"MAIL AWAY" CLOSINGS AND THE PRACTICE OF LAW - IS IT MALPRACTICE?

On November 10, 2003, the Georgia Supreme Court held that the practice of law in Georgia encompassed the "closing" of real estate transactions. Many states do not hold this view, and other states have also recently struggled with the question. The federal government has been pushing states to allow non-attorney or title company closing practice as a way to reduce borrowing costs for homebuyers.

The decision should not have been a surprise to anyone involved in the Georgia real estate industry. Custom and practice over the years has evolved so that attorneys handled the closing of real estate secured loan transactions. This practice arose from the definition of "conveyancing" as defined by state statute. Title examiners who certified title were logically the best people to handle the preparation of the conveyance documents since they researched the title. Since Georgia is a title theory state, it made sense to have the attorney preparing the conveyance documents to also prepare the documents securing the lender's interest in the property. Title insurance companies, relying on title examiners to certify title also relied on those same attorneys to underwrite their title insurance policies. From these myriad responsibilities and duties came Chapter 24 of the Georgia Title Standards.

Over the years, the Georgia Supreme Court has clarifed definitions to real estate practice. In 1989, the Court held that paralegals could not close real estate transactions. The question presented to the Court was " whether it is ethically permissible for a lawyer to delegate to a nonlawyer the closing of real estate transactions?" The Court decided that, "it appears that the closing of real estate transactions constitutes the practice of law as defined by O.C.G.A. § 15-19-50. Accordingly, pursuant to Standard 24, Canon II, and the Ethical Considerations and Rules cited above, it would be ethically improper for a lawyer to aid nonlawyers to "close" real estate transactions."

When the Standing Committee on the Unlicensed Practice of Law of the State Bar of Georgia presented the question of whether the preparation and execution of a deed of conveyance on behalf of another and facilitation of its execution by anyone other than a licensed Georgia attorney constitutes the unlicensed practice of law, the outcome was really not in doubt. In Re UPL Advisory Opinion 2003-2t, the Court answered the question in the affrmative. Only Georgia licensed attorneys could prepare documents conveying interests in real property and furthermore, only a Georgia licensed attorney could close a real estate transaction. The Court's opinion really reiterates its long held view that the public interest requires the protections afforded by having trained, licensed and regulated attorneys handle these complex and expensive transactions for the protection of the public interest. The Court saw through the argument espoused by proponents of lay closings by stating that any short term savings to the consumer would be more than offset by the harm that could be caused by untrained individuals overseeing real estate transactions. "It is thus clear that true protection of the public interest in

1 Supreme Court of Georgia, S03U1451, November 10, 2003.

Georgia requires that an attorney licensed in Georgia participate in the real estate transaction.

This duty to protect the public interest in supervising the real estate closing calls into question many contemporary practices in the day to day operation of a real estate closing firm. The first is the so-called witness only closing. The second is known as the "mail away" closing.

Every residential closing attorney eventually gets the request. Either the buyer or the seller cannot attend the closing. Can't you just send the loan package or the seller's document package to the buyer or seller and let them take them to be executed in front of a notary? The answer is an emphatic NO!

> Recognizing that adherence to the public interest is "the foremost obligation of the practitioner," First Bank & Trust v. Zagoria, 250 Ga. 844, 845 (302 SE2d 674) (1983), as it distinguishes a professional service from a purely commercial enterprise, we continue to believe that the public interest is best protected when a licensed Georgia attorney, trained to recognize the rights at issue during a property conveyance, oversees the entire transaction. If the attorney fails in his or her responsibility in the closing, the attorney may be held accountable through a malpractice or bar disciplinary action. In contrast, the public has little or no recourse if a non lawyer fails to close the transaction properly. It is thus clear that true protection of the public interest in Georgia requires that an attorney licensed in Georgia participate in the real estate transaction.

In Re UPL Advisory Opinion 2003-2, Opinion No. S03U1451 (November 10, 2003).

One of the very basic duties of the closing attorney is to verify the identity of the parties to the closing and to insure that the proper parties execute the documents memorializing the transaction. In the vast majority of closings, the attorney present represents the lender. If the closing attorney releases the documents to a borrower, there is no way that he or she can verify the identity of the borrower. The closing attorney will at best get a copy of the borrower's driver's license with the executed documents. Perhaps the notary selected by the borrower or seller will provide an affdavit of identity. Is that enough?

Is it sufficient to rely on a layperson notary public in a foreign jurisdiction, selected by either the buyer or seller to suffciently identify that party or to supervise the execution of the closing documents? The answer again is an emphatic NO!

The actions set forth above absolutely violate the standard of care owed by the closing attorney to his or her client. A major source of title claims is fraudulent conveyances. There is absolutely no check on either a fraudulent seller or borrower in the absence of arms length verification of identity. A much better practice is to identify either a title company or attorney in the jurisdiction where the absentee party to the

closing is located. The document package should be sent to that location and arrangements made for such party to execute the documents in the attorney of title company office. The title company or attorney can then return the documents to the closing attorney. The closing attorney must be available by telephone to advise the borrower of Georgia's law of non judicial foreclosure as required in the closing attorney's affidavit which is attached to the security deed.

There are a lot of pressures to forego this practice. Absentee parties do not want to bear the expense of having to sign documents in a title company or attorney's offce. They often do not want to bear the expense of the closing attorney preparing the mail away package. Too often, real estate transactions are treated cavalierly. In this electronic age, most people have a false impression of the ease of disbursing hundreds of thousands of dollars to buy and sell real estate. The danger lurking in the shadows is that the real estate attorney bears the liability of loss in every transaction if he or she fails to exercise the standard of care in the prosecution of the closing. Every other party except the lender actually bears little risk of loss because the lender has the most money at stake in the transaction. In the average real estate sale, the lender is putting up at least 80% of the funds for the transaction. With the median price of homes now over $200,000.00, one can easily see what is at stake for the lender in each transaction. Is it worth the liability exposure for the real estate attorney to simply release closing documents to a party for signature outside his or her supervision in exchange for a $400.00 closing fee? Of course it's not.

The premise of this essay is simply to remind practitioners to avoid lax practices in the most basic of the settlement attorney's duty - to supervise the execution of closing documents.

> In this regard, we have issued formal advisory opinions which confrmed that a lawyer cannot delegate responsibility for the closing of a real estate transaction to a non-lawyer and required the physical presence of an attorney for the preparation and execution of a deed of conveyance (including, but not limited to, a warranty deed, limited warranty deed, quitclaim deed, security deed, and deed to secure debt). In other words, we have consistently held that it is the unauthorized practice of law for someone other than a duly licensed Georgia attorney to close a real estate transaction or to prepare or facilitate the execution of such deed(s) for the benefit of a seller, borrower, or lender. See, e.g., Formal Advisory Op. No. 86-5 (86-R9) (May 12, 1989); Formal Advisory Op. No. 00-3 (Feb. 11, 2000).

In Re UPL Advisory Opinion 2003-2, Opinion No. S03U1451 (November 10, 2003). The intention of the Court's opinion is not to impede moder real estate transactions by imposing unworkable restrictions. By arranging for a borrower, buyer or seller who is unable to attend the closing to execute the documents in a title company office or attorney's office, the Georgia lawyer is facilitating the execution of those documents for the benefit of the parties by maintaining control of the custody of the instruments that

document the transaction. Furthermore, the attorney is fulfilling her duty to the client to maintain the integrity of the closing.

To release documents to a buyer, seller or borrower for execution outside the control of the closing attorney is to remove all vestiges of the arms length nature of the transaction. Avoid the temptation and pressure of others to abrogate the duty to the client to insure the authenticity of the execution of the documents by the proper parties. If closing attorneys fail to respect the serious nature of the real estate transaction, why should the parties? Attorneys have a higher standard of care placed on them because they hold the keys to the courthouse. The public can only access it through attorneys, whether in the form of litigation or through the conveyance of legal interests in real estate. This position of confidence and trust is delegated to non-lawyers in many jurisdictions. Only through continued vigilance for the protection of the public's interest in private property rights will attorneys be able to maintain their guardianship of the keys to the courthouse. An easy way to do this is to take steps to maintain control over the execution of documents to the closing, for it is the documents that are evidence of the conveyance of the rights of the parties to the real estate.