

Commercial Real Estate Closings in Delaware: What Out-of-State Counsel and Title Companies Need to Know

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Commercial real estate transactions frequently cross state lines. A lender may be headquartered in New York, the borrower may be a Delaware limited liability company, the property may be part of a national portfolio, and the title company may be coordinating the transaction from an office hundreds of miles away.

When one of the properties is located in Delaware, however, there is an important difference that out-of-state counsel and title companies need to understand early in the transaction: closings involving Delaware real property require the involvement of a Delaware-licensed attorney.

For attorneys and title professionals accustomed to closing transactions in other jurisdictions, Delaware's requirements can initially seem unusual. In many states, a national title company can coordinate virtually the entire closing process, including title, escrow, execution, recording, and disbursement. Delaware takes a different approach. Understanding that difference at the beginning of a transaction can make the Delaware portion of a commercial or multi-state real estate closing considerably easier.

The Mid-Atlantic Decision and the Scope of Delaware Counsel's Role

The Delaware Supreme Court has determined that significant components of a real estate settlement constitute the practice of law. The foundation for Delaware's approach is *In the Matter of Mid-Atlantic Settlement Services, Inc.*, 755 A.2d 389 (Del. 2000), commonly referred to as *Mid-Atlantic*. Delaware's rules regarding attorney involvement in real estate transactions developed further following that decision. Under the *Mid-Atlantic* line of authority, a Delaware-licensed attorney is required to conduct the closing of a sale of Delaware real property. Attorney involvement is likewise required for a refinancing secured by Delaware real property.

But the Delaware attorney's responsibility extends beyond simply appearing at the closing table. Delaware counsel must be involved, directly or in a supervisory capacity, in all legal aspects of the transaction affecting the transfer of title or the use of Delaware real estate as security for an obligation.

Delaware Counsel Must Be Meaningfully Involved in the Closing Process

The Delaware attorney's responsibilities include evaluating the legal rights and obligations of the parties, examining title and addressing and/or removing title exceptions, reviewing documents affecting Delaware real property, conducting the settlement, and supervising the disbursement of settlement funds.

In transactions involving properties in multiple jurisdictions, local counsel is sometimes engaged primarily to attend a signing, witness documents, or handle a discrete local requirement. That is not the Delaware model. The *Mid-Atlantic* line of authority

treats the components of a Delaware real estate settlement as an integrated process rather than a collection of isolated tasks that can simply be divided among attorneys and nonlawyers.

A Delaware attorney cannot simply attend the signing while a title company independently handles the substantive settlement functions. Delaware counsel must have meaningful involvement in the closing process, including title examination, document review, and supervision of the disbursement of settlement funds.

The Interplay Between Delaware Counsel and Title Insurance

Title insurance is also closely integrated into the Delaware settlement process. Among the settlement functions considered in *Mid-Atlantic* were advising purchasers concerning title insurance and issuing title insurance policies. In practice, Delaware closing counsel commonly works as an authorized issuing agent or representative of the title insurer. Delaware counsel examines or supervises the examination of title, addresses title exceptions, coordinates underwriting matters with the title company or underwriter, conducts the Delaware settlement, supervises the disbursement of settlement funds, and coordinates issuance of the title insurance policy.

The title examination itself is also a substantive part of the Delaware attorney's role. In a commercial transaction, the title commitment may contain matters ranging from mortgages and judgments to easements, declarations, restrictions, reciprocal easement agreements, and other recorded documents affecting the property. Delaware counsel therefore does more than simply confirm that a title commitment has been obtained. Counsel works with the title company and transaction counsel to determine which exceptions must be satisfied, which will remain as permitted exceptions, and whether additional documentation, affirmative coverage, or underwriting approval is required before closing. For an out-of-state title company, none of this means that the title company is excluded from the transaction. National title companies regularly participate in Delaware commercial real estate transactions. It does mean that the respective roles of the title company and Delaware counsel need to be coordinated properly.

A national title company may already be handling title for an entire portfolio transaction. It may have coordinated underwriting, negotiated endorsements with lender's counsel, and assembled the closing requirements for properties in several states. The presence of a Delaware property does not necessarily require abandoning that structure. Instead, Delaware counsel can work with the national title company to handle the Delaware-specific portion of the transaction. Depending upon the transaction, that coordination may include:

- Reviewing the Delaware title search and title commitment
- Examining title and addressing Delaware-specific title exceptions
- Coordinating with the national title company and its underwriter
- Obtaining underwriting approval for requested affirmative coverage and endorsements
- Reviewing the deed, mortgage, and other instruments affecting Delaware real property
- Coordinating Delaware recording requirements
- Confirming satisfaction of liens and other matters affecting title
- Reviewing transfer-tax requirements and applicable exemptions
- Preparing and coordinating required affidavits and other Delaware closing documents
- Supervising execution of the Delaware closing documents
- Receiving and supervising disbursement of settlement funds as required by Delaware law
- Coordinating recording with the appropriate county Recorder of Deeds
- Issuing and signing the owner's and/or lender's title insurance policies and applicable endorsements as the title insurer's authorized agent or representative

The objective should not be to duplicate work already being performed by national transaction counsel or the title company. The objective is to integrate Delaware counsel into the existing closing team so that the national title company's underwriting and coordination capabilities work together with the responsibilities Delaware law assigns to Delaware counsel.

Delaware's Extensive Transfer Tax and Recording Documentation Requirements

Another difference that often surprises out-of-state counsel and title companies is the amount of ancillary documentation required to complete and record a Delaware deed for the real estate transaction.

Delaware generally requires more transfer-tax affidavits, tax forms, and ancillary closing and recording documents than many other jurisdictions. The exact documents vary depending upon the type of transaction, the parties, the county and municipality in which the property is located, and whether a transfer-tax exemption or other special treatment is being claimed.

For a conveyance, the closing package may include not only the deed but also state realty transfer tax documentation, an affidavit of residence and gain, applicable nonresident seller tax documentation, county transfer-tax affidavits, municipal transfer-tax forms, exemption affidavits, and other documents required by the applicable Recorder of Deeds or taxing authority. Delaware law generally requires a deed or other instrument conveying title to be accompanied by the required affidavit of residence and gain before the Recorder will accept it for recording, unless the transaction falls within an applicable exemption. Delaware does not require the full purchase price on the deed itself, but requires the true, full, and complete value of the transaction to appear in the accompanying affidavits. Additional requirements can exist at the county and municipal level. For example, New Castle County requires a county Realty Tax Affidavit for properties located within the county. Additional exemption documentation may be required when an exemption is claimed, and properties located within a municipality may be subject to additional municipal requirements.

Financing Transactions Require Their Own Delaware-Specific Review

Financing transactions also have Delaware-specific documentation and recording requirements that should be identified before closing. As a result, a deed or mortgage that is substantively acceptable to lead transaction counsel may still not constitute a complete Delaware recording package. This is one reason involving Delaware counsel early is particularly important. Determining the required ancillary documents after the parties have already executed the principal transaction documents can delay recording and, in some cases, funding.

Recording Real Estate Documents in Delaware

Delaware real estate documents are recorded in the county in which the property is located: New Castle, Kent, or Sussex County. Recording requirements vary among Delaware's three counties and, where applicable, its municipalities. Although recording a deed or mortgage may appear routine, documents affecting Delaware real estate should be reviewed for compliance with applicable Delaware, county, and municipal requirements before the closing date.

Depending upon the transaction, the closing team may need to address matters such as:

- Proper execution and acknowledgment
- Property descriptions
- Placement of required information on the instrument
- Parcel identification information
- State realty transfer tax documentation
- County and municipal transfer-tax affidavits
- Transfer-tax exemption affidavits, when applicable
- Seller residence and gain documentation

- Nonresident seller tax documentation
- Mortgage information
- Recording fees
- Satisfaction or release of existing liens
- County-specific recording requirements

The parcel identification requirement itself illustrates the importance of local review. Delaware law generally prohibits a Recorder of Deeds from accepting an instrument affecting real property unless the applicable county tax-assessment parcel identification number appears conspicuously on the instrument. County recording requirements may impose additional formatting or placement requirements. Resolving these matters before documents are executed helps avoid rejected recordings and post-closing problems.

Delaware's Extensive Transfer Tax and Recording Documentation Requirements

Transfer tax is another issue that should be considered early rather than discovered while preparing the closing statement. Delaware imposes a state realty transfer tax on taxable transfers of real property. Local transfer taxes may also apply depending upon the county or municipality in which the property is located. In a substantial commercial transaction, transfer taxes can represent a significant closing cost. The parties should determine the applicable tax allocation between the parties and the availability of any exemption well before closing. This becomes especially important in transactions that are more complicated than a straightforward conveyance, including entity transactions, portfolio transactions, and transactions involving affiliated entities.

A transaction that does not look like a traditional deed transfer should not automatically be assumed to be exempt from Delaware realty transfer tax. The transfer-tax analysis is also connected to the documentation requirements discussed above. If the parties are claiming an exemption or taking a particular position regarding the taxable value of a transaction, the appropriate affidavits and supporting documents need to be prepared consistently with that position.

Commercial real estate transactions frequently involve limited liability companies, limited partnerships, and other special-purpose entities. Delaware counsel's real estate role should therefore be distinguished from, but coordinated with, any Delaware entity law or opinion work required by the transaction. For example, assume a Delaware LLC owns a commercial property in Delaware and is refinancing the property through a national lender. The transaction may require analysis of two different categories of Delaware law. First, Delaware real estate counsel must address the Delaware property, mortgage, title, settlement, and recording issues. Second, the lender may require a Delaware legal opinion concerning the borrower's existence, good standing, power, authority, and due authorization to enter into the loan transaction. Those areas overlap, but they are not identical.

Early-Stage Planning Checklist for Out-of-State Counsel and Title Companies

For out-of-state counsel or title companies handling a commercial transaction involving Delaware real estate, the following questions should be addressed early:

- **Is Delaware real property being purchased, sold, or financed?** If so, determine the required role of Delaware counsel at the beginning of the transaction.
- **Who is handling title?** Identify the title insurer, national title company, local title resources, and Delaware counsel, and establish how responsibilities will be divided.
- **Has Delaware counsel received the title commitment and underlying documents?** Do not wait until immediately before closing to begin title review.
- **Who is preparing and reviewing the Delaware real estate documents?** Determine responsibility for the deed, mortgage,

and other documents affecting the Delaware property.

- **Who will issue the title insurance policies?** Coordinate the relationship between the national title company, the title insurer or underwriter, and Delaware counsel, including Delaware counsel's role in issuing and signing the policies and endorsements.
- **Have Delaware transfer taxes and recording charges been analyzed?** These amounts should be incorporated into the closing economics well before funding.
- **Which Delaware state, county, and municipal affidavits and ancillary documents are required?** Identify the required transfer-tax, residence and gain, seller tax, exemption, and recording documentation before the principal documents are circulated for execution.
- **How will settlement funds be handled?** The closing structure must account for Delaware counsel's responsibilities regarding settlement funds and disbursement.
- **Does the transaction also require a Delaware entity-law opinion?** Do not assume that engaging Delaware closing counsel automatically resolves every Delaware opinion requirement contained in the loan documents or closing checklist.
- **Who will coordinate recording and post-closing title matters?** Establish responsibility for recording the Delaware documents, obtaining the recorded instruments, satisfying post-closing requirements, and coordinating issuance of the final title policies.

Conclusion: Integrating Delaware Counsel for a Smooth Closing

Delaware's attorney-closing requirement is unusual, but it does not need to make a commercial real estate transaction difficult. The key is understanding the Delaware structure early. Out-of-state counsel continues to manage the overall transaction. National title companies continue to provide the underwriting and national coordination that make multi-state transactions efficient. Lenders and borrowers can continue using their established closing processes. The Delaware component simply needs to be structured so that a Delaware-licensed attorney performs the responsibilities Delaware law assigns to Delaware counsel. That includes more than attending a signing. Delaware counsel's role encompasses the legal components of the settlement process identified by the Delaware Supreme Court, including title examination, review of documents affecting Delaware real estate, supervision of settlement and disbursement of funds, title-insurance functions, preparation and coordination of the Delaware-specific affidavits and ancillary documents necessary to complete and record the transaction.