

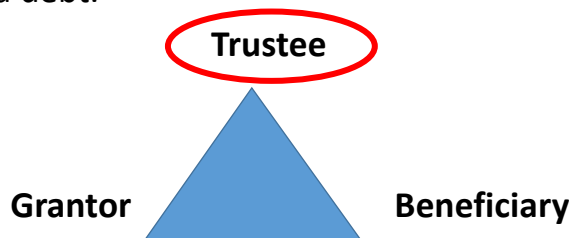
The Role of the Trustee

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Foreclosure for Clerks
November 2025

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Deed of Trust – Three Parties

- Owner conveys legal title to trustee for benefit of third party.
- To secure a debt.



2

Trustee

Charged with carrying out the foreclosure

Initiates the foreclosure at the instruction of the creditor by filing a **notice of hearing** with the clerk

[Space Above This Line For Recording Data]

DEED OF TRUST

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated January 5, 2012, together with all Riders to this document.

(B) "Trantor" is Sally and John Homeowner. Trantor is the Borrower under this Security Instrument.

(C) "Lender" is Happy Lending LLC. Lender is a limited liability company organized and existing under the laws of North Carolina. Lender's address is 89 Lending Lane, Chapel Hill, NC 27514. Lender is the beneficiary under this Security Instrument.

(D) "Trustee" is Sunshine Trustee Services, Inc.

(E) "Note" means the promissory note signed by Sally Homeowner and dated January 5, 2012. The Note states that Sally Homeowner owes Lender \$450,000.00 plus interest. Sally Homeowner has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than January 5, 2046.

(F) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

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Substitution of Trustee

New trustee is substituted by execution of a written document properly recorded pursuant to G.S Chapter 47.

G.S. 45-10(a)

When may this occur?

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When?

The power to substitute a trustee **may be exercised as often and as many times** as the right to make such substitution may arise.

G.S. 45-17

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Clerk's Role

Check the time and date of the recording of the substitution instrument to make sure that the trustee initiating foreclosure has the authority to exercise the power of sale at the time of filing.

If filed before the recording of the substitution instrument, then the trustee must dismiss and refile a new NOH.

[CSC Manual Series, Foreclosure, pg. 2.5](#)

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Substitution of Trustee

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G.S. 45-10(a)

Who signs the substitution?

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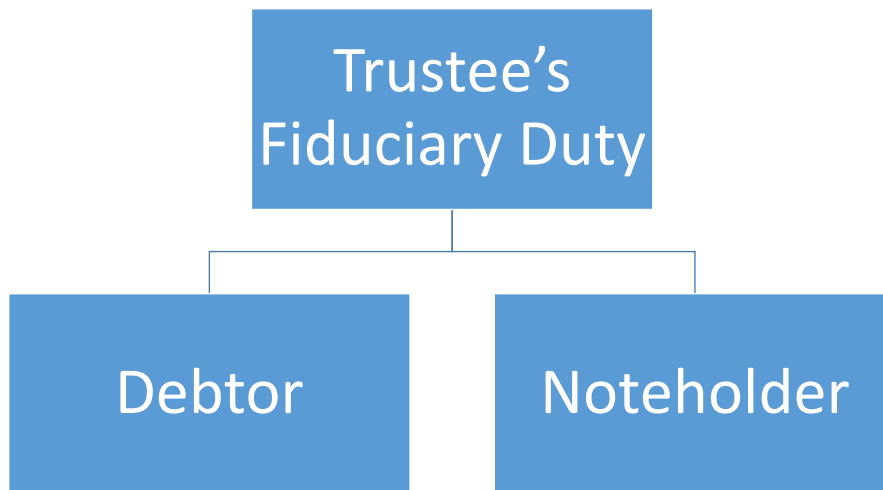
“Noteholder” under G.S. 45-10

The holders or owners of a majority in the amount of the indebtedness, notes, bonds, or other instruments evidencing a promise to pay money and secured by instruments creating a lien on property, such as a deed of trust.

A noteholder is commonly referred to as the creditor or lender.

SL 2017-206 (H770)

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In re Foreclosure of Vogler Realty, Inc.,
365 N.C. 389, 397 (2012)

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What does that mean?

- Disinterested third party
- Must be impartial in the performance of his or her duties
- May not give an unfair advantage to one party to the detriment of the other

In re Foreclosure by Goddard & Peterson, PLLC,
789 S.E.2d 835, 841 (2016)
In re Foreclosure of Real Property for \$143,600.00,
156 N.C. App. 477, 483 (2003)

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Notice of Hearing

Must include the statement that the trustee is a neutral party and, while holding that position, may not advocate for the creditor or the debtor in the foreclosure proceeding.

[G.S. 45-21.16\(c\)\(7\)b.](#)

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PART ONE: Trustee is an Attorney

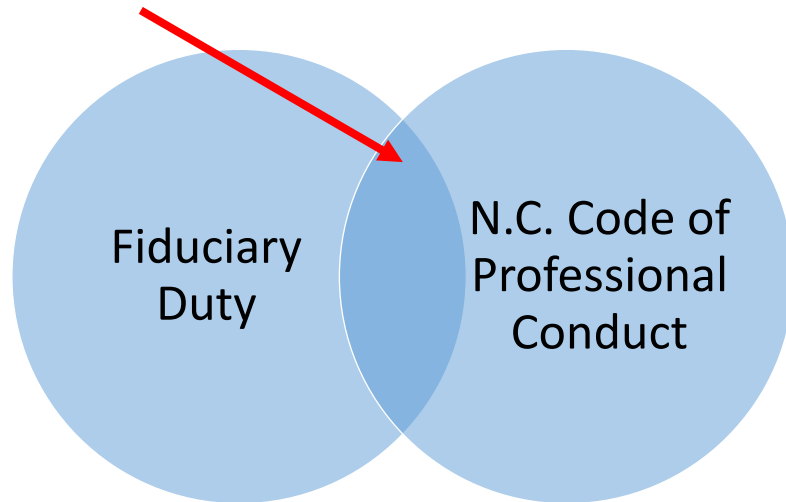
N.C. Rules of Professional Conduct apply to the attorney's conduct.

- Means must maintain client confidences
- Means must avoid conflicts of interest

2013 FEO 5: Attorney/trustee has a duty to act impartially as between the parties and to ensure that the foreclosure is prosecuted in accordance with the law and the terms of the DOT.

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Attorney/Trustee



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SL 2017-206 (H770)

- Revisions to G.S. 45-10
- Codifies ethics opinions from the NC State Bar

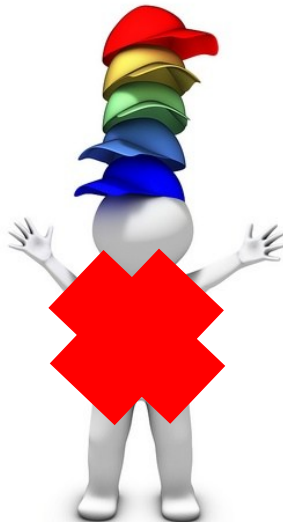
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Rule #1

An attorney who serves as trustee or substitute trustee shall not represent either the noteholder or the interests of the borrower while **initiating** a foreclosure proceeding.

G.S. 45-10(a).

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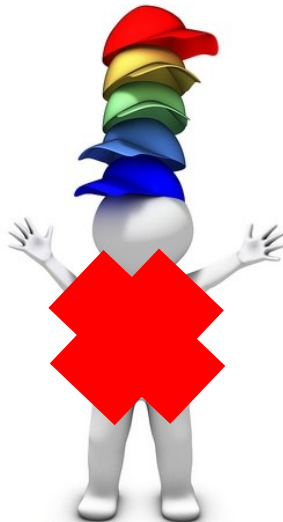
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CPR 166

A fiduciary represents the interests of both the lender and the borrower and would violate his or her fiduciary duty to also be the attorney-advocate for either party **at any stage of the foreclosure** proceeding while serving as trustee.

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Hat of Trustee
+ Hat Lender's
Counsel



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Contested vs. Uncontested

Does not ethically prohibit the trustee from presenting evidence at the hearing on behalf of the lender necessary to support the clerk's findings essential to a foreclosure order **if the matter is uncontested.**

CPR 166

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Contested vs. Uncontested

If the matter becomes contested, then the trustee must assume a neutral posture consistent with the trustee's fiduciary duty.

CPR 166

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When is it contested?

- Request for continuance?
 - Request to postpone the sale?
 - Challenge?
 - Service
 - Debt
 - Default
 - Notice
 - Power of Sale
 - Home Loan
 - Military Status
 - Jurisdiction
-

2008 FEO 11

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Question

- Attorney sends a demand letter to borrower expressly stating he represents the lender
- Borrower fails to pay
- Attorney is then appointed as trustee and files the notice of hearing
- **Does this violate trustee/attorney's duty?**

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RPC 3

Prior representation of the lender does not ethically prohibit the attorney from serving as trustee, provided that the attorney does not also represent the lender in the foreclosure or proceedings related to the foreclosure.

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Question

Attorney Adams previously represented lender in closing the loan that is the subject of the foreclosure. Attorney Adams is later appointed as trustee in the foreclosure. Borrower and lender begin discussing a loan modification. An attorney from the Attorney Adams' firm represents the lender in the negotiation of the modification.

- Violate fiduciary duty, ethical responsibilities?

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RPC 90 + CPR 220

Yes –

#1: It would violate the ethical rules for the attorney to serve as trustee and represent the lender in the negotiation of the modification EVEN IF it is amicable and no foreclosure proceeding is initiated.

#2: If an attorney is serving as trustee and is ethically unable to rep either party, then no member of the attorney's firm may rep the lender in the foreclosure.

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Rule #2 (H770):

An attorney may serve as the trustee in a foreclosure proceeding while simultaneously representing the noteholders on **unrelated** matters and others within the attorney's firm may also continue to represent the noteholders on **unrelated** matters.

G.S. 45-10(a).

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Question

Attorney Adams is employed by a law firm. The firm's biggest client is Bankers R Us. All of the lawyer's in the firm perform some work for Bankers R Us.

May the attorney ethically serve as trustee in the foreclosure while the attorney and others in the firm continue to represent the bank on unrelated matters?

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2008 FEO 11

Possible for the attorney to ethically serve as trustee under those circumstances provided that the attorney determines he can protect the interests of the bank in unrelated matters and maintain impartiality in the foreclosure proceeding.

Attorney has a duty to inform debtor that lawyer and members of law firm will continue to represent creditor on unrelated matters.

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CPR 305

While serving as trustee, the attorney and the other attorneys in the firm **could not represent** the bank on matters related to the loan with the borrower, including filing a motion for relief from stay in a related bankruptcy proceeding.

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Rule #3:

An attorney who initiates a foreclosure as trustee may resign as trustee after the foreclosure becomes contested and act as counsel to the noteholders.

G.S. 45-10(a).

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Trustee



Lender's Counsel



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CPR 201, RPC 82, RPC 90

Former service as trustee does not preclude an attorney from resigning and assuming a partisan role in all further proceedings related to the foreclosure.

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PART TWO: Trustee is a corporation

A corporation cannot represent itself in court, and may only appear through an attorney.

G.S. 84-5; Lexis Nexis v. Travishan Corp., 155 NC App 205 (2002)

Trustee must be represented at all stages of the litigation – from signing the NOH to appearing at the foreclosure hearing before the clerk.

AOC Legal Memo, Feb. 10, 2005

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Attorney represents the trustee

- Trustee is a lawyer.
- Trustee is represented by a lawyer.

Duty is the same:

The **lawyer** is subject to the same duties relative to the debtor and creditor.

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Rule #1:

An attorney may not ethically represent the lender in an adversarial proceeding related to the deed of trust where the trustee is a corporation that is controlled by or the alter ego of the attorney for the lender.

See [RPC 82](#).

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Rule #2:

An attorney may not represent the lender and a corporate trustee in the same foreclosure proceeding, regardless of whether the attorney or the attorney's firm has ties to the corporation.

See [2008 FEO 11](#); [2014 FEO 2](#).

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Rule #3:

An attorney is precluded from representing the lender in a foreclosure where the attorney's spouse, relative, or employee is serving as trustee or owns an interest in the closely-held corporate trustee.

See [RPC 82](#); [2011 FEO 5](#).

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Question

Separate entity created by law firm to serve as trustee on DOTs. Law firm, its lawyers, or their family members have a controlling interest.

- May lawyer from the firm represent the entity as trustee in the F/C?

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Answer

Yes

BUT, if the foreclosure is contested, a firm lawyer may not represent the creditor or debtor in the foreclosure or related matters

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What can you do?

- Warn the attorney, advise of neutral role
- Call the State Bar Ethics Counsel: 919-828-4620

Note, Borrower could bring breach of fiduciary duty claim in civil court or file complaint with the State Bar

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Trustee's Duty

Attorney/trustee has a duty to explain role in the foreclosure proceeding to any unrepresented party who is an unsophisticated consumer of legal services.

2013 FEO 5

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Ex Parte Communications

- May lawyer/trustee communicate *ex parte* with the Clerk of Court after the foreclosure is filed?
 - Rule 3.5(a)(3) prohibits *ex parte* communications by litigator with a “judge or other official” except in court, in writing copied to opposing party (OP), or orally on adequate notice to OP.
- Answer: Maybe. Is lawyer/trustee more like a litigator or a litigant?
 - “Generally, in adversary proceeding, lawyer should not communicate with judge relative to a matter pending before...a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party.” cmt. [8].

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