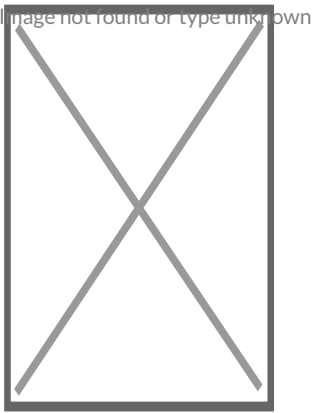


Georgia Supreme Court Closes Door on Witness Only Closings



Article by Bouhan Falligant Real Estate Attorney Rob Brannen, BiS

After years of review, debate and deliberation, Georgia attorneys now have clear guidance from the Supreme Court of Georgia regarding witness-only closings.

On Sept. 22, the court ratified and approved a formal advisory opinion issued by the Georgia Bar making lawyer participation in a witness-only closing an ethical violation under the Georgia Rules of Professional Conduct.

A witness-only closing occurs when a non-lawyer lender or closing company hires a Georgia attorney to witness and notarize documents, but the attorney does not take responsibility for the transaction or perform significant legal work.

National lenders and closing companies promoted the witness-only closing model so they could maintain control of the closing process, while complying with Georgia laws requiring that a Georgia attorney close a real estate transaction.

However, the formal advisory opinion provides that the presence of a Georgia attorney who witnesses and notarizes documents is not enough to comply with Georgia law. The Georgia attorney must oversee the transaction from beginning to end.

The formal advisory opinion maintains that the "lawyer's failure to review closing documents can facilitate foreclosure fraud, problems with title and other errors that may not be detected until years later when the owner of a property

attempts to finance, sell or convey it.”

Georgia real estate lawyers report that when errors are discovered after the closing, the witness-only closing attorney is typically not available to correct them. Most

importantly, the presence of a witness-only closing attorney misleads consumers by creating the impression that the witness-only attorney is overseeing and is responsible for the transaction when he or she is not.

Requiring an attorney to maintain full professional and direct responsibility for the closing protects all parties to the transaction and is in the public interest.

The Georgia Bar had asked the Georgia Supreme Court to affirm its position on three specific questions:

1. Does a lawyer violate the Georgia Rules of Professional Conduct when he/she conducts a “witness only” real estate closing?
2. Can a lawyer who is closing a real estate transaction meet his/her obligations under the Georgia Rules of Professional Conduct by reviewing, revising as necessary and adopting documents sent from a lender or from other sources?
3. Must all funds received by a lawyer in a real estate closing be deposited into and disbursed from the lawyer's trust account?

The Supreme Court affirmed the Bar's position on the first question, stating that “a lawyer may not ethically conduct a witness-only closing.”

Since only a lawyer can close a real estate transaction in Georgia, a Georgia lawyer cannot avoid liability for a transaction by claiming that he/she is only a witness. A lawyer who becomes involved in a witness-only closing is fully responsible.

Second, a Georgia lawyer is required to be in control of the process from beginning to end. Therefore, an attorney who receives documents from a lender or other source must review all documents, resolve any errors in the paper work, detect and resolve ambiguities in title or title defects and otherwise act with competence.

While a Georgia attorney does have the ability to outsource both legal and non-legal work, when an attorney adopts documents prepared by others as his/her own, the attorney then becomes responsible as if he/she had drafted those documents.

Last, if an attorney “receives funds on behalf of a client or in any other fiduciary capacity, he/she must deposit the funds into, and administer them from, a trust account in accordance with the Georgia Rules of Professional Conduct.”

Attorney trust accounts protect consumers because banks are required to immediately notify the State Bar of overdrafts so the State Bar can monitor these accounts and sanction or disbar attorneys who do not properly maintain them.

The decision by the Supreme Court marks a monumental victory by the Real Property Law Section of the State Bar, which has fought for years to end the witness-only closing practice.

Georgia attorneys should now have a clear understanding of their ethical duties in real estate closings. Most importantly, consumers attending a real estate closing now can have confidence that a Georgia attorney is overseeing the transaction and that their interests are protected.

Robert B. Brannen Jr. is chairman of the Executive Committee of the Real Property Law Section of the State Bar of Georgia. He is a real estate partner at Bouhan Falligant LLP in Savannah and can be reached at rbrannen@bouhan.com or 912-644-5721.

Practice Areas

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Attorneys

- Rob Brannen