

Top Residential Real Estate Traps

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Real estate is an area of the law that touches many other practice areas. It is important that we be aware of common pitfalls in order to protect our clients. This presentation seeks to identify and address the more important real estate traps in the following contexts:

- A. *Drafting and reviewing residential purchase agreements.*
- B. *Examining abstracts – practice and substantive areas.*
- C. *Closing the transaction.*
- D. *Drafting deeds.*
- E. *Advising clients with installment contract transactions.*
- F. *Watching for ethical pitfalls.*

The focus of this presentation will not be comprehensive (*e.g.*, how to examine abstracts or draft deeds); rather, we will focus instead on areas that might be a “gotcha” for the general practitioner.

A. Drafting and reviewing residential purchase agreements.

1. Do you have all the terms and addenda?

Pointer: There cannot be any side agreements between the parties. Be ever watchful for issues of seller carry back (*i.e.*, the seller loaning a portion of the down payment). You have a duty to notify the lender of any adverse information.

2. Are all the necessary parties joining?
3. Do you have the correct property?

Pointer: Never use the legal description from the assessor website. It is only provided as a reference and not for conveyancing purposes.

4. For sellers:
 - a. Have you done your due diligence as to the price?
Pointer: Pretend to buy your own property. Understand the market as if you are the buyer.
 - b. If the buyers are taking early possession, will the buyers' insurance be in place?
 - c. Are the fixtures you wish to take with your or leave recited in the purchase agreement?
 - d. Are there judgments or liens that will be an issue?
Pointer: Remind realtors to take proactive steps to address known title issues rather than to wait for the title opinion to be issued. This can make the difference as to whether a transaction closes on time.
 - e. Have the sellers owned the property 2 years during the last 5 to avoid capital gains?
 - f. Does the seller have the authority to convey the real estate? (*E.g.*, an executor with a power of sale, a conservator, a city conveying real estate, a church).
 - g. Has the seller accurately completed the Residential Sellers Disclosure Statement?
Pointer: Better to disclose too much.
 - h. Is there a septic system that will need to be inspected?

5. For buyers:
 - a. Have you done your due diligence as to: price, condition of the property, title, and restrictions on the use of the property (*e.g.*, zoning, restrictive covenants, and easements)?
 - b. Is the financing contingency completed with the lender's assistance?
Pointer: "Pre-approval" is not a loan commitment.
 - c. Are possession and closing dates realistic?

d. Have you reserved a contingency for inspection of the property? Are there any questions regarding the boundary lines? Would it be worth considering having the sewer lines televised?

e. Have you received and reviewed the Residential Sellers' Disclosure Statement?

f. Have you shopped for a lender considering both the interest rate and closing costs (or APR)?

Pointer: We must not refer clients just to the lenders we work with or to our friends. To do so means we are not acting in our clients' best interests; we are acting in our best interests. Equip your borrower clients to be good consumers of loans.

6. Is there is a power of attorney involved for either party? Will the original be available to record?

7. Are there any special considerations (*e.g.*, timing or availability of the parties, a simultaneous purchase by the sellers) that need to be addressed?

8. Is there any personal property that needs to be addressed?

Pointer: Lenders are guarded about personal property impacting the value of the property. Use a separate agreement for valuable personal property such as riding lawn mowers and pool tables.

9. Do the notes of your meeting with the clients presume: (1) you will not remember what you need to about this file and (2) you will be sued?

B. Examining abstracts – practice and substantive areas.

1. **Examination notes.** Are your notes complete and legible?

Pointer: Your notes are your best insurance policy and should be scanned and readily accessible in case there are ever future questions.

2. **Legal descriptions.**

a. Have you proofed your legal description?

Pointer: The legal description should be taken from the last continuation and *not* the cover of the abstract. Sometimes there are changes to the legal description that are not reflected on the cover.

Pointer: Metes and bounds descriptions can be very challenging. Learn how to draw a metes and bounds description. The mapping feature on the assessor's website is an excellent aid to reviewing a complicated metes and bounds description. Read metes and bounds descriptions with someone else.

Pointer: Consider e-mailing a long legal description to the parties to use with the deed and mortgage to keep them from having to retype it.

b. Is there a vacated alley?

The 40-year chain of title is a requirement for all real estate described in the caption.¹ If real estate is added to the caption (*e.g.*, a city vacating an alley), the abstract must include a root of title for that additional real estate if a title opinion is to be rendered on all of the real estate being conveyed. (Pursuant to Iowa Code § 364.7, a conveyance of an interest in real estate from a municipality requires a showing of (1) the resolution of the city council to sell the property, (2) proof of publication of the notice, and (3) the resolution of the council following the hearing.) To obtain an Iowa Title Guaranty policy, the legal description used in the appraisal and the title opinion must agree. Thus, if an 8-foot strip from a vacated alley does not affect the property value, then the owner *could* forego adding the root of title to the abstract for the 8-foot strip. (This is not recommended because the buyers are provided with an abstract that does not cover all of the real estate being conveyed, probably contrary to the purchase agreement.) Conversely, if a garage now sits on the 8-foot strip, this will likely require consistency between the title work and the appraisal.

3. **Vesting.**

a. Does your recital showing the vesting provide all necessary name variations?

b. If title has been quieted through a quiet title action, have the necessary parties been named and served?

4. **Marital status.** Is there a deed where the marital status of individual grantors is not shown?

A deed needs to recite the marital status of each grantor. *See* Title Standard 5.3. If the deed was recorded over ten years ago without a recital of the marital

¹ *See* the Marketable Title Act (Iowa Code § 614.29-.38).

status, no further showing is required unless a suit has been commenced or a claim has been filed in accordance with Iowa Code § 614.15. The marital status of the mortgagor(s) must also be shown on a mortgage.²

5. **Trusts.** Is title vested in the trustees of a trust?

a. Here is a sample paragraph where title is vested in a trust:

◇. Since this deed will be executed by the trustee, there must be recorded along with the deed current affidavits from both the grantor and grantee, under §614.14, Code of Iowa.

◇. Title is in the trustee or trustees by virtue of a deed executed by ◇, which was recorded on ◇ as Inst. No. ◇ of the county records.

Pointer. Assist the attorney drafting the trustee's affidavit by providing the recording information for the deed when the titleholders took title.

b. If a grantor of a trust has died, are you requiring a proper showing as to Iowa inheritance tax pursuant to Iowa Land Title Standard 4.7?

6. **Mortgages.**

a. Does your opinion reflect when a mortgage is open-ended?

Sample paragraph: Entry No. ◇ reports the real estate is encumbered by an **open-end** mortgage given to ◇ on ◇ and recorded on ◇ as Inst. No. ◇ in Book ◇, Page ◇ of the county records. This mortgage secures a loan in the amount of \$◇. **I advise that you determine whether this mortgage is securing a line of credit that will require written instructions from the borrower in order to obtain a mortgage release.**

Title Guaranty will not force open-mortgages off of title.³ Without an instruction to close the open-end loan, a borrower could continue to draw against it as long as it has not been closed.

b. Is a mortgage barred because of the passage of time?

The following is a helpful way to determine if a mortgage is barred from foreclosure:

² See comment to Title Standard 5.3.

³ See <https://www.iowafinance.com/iowa-title-guaranty/mortgage-release-certificate-program>.

- 1) The following mortgages **are barred** from foreclosure:
 - a) A mortgage that is more than 20 years old and has no maturity date.⁴
 - b) A mortgage that is less than 20 years old, but 10 years have elapsed from the date of maturity.⁵
- 2) The following mortgage **is not barred** from foreclosure:
 - a) A mortgage that is more than 20 years old with a maturity date where fewer than 10 years have elapsed from the maturity date.⁶
 - c. If there is a mortgage foreclosure shown, is the right party bringing the foreclosure and have all necessary defendants been named and served?

Pointers:

- 1) A junior lienholder not named and served remains survives the foreclosure.
- 2) If the foreclosure decree has not been filed, the mortgage and the junior liens remain.
- 3) If the foreclosure decree has been filed, the mortgage has been converted into a judgment; the junior liens remain.
- 4) The sheriff's sale discharges the junior liens.
- d. Is there a defective mortgage release?

A common problem is releases from the wrong entity. This is usually remedied by the use of an assignment to the releasing entity or a new release from the mortgagee of record. A defective release filed over 10 years ago is considered valid pursuant to Iowa Code § 589.8. Title Standard 7.5 provides that a mortgage release is sufficient if it correctly states the document reference number and reasonably identifies

⁴ Iowa Code § 614.21(1). *See also* Title Standard 10.4.

⁵ Iowa Code § 614.1(5). *See U.S. Bank Nat. Ass'n v. Lamb*, 874 N.W.2d 112, 120 (Iowa 2016) (holding “In sum, we conclude the statute of limitations for such ‘mortgagee’s right,’ which govern the timeliness of rescission, is . . . either a ten-year or twenty-year statute of limitations found in the Iowa Code. *See* Iowa Code § 614.1(5) (requiring actions ‘founded on written contracts’ be brought within ten years); Iowa Code § 614.21 (barring actions to foreclose or enforce any real estate mortgage after twenty years of the date thereon).”). *See also* Title Standard 10.5.

⁶ Iowa Code § 614.21(1)(a).

the mortgagee. There is disagreement among attorneys as to whether a wrong entity qualifies under Iowa Code § 589.8.

e. What steps should be taken with a stray mortgage (or a stray deed), *i.e.*, when the instrument has an error in the legal description that causes it to appear in the chain of title of another property? Here is sample language for a stray mortgage:

Pursuant to Iowa Land Title Standard 4.5, I require the following:

- (1) An affidavit or disclaimer showing no interest in the property from the mortgagor.
- and
- (2) A release of the mortgage.

If neither (1) or (2) can be obtained, a corrected deed or mortgage setting out the true facts and stating that the description in the prior deed or mortgage was in error is acceptable. If the affidavit or disclaimer cannot be obtained from the grantee or mortgagor, then an affidavit of a person having personal knowledge of the facts is acceptable.

7. **Judgments.**

- a. Does the abstract show judgments?

Do not just state that an entry reports a judgment. Provide the case number, parties, date of judgment, and nature of judgment so that a remedial measure can be taken. Here is a sample paragraph for judgments:

Entry No. <> reports a judgment in favor of <> (the Plaintiff<> Defendant<>) against <> (the Plaintiff<> Defendant<>) entered on <> in <> Case No. <>, in the initial amount of \$<> plus interest and costs. Unless the defendant named is not the same as the titleholder shown above<> Upon recording of the deed to the proposed grantee (unless the defendant named is not the same as the grantee) this will constitute a lien against the real estate which must be paid.<> You are advised to check with the Clerk of Court prior to closing to determine the correct amount of the judgment and the amount of any court costs which may be payable.

- b. Can a judgment be resolved with the application of the Notice of Homestead and Demand to Levy?

Judgments do not attach as liens against homestead property. Iowa Code § 561.4 provides a means of platting the homestead in order to establish of record that certain real estate should be considered homestead property. In addition, subsection b of Iowa Code § 624.23(2) was rewritten to read as follows:

b. A claim of lien against real estate claimed as a homestead is barred unless execution is levied within thirty days of the time the defendant, the defendant's agent, or a person with an interest in the real estate has served written demand on the owner of the judgment. The demand shall state that the lien and all benefits derived from the lien as to the real estate alleged to be or to have been a homestead shall be forfeited unless the owner of the judgment levies execution against that real estate within thirty days from the date of service of the demand. The demand shall contain an affidavit setting forth facts indicating why the judgment is not believed to be a lien against the real estate. A warranty of title by a former occupying homeowner in a conveyance for value constitutes a claim of exemption against all judgments against the current homeowner or the current homeowner's spouse not specifically exempted in the conveyance. Written demand shall be served in any manner authorized for service of original notice under the Iowa rules of civil procedure or in a manner provided in [section 654.4A, subsections 1 through 3](#). A copy of the written demand and proof of service of the written demand shall be filed in the court file of the case in which the judgment giving rise to the alleged lien was entered.

c. A party serving a written demand under this subsection may obtain an immediate court order releasing the claimed lien by posting with the clerk of court a cash bond in an amount of at least one hundred twenty-five percent of the outstanding balance owed on the judgment. The court may order that in lieu of posting the bond with the clerk of court, the bond may be deposited in either the trust account of an attorney licensed to practice law in this state or in a federally insured depository institution, along with the restriction that the bond not be disbursed except as the court may direct. A copy of the court order shall be served along with a written demand under this subsection. Thereafter, any execution on the judgment shall be against the bond, subject to all claims and defenses which the moving party had against the execution against the real estate, including but not limited to a lack of equity in the property to support the lien in its proper priority. The bond shall be released upon demand of its principal or surety if no execution is ordered on the judgment within thirty days of completion of service of the written demand under this subsection.

See Baratta v. Polk County Health Services, Inc., 588 N.W.2d 107, 114 (Iowa 1999) (holding “We find that the purpose of the enactment of subsection two of Iowa Code §624.23 was not to change prior law on the effect of judgment liens upon homestead rights, but to provide a simplified procedure for homestead owners to clear the title of their homesteads from any recorded judgments against them which may cloud title to the property.”) *See Exhibit 1 for a Notice of Homestead Designation and Demand to Levy.*

Pointer: The Notice of Homestead and Demand to Levy is only effective with judgments that have been issued after taking title to the homestead. This procedure does not resolve pre-existing judgments.

- c. Has the judgment been discharged in bankruptcy?

According to Marshall § 21.1, “[t]he effect of bankruptcy upon a judgment lien is that in the event the bankrupt is discharged he is relieved only of personal liability to all provable debts but the lien remains.”⁷ Thus, the lien must still be released.

8. **Dissolution of marriage.**

- a. Does the Decree serve as the muniment of title?

A dissolution decree may serve as a muniment of title. However, dissolution decrees vary as to whether the decree itself serves as a muniment of title or whether they require a quit claim deed. This raises the question for title examiners of whether to require the prescribed quit claim deed or rely on the dissolution decree as a muniment of title where the quit claim deed has not been filed. A safer approach is to require the quit claim deed if there is any ambiguity where the decree contemplates an additional step. Note that the description of the marital property used in the dissolution decree should be the legal description rather than the street address of the property. If the dissolution decree inadvertently uses the street address, an order *nunc pro tunc* will resolve this.

- b. Has a judgment holder given a quit claim deed?

A quit claim deed given by a judgment holder for spousal support or child support can create a question of whether the deed extinguishes the lien since it conveys all the grantor’s interest in the real estate. For example, a decree requires Jane Doe to convey her interest by quit claim deed; John Doe owes her a monthly spousal support obligation. Although every unpaid monthly payment creates a new judgment lien, the quit claim deed from Jane Doe should specifically recite that the conveyance is subject to the lien created by the decree. The recital in the body of such a quit claim deed should use the following language:

⁷ See also Title Standard 13.4.

This deed is given subject to that certain spousal support / child support / property settlement ◊ lien created in ◊ County Case No. ◊ by an Order dated ◊ and any amendments thereto.

If the quit claim deed is silent on the judgment lien, I still require a release from the judgment holder.

c. Is the child who is the subject of a child support judgment over age 18?

A judgment remains a lien for 10 years against property owned by the judgment debtor. A pitfall to avoid is to assume that there could not be a lien for child support where the child is over age 18. Read the decree carefully. The following paragraph can be used when identifying a child support or spousal support obligation:

Entry No. ◊ reports Dissolution of Marriage Case No. ◊, in which a judgment was entered on ◊ in favor of ◊ (the Petitioner◊ Respondent◊) against ◊ (the Petitioner◊ Respondent◊) for child support◊ spousal support◊ and other matters. I require the judgment holder, ◊, file an Affidavit which acknowledges receipt of all child support and other judgment payments due under the decree of Dissolution up to and including the date upon which your deed and/or mortgage is recorded. You are advised to check with the Clerk of Court prior to closing to determine the amount of any court costs which may be payable

d. Has child support for post-secondary education been ordered?

When child support for post-secondary education is required, a release from the adult child is needed. The following language may be used in the title opinion:

Entry No. ◊ reports Dissolution of Marriage Case No. ◊, in which a judgment was entered on ◊ in favor of ◊ (a child whose date of birth is ◊) against ◊ (the Petitioner◊ Respondent◊) for support for post-secondary education pursuant to Iowa Code § 598.1. Iowa Code § 598.1(8) indicates that this obligation may be required for educational expenses of a child who is between the ages of eighteen and twenty-two years if the child is regularly attending a course of vocational-technical training either as a part of a regular school program or under special arrangements adapted to the individual person's needs; or is, in good faith, a full-time student in a college, university, or community college; or has been accepted for admission to a college, university, or community college and the next regular term has not yet begun.

I require the judgment holder, ◇, to file an Affidavit which acknowledges receipt of all support for post secondary education due under the decree of Dissolution up to and including the date upon which your deed and/or mortgage is recorded.

e. Is there a property distribution that is structured in monthly payments?

Occasionally a dissolution decree will require one of the parties to make installment payments towards a property distribution. For example, John Doe owes \$10,000 to Mary Doe, with monthly payments of \$500 beginning the month after the entry of the decree. This looks very similar to a child support or spousal support obligation and it would seem reasonable to only have the judgment debtor current on monthly payments. *However, the entire amount of the property settlement, because of the certainty of the amount owed, is a lien against the real estate and must be satisfied.*⁸ In the alternative, the judgment holder can release the property from the lien without satisfying the judgment.

9. **Installment contracts.**

a. Has a contract vendor (seller) married after the conveyance?

When the equitable title is conveyed, the contract vendor is left with bare legal title (*i.e.*, personalty) by virtue of equitable conversion. As a result, judgments against the vendor subsequent to the conveyance do not attach as liens. In addition, if a contract vendor marries after the conveyance of the equitable interest, the spouse does not have a dower interest in the personalty which must be released.⁹

b. What showing is required where there is an assignment by the contract vendor (seller)?

Review Marshall § 20.1(G) for an excellent explanation of the nature of installment contracts. A conveyance by the contract vendor is made by *both* (1) assignment of the vendor's interest in the contract and (2) conveyance of the vendor's interest in the title to the real estate.

⁸ See Marshall § 10.3.

⁹ See Marshall § 20.1(B).

c. What showing is required where is an assignment by the contract vendee (buyer)?

Marshall addresses conveyance by the vendee at § 20.1(H). The vendee's interest in the real estate may be conveyed by an assignment with proper language of conveyance as long as the instrument is signed by the spouse (if any) and properly acknowledged.

d. What showing is required where the contractor vendor has died?

Marshall explains the importance of executing a deed in fulfillment of the contract:

The proper mechanics of a contract of sale of real estate is for the vendor, at the time of the execution of the contract, to execute and deliver in escrow a deed, to be delivered to the vendee or his assignee when the vendee has fully performed the terms of the contract. This prevents difficulty if the vendor should die before the time for transferring the legal title to the vendee. Otherwise, the conveyance must be made by the personal representative of the vendor, unless his estate has been closed, in which case his heirs or beneficiaries would make the conveyance.¹⁰

e. What showing is required when there is a contract forfeiture?

Iowa Code chapter 656 is the statutory authority for contract forfeiture. A 30-day notice is required, but there must be care given that all parties in interest receive notice. The effect of a contract forfeiture is that all parties claiming an interest in the real estate (*e.g.*, lien holders) under the original or successor vendee lose their interest in the real estate. However, if the vendee conveys a deed to the vendor in "lieu of forfeiture," this *does not* operate to cut off all those interests in the real estate. **Thus, if there are judgments against the vendee, the vendor should forfeit the contract rather than accept a deed offered in lieu of forfeiture.** If you are going to use a deed, be sure to have the abstractor do a search before filing.

¹⁰ Marshall § 20.1(B).

10. **Restrictive covenants.**

- a. Is there an automatic renewal provision?

Here is a sample paragraph where there is an automatic renewal:

Entry No. <> reports the real estate is subject to certain restrictive covenants which govern the use of the real estate. For a copy of these restrictive covenants, please contact your realtor or the seller. **These restrictive covenants provide for automatic renewal. The automatic renewal provision will not serve to renew the covenants.** See *Compiano v. Jones*, 269 N.W.2d 459 (Iowa 1978). You should consult your real estate advisor to determine what effect, if any, the absence of these restrictive covenants may have on the marketability of the real estate. The potential unenforceability of these restrictive covenants could also have an adverse effect on your ability to obtain financing. In addition, I recommend amending the covenants to provide for extending the covenants by filing a verified claim. The covenants were filed <> in Book <>, Page <> / as Inst. No. <> of the county records.

If this real estate is subject to restrictive covenants it may be subject to homeowner's dues or assessments. You are advised to consult the homeowner's association to determine whether any dues remain unpaid and determine whether you may become liable for their payment.

- b. Do the covenants contain provisions which address issues that your buyers have informed you are important to them?

In 1999, the Iowa Court of Appeals decided *Bazal v. Rhines*.¹¹ On its face, the case deals with the duties real estate brokers have to their buyers. However, the duties of fidelity and good faith of brokers would be comparable to the duties attorneys owe their buyers and lenders as well.

In this case, the buyers (the Rhines) needed a house that could accommodate four dogs and entered into a purchase agreement to buy a house in Linn County for \$211,000. The buyers' realtor (Palma) was aware of this condition and that the selected property was subject to restrictive covenants which permitted only one dog per house. The buyers, at some point, learned of the covenants and did not close on the purchase. The sellers (Bazals) sued the real estate broker (who was a dual agent) and the buyers.

¹¹ 600 N.W.2d 327 (Iowa Ct. App. 1999).

In finding for the sellers, the Court held:

Real estate brokers assume a fiduciary relationship with their principals which creates a duty of fidelity and good faith. By virtue of the Listing Agreement, the Agency Policy Disclosure and Acknowledgment Form, and the Consensual Dual Agency Agreement, Skogman and Palma had a fiduciary duty and a duty of good faith to the Bazals. Skogman and Palma had a duty to discover material facts regarding the property which were reasonably discoverable. *Palma was aware of the “dog clause” but never informed the Rhineses about it, but should have.*

In addition to the Consensual Dual Agency Agreement and the Agency Policy Disclosure and Acknowledgment Form, the National Association of Realtors Code of Ethics requires realtors to disclose material facts to the buyers and the sellers. Under the facts in this case, the existence of the “dog clause” and the Rhineses' plan to bring four dogs to the property were material facts which should have, if known, been disclosed to all parties. There is substantial evidence to support the district court's finding that Palma failed to disclose these material facts.¹²

Although this case does not specifically reference the fiduciary duties of a lawyer to buyers and lenders, lawyers have a similar duty to act with “commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf.”¹³ Thus, an attorney advising a lender or buyer would have a similar fiduciary duty to make the client aware of material facts that are disadvantageous to the client.¹⁴

11. **Easements.**

a. Are all easements pertaining to the property referenced in the opinion?

Pointer: Ideally, easements are created in a separate instrument that will clearly indicate whether they encumber or benefit the subject property. However, they will sometimes be reserved in a deed or created by showing on a plat map. Creating easements on a plat map is disfavored because the subdivision plat maps are generally not

¹² *Id.* at 329 (citations omitted) (emphasis added).

¹³ I.C.A. Rule 32:1.3 cmt. [1].

¹⁴ It interesting to note that the examining attorney, Michael Donohue, prepared a title opinion which disclosed the restrictive covenant with the “dog clause” and suggested that a waiver be obtained. *Bazal* 600 N.W.2d at 328-29. The case does not address the duties of the examining attorney.

provided in an abstract at a size that is legible. Plat maps also are silent as to who the judgment is in favor of and any duties of maintenance.

b. Is access to the subject property created by a private ingress and easement appurtenant?

If so, “the abstract must include the servient estate to the date of the recording of the grant of easement.”¹⁵ “Abstracting of the servient estate subsequent to the recording [of the easement] is not necessary.”¹⁶

c. If there is an access easement, is there a maintenance agreement?

Although not a title defect, secondary market lenders sometimes require a maintenance agreement as a condition of closing.

12. **Mechanic’s Lien and Notice Registry (MNLN).** Has the abstractor searched the MNLN on the Secretary of State website for pre-lien searches?

Iowa Title Guaranty now requires that abstractors search the Mechanic’s Lien and Notice Registry (MNLN) for pre-lien filings and not just mechanic’s liens. Search the MNLN for commencements of work (usually filed by contractors), preliminary notices (filed by subcontractors), and mechanic’s liens. The MNLN should be searched at the time of the title opinion, the closing, and, if a refinance, the day the mortgage is filed. If the MNLN search yields a filing, be sure to file lien waivers on the MNLN. Here is language for your title opinion if the abstractor did not search the MNLN:

I performed a search on the Iowa Secretary of State Mechanic’s Notice and Lien Registry website against the legal description, address, current titleholder(s), and parcel number of the real estate. The MNLN website should be searched at the time of closing and filing the mortgage.

a. A Commencement of Work / Preliminary Notice was filed by <> on <> (MNLN #<>). **I require a lien waiver to be obtained and filed on the MNLN.**

13. **Subdivision platting procedures.** Have all mortgagees and judgment holders consented to the platting?

¹⁵ Title Standard 1.11.

¹⁶ *Id.*

14. **Title Standard 1.1.** Are you raising objections that should be waived under Iowa Land Title Standard 1.1?

1) **Is there a technical objection?**

In some instances, an attorney will skip this and go on to the question of whether there is a reasonable probability of litigation – a common mistake among examining attorneys. For example, there may be a defectively released mortgage, but the mortgage is barred from foreclosure due to the date of filing or the maturity date. *Make sure there is actually a technical objection.*

2) **Is there a reasonable probability of litigation?**

a) Who has standing to file a claim?

If there are no potential claimants, the analysis ends.

b) What grounds would the claimant have?

There must be a recognized cause of action that has not been barred by the curative statutes.

c) Can the claim reasonably be expected to expose the purchaser or lender to litigation?

The third prong is the hardest prong of the test. It is not practical to expect all attorneys to analyze the risk of litigation in the same way. The goal is not complete uniformity of outcome,¹⁷ but rather, *a unity of how to apply Title Standard 1.1.* “The extent to which this standard can be applied liberally without compromising the safety of a client’s title is the test of the success of the Iowa Land Title Examination Standards.”¹⁸

¹⁷ Iowa Title Standard Committee, *The New Iowa Land Title Examination Standards*, DRAKE L. REV. 589, 598 (1984-85) (citations omitted).

¹⁸ *Id.*

C. Closing the transaction.

1. Prior to the closing.

- a. Is the seller a foreign person without a Social Security Number?

Special steps are required. See www.irs.gov/instructions/i1099s and www.irs.gov/publications/p515.

- b. Does the borrower speak English with sufficient fluency to understand the transaction?¹⁹

If not, an interpreter (not the borrower's 10-year-old child) should be enlisted.

- c. Do the borrowers know to bring certified funds or arrange for a wire transfer and bring a valid, government-issued photo id for the notary?

- d. Has an issue regarding the condition of the property arisen during the final walk through?

Pause the closing to make sure that the issue can be thoroughly understood. Door knob v. unknown water damage.

- e. Do you have a legible payoff statement from the lender?

- f. Do you have reliable wire instructions?

- g. Does the mortgage provide the marital status of the mortgagors? A recital of the purchase money mortgage protection?

Pointer: The spouse must join in giving a mortgage in order to have a valid mortgage.²⁰

- h. If the sellers are unrepresented, have you contacted them and communicated your expectations? See Exhibit 2 for a checklist for unrepresented sellers.

¹⁹ See *Nationwide Advantage Mortg. Co. v. Ortiz*, 776 N.W.2d 111 (Iowa Ct. App. 2009) (unpublished). In *Ortiz*, the mortgagor, a non-English speaker, gave a mortgage without his wife joining in giving the mortgage. A fact question existed about whether Ortiz understood what it meant that his spouse needed to sign the mortgage when he signed it.

²⁰ *Wells Fargo v. Hudson*, 742 N.W.2d 605 (Iowa Ct. App. 2007).

2. **At the closing.**

a. Has a side transaction come to light where money is changing hands that is not reflected on the settlement statement?

This could be mortgage fraud. The lender must be notified about such matters.

b. Is there a gift of equity in the transaction?

Pointer: Confirm that there is no expectation of repayment. Lenders do not permit subordinate financing. The source of the buyers' funds is very important to the structure of the loan.

c. What if a dispute arises during the closing?

Pause the closing, inform the lender immediately, and provide the parties with a chance to resolve the conflict. Never pressure the parties to close.

d. What if you learn of information during the closing that is adverse to the lender (*e.g.*, the borrower has changed jobs, the borrower has taken on new debt to buy a car)?

We are agents of the lender and therefore have a duty of relaying any adverse information to the lender.

e. What if the borrower asks for legal advice during the closing?

Refrain from doing this as you represent the lender. Misinformation could be construed as coming from the lender. Make a separate appointment.

f. What if the buyer wishes to add a party to the deed at closing?

You cannot add another party to a deed that has been executed and delivered.²¹ Draft a quit claim deed after the closing. Similarly, there should be no changes to the property being conveyed.

²¹ *McNertney v. Kahler*, 710 N.W.2d 109 (Iowa 2006).

3. **After closing.**

a. What if there is an error on a CD that is discovered after the closing?

1) 30-day changes

a) Nature of changes. When the borrower actually paid fees that differ from those shown on the CD because of an event that occurs during the 30-day period after the closing (*e.g.*, a recording fee), a revised CD will need to be provided.²² There may be events that do not require a revised CD (*e.g.*, tax increases).²³ Comment 19(e)(4)(i)-1 provides other examples of changes that will or will not require a revised CD.

b) Timing. A corrected CD must be provided during the **30-calendar-day** period after the closing that causes the CD to become inaccurate and results in a change to an amount paid by the borrower from what was previously disclosed.²⁴ When such an event occurs, the corrected CD must be delivered or mailed not later than **30 calendar days** after receiving information of the event.²⁵

2) 60-day changes

a) Nature of changes. These are clerical errors where the error does not affect a numerical disclosure and does not affect the timing, delivery, or other requirements of § 1026.19(e) or (f).²⁶ For example, a CD that shows the wrong closing agent would be clerical because it is non-numerical and does not affect the delivery requirements. However, a CD that lists the wrong property address would be considered non-clerical because it affects the delivery requirements.²⁷

b) Timing. A corrected CD must be delivered or mailed to correct non-numerical clerical errors and document refunds for tolerance violations no later than 60 calendar days after the closing.²⁸

²² Comment 19(f)(2)(iii)-1.i; COMPLIANCE GUIDE § 12.4.

²³ Comment 19(f)(2)(iii)-1.iii; COMPLIANCE GUIDE § 12.4.

²⁴ 42 U.S.C. § 1026.19(f)(2)(iii); Comment 19(f)(2)(iii)-1; COMPLIANCE GUIDE § 12.5.

²⁵ 42 U.S.C. § 1026.19(f)(2)(iii); Comment 19(f)(2)(iii)-1; COMPLIANCE GUIDE § 12.5.

²⁶ Comment 19(f)(2)(iii)-1; COMPLIANCE GUIDE § 12.7.

²⁷ *Id.*

²⁸ 42 U.S.C. § 1026.19(f)(2)(iv)-(v); COMPLIANCE GUIDE § 12.7.

3) Refunds to cure tolerance violations

a) Nature of changes. A lender may need to refund money to the borrower to cure a tolerance violation.

b) Timing. The corrected CD must be delivered or mailed no later than 60 calendar days after consummation.²⁹

D. Drafting deeds.

1. See Exhibit 3 for a warranty deed form. Cover sheets are not required where the document is in proper form for recording and needlessly add \$5 to the buyers' recording costs.

2. Are the names of the grantors taken from the title opinion or last deed?

3. Is the legal description taken from the title opinion or the last continuation?

4. Is the correct acknowledgment form used?

The following short form certificates of notarial acts are sufficient for the purposes indicated, if completed with the information required by section 9B.16, subsection 1. Note that the acknowledgement should *not* recite the marital status as this is not something required under Iowa Code § 9B.5. The Bar form for the warranty deed has been modified to remove the recital of marital status.

a. For an acknowledgment in an individual capacity:

State of _____
(County) of _____

This record was acknowledged before me on _____, 20__ by _____.

(signature of notarial officer)

(Seal, if any)

Title (and Rank)
[My commission expires: ____]

²⁹ 42 U.S.C. § 1026.19(f)(2)(v); COMPLIANCE GUIDE § 12.7.

- b. For an acknowledgment in a representative capacity:

State of _____
(County) of _____

This record was acknowledged before me on _____, 20____ by
_____ (name(s) of person(s)) as
_____ (type of authority, e.g., officer, trustee, etc.) of
_____ (name of party on behalf of whom instrument was
executed).

(signature of notarial officer)
(Seal, if any)

Title (and Rank)
[My commission expires: ____]

E. Advising clients with installment contract transactions.

1. **For sellers:**

a. Has the seller considered the risk of serving as the source of financing without the underwriting tools of a lender?

b. Has the installment contract been recorded?

Pointer: The contract must be recorded within 90 days of execution.³⁰ The Groundwater Hazard Statement and Declaration of Value are filed with the installment contract.

c. Have the deed in fulfillment of the contract and the abstract been escrowed?

d. Does the seller know that the transfer tax is paid when the deed is recorded?

Pointer: Memorialize the amount of transfer tax on the settlement statement for reference.

e. Does the installment contract provide a right of forfeiture?

³⁰ See Iowa Code § 558.46. Failure to record within 90 days results in a fine of not to exceed \$100 per day and the loss of forfeiture as a remedy.

2. **For buyers:**
 - a. Has the abstract been examined? Any limitation on the sellers' ability to convey the real estate (*e.g.*, due-sale-clause in the mortgage)?
 - b. Have the buyers been advised as to the risk of forfeiture?
3. Is there a plan for the Sellers and Buyers to document the payment history to avoid disputes?

F. Watching for ethical pitfalls.

1. **Conflicts of interest.** Can an attorney represent both the buyer and seller in a residential real estate transaction?

In Iowa, an attorney cannot represent both the buyer and seller in the same transaction without a written waiver of the conflict of interest.³¹ Neither the Courts nor the Iowa Bar Association have approved a particular form, but the included waiver is a form developed to follow the current law. (*See* Exhibit 4 for a waiver of conflict of interest in a residential real estate transaction.)

2. **Ethics in title examination – duty to inform clients of adverse information.**

What should guide an examining attorney when the attorney becomes aware of information outside of the abstract that is adverse, or potentially adverse, to the client? Examples would include knowledge of a latent defect with the structure of the house, a boundary encroachment discovered when viewing an aerial view of the property on the assessor's website, a judgment that was omitted from the abstract, or the fact that a fuel company was a prior owner of the property (*i.e.*, possibly triggering the need for a Phase I environmental survey as part of the due diligence).

³¹ *See* Iowa Rule of Professional Conduct 32.

Iowa Rule of Professional Conduct 1.4 provides:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in rule 32:1.0(e), is required by these rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Iowa Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

In addition to the Rules of Professional Conduct, because the attorney serves as an agent for the client, the law of imputed knowledge imputes the agent's knowledge to the principal. "By requiring reasonable diligence, Iowa Rule of Professional Conduct 1.3 asks the lawyer to bring vitality and devotion to the project, similar to that which the lawyer would bring to bear if the matter with the lawyer's own."³² Thus, stated another way, if the examining attorney was the buyer or the lender, would the attorney want to know about this information in order to make an informed decision about property that would be their home or serve as sufficient collateral for their loan? Articulated formally:

An examining attorney has an ethical duty to raise an issue about a known latent defect or speculative concern that a reasonable buyer or lender would want to know in order to make an informed decision regarding the subject property.

This is *not* a new rule, but the application of the *existing* rules of agency and the Iowa Rules of Professional Conduct. Like the rules of physics, the Iowa Rules of Professional Conduct cannot be turned on and off – whether we are advising the clients in our conference room or examining an abstract for them.³³ If we want to help our clients make informed decisions, we cannot knowingly withhold information they need. Admittedly,

³² GREGORY C. SISK ET AL. LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION, § 4-5.3(a) at 286 (2018).

³³ See *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Fay*, 619 N.W.2d 321, 325 (Iowa 2000) (holding that "the attorney-client relationship cannot be turned off and on . . .").

the decision is easier with a known latent defect (*e.g.*, the missed judgment or the defect in the foundation). With speculative concerns (*e.g.*, the fuel station in the chain of title), I recommend that a reasonable person standard be used to determine if disclosure is required.

3. **Zealous advocacy – growth as attorneys.** The duty of zealous advocacy applies to transactional lawyers and not just litigators. In order to be zealous advocates, we must be intentional about our own growth as attorneys. We never “arrive.” There is always more to learn. Stoke your intellectual curiosity about the law. Read appellate cases (lots of cases, both state and federal, and across practice areas), attend CLEs, read books, and find lawyers who can mentor you and lawyers who you can mentor. As an example, in the several years, I have benefited from listening to Jeffrey Rosen’s weekly podcast “We the People” from the National Constitution Center³⁴ and watching C-SPAN’s two seasons of Landmark Cases series.³⁵ Both resources are outstanding. I also strongly recommend participating in the Iowa Bar Association listserves.

³⁴ www.constitutioncenter.org

³⁵ www.c-span.org/series/?landmarkCases

If you fail to levy within thirty (30) days from the date of service of the demand, the lien and all benefits derived from the lien as to said real estate alleged to be or to have been homestead, SHALL BE FORFEITED.

The undersigned, being first duly sworn or affirmed do hereby depose and state of our personal knowledge that:

1. We make this affidavit from our personal knowledge for purposes of establishing of record, pursuant to § 624.23(2) of the Code of Iowa, certain facts known to us and affecting the chain of title to the above-described real property situated in ◊ County, Iowa.

2. The above-described real estate was conveyed to ◊ and ◊, a married couple, by a warranty deed filed ◊ as Inst. No. ◊, of the ◊ County records.

3. From the time we purchased the above-described real estate through the present, we have occupied the premises habitually and in good faith as our homestead.

4. The property is within the city limits of the City of ◊, Iowa, and does not exceed one-half acre in extent and its value is exceeds \$500.

5. Our homestead does not embrace more than one dwelling house or any other buildings.

6. The debt to the Plaintiff on this Notice was contracted subsequent to our acquisition of the property as our homestead, and said debt was not incurred for work done or material furnished exclusively for the improvement of the homestead.

As a result of the above-described real estate being our homestead property, the above-referenced judgment does not attach as a lien affecting the real estate. *Baratta v. Polk County Health Services, Inc.*, 588 N.W.2d 107, 113 (Iowa 1999).

◊

Date

◊

Date

State of Iowa, County of _____) SS:

Subscribed and sworn or affirmed before me by <> on <> _____,
20____.

Print name here: _____

Notary Public in and for said State and County

Original sent by certified mail to:

Copy sent by certified mail to:

Attorney at Law

Copy of demand and certified mail receipt filed with the <> County Clerk of Court.

Proof of Service

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on _____, 20____

By: U.S. Mail FAX
 Hand Delivered Overnight Courier
 Certified Mail Other

Signature _____

Exhibit 2



HASTINGS GARTIN BOETTGER LLP
ATTORNEYS AT LAW

Instructions to a Party Selling Real Estate without an Agent or Attorney
Revised January 8, 2020

The following documents need to be provided to me as the closing attorney no later than **two weeks** in advance of the closing:

1. Warranty deed (should be prepared by an attorney).
2. Declaration of Value (should be prepared by an attorney).
3. Groundwater Hazard Statement (should be prepared by an attorney).

NOTE: If the property is not served by a public or semi-public sewage disposal system, you must address the requirements contained in Item 6 of the Groundwater Hazard Statement. This usually means having an inspection of the sewage disposal system. You are advised to review the requirements at least a month before the closing.

4. Title Guaranty Composite Mortgage Affidavit (should be prepared by an attorney).
5. Power of Attorney (if one is used, it should be prepared by an attorney).
6. Payoff statement from each mortgage holder. The payoff needs to include the interest per diem.
7. Invoices for any bills you would like to have paid out of your proceeds (assuming there are proceeds). *E.g.*, abstracting, attorney fees.
8. Instructions with what to do with your proceeds. The proceeds can be mailed, picked up, or wire transferred to your account.
9. Instructions on how to provide you with a draft of the settlement statement (called the Closing Disclosure (CD)) to review (preferably by e-mail). You will need to sign the final CD. We do not need an original signature.

10. You are responsible for addressing any title problems that are presented in the preliminary title opinion. Examples of such problems include unpaid judgments, liens, child support, spousal support, court costs, estate matters, unpaid taxes, and boundary matters.
11. You do not need to obtain the real estate tax proration. We will prepare this.

I also recommend that you consider the following:

1. Make sure all arrangements for the transfer of keys, garage door openers, etc. are resolved well in advance of the closing.
2. Allow enough time between the final walk-through inspection and the closing to resolve any matters that come up during the walk through.
3. **Obtain legal counsel to review your rights and obligations as the seller and to assist you with document preparation.**

Please call me if you have any questions.

Exhibit 3

Prep By: Attorney's Name, Att'y at Law, Attorney's address and phone number
Sent Tax Statement To:
Return Document To:

Warranty Deed

KNOW ALL PERSONS THAT BY THIS INSTRUMENT:

◇, ◇, a married couple◇ a single person◇, for valuable consideration, CONVEY(S) to: ◇, a married couple◇, as JOINT TENANTS WITH RIGHT OF SURVIVORSHIP AND NOT AS TENANTS IN COMMON, the following described real estate in ◇ County, Iowa:

<legal description>

Consummation of contract

This deed is given in consummation of a certain real estate contract recorded on ◇, in Book ◇, Page ◇, of the ◇ County Records.◇

Exemption from transfer tax

This deed is <SUMMARIZE THE EXEMPTION◇ and is therefore exempt under §428A.2(◇).

Power of attorney

The undersigned Attorney-in-Fact warrants that the principals are alive on the date the deed is delivered. If the power of attorney is triggered upon disability, the principal(s) is/are disabled.

AND the Grantor(s) do HEREBY COVENANT with the Grantee(s), and successors in interest, that Grantor(s) hold this real estate by TITLE IN FEE SIMPLE; that they have good and lawful AUTHORITY TO SELL AND CONVEY the same; that this real estate is FREE AND CLEAR OF ALL LIENS AND ENCUMBRANCES WHATSOEVER, except as may be stated above; and Grantor(s) covenant to WARRANT AND DEFEND the real estate against the lawful claims of all persons whomsoever except as may be stated above. If a spouse who is not a titleholder executes this deed, that spouse does not join in the warranties stated above, but executes solely for purposes of releasing rights of dower, homestead and distributive share.

Each of the undersigned releases all rights of dower, homestead and distributive share in and to the real estate described above. Words and phrases herein, including the acknowledgment, shall be construed as in the singular or plural number and as masculine, feminine or neuter gender, according to the context.

Individual capacity

Signed _____, 20__

Print name:

Print name:

State of Iowa, <> County) SS.

This record was acknowledged before me on _____,
20____, by <>.

Print name here: _____
Notary Public in and for said State and County

Representative capacity

<Grantor>

by _____
Print name: _____
Print office: _____

Date

State of Iowa, <> County) SS.

This record was acknowledged before me on _____,
20____, by <> as <> of <>.

Print name here: _____
Notary Public in and for said State and County

Exhibit 4

Waiver of Conflict of Interest in a Residential Real Estate Transaction

IT IS AGREED between _____, Seller(s), whose address _____ for purposes of this Waiver is _____, and _____, Buyer(s), whose address _____ for purposes of this Waiver is _____, that Sellers and Buyers agree to waive the conflict of interest involving _____ (hereafter Attorney) and _____ (hereafter Law Firm).

Recitals

1. Sellers own real estate located at _____ (hereafter Real Estate).
2. Buyers desire to purchase Real Estate.
3. Sellers desire to sell Real Estate to Buyers.
4. Sellers and Buyers desire to have the above-referenced Attorney and Law Firm represent them in said transaction (hereafter Transaction).
5. The Parties have been informed that Attorney and Law Firm are governed by Iowa Rule of Professional Conduct 32 regarding conflicts of interest.
6. The Parties have been informed that under applicable rules of professional conduct, a law firm owes each of its clients a duty of loyalty, which would normally preclude any attorney within the firm from undertaking a representation adverse to any client of the firm without the affected client's informed consent. Other rules generally prohibit a firm from undertaking any representation involving an actual or potential conflict of interest without the informed consent of all affected parties. Such a situation exists whenever a firm represents two clients simultaneously in a situation in which their interests are actually or potentially adverse.
7. The conflict of interest, and the need for informed consent, exist no matter how cordial the business relationship between the two parties currently is or is anticipated to be, and no matter how non-controversial the transaction is anticipated to be.
8. The Parties have been informed of the following, potential risks to this dual representation:
 - a. Compromise in negotiations on the pricing of the real estate.
 - b. Compromise in negotiations on the terms of payment and security for unpaid balances.

- c. Compromise as to warranties as to the condition of the real estate.
- d. Compromise as to the quality of title of the real estate.
- e. Compromise as to negotiations on the date of closing and the risk of loss in the interim.
- f. Compromise as to the tax consequences of the transaction.
- g. Compromise as to the Buyers' effort to secure financing.
- h. Compromise as to relations with brokers, tenants, and title insurance providers.³⁶
- i. Transaction-specific risks: _____

9. **The Attorney does not recommend simultaneous representation of adverse parties, and has not recommended this simultaneous representation to the Parties. The Parties have been advised to seek separate representation. It has been recommended to each of the Parties that they seek the advice of independent counsel of their own choice regarding this written consent.**

10. The Attorney is undertaking this dual representation of the Parties with respect to this transaction only because the Parties have waived the conflict of interest.

11. If a dispute should arise in the future between the Parties concerning the Transaction or any other aspect of dealings between the Parties, the Attorney would have to withdraw, or would be disqualified, from representing either Party with regard to that dispute or any other relationship they might then have with each other. The Parties would then each have to retain separate counsel, resulting in additional expense and inconvenience that might not have been incurred had the Parties been separately represented from the outset.

Acknowledgement and Consent

Despite any potential or actual conflict of interest which may exist now or in the future, the Parties hereby consent to the Attorney's and Law Firm's simultaneous representation of both Sellers and Buyers with respect to the transaction described above. We further agree that the Law Firm may withdraw its representation of either client or both clients without prejudice should it determine that continued representation might violate applicable rules of professional conduct.

Dated _____.

Sellers

Buyers

³⁶ *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Wagner*, 599 N.W.2d 721, 726-27 (Iowa 1999) (citations omitted).