

## **Fees Charged by Attorney Settlement Agents**

### **By the NHBA Ethics Committee**

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Attorneys often act as settlement agents in real estate transactions in New Hampshire. As settlement agents, the attorneys perform a variety of services for different parties to the transaction. This article addresses the ethical limitations on the fees that may be charged for such services.

A residential closing settlement agent is expected to collect all of the funds necessary to close the transaction and to disburse the funds from the closing to the appropriate parties. As part of the agent's services, the settlement agent will often contact the holders of existing liens on the property involved in the closing to obtain lien pay-off information. As changes in the residential loan marketplace have occurred, the settlement agents have had to change the way that they conduct their businesses and the way that they charge for their services. Attorneys who act as settlement agents in real estate transactions must comply with the New Hampshire Rules of Professional Conduct ("Rules") in their dealings with their clients and with third party participants in the closings.

Not long ago, the vast majority of residential mortgages on New Hampshire real estate were held by New Hampshire lenders. When property was sold or a loan refinanced, most lenders would provide loan payoff information to settlement agents over the phone, and many lenders would furnish an executed discharge in advance of the closing. The U. S. Mail used to provide overnight delivery service within New Hampshire and in much of New England. Mortgage payoff checks were customarily sent to the lender by the settlement agent by mail.

Times have changed. It is now rare to find a residential mortgage loan that is still held in New Hampshire by the original lender. Loans are now freely assigned among lenders--and are frequently serviced by large in-state and out-of-state loan services. Often, the lenders omit to record proper evidence of assignments of loans and the settlement agent is forced to chase down the intervening holders of the loan for proper assignments. The loan servicers will no longer provide loan information over the phone. They require written requests for loan payoff information and loan payment instructions, they will not provide mortgage discharges in advance of payment, and they rarely provide mortgage discharges in a timely fashion once a loan has been paid. The settlement agent must forward the loan payment to these services at the time of closing, and then monitor the title servicer to assure that a mortgage discharge is recorded. As a result, the time and effort required by settlement agents to obtain loan payoff information and assure that a mortgage discharge has been recorded is significant.

When the U.S. Mail could be counted upon for one or two day delivery and residential loans were held in New Hampshire, most parties were content to have their loan payoffs mailed to the lender with an additional one or two day's interest to allow for the delivery time. However, because of the unreliability of the U.S. Mail, most parties now insist that their mortgage payoffs be sent by the settlement agent to the loan servicer by overnight courier service in order to minimize extra interest expense on the loan

Where once a settlement agent's job was completed at closing, the settlement agent is now required to file information about many closings with both state and federal authorities. Whenever title to property changes hands, a so-called "1099 Report" for the closing must be filed by the settlement agent with the IRS by year end, and a Declaration of Consideration Form must be filed by the purchaser with the Department of Revenue Administration within 30 days of the closing. The settlement agent is personally liable for failing to file a proper 1099 Report, and settlement agents have customarily filed the Declaration of Consideration Form on behalf of the purchaser.

Both lawyer and non-lawyer settlement agents have responded to these growing administrative burdens by increasing the fees that they charge for certain closing services. These such fee increases include:

1. Charging the seller a fee to obtain mortgage payoff information, to remit the mortgage payoff, and to obtain a mortgage discharge;
2. Charging a fee in excess of the actual fee charged to the settlement agent by an overnight courier service; and

3. Charging a fee to the purchaser to file the Declaration of Consideration Form with the State of New Hampshire.

While a non-lawyer settlement agent's right to charge fees at closing is limited solely by the law-of contracts, an attorney who acts as a settlement agent may only-charge a party a fee that is consistent with both the attorney's contractual relationship with the party and the Rules. Generally, the lawyer/settlement agent's client may be charged any fee that is consistent with the lawyer's fee agreement with the client so long as the fee is not illegal or clearly excessive. Rules 1.2 and 1.5. If the lawyer/settlement agent is representing the lender in the closing, and the lender's contract with the borrower requires the borrower to pay the lender's legal fees, the lawyer/settlement agent's bill for services must be consistent with the lawyer's fee agreement with the lender. The lawyer/settlement agent may only charge fees and expenses to a non-client third party in accordance with an express agreement between the lawyer and the third party.

It has been the custom and practice in New Hampshire for settlement agents to obtain loan payoff information and to assure that a proper discharge of mortgage has been recorded without charging the seller or the borrower an extra fee for this service. However, there is no question that it is now much more difficult and burdensome for a settlement agent to provide this service. In light of the changes in the loan marketplace, it is reasonable for a settlement agent, including a lawyer/settlement agent, to charge an additional fee for that service.

Because the parties are likely to assume that a lawyer/settlement agent will provide loan payoff and discharge services without an additional fee, the lawyer/settlement agent must communicate with the property owner relative to the owner's obligation to properly discharge the mortgage lien at closing. If the owner does not desire to take the steps necessary to discharge the mortgage lien at closing, the lawyer/settlement agent may offer to provide that service for a fee. If the party agrees to pay the fee, the lawyer/settlement agent may proceed to render the service and collect the agreed upon fee. However, absent the agreement of the third party, the lawyer/settlement agent may not charge an additional fee to the third party for mortgage payoff and discharge services. See Rules 4.1 and 4.3.

It is administratively more burdensome for a settlement agent to send a loan payoff via overnight courier than by U.S. Mail. The lawyer/settlement agent must prepare and maintain proper records of the delivery of the package to the courier. The invoice for the delivery must be processed and paid when received. For many settlement agents, delivery of the package to the courier drop off location requires additional staff time. For these reasons, if a party to a closing elects to have the loan payoff sent by overnight courier so as to save interest expense, it is not unreasonable for a lawyer/settlement agent to charge a fee that includes both the actual cost of using the courier service and a charge for the lawyer/settlement agent's additional administrative expenses associated with providing the additional service. However, because parties may justifiably expect to be charged the actual amount of a disbursement, the lawyer/settlement agent may only assess a surcharge on such a disbursement if the surcharge is described in the fee agreement with the party and if the surcharge is reasonably related to the lawyer/settlement agent's additional expenses associated with the disbursement. ABA Formal Opinion 93-379 (1993).

By law, the settlement agent is prohibited from charging a fee for making the 1099 Report to the Internal Revenue Service. There is no comparable prohibition with respect to the State of New Hampshire Declaration of Consideration Form. Virtually all of the information that is required for the Declaration of Consideration Form is filled in prior to closing, and the parties typically sign the Declaration of Consideration Form at closing. Since the settlement agent must do little more than fill in two blanks when the deed is returned from the Registry of Deeds, and mail the Declaration of Consideration Form to the Department of Revenue Administration, it would be hard to argue that a lawyer/settlement agent may charge more than a minimal fee for the filing of the Declaration of Consideration Form. Moreover, the fee for filing the Declaration of Consideration Form cannot include any of the settlement agent's costs of filing the 1099 or be a subterfuge to collect those costs. Rule 8.4.

When an attorney acts as a settlement agent in a real estate transaction, the attorney will often receive fees from more than one party. The fees charged to the lawyer/settlement agent's client must be consistent with the lawyer's fee agreement with the client. Fees charged to a third party are not in the nature of legal fees. However, such fees must be consistent with a contractual agreement between the lawyer/settlement agent and the third party.