



THE CLOSER

At a real estate closing, the closing agent (the "Closer") has multiple responsibilities and must rely upon the cooperation of all parties to complete those duties. The Closer must determine that all title commitment requirements have been satisfied, that all documents are properly executed, that all parties have provided appropriate identification, and that funds provided for the closing have cleared. All of these issues must be resolved prior to disbursing proceeds and recording the documents. This article addresses the documentation and funds that are to be supplied by the parties prior to or at the time of closing.

The first task of the Closer is to confirm that the appropriate parties are present. Sometimes the Closer will personally know one or more of the parties. Absent personal knowledge, the Closer, both in his or her capacity as a notary public and as the closing agent, must obtain acceptable forms of photographic identification from the parties. According to Florida law, acceptable forms of identification include, but are not limited to, a valid Florida or other U.S. state issued driver's license, an identification card issued by an authorized public agency, a passport issued by the Department of State of the United States, or a passport issued by a foreign government (if duly stamped by the United States Bureau of Citizenship and Immigration Services). The originals of these forms of identification must be provided to the Closer, who will copy the identification for the file.

Individuals are often under the mistaken belief that any form of picture identification is sufficient. A Costco card, an office I.D. card, and other similar forms of identification, although frequently presented as identification, clearly are not sufficient under Florida law, with the result that the closing will be either delayed, or canceled. The original must be presented to the Closer for inspection prior to the completion of closing. Faxing or scanning a copy of a passport or driver's license to the Closer, or promising to return with the identification, is not sufficient. If, for example, a "Seller" attends a closing and executes a deed, is provided with the proceeds check, and promises to return in an hour with his driver's license, then the Closer clearly has exposed himself to significant liability.

Unfortunately, there are too many examples of fraud that have been successfully perpetrated for failure to obtain sufficient proof of identification. A classic example is the situation where a husband, the only party in title, owns homestead property. The estranged wife refuses to appear (or is oblivious to the fact that the property is being sold), and the husband makes arrangements for a friend to appear in her place, insisting that the person is his wife. The Closer must be alert, and obtain and scrutinize that individual's forms of identification.

Any original document in the possession of a party that is to be used in conjunction with the closing should be delivered to the Closer in advance. These might include, for example, an unrecorded corrective deed or a private satisfaction of a mortgage. Often a party "offers" to help by obtaining and delivering one of these documents to the Closer at the closing table. The Closer then has the affirmative duty to not only to confirm that the document was properly executed, but also to determine that there is no evidence of fraud. The Closer will typically require that a copy of the signer's driver's license is provided and, in certain situations, will independently contact both the signer

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If you have questions or topics pertaining to the legal aspects of residential real estate that you would like to see addressed in this column, send them to Frank c/o:

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and/or the notary who executed the acknowledgement section. It is far better for the Closer to contact the necessary parties and prepare and coordinate the execution of any corrective deed or satisfaction of mortgage. Alternatively, the Closer should review the document before closing, so that any issues can be addressed to everyone's satisfaction.

This is also true of a party's reliance on a Power of Attorney ("POA"). If a Closer is unaware of the existence of a POA until the actual closing, there is a risk that the document will be rejected because it was not properly executed, or because the parameters of authority set forth in the POA are not adequate for the particular transaction. In addition,

lenders have their own guidelines relative to the use of a POA by a borrower. By providing the POA in advance, the Closer can determine its adequacy and legal sufficiency and confirm that the Lender will approve its use.

The ideal method of providing funds at closing, and the procedure used by the author's law firm, is the wire transfer. Although it may be possible for a buyer to provide a cashier's check well in advance of closing, there are legitimate concerns that these checks will not clear on time. For that reason, wired funds should be coordinated with and delivered to the Closer's office immediately prior to or at the time of closing in order to avoid any unnecessary delays.

Historically, many Closers have accepted cashier's checks and made disbursements prior to the clearance of funds. However, cashier's checks are not "good" funds at the time the check is delivered to the Closer. The check must first be deposited into the Closer's account, processed through the banking system, and confirmed as collected ("cleared") funds, before those funds are deemed sufficient. Closers who disburse prior to funds being cleared run the risk of those checks being returned marked "insufficient funds". There are also many recent examples of banking institutions that cannot timely honor their "cashier's check" due to a subsequent takeover by the FDIC. Also, a growing number of fraudulent checks are being provided to Closers.

Until such time as all funds have been confirmed as cleared, the closing is not complete, and no funds should be disbursed. Title underwriters also mandate that all funds be cleared prior to disbursing at a closing. Florida Bar rules similarly mandate that a law firm cannot disburse until receipted funds have cleared the law firm's trust account. ▲