity to educate the client on the need to confirm wiring instructions before initiating a wire.

The Latest Cyber Risk: Vulnerability of Your Email Accounts

Law firms continue to be under attack by cybercriminals. The current urgent vulnerability we are hoping to address relates to access to your email accounts.

As you know, cybercriminals are intercepting wire transfers in record numbers. Their access to your email system exposes sensitive information. Recent claims involve breaches to cloud-based accounts. There are simply too many law firms that are experiencing the same issues, so we want to offer some risk management tips.

While recent claims have involved cloud-based systems, we are not discouraging you from using cloud-based systems, but we want you to be aware of the risks and properly manage them.

Without proper security features, hackers can read and respond to emails, deleting the evidence from your inbox. They can also set up rules to forward emails to unknown accounts.

Immediate Action Items

- Consult your current IT resource today to confirm your system has the appropriate safeguards in place and to ask questions about any of the tips below that you do not understand.
- Update/manage/modify your existing cloud-based email accounts to ensure:
 1. Passwords are strong and unique in that they are used only for the email account.
 2. Two-factor authentication is enabled on all accounts.
 3. Rules allowing for the automatic forwarding of emails are disabled/not allowed (verify no unauthorized existing rules are present). This does not prevent the sorting of emails into folders or clicking the forward button on an email to send it to someone else.
 4. Regularly check to ensure that there are no rules set on the account without the user's knowledge.
 5. Review sent and deleted emails for accuracy and suspicious activity.
 6. Ensure that logging is enabled - most cloud providers turn this off by default.
- Beware of SMS/Text messages notifying you that your password has been reset without your knowledge. This is a new type of targeted phishing scam.
- Review recent instructions (incoming/outgoing) relating to any wire transfers. Review your authentication and related practices relating to all wire transfers. You should not wire money to a new account without verifying the instructions via telephone first.

Hacked email systems is a global issue and we all need to increase our defenses against these rampant threats. Please be prudent and take immediate action to ensure your systems have the above basic protections in place regarding your email.

Next, review your Information Security practices to ensure proper data backup, data encryption, education surrounding phishing attacks and related items that can impact day-to-day operations.

You can learn more about defending against hacking attempts in our article "You Are the First Line of Defense Against Hackers" available here: <http://www.lawyersmutualinc.com/risk-management-resources/articles/you-are-the-first-line-of-defense-against-hackers>.

You are welcome to reach out to Lawyers Mutual by calling our Risk Management Hotline at 800.662.8843 and/or Identity Fraud, Inc. (BIZLock) cyber at info@bizlock.net.



CHICAGO BULL

(8-6-2018)

EMAIL & WIRE FRAUD:

**FIRST PRIORITY:
PROTECTING your clients,
your firm and yourself!**



Who and What are AT RISK?

- Commercial and residential transactions are at risk
- Payoff letters, wiring instructions to buyers from sellers and for others - any communications (other than in person personal delivery by the intended recipient)
- Your and your law firm's financial and business future, as well as reputation in the community
- Your personal finances

This is NOT A NEW ISSUE! Alerts, information and advice have been broadly disseminated and are available everywhere – the [news](#), the [Real Property Section listserv](#), [Lawyers Mutual](#), [title insurers](#), the [NC State Bar](#) ([repeatedly](#), including [2011 FEO 7](#)), the [NC Closing Attorney Best Practices Task Force](#), banks with trust accounts now requiring multi-factor authentication AND EVEN THE [Attorney General's office](#)! LISTEN, LEARN AND IMPLEMENT TODAY so that *you* will *not* be next!

Here's the nutshell:

- TRAIN AND EDUCATE YOUR STAFF, OTHER ATTORNEYS, YOUR REGULAR REALTOR & LENDER CUSTOMERS, AND BASICALLY EVERYONE WHO MAY BE INVOLVED IN THE CLOSING, WIRING AND TRUST ACCOUNTING PROCESS.
- Obtain signed [Wire Fraud Alert Forms](#) with your *reliable contact information* (yours and theirs) and warnings about why this is critically important *to them, directly and securely* with each of the parties with whom you may be electronically receiving or transmitting information or funds *immediately when you open the file*.
- Consider including this Wire Fraud Alert in your engagement letter with the proposed new client, on your firm's website, in your automatic email footer, and any other location which might reach or be available to a client or party to a transaction.
- Obtain verbal verification *before any financial transaction, incoming or outgoing*, from a known, trusted contact *with the payee* at a known trusted telephone number for every instruction *and especially any last minute changes!* REMEMBER: Most banks and closing attorneys do not suddenly change their wiring instructions at the last minute.
- *You initiate the contact! DO NOT rely on them calling in to you.*

- Verify delivery with the intended recipient using the *reliable contact information*, especially for larger amounts.
- Verify the coverage of any cyber-insurance or endorsements to existing malpractice or comprehensive liability policies. Do not assume that you will be covered.
- And, most importantly of all: **BE DILIGENT!! KEEP UP WITH ADVICE AND INSTRUCTIONS FROM OTHERS IN THE INDUSTRY ABOUT THE SOURCES OF THE RISK. KEEP UPDATING AND IMPROVING YOUR SYSTEMS AND PRACTICES TO CONTINUE PROTECTION.**
- **TRAIN AND EDUCATE YOUR STAFF, OTHER ATTORNEYS, YOUR REGULAR REALTOR & LENDER CUSTOMERS, AND BASICALLY EVERYONE WHO MAY BE INVOLVED IN THE CLOSING, WIRING AND TRUST ACCOUNTING PROCESS.** (Did I say that already? Well, THAT bears saying again, repeatedly with existing and new firm employees.)
- And, despite all your efforts, if a wire goes astray, **FOLLOW UP ASAP WITH:**
 - Your bank and be sure to say: **FRAUD**
 - The transmitting bank (for incoming wires, such as buyer or loan proceeds)
 - The recipient bank (for outgoing wires, such as payoffs or seller proceeds)
 - Local law enforcement
 - Federal Bureau of Investigation: <https://www.fbi.gov/>
 - Internet Crime Complaint Center: <http://www.ic3.gov>
 - Your malpractice carrier
 - Your cyber-insurance carrier
 - The title insurance company involved
 - Your client and/or the parties involved

BE SAFE OUT THERE!! A little due diligence goes a very long way!!

CEO & Wire Transfer Fraud Checklist

Have you been a victim of CEO or Wire Transfer Fraud, commonly known as Business Email Compromise (BEC)? Review the checklist below for immediate actions:

IMMEDIATE ACTIONS

Internal Actions

- Review all IP logs accessing the relevant infrastructure (internal mail servers or other publically accessible infrastructure) – looking for unusual activity
- Scan for log-in locational data. Was there a log-in from an unknown country or location, specific to that email account?
- Review the relevant email account(s) which may have been spoofed or otherwise compromised for any rules such as “auto forward” or “auto delete”
- Inform employees/agents of the situation and require they contact clients and customers who are near the wire transfer stage
- Review all requests that asked for a change in payment type or location. ***Remain especially vigilant on transactions expected to occur immediately prior to a holiday or weekend. ***

Reporting the Incident

- Contact your bank
 - Determine the appropriate contact at your bank, who has the authority to recall a wire transfer
- Notify your bank you have been the victim of a Business Email Compromise
 - AND -
- Request a wire recall or SWIFT Recall Message
 - AND -
- Request they fully cooperate with law enforcement
- Report the incident (or attempt) to the FBI at www.IC3.gov
- Provide all details for the beneficiary: account numbers, contact information, names
- Contact your local FBI Field Office

PREVENTION & RECOGNITION

- Does the Routing Number provided to you, resolve to the expected bank used by the other party? (*Example: Have you received wire information for an account at a Hong Kong bank; however, your other party only banks in the U.S.?*)

Possible websites to verify a Routing Number:

- a. The Federal Reserve
www.FRBServices.org
 - b. American Bankers Association
<https://routingnumber.aba.com>
- Call a known/trusted phone number or meet in person to confirm the wire transfer information provided to you, matches the other party's information
 - Hover your cursor over suspicious email addresses – Looking for indications of Display Name Deception or Spoofing
 - DO NOT hover on *links* within emails, as simply hovering *may* execute commands.

- Regularly check your email account log-in activity for possible signs of email compromise

- Regularly check your email account for new “rules”, such as email forwarding and/or auto delete

- Be cautious of “new” customers, suppliers, clients and/or others you don't know who ask you to:

- a. ...open or download any documents they send

- OR -

- b. ...sign into a separate window or click on a link to view an invoice or document

- OR -

- c. ...provide sensitive Personal or Corporate information

- Verify the wire instructions you provide to your customers/clients are accurate for both the pertinent bank and pertinent account.

- a. Where did you get the account data?

- b. Is this the correct account number?