

Lawyers

LIABILITY UPDATE

A LIABILITY NEWS BULLETIN FROM GEORGIA LAWYERS INSURANCE COMPANY

Avoiding the Pitfalls of “Witness Only Closings”

A “**witness-only closing**,” in a residential real estate closing context, is a closing where a notary, who is not a party to the real estate closing, presides over the execution of the mortgage (security deed) and other closing documents, but purports to do so merely as only a witness and notary, not as someone who is practicing law. In the past, lenders frequently utilized the services of notaries (attorneys and non-attorneys) or signing agents to facilitate closing transactions. This was done as a matter of convenience and cost savings to the customer so as to circumvent the services of a Georgia attorney.

The Georgia Supreme Court put an end to non-attorney “witness-only closings” in its decision in *In re UPL Advisory Opinion 2003-2*, 277 Ga. 472 (588 SE 2d 741) (2003). The Court held that it was the unlicensed practice of law for a non-lawyer to prepare or facilitate in the execution of a deed of conveyance, which would include a mortgage or security deed. However, the Court’s decision left unanswered the propriety of a Georgia licensed attorney handling a closing as a “witness-only.” As noted by State Bar of Georgia Standing Committee on the Unlicensed Practice of Law, while it may not be a UPL violation for a Georgia attorney to handle a “witness-only” closing, there may be professional liability and other ethical concerns that do apply to such conduct. UPL Advisory Opinion 2003-2 (Issued April 22, 2003).

• Possible Violation of State Bar Rule 5.5

State Bar Rule 5.5 prohibits a lawyer from assisting a non-lawyer in the unauthorized practice of law. It is well established under Georgia statutory and case law that the handling of a real estate closing transaction is the “practice of law.” Thus, a Georgia attorney must be responsible for all elements of a real estate closing, from beginning to end. (See: OCGA Section 15-19-50 et seq.; Supreme Court of Georgia Formal Advisory Opinions: Formal Advisory Opinion 86-5 (86-R9) (Issued May 12, 1989); Formal Advisory Opinion 00-3 (Proposed Advisory Opinion No. 9-R3) (Issued February 11, 2000); and Formal Advisory Opinion 2003-2, supra.).

The actual execution of the closing documents is but one of many elements of the closing process. Other aspects may include, but are not limited to, obtaining and reviewing the title commitment and fulfilling any requirements necessary to issue an insurable title, reviewing and complying with the lenders closing instructions, recording of the deeds and properly disbursing the funds in accordance with the settlement statement. If someone other than a Georgia attorney is handling any of these key elements, which is often the situation in these types of transactions, then the attorney handling the “witness-only” or signature aspect of the closing may be in violation of Rule 5.5 by assisting a non-

lawyer in the practice of law. A violation of this rule could result in the attorney's disbarment. Thus, the attorney should be extremely cautious of the various roles played by other parties in facilitating the transaction to determine whether he or she may be "aiding or abetting" the non-attorney(s) in the unauthorized practice of law.

- **State Bar Rule 1.15 (II)**

State Bar Rule 1.15 (II) governs the use of IOLTA accounts. An attorney who handles a witness-only closing should also pay close attention to this rule to make a determination as to whether he or she is in compliance with this rule, especially in light of a recent Supreme Court decision issued in *In Re: Formal Advisory Opinion 04-1* (decided February 13, 2006).

- **Bad Business**

The consensus among the Georgia attorneys with whom the author has consulted, and who have handled witnessed only closings in the past, seems to be that it is a bad business decision. The transaction is typically presented to the attorney as a "simple transaction" in which the attorney can make \$50.00 to \$150.00 for simply acting as a notary and making sure the borrower properly executes a set of loan documents prepared by the third party and delivered to the attorney. The attorney is told that he or she is not responsible for preparation, review or explanation of any loan documents, or for obtaining or reviewing any title work pertaining to the property, or for disbursing any funds. If this scenario sounds too good to

be true, it probably is. In reality, the feedback from attorneys who have participated in these transactions is that the closings present a number of unexpected challenges. Often times the documents are obviously incorrect, contain typographical errors; misspelled, wrong or missing names; or missing or improper legal descriptions. It is not unusual for the borrower to have questions about the meaning or correctness of the terms and condition of the loan, which, understandably, they want answered. As a result, the attorney is put in the awkward position of having to either address these issues, utilizing additional time and resources; or ignore or refuse to deal with the problems or issues, potentially exposing himself or herself to professional or ethical consequences. As a result, many attorneys have concluded that the nominal fee paid to handle these "simple" transactions is not worth the time and effort involved, not to mention the potential exposure to professional liability and ethical violations.



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