Delaware Real Estate Closings: Why Delaware Attorneys Are Always Required

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Contrary to just about every jurisdiction in the country, all real estate settlements for real property located within the State of Delaware must be performed by a Delaware-licensed attorney. The Delaware Supreme Court has determined that nearly all aspects of a real estate transaction constitute as the practice of law. Therefore, every real estate settlement — whether residential or commercial, purchase or refinance — must be conducted by a Delaware-licensed attorney. Anyone not a Delaware-licensed attorney performing these services is engaging in the unauthorized practice of law and is subject to sanctions.

The practice of law, as defined in Delaware, "occurs where there is an exercise of judgment on a legal matter by someone acting in a representative capacity." *Delaware State Bar Association v. Alexander*, Del. Supr., 386 A.2d 652, 661 (Del.), *cert. denied*, 439 U.S. 808 (1978).

The basis for Delaware attorneys' requirement to perform all real estate settlements derives from the case of *In the Matter of: Mid-Atlantic Settlement Servs., et al.* 755 A. 2d 389 (Del. 2000) (commonly referred to as "Mid-Atlantic). On September 22, 2006, the Supreme Court of Delaware approved the report and recommendations of the Delaware Board on Professional Responsibility, which determined as follows:

- An attorney licensed to practice law in Delaware is required to conduct a closing of a sale of Delaware real property.
- An attorney licensed to practice law in Delaware is required to conduct a closing of a refinancing loan secured by Delaware real property.
- An attorney licensed to practice law in Delaware is required to be involved in a direct or supervisory capacity in drafting or reviewing all documents affecting transfer of title to Delaware real property or where Delaware real property is used as security for the repayment of a debt or the performance of an obligation, with the exception of home equity loans in which the lender is acting in a pro se capacity and no evaluation of exceptions to title is required.
- The participation of an attorney licensed to practice law in Delaware is necessary in evaluating the legal rights and obligations of the parties, representing the buyer in examining the title and removing exceptions to the title, supervising the disbursement of funds, and responding to questions concerning the legal effect of documents and ramifications of a transaction by which title to Delaware real property is transferred or where Delaware real property is used as security for the repayment of a debt or the performance of an obligation, with the exception of home equity loans in which the lender is acting, in a pro se capacity and no evaluation of exceptions to title is required.

Subsequent to *Mid-Atlantic,* the question arose whether Delaware attorneys could perform "witness only" closings, in which the Delaware attorney was present for the signing of the documents and to answer questions, while the rest of the transaction was performed by non-lawyers. The main issue is whether attorneys are required to perform disbursements. On September 22, 2006, the Supreme Court of Delaware approved the report and recommendations of the Delaware Board on Professional Responsibility, finding that attorneys must directly supervise the disbursement of funds from real estate transactions pursuant to Rule 1.15(A) trust accounts. According to the report, attorneys who allow title companies or other third parties to disburse settlement funds are engaging in the unauthorized practice of law and could face sanctions.