

RESIDENTIAL REAL ESTATE CLOSING OVERVIEW SLIDES



The Client's Closing Cycle

- Residential Real Estate Mortgage
 1. Negotiation and Execution of Contract
 2. Mortgage Approval Process
 3. Due Diligence (inspections, title search, survey)
 4. Closing
 5. Post-closing items

“Know Before You Owe”

- Rules and enforcement established by the Consumer Financial Protection Bureau (CFPB)
- CFPB Bulletin 2012-13: Service Providers
 - Consumer Financial Protection Bureau (CFPB) expects financial institutions to oversee their business relationships with service providers to ensure compliance with federal consumer financial law
- Lenders are very focused on compliance and enforcement risk
 - Many are using the American Land Title Association (ALTA) "Insurance and Settlement Company Best Practices" as a foundation for provider management

ALTA Best Practices

1. Comply with All State and Local Licensing
2. Procedures and Controls Regarding Escrow Trust Accounts – Reconciliation
3. Physical and Network Security – Protecting Confidential Customer Information and Trust Accounts
4. Recording and Pricing Procedures
5. Title Policy Delivery, Premium Reporting and Remittance
6. Errors and Omissions Insurance/Fidelity Coverage
7. Dealing with Consumer Complaints

Resource: www.alta.org/bestpractices

Representing the Client

- Representation Letter / Engagement Letter
- Fee Arrangement
 - Flat Fee Billing
 - Time-Incurred Billing
 - Billing for Services and Disbursements
 - Payment for Services upon termination of contract before closing
- Dual Representation?
- Other ethical considerations (trust accounts, informed consent of clients, executing closing documents)

The Contract

- A contract is a binding agreement between the purchaser and seller that imposes and defines legally enforceable rights and obligations of the parties.
- Under the S.C. Constitution, the South Carolina Supreme Court has sole jurisdiction with regard to the practice of law (S.C. Const. art. V, § 4); *see also* S.C.Code Ann. § 40-5-10.
- S.C. Supreme Court has not deemed Real Estate Brokers form of contracts to be the unauthorized practice of law

Primary Forms Of Residential Contracts

- Real Estate Brokers Form Contract
- Pre-Printed Forms (Legal Zoom, internet "finds")
- Draft contract prepared by Seller, Purchaser or their attorney(s)

The Contract

- Contracts can be amended by writings - from addendums to emails
 - Best practice is to have buyer(s) and seller(s) sign to ensure enforceability
- Request back title, permits and surveys

Commonly Negotiated Items

- Closing date/time
- Closing Documents (Form of Deed, Type of Title, etc.)
- Closing Costs
- Use and Occupancy / Property Storage post-closing

Commonly Negotiated Items

- Financing contingency
- Sales contingency
- Appraisal contingency
- Items included in purchase
- Inspection provisions and terms
 - Structural inspections
 - Environmental inspections (radon, formaldehyde, asbestos, pesticides, toxic chemicals, water contamination)
 - HVAC
 - Septic/well testing
 - Oil tanks

Due Diligence

- Lead Based Paint (Dwellings built prior to 1978)
- Private Well Test (Seller's obligation if well exists)
- HVAC Systems
- Septic System (if no public sewer)
- Radon Test
- Home Inspection - all aspects of structure, utility equipment, appliances, exterior features including driveway, drainage, landscaping
- Underground storage tank/tank sweep
- Other environmental testing
- Wood destroying insects/vermin
- Flood search

Title Insurance

- “Title insurance is a policy of indemnity, not guarantee.”
First Fed. Savings Bank of Brunswick v. Stewart Title Guar. Co., 317 S.C. 131, 140, 451 S.E.2d 916, 921 (1994).
- ALTA Loan Policy
 - Typically required by the Lender and protects the Lender’s interests only.
- ALTA Owner Policy
 - "Optional" to the consumer
 - Protects the interests of the Owner (no coverage under the Lender’s Policy)
 - Waiver is required if Owner/Buyer decides not to purchase an Owner’s Policy

Title Insurance

- Title is your ownership rights to your property
- Title insurance is a policy that protects your investment and property rights
 - Owner's policy
 - Purchased by the Mortgagor / Buyer
 - Best way to protect owner's interests, as well as trustees, inheritors, and beneficiaries
 - Lender's policy
 - Paid for by the Mortgagor
 - Almost always required by the lender
 - Only protects the lender's interest

Title Insurance

- What does owner's title insurance cover?
 - Any unforeseeable errors in the title
 - Forgery: making a false document; for example, the seller misrepresents the identity of the person who signed the title
 - Fraud: deception to achieve unfair gain; for example, someone steals your identity and either sells your house without your knowledge or consent, or takes out a second mortgage on the property and walks away with the money
 - Human error: inconsistent paperwork and historical records; for example, an unforeseeable discrepancy in the property or fence line can cause confusion in tracking the title history.

The Closing

- For Closing, Seller provides:
 - Deed
 - Seller's Affidavit
 - Certificate of Non-Foreign Status
 - Organizational Documents (if applicable)
 - Documents to Remove Title Exceptions
 - 1099
 - Signed Settlement Statement
 - Tax bills, Unexpired warranties, Keys, Security Codes, Garage Door Remotes, etc.
 - Any other documents requested by title company and lender

The Closing

- At Closing Buyer/Mortgagor would deliver:
 - Notice of Settlement
 - Mortgagor's Affidavit of Title
 - Execute Lender's Closing Documents (Note, Mortgage, other ancillary loan documents)
 - Proof of Homeowner's Insurance
 - Funds Due to Seller
 - Signed Settlement Statement
 - Documents to Remove Title Exceptions

Post-Closing

- Disbursement to all payees according to the Settlement Statement
- Recording of Documents
 - Deed and/or Mortgage
 - Satisfaction of Mortgage and any other liens set forth in Commitment
- Update of title to confirm required documents were properly recorded
- Confirm all taxes are paid / current
- Confirm all requirements have been met
- Issuance of title policies
 - Lenders and most title companies require issuance of the policy within 30 days of closing

The Supreme Court of South Carolina

JEAN HOEFER TOAL
CHIEF JUSTICE

1231 GERVAIS STREET
COLUMBIA, SOUTH
CAROLINA 29201

MEMORANDUM

TO: Members of the South Carolina Bar

FROM: Jean Hoefer Toal

RE: Guidelines for Attorneys Conducting Residential Real Estate Closings

DATE: September 23, 2009

The South Carolina Bar Task Force on Closing Responsibilities (Task Force) developed guidelines or “best practices” for attorneys conducting residential or commercial real estate closings in South Carolina and submitted them to this Court for consideration. [1] On February 21, 2008, the Court issued a request for written comments and notice of a public hearing to be held on May 7, 2008. Input was received from various committees of the South Carolina Bar, the financial community, title insurance companies and individual attorneys who practice in the area of real estate closings. Thereafter, the Court asked the Task Force to consider several common concerns voiced by those who provided input and determine whether they believed any changes were warranted.

The Task Force determined, and this Court agrees, that the two main concerns set forth in the written statements and at the public hearing pertained to whether the guidelines were necessary for commercial real estate transactions and whether a South Carolina lawyer should no longer be required to act as the closing attorney for home equity line of credit closings (HELOCs).

The Task Force, upon reconvening, unanimously agreed that the suggested guidelines should be explicitly limited to residential real estate closings because it appears, from the majority of opinions issued by this Court regarding closings, that it is residential closings that are overwhelmingly the professional concern. However, the Task Force noted that commercial real estate transactions are extremely important and it remains steadfast in its unanimous belief that State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987), remains highly relevant and of great importance to all real estate transactions, whether residential or commercial, in this state.

With regard to HELOCs, the Task Force unanimously agreed that HELOCs “should continue under the requirements now existing related to certain duties being performed by lawyers licensed in the State of South Carolina, or admitted to practice in the State of South Carolina, and fall within the . . . ‘Guidelines for a Closing Attorney in Non-Purchase Residential Real Estate

Transactions, Including First Mortgage Loan Closings and Junior Lien Mortgage Closings,” previously suggested by the Task Force.

Finally, the Task Force suggested changing the guidelines and lists to delete the approval of certain documents from the tasks to be performed by attorneys in residential closings.

This Court believes that publishing the revised versions of the “Guidelines for a Closing Attorney in Non-Purchase Residential Real Estate Transactions, including First Mortgage Loan Closings and Junior Lien Mortgage Closings,” the “Guidelines for a Closing Attorney in a Residential Real Estate Purchase,” and the list of tasks “[i]n relation to Residential Real Estate Purchases, First Mortgage Loan Closings, and Junior Lien Loan Closings in South Carolina” that only lawyers licensed in South Carolina or admitted to practice in South Carolina may perform as a Best Practices Model would benefit the Bar in the area of residential real estate closings. We emphasize that these guidelines, which are enclosed with this memorandum, are not applicable to commercial real estate closings. We also emphasize that the guidelines are not being adopted by this Court as rules nor endorsed by the Court, but are instead being published as a Best Practices Model developed by a cross-section of those who practice most frequently in the area of real estate transactions for the benefit of the Bar.

Finally, the Task Force is to be commended on the time and effort spent on developing the guidelines. Their dedication to upholding the integrity of the legal profession and to protecting the public is apparent from their willingness to participate in this endeavor, their willingness to consider the opinions of the various professionals involved in the real estate closing process, and their ability to develop a comprehensive set of ideas that will serve to guide those involved through the real estate closing process.

Enclosures

Guidelines for a Closing Attorney in Non-Purchase Residential Real Estate Transactions, including First Mortgage Loan Closing and Junior Lien Mortgage Closings

Guidelines for a Closing Attorney in a Residential Real Estate Purchase

Task List in Relation to Residential Real Estate Purchases, First Mortgage Loan Closings, and Junior Lien Loan Closings in South Carolina

[1] The Task Force prepared a list of tasks that only lawyers licensed or admitted to the practice law in the State of South Carolina can perform in residential real estate purchases, first mortgage loan closings and junior lien loan closings, and a separate list for commercial real estate transactions. The Task Force also prepared “Guidelines for a Closing Attorney in Non-Purchase Residential Real Estate Transactions, including First Mortgage Loan Closing and Junior Lien Mortgage Closings” and “Guidelines for a Closing Attorney in a Residential Real Estate Purchase.”

Guidelines for a Closing Attorney in Non-Purchase Residential Real Estate Transactions, including First Mortgage Loan Closing and Junior Lien Mortgage Closings

I. Pre-Closing

1. Determine all conflicts of interests, including but not limited to multiple representation, that need to be disclosed, consented to, and/or waived, and obtain the informed consent of such parties in accordance with the Rules of Professional Conduct
2. Send an engagement letter to the client(s)
3. Certify the title to the subject property
4. Order a survey of the subject property if the client has elected to have a new survey of the property performed, or if obtaining a new survey is a requirement of the loan, and if the survey has not already been ordered
5. Review the survey
6. Prepare and/or review the legal description of the subject property
7. Obtain payoff information for all liens affecting the subject property
8. Ascertain the hazard insurance carrier for the owner
9. Review the hazard insurance declaration page to ensure the policy dates and loss payee information are satisfactory to the lender
10. Collect any letters or inspection reports that are a requirement of the loan
11. Either prepare or review the Loan Documents for compliance with the Closing Instructions and applicable laws
12. Either prepare or review the Settlement Statement for compliance with the Closing Instructions and applicable laws
13. Either prepare or review and approve any Title Insurance Documents required by Title Insurance Company and/or the South Carolina Department of Insurance, which may include, but are not limited to the following:
 - a. Lien Affidavits
 - b. Title Insurance Disclosure Form SC-305
 - c. Survey Affidavit
 - d. Privacy Disclosure
 - e. Insured Closing Letter
14. Review any Power of Attorney to be used in connection with the transaction for compliance with the Lender's and Title Insurer's requirements and applicable laws.
15. Review for compliance with the Closing Instructions and applicable laws any other applicable Closing Documents, which include, but are not limited to, the following:
 - a. Credit Line Closure Authorization

II. Closing

1. Explain to the borrower the closing documents, which may include, but are not limited to the following:
 - a. Disclosure and consent to multiple representation
 - b. Loan documents, specifically noting the following provisions, as applicable:

- i. Prepayment Penalties
 - ii. Late Payment Penalties
 - iii. Loan Assumption Rules
 - iv. Due on Sale Clause
 - v. Judicial Foreclosure
 - vi. Events of Default
 - vii. Annual Percentage Rate
 - viii. Interest Rate, and if the loan has an adjustable rate, point out that fact.
 - ix. Term of the Loan
 - x. Maturity Date
 - xi. Date the First Payment is Due
 - xii. Payment Location
 - xiii. Transfer of Loan Servicing Rights
 - xiv. For rescindable transactions, Notice of Right to Cancel
2. Supervise the proper execution of the closing documents that are executed at the closing
3. Collect the closing funds and verify that all closing funds are properly deposited into the closing attorney's trust account in accordance with the Rules of Professional Conduct
4. Disburse all of the closing funds in accordance with the Settlement Statement. The only exception to this rule is that in the event a borrower is refinancing a loan with the same lender, and that lender is paying off its prior loan to the borrower with the proceeds of the new loan to the borrower, neither the portion of the loan proceeds that are required to pay off the lender's prior loan to the borrower nor the lender's fees in connection with the new loan have to be disbursed by the closing attorney
5. Supervise the recording of the recordable closing documents

III. Post-Closing

1. Perform the final title update, which includes but is not limited to the following items:
 - a. Verify that the documents were recorded with the correct priority
 - b. Verify that the documents were indexed properly
 - c. Verify that all liens that were paid in connection with the transaction are satisfied of record
2. Issue the final title opinion
3. Transmit all applicable documents to the appropriate parties

Guidelines for a Closing Attorney in a Residential Real Estate Purchase

I. Pre-Closing

1. Determine all conflicts of interests, including but not limited to multiple representation, that need to be disclosed, consented to, and/or waived, and obtain the informed consent of such parties in accordance with the Rules of Professional Conduct
2. Send an engagement letter to the client(s)
3. Review the sales contract
4. Certify the title to the subject property
5. Order a survey of the subject property if the client has elected to have a new survey of the property performed, and if the survey has not already been ordered
6. Review the survey
7. Prepare and/or review the legal description of the subject property
8. Obtain payoff information for all liens affecting the subject property
9. Ascertain the hazard insurance carrier for the purchaser
10. Collect inspection letters for determination by the client of compliance with the sales contract
11. Review the hazard insurance declaration page to ensure the policy dates and loss payee information are satisfactory to the lender
12. Collect the termite letter / HVAC and/or other letters required by the sales contract and/or lender's instructions
13. Either prepare or review the Loan Documents for compliance with the Closing Instructions and applicable laws
14. Either prepare or review the Settlement Statement for compliance with the Contract of Sale, Closing Instructions and applicable laws
15. Either prepare or review and approve any Title Insurance Documents required by Title Insurance Company and/or the South Carolina Department of Insurance, which may include, but are not limited to the following:
 - a. Lien Affidavits
 - b. Title Insurance Disclosure Form SC-305
 - c. Survey Affidavit
 - d. Privacy Disclosure
 - e. Insured Closing Letter
16. Either prepare or review the deed prepared by the Seller's attorney for accuracy, completeness and suitability to the transaction
17. Review any Power of Attorney to be used in connection with the transaction for compliance with the Lender's and the Title Insurer's requirements and applicable laws
18. Review for compliance with the Closing Instructions and applicable laws any other applicable Closing Documents, which may include, but are not limited to the following:
 - a. Internal Revenue Service Form 1099
 - b. Non-Foreign Person Affidavit

- c. Seller's Affidavit regarding South Carolina Withholding Tax and/or South Carolina Department of Revenue Form I-290
- d. Notice of Eligibility for 4% Tax Assessment
- e. Seller's Affidavits
- f. Credit Line Closure Authorization

II. Closing

1. Explain to the buyer/borrower the closing documents, which may include, but are not limited to the following:
 - a. Disclosure and consent to multiple representation
 - b. Deed
 - c. Loan documents, specifically noting the following provisions, as applicable:
 - i. Prepayment Penalties
 - ii. Late Payment Penalties
 - iii. Loan Assumption Rules
 - iv. Due on Sale Clause
 - v. Judicial Foreclosure
 - vi. Events of Default
 - vii. Annual Percentage Rate
 - viii. Interest Rate, and if the loan has an adjustable rate, point out that fact.
 - ix. Term of the Loan
 - x. Maturity Date
 - xi. Date the First Payment is Due
 - xii. Payment Location
 - xiii. Transfer of Loan Servicing Rights
2. Supervise the proper execution of the closing documents that are executed at the closing
3. Collect the closing funds and verify that all closing funds are properly deposited into the closing attorney's trust account in accordance with the Rules of Professional Conduct
4. Disburse all of the closing funds in accordance with the Settlement Statement
5. Supervise the recording of the recordable closing documents

III. Post-Closing

1. Perform the final title update, which includes but is not limited to the following items:
 - a. Verify that the documents were recorded with the correct priority
 - b. Verify that the documents were indexed properly
 - c. Verify that all liens that were paid in connection with the transaction are satisfied of record
2. Issue the final title opinion
3. Transmit all applicable documents to the appropriate parties

In relation to Residential Real Estate Purchases, First Mortgage Loan Closings, and Junior Lien Loan Closings, in South Carolina, only lawyers licensed in the state of South Carolina, or admitted to practice in the state of South Carolina, may do the following:

1. Certify the title to real estate and issue a title opinion to a client, a lender, a title insurance company, a governmental agency, or anyone else
2. Prepare deeds
3. Either draft, oversee the drafting, or review for compliance with the Closing Instructions and applicable laws the loan closing documents to be utilized in a real estate transaction, including the legal description utilized in any document
4. Be responsible for the actual closing of a real estate transaction to include the explanation of the pertinent issues related to the transaction and review all documents for proper signatures, witnesses, notarization and authorizations, as applicable, even if the closing takes place out of state, or in a location other than the closing attorney's office
5. Oversee the proper recordation of the pertinent documents
6. Review and approve the form and execution of any power of attorney used in a real estate transaction for proper authority of the attorney-in-fact as well as the validity of the document
7. Disburse all funds related to the transaction, except payoffs and fees that can be held by a lender that will be paid to the lender and not to third parties