

# Preparing for the Commercial Real Estate Closing

(Part 1)

Joshua Stein

*To master the many details of a major closing, you need to plan meticulously, prepare and use good checklists, and delegate effectively.*

**MAJOR COMMERCIAL  
REAL ESTATE CLOSINGS** require management skills and techniques much like those you would need to produce a Broadway show, build a building, or invade a small country.

Every real estate transaction starts with a basic business goal. Then, as the transaction moves from concept to closing documents, the details multiply and so do the players, the documents, and the deliveries. When you are in charge

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of making the closing happen, you need to anticipate, understand, and to the extent possible, resolve potential complications before the closing. Even "minor details" can, if not anticipated and dealt with ahead of time, wreck the transaction. As with so many other things, preparation is the key to success.

This article summarizes many problems, issues, and concerns that often arise in any commercial real estate closing, and offers some suggestions on how to handle them. It also lists many steps that need to be taken along the way. This article provides a convenient checklist for use in actual transactions to help prevent dropped balls and other problems. This article doesn't, however, fully describe every step that needs to be taken for every possible real estate transaction; instead, in many cases it merely provides a reminder of something that may require further attention. Every category this article covers would itself justify a separate article, or perhaps a book. And any transaction, even a "cookie cutter," will raise its own unique issues and concerns.

Very little summarized here will be new for anyone who has practiced real estate law for more than a year, but even the most seasoned practitioner can sometimes benefit from an organized summary of the pre-closing process.

The real estate transaction addressed in this article could be a multi-site mortgage loan, an acquisition of ground leases in a dozen states, a "corporate" transaction that happens to involve the transfer of 500 leased sites, or any other complex commercial real estate transaction with many players and many properties.

Because the possible transactions range so widely, and because any one transaction often really amounts to two or more smaller ones, any suggestion in this article could apply to almost any transaction—and could also be completely irrelevant or excessive overkill under the circumstances. The purpose here is merely to offer a checklist and a collection of ideas and suggestions. You need to figure out which ones apply to your transaction, and how.

**OVERVIEW: SOME GENERAL PRINCIPLES OF THE REAL ESTATE CLOSING PROCESS** • Whatever transaction you are closing, some fundamental principles will always apply. Keep them in mind from beginning to end.

Very little of the closing process is in fact a legal process. But it is very much a process, and one that the business world expects lawyers to perform, primarily because legal issues can and do arise at any time

during the closing process. Therefore, as you push forward on all the different fronts necessary for a real estate closing, be ever alert for the legal issues and problems that can pop up at any time.

Precisely because so little of the real estate closing process is strictly legal, it gives you endless opportunities to delegate work to paralegals and secretaries. To seize those opportunities, you need to identify them early in the process and enlist the right people. Then you need to tell them what they need to know to do their job. If you don't plan ahead, you will end up doing tasks yourself that would have been far more appropriately and effectively performed by others.

Real estate closings are full of third parties: people who need to deliver documents, signatures, information, money, or other things to make the closing happen. Each of those third parties has its own requirements and expectations. Those can take time to identify and handle. Therefore you need to identify all the third parties, and get everything you need from them, as early as possible in the transaction.

The value of a closing checklist is often underestimated. This simple document can give you tremendous control over the closing process—but only if you prepare it properly and use it correctly.

Many wonderful opportunities to simplify your task will emerge in the real estate closing process. Watch for those opportunities and try to seize them.

**START-UP MEASURES: THE STEAM AND THE BIG PICTURE** • When a transaction begins, you first need to identify the team and get as much information as you can, all as early as possible.

The team will consist not only of your own attorneys and paralegals, but also of representatives of your client, the title insurer, guarantors, "the other side," and other concerned parties. You need to identify all these people at the outset and know how to contact them quickly.

#### **Specialty Staffing**

Identify any specialty areas that will be involved. These could include, for example: bankruptcy; tax; ERISA; litigation; and environmental. If you might need help in these areas, try to line it up as early as you can.

#### **Local Counsel**

If the transaction will involve property outside your state, select local counsel. Two parties can sometimes share local counsel (for example, borrower and lender), but in that case confirm that an appropriate conflict waiver is in place if needed. The point here isn't that you are

responsible for local counsel's ethical issues (although you may be), but that local counsel might not think about conflict waivers until the night before the closing.

They might not focus on the potentially conflicted nature of their role until you persuade them, assuming you are lender's counsel, that you really do want them to tell you how to craft your loan documents to maximize leverage against the borrower after a default. Then the "conflict waiver" issue may precipitate a last-minute crisis, which may delay the closing, which will be your fault even if it wasn't.

Clarify billing arrangements with local counsel, including ultimate responsibility for payment, requirements for delivery of a final bill at closing, and the like.

#### ***Client Contact***

If the transaction is fundamentally real estate driven, you will probably work with the client's real estate personnel from the beginning. But should you also be working with people from other areas within the client's organization? How involved does the legal department want to be? If it is a loan, what about the people who will actually handle the logistics of finalizing the loan amount and disbursing the funds? Are there other people involved in loan approval and

underwriting with whom you should also be in touch?

If the transaction isn't driven by real estate, you will probably want to obtain a contact person at the client who understands the client's real estate assets and agenda. This person should have access to the client's real estate files and records. You also may need a contact person who will know about the payment of taxes—real estate, corporate, franchise, and other.

If the transaction will involve any financial calculations, try to have the client assign an accounting person to work on the transaction.

#### ***Cast of Characters***

Find out who—both at the client and in other organizations—will be involved in developing, reviewing, and approving the closing documentation. At the title company, identify the contact person for title insurance work and for closing coordination. Beware of transactions in which escrow is handled separately from title clearance, including the issuance of a title commitment and a policy. Identify who is responsible for title and who is responsible for escrow. Involve both of them and treat them as independent players.

#### ***Players' List***

Prepare (or make sure someone else is preparing) the players' list,

including home addresses, telephone numbers, and email addresses. Distribute these to all persons listed, obtain corrections and additions, and recirculate. Treat this as part of the closing checklist. Just like a closing checklist, it will probably always be in flux.

#### ***Data Summary***

It can be extremely helpful at the beginning of a transaction to send out a form or checklist to the other side, requesting at one time all the deal-specific information that you will need from them: names, addresses and identifying numbers of parties and guarantors; addresses of property; and names and addresses of participants who are already involved in the transaction when you are first brought into it.

#### ***Get the Legal Names of Entities***

Obtain all necessary correct legal names, addresses, and states of incorporation of entities, trustees, and the like, as early as possible in the transaction. Identify which entities will need to be formed, and assign responsibility. Reserve names as early as possible. It is astonishing to see how often smart and sophisticated real estate players and their counsel waste vast amounts of time at the last minute because the parties can't use an entity name that they had assumed would be avail-

able, and all the documents need to be revised and re-executed.

Determine the principal executive office of borrower. Understand any special capacity of, for example, the "trustee" or the "collateral agent." Consider any special provisions required by this special status.

Request that no one change any of these items, once they have been set, until after closing.

#### **Overall Approach**

If the transaction isn't fundamentally driven by real estate, determine just how much the real estate part of it matters. What is the significance and relative value of real estate in the larger picture? How much scrutiny of the real estate is required? If due diligence were to reveal that all the real estate had zero value and was actually owned by the Vatican rather than by the borrower, would the transaction still close on the same terms? The answer to this question will affect a great deal of what a real estate lawyer should do when the lawyer is part of the team for a non-real-estate transaction.

#### **Existing Financing**

Consider whether to take existing loan security documents by assignment. Whether this should be done depends on the desires of the

parties, the underlying deal structure, and tax considerations.

### **Third-Party Deliveries**

Identify any deliveries, including document exhibits, that will need to be prepared or provided by third parties. Allocate responsibility and get people started.

### **Confidentiality**

Ask whether this transaction raises any abnormal confidentiality concerns. Can you assume that people within the client company can know about the transaction? Is it confidential even within the company? If it is generally not a sensitive transaction, are there any particular parts of it, or particular participants, that must be kept confidential?

### **Delayed Commencement**

Often clients are reluctant to bring counsel into a transaction until almost the last minute, because they often don't know whether the deal is "a go" until the last minute, and they don't want to run up legal fees until they are sure about the deal. Try to discourage that approach, because it produces emergencies and fire drills—and ultimately extra expense that could have been avoided.

At least try to encourage the client to deliver the necessary third-

party documents (title, leases, underlying documents) as soon as it looks like a deal might be on the horizon. That way, when the deal hits you will have what you need and will be able to start work immediately.

**STARTUP MEASURES: THE REAL ESTATE** • Once you have identified the people involved and the basic scope of the transaction, you will next need to start to get your arms around the real estate itself.

### **Identification**

Obtain a list of the relevant properties. Include non-operating properties. What entity owns each site? Understand the existing site and the numbering scheme; establish a new scheme if necessary. Try to obtain the site list in machine-readable form.

### **Leases**

Obtain at least the following basic information for each lease:

- Property affected (site number, location, etc.);
- Name;
- Date of lease;
- Remaining term; and
- Options.

Obtain copies of all leases and related amendments and assign-

ments. Cross-check these against the list of leased sites and a rent roll if appropriate.

#### **Pre-Closing Transfers**

Consider the need to perfect any conveyances or transfers before the main closing presently contemplated. Is title in the wrong place? What instruments will need to be recorded to correct that situation? Start that process. (For any documentation, think about ancillary and related documents, such as additional transfer documents, organizational documents, tax returns, and filings.) Are there tax-planning reasons to suggest that an asset should be moved around before the closing now contemplated?

#### **Choice of Title Company**

You may want to control the choice of title company, unless the client desires otherwise or other good reasons exist. Remember, though, that if you insist on using "your" title company and it does a bad job (or is merely perceived as doing a bad job, such as by failing to meet a deadline that was absurd to begin with), it is "your" fault.

If an abstract company or agency is being used, consider the need for an insured closing letter. If needed, obtain it early in the transaction. Negotiate the title insurance premium. Consider seeking bids. The title

clearance and title insurance process is otherwise discussed further below.

#### **Unusual Security Mechanisms**

If the transaction will include a letter of credit, cash collateral, a stock pledge, interest rate hedges, or other non-real-property security mechanisms, these will usually involve third parties such as banks, custodians, or the like, plus their attorneys. Develop the structure and documentation as early as possible, in consultation with the parties who will have to administer it.

#### **Acquisition Contract**

If you represent a lender making a loan to allow the borrower to acquire the mortgaged property, obtain a copy of the purchase and sale contract. This will allow you to:

- Validate the purchase price being paid;
- Determine whether the borrower is accurately describing the time pressure to close and other business needs allegedly arising from the contract; and
- Uncover issues or problems with the property.

For exactly these reasons, borrowers will typically ignore your requests for the purchase and sale contract and hope you will forget, or that if they delay until the last minute you won't actually read the

contract when you receive it. The most common excuse is that "the contract is still being negotiated," in which case you need to ask for copies of drafts.

You need to be extremely forceful and persistent about obtaining the purchase and sale contract, particularly including any last-minute amendments that might reduce the purchase price.

### **Appraisals**

Identify any appraisal requirements and arrange staffing and scheduling, or confirm that someone else has. Typically you will have no involvement in the appraisal process. Recognize, however, that an appraisal represents, or should represent, a reasoned analysis of all characteristics of the property, financial and nonfinancial. Therefore, reading the appraisal is typically well worth the hour it will take. In doing so, look for:

- Issues and concerns that you might need to address in the closing documents, such as exactly who owns what;
- Confirmation that the real property being affected by your closing documents is the same real property that was appraised;
- Issues that might limit or restrict your client's rights or interests in

that real property, such as use restrictions, rights of third parties, or burdensome contracts or obligations; and

- Any other possible problems of any type, such as environmental concerns.

### **THE CLOSING CHECKLIST**

• Develop, distribute, and maintain a current closing checklist throughout any transaction, simple or complex. The closing checklist is a roadmap for everything that needs to be done.

### **What the Closing Checklist Should Say**

For maximum value, a closing checklist should:

- List every document and the separate elements of each document, such as exhibits and simultaneous deliveries (e.g., tax returns and affidavits) being separately prepared. Normally, no single item in a closing checklist should actually consist of multiple items. Instead, break each separate item out separately;
- If appropriate, indicate for each document: who will sign it; how many originals will be required; who is responsible for preparing it; its computer file name; and its status;



- Deal separately with documents that apply to the transaction overall versus site-by-site document requirements;
- Include not only specific documents, but also events and deliveries that must occur before or at closing—including checks. Anything that needs to be separately noted and kept track of for the closing should be noted and kept track of in the closing checklist rather than exclusively in someone's memory;
- Indicate responsibility, by organization and individual, for every item on the list. Make sure others involved in the transaction know what you are expecting of them and are working on it. If the closing becomes a disaster because someone didn't do their job, the client doesn't much care that it "wasn't your fault." They will ask instead why you didn't prevent the problem and why you didn't make sure other people did their jobs;
- Indicate the date of each draft of the checklist;
- Include a list of participants and their counsel, with all pertinent name and address information, including, as appropriate, fax, email, portables, and home.

#### **How Do You Start a Closing Checklist?**

The best way to prepare a closing checklist is by tailoring the final

closing checklist from a similar transaction.

Another method is to read through the draft closing documents. Numerous sections of the documents will describe required deliveries, closing conditions that need to be satisfied, and so on. Don't limit your review to the section of the document that talks about documents to be delivered. Read the entire document from beginning to end. For example, the section on "brokerage" may say that one party or another will, at closing, deliver proof that some brokerage commission has been paid. The requirement for that delivery needs to be added religiously to the closing checklist and then tracked through to completion. Otherwise it will be forgotten.

#### **Name the Documents**

Give each document an appropriate name that you won't have to change later. The checklist should then indicate the exact name of each document—correctly, the first time, as soon as you add the document to the checklist. This way, people will be able to refer reliably to the checklist when they want to find out exactly how to refer to each document. Continuously update the document list in the closing checklist and cross-check the document titles against the checklist.

### **Keep the Closing Checklist Current**

As the need for each new document, delivery, closing condition, exhibit, rider, or schedule arises, update the closing checklist accordingly. Any time you hear a reference to a piece of paper to be delivered for the transaction, add it the closing checklist immediately. The closing checklist should always provide an up-to-date reference point for the transaction and every separate document or delivery the transaction will require.

### **Distribution and Redistribution; Followthrough**

Distribute the closing checklist broadly, to all participants. Revise and redistribute it as circumstances change. Make sure anyone with any responsibility for providing any document receives a copy of every distribution of the closing checklist, so they can't say they were unaware of their responsibilities. But don't expect them to read the updated closing checklist. To the extent that you are responsible for a successful closing, communicate regularly with each participant and be sure they are doing what they are expected to do.

### **Changes**

A closing checklist will, and should, change constantly. If you

wait until it is "final" you will never distribute it. Print a snapshot of the then-current closing checklist and send it out periodically as the closing approaches.

### **Consolidated List**

Try to have all parties share the same checklist. If each party has their own checklist, you will spend significant time cross-coordinating the checklists and document deliveries—although this process will also reduce the likelihood of mistakes, problems, and gaps.

Of course, if the transaction fundamentally consists of many multiple transactions it may make sense to maintain separate checklists for each. In that case, do it in a way that eliminates overlap and excessive coordination.

**CONSENTS AND APPROVALS** • If your transaction will require any governmental or private approvals, you need to identify them as early as possible and figure out how you will obtain them. They typically require a great deal of lead time.

### **Public Approvals**

If the transaction involves any development or significant changes in existing buildings, you may need

building or zoning approvals. What approvals are necessary? Which ones are in place? Which ones can be left until after the closing? Is there any chance of obtaining an opinion of permitting or zoning counsel? Are any subdivision approvals needed? Zoning? Building or other codes? Are there any issues regarding the certificates of occupancy? Site plan approval? Make sure someone competent to do so is thinking about these questions.

#### **Miscellaneous Approvals, Clearances, and Consents**

Consider the need for any other governmental or legally required pre-clearances. Some examples:

- Are there Hart-Scott-Rodino reporting requirements pertaining to shopping center, hotel, or other "transfer of business" transactions?
- Are environmental clearances required by environmental laws of any state?
- Will you need any "fairness" opinions, or other third-party validations of the transaction? What are the requirements of your client's own organizational documents? Board approval? Shareholder approval? Specified consent or vote? What about any limited partners?
- Determine whether any relevant localities require reissuance of cer-

tificates of occupancy, or other similar permits, upon or in contemplation of closing.

- Determine whether the real property includes an operating business that will be closed or reduced in size and hence may be subject to federal plant closing legislation.
- Determine the need for governmental approvals for any other operations on the property or the transfers of the property, such as gaming, liquor, and hazardous activities.
- Does this transaction include the sale of a "business" (including hotels, warehouses, or other assets involving significant personal property)? If so you may need to comply with bulk transfer sales statutes (including pre-filing or publication in some cases).
- Sales (including subsequent transfers in certain cases) of cooperative or condominium apartments purchased in bulk, or limited partnership interests, may require Martin Act filing in New York. Other state securities laws may apply.

#### **Foreign Investment**

If the transaction involves foreign investment in United States real property or other assets, consider whether it must be reported to

the federal government. Add appropriate documents to the closing checklist.

#### **Corporate Tax Clearance**

If a corporation will be merging, consolidating, or terminating, consider the need for pre-clearance of that event with the state tax collectors.

#### **Private Approvals**

What private parties (whether real-estate-related, corporate-debt-related, or acting in some other capacity) have the right to approve (or disapprove) the contemplated transaction? Does your client need approvals from any of its lenders? Lessors? Other counterparties? How will the approval process work? What notices need to be given? Regardless of what the legal documents say, have the parties thought about whether the necessary approvals will be easy or difficult to obtain, and who should be initiating the process? How is the relationship with the consenting party?

**DUE DILIGENCE** • Any transaction will require “due diligence” to investigate and validate the facts and circumstances of the real estate. Plan it carefully and then control it, or it can easily get out of control. Here are some common and not so common questions to consider. (Leases, title

insurance, and surveys are all discussed separately below.)

#### **Practical Site Concerns**

Consider practical issues such as access, zoning, use and use restrictions, operations, garbage removal, parking, infrastructure, utilities. Look for problems—such as reliance on off-site locations for amenities or building services—and figure out how to solve them. Does the site include any development rights from other sites? Have development rights been transferred to other sites? What effect on the closing process and valuation?

#### **Field Trip**

If feasible and appropriate, visit the site. This almost always produces useful and important information.

#### **Real Estate Taxes**

Analyze existing real estate taxes. Understand whether the site is already subject to any built-in future increases, such as a gradually eroding tax abatement. Will the transaction itself trigger an increase? Make sure these possible surprises have been reflected in the financial analysis of the deal.

#### **Code Compliance**

Building and zoning compliance is often a due diligence “orphan.”

Attorneys don't want to do it because they "don't do building code." Engineers don't want to do it because they do "physical stuff." Appraisers don't want to do it because they assume it away. Clients don't want to do it, period. So it lingers until the closing, at which point it becomes a crisis. Therefore, work with the client to identify responsibility early and make sure that it gets done.

#### **Related Documents**

Identify all pre-existing documents and agreements related to the transaction and, if they may be material, request copies as early as possible, preferably in writing. Pay particular attention to third-party documents that are purportedly the basis for business needs or timing needs. If those documents are slow in coming when requested, you may be surprised at what they ultimately say. Insist on also seeing any amendments.

**TITLE INSURANCE** • When any real estate transaction begins, one of the first items to think about is title insurance coverage, and the title review process that ultimately culminates in issuance of a title policy.

#### **Back Title**

Does your client or anyone else already have "back title"—existing title policies or reports that may save time for the title process? If so, understand what's available and perhaps have copies provided to whichever title company is handling today's transaction.

#### **Title Orders**

Open title orders as early as possible, and give the title company appropriate instructions. You might, for example, advise the title company that:

- You want copies of all underlying documents that will survive the closing; and
- Title coverage should comply with your standard title specifications, which you should distribute as early as possible.

Make sure that no one else has opened title. If any title requirements are nonroutine or nonobvious (and perhaps in all cases), confirm in writing the directions to the title company, particularly when and to whom the title report(s) are to be distributed. If possible, have the title company, rather than attorneys, make and distribute copies of the title reports to all recipients.

**Coordinating the Title Work**

Be sure that all title work is properly coordinated and all title issues are properly identified:

- Consider the need for UCC-1 searches (central and local), judgment searches, tax lien searches, violations searches, and other searches. Order them, if necessary, for all appropriate jurisdictions. Identify any former names of the borrower, perhaps via an officer's affidavit and certificate, and order searches under those names as well;
- Identify affirmative insurance and endorsement requirements. Consider the need for a tie-in endorsement and other special coverage measures that are unique to multi-site transactions, or any other special endorsements;
- Maintain and update the checklist indicating title work received. When a title report is received, check it in and (if appropriate for the particular transaction) make sure the report includes copies of all underlying documents that will survive the closing. Follow through to make sure that you receive all missing underlying documents as soon as possible. Each is a potential last-minute crisis if not received before closing;
- Review underlying documents. Deal with any problems they may reveal;
- Identify who will receive title insurance coverage, in what amounts,

and in the name of what "named insured." Will there be an owner's policy? (Not always);

- If the transaction involves multiple sites, ascertain coverage for each site. The allocation of title insurance coverage among sites is a semi-significant business decision, to be made by the client and not the law firm, the title company, or any other party to the transaction;
- If the transaction is complex and will involve multiple estates, the title company may offer to insure specified parties "as their interest may appear." This is tantamount to insurance that the sky is blue, provided that it looks blue. The title policy should instead describe each estate and say who holds it and subject to what, because it is the title company's job to provide exactly that assurance;
- If the title coverage will exceed the capabilities of a single company, think about reinsurance and coinsurance early. Obtain and review a schedule of proposed reinsurers or coinsurers. If more than one company will be represented at closing, require all to agree upon and send a single closer;
- Make sure that the following documents and deliveries will be available at closing to the extent required by the title company: resolutions; good standing certificates; and secretary's certificates;

- Prepare recording or escrow instructions for the title company's review well before the closing;
- To the extent that you or your client will need to remove any title exceptions before closing, identify those requirements and start the process early. Third-party cooperation will often be required, and this takes time;
- If any real estate or other taxes are "open," arrange to pay them in a way that is satisfactory to the title company—i.e., sufficient to produce at closing a "paid" receipt or other evidence that the taxes have been paid, other than merely a copy of the owner's check. The municipality may be very slow at posting "recent" payments, so you need to be prepared to show that those payments were made. Make sure someone will obtain a current bill—including any interest and penalties—for the open taxes at closing. Understand how the check should be made payable, and how long the "pay-off" figure in the latest tax bill will be valid;
- Identify future tax payments and the period covered. Coordinate with the calculation of tax escrows for closing.

**Stock Purchase  
or Partnership/  
LLC Interest Transaction**

When your client buys stock or some other equity interest in an

existing company, the transaction may not look like a real estate transaction, but it may be one—for example, if the company's major asset is a real estate project. In that case, the equity purchaser may want the company, at closing, to obtain updated title insurance coverage regarding its real estate to confirm that the company still owns the same interests in real estate that the purchaser thinks it does.

In that case, the purchaser will also be concerned about certain troublesome boilerplate in the standard title insurance policy. Under that boilerplate language, the title insurer disclaims any liability for unrecorded title problems that the insured (i.e., in this case the company whose equity is being acquired) knew about but didn't disclose to the title company. This boilerplate, if not dealt with, would effectively make the new title insurance coverage worthless, because it would negate coverage against the one source of title problems most likely to be relevant—i.e., the blunders and bad acts of prior management.

The purchaser can solve the problem by asking the title company to issue a "non-imputation endorsement" to protect the purchaser from whatever title problems prior management knew about but didn't disclose to the title company. Before issuing such an endorsement, the

title company will typically require an affidavit from someone. If the affidavit comes from the company itself, then the title coverage becomes worthless again, because if one of these title problems arises, the title insurer will simply hit the ball back over the net to the insured.

The purchaser can protect itself by making sure the “non-imputation affidavit” is issued by someone other than the company itself—for example, by the seller of the equity or by the outgoing management of the company. But neither of these parties will be under any obligation to sign the affidavit unless the purchaser thought of the issue during the original contract negotiations. Therefore, if the purchaser cares about this issue, it needs to try to address it in the contract.

A purchaser might also conclude that the entire discussion is a waste of time and effort, depending as always on the business context of the transaction. If the company is an operating business and the purchaser is buying equity, then they are buying all the warts and problems of the company, including all past mismanagement and liabilities of all kinds—not just whatever dumb things management has done to the company’s real estate.

If the purchaser has so little confidence in management that it feels

the need to spend the money to re-date the company’s title policies and obtain non-imputation protection, perhaps it shouldn’t do a stock or equity deal at all, and should instead buy “pure” assets. Others may differ, particularly if the transaction is fundamentally a real estate transaction. As always, the business context dictates everything.

### **Warranty Deeds**

When a purchaser acquires a real estate portfolio from a credit-worthy seller, the parties may be able to structure the transfer in a way that gives the purchaser the benefit of the seller’s title insurance coverage, thus reducing the need for the purchaser to buy new title insurance coverage. The savings on title premiums may help both parties create a more financially attractive transaction. Although this technique might not be foolproof and the author isn’t aware of any transaction in which anyone ever tried to make a title claim in reliance on this structure, the author has been informally advised by title companies that it should work.

In general, of course, when a seller sells real estate it can’t transfer its title insurance coverage to the purchaser. But if the seller issues a warranty deed to the purchaser and suffers a loss because one of the warranties in the deed was incor-



rect, the seller can make a claim under its title insurance policy if the title problem was one that the original title insurance policy covered. That coverage applies only as of the date the policy was issued, and doesn't cover anything that happened later.

The parties can therefore structure the transaction as follows. The seller conveys the real estate to the purchaser using a warranty deed, with a general warranty against all possible title problems since the beginning of time, but stating that the seller's liability is limited to whatever the seller can recover under its title policy. That limitation doesn't apply to any title problems the seller itself created, including any defects in the transfer from the seller to the purchaser.

These assurances from the seller should give the purchaser almost the equivalent of its own title insurance coverage, at zero cost. To the extent that they don't provide an exact equivalent, the purchaser may conclude that they are close enough, particularly in view of the present savings achieved. And, of course, the structure assumes a creditworthy seller.

If a transaction may be suitable for this "warranty deed" structure, the point needs to be considered as part of contract negotiations, and appropriate provisions negotiated.

And anyone using this technique should try to obtain written confirmation that the relevant title insurance company agrees that the technique works.

#### **Pro Forma Policies**

If the transaction is complex or will require unusual affirmative coverages or vesting, obtain a "pro forma policy" rather than a commitment. Negotiate with the title company the exact wording of any important but unusual terms of the policy.

#### **Future Transactions**

If you know today that the parties already contemplate some future transaction—exercise of a purchase option, or conversion of interim to permanent financing—try to persuade the title company to agree today to issue further title insurance coverage for that future transaction without additional charge when it occurs.

#### **Survey**

As part of dealing with title insurance, you also need to deal with obtaining or updating appropriate surveys of the real property affected by the transaction. Here is a short list of crucial steps and suggestions for that process.

- As early as possible, consider the need for survey updates. If necessary, order them. See if you can persuade the title insurance company to issue title insurance coverage sufficient to avoid any need to redate surveys;
- Determine to whom (exactly) the survey should be certified, including the representative capacity of, e.g., any "collateral agent." Notify the title company or surveyors in writing of the exact wording of the survey certification;
- Make sure that no one else has already ordered a survey;
- If the lender has "survey standards," make sure that the surveyor is aware of them—in writing—before starting work. Make sure that the surveyor complies with them;
- When you receive the survey, cross-check it against the legal descriptions and underlying documents. Understand, with the survey, how the site fits together and make sure it is the correct site and the complete site. Look for access problems, signs of wetlands, other practical problems relating to the site. Check setbacks. Understand whether this is all the property involved, or whether additional sites or parcels are now involved or will be involved later. When appropriate, cross-check the survey against the appraisal to make sure that the

property surveyed (and described and mortgaged) is the same as the property appraised. Deal with any survey problems.

**LEASES** • If a transaction involves income-producing commercial real estate, the leases will be crucially important, as they are the source of the rental income that is ultimately the main source of value. And if the transaction includes leases as assets (e.g., the tenant's position under long-term ground leases), this will raise a separate set of issues.

#### **Due Diligence**

Consult with the client regarding the desired breadth and intensity of lease review. Because of their scope, variations, and frequency of amendments, leases can be very labor-intensive. Sometimes a deal will justify full review of every lease, or even preparation of new lease summaries. In other cases, the client will want counsel to quickly skim through the leases, confirming that they exist, that they don't have anything unusual in them, and perhaps that the rent complies with certain financial projections. It all depends on the transaction.

#### **Lease-Related Deliveries**

Identify any documentation to be required for leases, such as estop-

pel certificates and nondisturbance agreements. Prepare the form as early as possible. See to it that the process of obtaining these documents begins as early as possible.

#### **Lease Amendments**

To the extent that leases (such as long-term ground leases that are part of the asset package) may need to be amended, commence that process as early as possible. Consider ancillary and related documents, such as memoranda of amendment. Update the closing checklist for any amendments. If any amendments will cost money, establish any necessary escrow arrangements for the closing.

#### **Transfer Mechanics**

Identify any requirements that need to be complied with in any assignment or pledge of a lease, including:

- The form of assignment and assumption;
- Any notices that need to be given, whether before or after the closing; and
- Appropriate entries in the closing checklist for all of the foregoing.

**EXISTING LENDERS** • If your transaction will refinance existing indebtedness, you

need to think about dealing with the existing lenders that will be paid off. Keep in mind that they might not be happy about being repaid, and hence might not go out of their way to cooperate. Consider at least the following issues.

#### **Releases**

As early as possible, open communications with the existing lender. Communicate with the existing lenders' counsel, make arrangements to receive a pay-off letter and releases or assignments in escrow. Give one person primary responsibility for dealing with the existing lender and obtaining all necessary documentation. If the transaction will involve prepayment of an existing loan, consider whether formal prepayment notices must be given (or waiver obtained) a specified period before the closing.

Review the governing loan documents. Identify any problems as early as possible, for consideration by the client. Understand the financing structure. If there is a bank group, make sure that you are dealing with the right representative and they are, in a timely manner, obtaining whatever bank group approvals they need. If they forget or postpone that process—which often happens—it is your closing (not

theirs) that may be derailed. A lender that is consenting but not being paid off may treat the transaction as an opportunity to re-document and re-close the loan. Be prepared for the resulting delays and documentation. Update the closing checklist as appropriate.

#### **Loan Pay-Offs**

If an existing loan will be paid off, ask the existing lender to confirm—by actually finding the documents in the files—that it holds the original note and mortgage documents and will be able to deliver them at closing. If the existing lender can't provide this confirmation, work with the title company, the new lender, and the borrower to resolve the problem. If the existing lender is non-institutional, the loss of the note may create significant problems, particularly if disclosed to the title company only at the last minute.

#### **Satisfaction (Can't Get No)**

Make sure that the existing lender doesn't plan to mark its note "void" or its mortgage "satisfied" if the note and mortgage are to be assigned in accordance with practice in New York and some other mortgage tax states.

**CLOSING DOCUMENTATION** • Determine what documents your closing will require and, to the extent possible, prepare them well in advance. Some suggestions follow.

#### **Model Documents**

Select an appropriate starting point for each document. Use a comparable document from a similar or comparable transaction, rather than something that comes from the wrong perspective and may require extensive reworking and revision. As appropriate, discuss with the client whether to start with a "one-sided" or "negotiated" document. The answer varies depending on the circumstances. Extra time spent here can save a great deal of time later.

If the client has its own "forms" that it wants to use, make sure that you know about that before you start preparing your documents.

#### **Drafting**

Make your first drafts as complete as reasonably possible. If you are sure they won't change, include names, dates, signature blocks, acknowledgments (with as much information as possible already filled in), and cross-references to other documents. Tailor documents as appropriate for the unique cir-

ment without extra hassle. When you want to sign the "execution" counterpart of the document, you simply remove the cover sheet. When you want to treat it as an "exhibit," you leave the cover sheet on. No problem.

### **Recording**

Aside from the obvious candidates for recording, such as deeds and mortgages (or anything else that will be the basis for title insurance), think about the possible need to record any other document that affects a particular estate in real property and should, by its nature, bind any subsequent holder of that estate; for example: estoppel certificates; nondisturbance agreements; consents; and co-ownership agreements.

On the other hand, particularly in high-tax states like New York, any recorded document entails numerous ancillary affidavits and forms, and possibly payment of taxes that could otherwise be avoided. And, of course, any recorded document becomes totally public forever.

### ***Title Company Review***

Provide drafts of all recordable documents, and other major documents, to the title company when and as prepared. Then follow through to obtain comments or sign-

off. In particular, treat legal descriptions as documents that require appropriate review by the title company and all interested parties.

### **Format**

For multi-state transactions, include the site number or other site designation at the upper right-hand corner of the first page of every document and every exhibit. Perhaps include on the cover of each document its identifying number from the closing checklist, if the closing checklist isn't subject to further change. Comply with state-specific format requirements, such as indicating the correct section, block, and lot of the property in question. In New York City, every recordable document also needs to indicate the street address of the property in question.

Check with local counsel or the title company to be sure you comply with any local requirements. In particular, focus on acknowledgments, tax returns and payments, affidavits, and required legends or disclosures. For a list of each state's acknowledgment forms, look in the portion of Martindale Hubbell that includes summaries of each state's laws.

### **Review and Negotiation**

Identify all parties that need to review and approve documents. Don't just send drafts to the obvi-

ous recipients. Think about the following additional parties: other investors in the deal; indenture trustee; participants or note purchasers; local counsel; title company (local and, where necessary, central underwriting); and other third parties, including separate counsel representing any of the foregoing.

Cover letters should state the deadline and ask the recipients to take the initiative by calling—or, better yet, faxing you a markup with specific line edit changes—if they have any comments. Then actively solicit comments and make sure other people review the comments. Don't mistake silence for acquiescence.

#### **Other People's Comments**

You expect to receive lots of comments, changes, objections, and the like regarding your documents from "opposing counsel." Those are easy to deal with and they will always be staring you in the face. But don't forget about comments from the other people mentioned in the preceding paragraph.

At first blush you might resent the process of having "another lawyer looking over your shoulder," such as counsel for the limited partner of your client. If you take a broader view, though, you will soon realize that it is extremely helpful to have someone else on your side

who shares your client's interests and can provide a second pair of eyes and a second opinion on issues. In my experience, most co-counsel are cooperative and constructive about this process, because they know it is a round world, and on the next transaction the roles could just as well be reversed. And if co-counsel proceeds that way, then the benefits of their involvement far outweigh the detriments.

Among other things, co-counsel can help catch mistakes and inconsistencies. And their involvement indirectly amounts to an insurance policy against sniping and criticism of the documents after the transaction has closed.

Pay attention when your co-counsel, or anyone else, says they can't understand your documents. Even if your documents are perfectly comprehensible and correct in your mind, it is your job to write documents that other people of reasonable intelligence can understand without an annotated explanation from you. When the judge has to read and understand your documents, you probably won't be around to explain. If you are around, the judge probably won't want to hear from you. And the judge won't necessarily be any smarter or more insightful about interpreting your work than whoever is looking at it today and says they can't understand it.

So even if you think it isn't necessary, take the time to fully edit your document as necessary to respond to anyone who says they can't understand it (even if, in the back of your mind, you think they must be trying not to understand it, or worse).

#### **Revise and Recirculate**

Distribute marked copies of documents showing changes. (Many real estate attorneys prefer cross-outs rather than carets for deletions.) As you should for first drafts, distribute enough copies to enough people—everyone who saw the preceding draft. When in doubt, other than because of confidentiality concerns, err on the side of broad distribution. This can help prevent last-minute comments. Be sure local counsel sees the “final” draft.

#### **Distributions to “The Other Side”**

Beware of an ethical pitfall: don't send documents or any other communications directly to “The Other Side” (i.e., to the client rather than to counsel) without express written or oral approval by opposing counsel. The rule against direct communications with the opposing client isn't limited to litigation matters.

#### **Conforming Changes**

As negotiations move forward, edit the documents as appropriate.

But watch for changes that require editing not only of the “main” document but also other documents—so-called “conforming changes.” Either make the “conforming changes” in the other document, or figure out a way to revise the document structure so you never need to make conforming changes, and can make all your changes only in one basic document. This can prevent mistakes and inconsistencies.

#### **Avoid Leaving Open Issues**

Any issues left to be dealt with at closing will usually take more attention and effort than if dealt with in the normal fashion. Ultimately, open issues left for the closing will usually waste a great deal of time. Try to prevent open issues.

#### **Coordination with Non-Real-Estate Documents**

If the transaction you are working on isn't fundamentally a real estate transaction, then you want to make sure the real estate side of it meshes appropriately with the non-real-estate side. That means you need to review or edit the non-real-estate documents to check references to real estate documents, issues, and closing procedures. Some common problems:

- *Reasonableness.* Corporate documents often give the borrower

more flexibility than real estate documents, because of differing fundamental premises about the value of the borrower's credit and business judgment versus the ability and need to rely on a so-called "hard asset." Make documents consistent. If necessary, include a "conflicts" clause.

- *Defaults.* Make sure the defaults, cure periods, and remedies between the larger transaction and the real estate side of the transaction coincide. This works both ways. If a problem arises with the real estate, at some point it needs to become a default for the larger transaction.

- *Scope of Security.* Understand the scope of the assets (whether being mortgaged, leased, bought or sold) intended to be included in the larger transaction. Real estate documents should reflect the business intentions of the parties. Should any sites be excluded? Should any form of related property be excluded?

- *Real Estate Representations, Warranties, and Covenants.* If the "deal documents" adequately cover real estate issues, consider cutting back the real estate documents so as to be sufficient merely to create whatever interests in real estate the par-

ties want to create, along with appropriate remedies for default.

### References

Check references between documents, particularly as defined terms and titles of documents change.

### Saving Trees

Try to combine documents. For example, if owner's affidavits are needed for multiple sites, see if the title company will accept a single affidavit covering all sites. Can a single form of mortgage be used, with an exhibit listing all the sites, to save time and paper generating separate mortgages? Is it necessary to have a separate "assignment of lessor's interest in leases" independent of the deed?

### The Rest of the Deal

The basic transaction documents rarely fall between the cracks. To the contrary, problems more often arise because the attorneys focus too much on the documents and not enough on everything else. Don't lose sight of the rest of the picture.

*(Part 2 of this article will appear in the September 1999 issue.)*



# Preparing for the Commercial Real Estate Closing

(Part 2)

Joshua Stein

*To master the many details of a major closing, you need to plan meticulously, prepare and use good checklists, and delegate effectively.*

**PART 1 OF THIS ARTICLE,** which appeared in the July 1999 issue, discussed some of the groundwork that a real estate attorney may need to perform for a major commercial real estate closing.

That discussion covered, among other things, start-up measures, the use of a closing checklist, consents and approvals, due diligence, title insurance, leases, existing lenders, and closing documentation.

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Part 2 discusses opinions of counsel, insurance, the pre-closing process, final closing preparations, disbursements, and logistical arrangements. This article stops just short of the closing itself, which will be covered in a later issue of *The Practical Real Estate Lawyer*.

## **O** PINIONS OF COUNSEL •

Treat any opinion of counsel as an important transactional document. Try not to assign it to someone who isn't otherwise involved in the transaction. Don't consider it something to be handled on a different track or the night before closing.

Any opinion of counsel is just another important closing document—but one that is particularly likely to produce fireworks if you put it off until the end. Handle it with all the rest of the documents.

### **Basic Principles**

To avoid difficult last-minute late-night opinion negotiations having no business significance to the deal or anything else, try to: deal with opinions of counsel early (resist the typical impulse to put them off until just before closing); distribute the “form” of any opinion as early as possible; ask for nothing that you would not be willing to give; give as much as

you would reasonably expect to get; and resist the temptation to be creative, new, and different, even though you can always think of new things to reasonably ask for in opinions.

### **Internal Review Process**

For your own opinion of counsel, understand your firm's internal review and approval procedures. Make sure that they are in place and won't delay your issuing the final opinion.

You may lose a client if the only reason the deal didn't close was because you were not ready to issue an opinion of counsel that the other side had given you plenty of notice that they would need.

### **Opinion Due Diligence**

Review due authorization and formation documents to confirm that all necessary steps were taken and all necessary consents obtained. When necessary, prepare documentation to implement any necessary steps and consents not already in place; add it to the closing checklist.

### **Back-Up Memo**

Prepare a back-up memo for your opinion of counsel; add it to the closing checklist.

**Other Parties**

Are there any parties—other than the obvious ones—for whom an opinion of counsel should be obtained? For example, if the whole transaction relies on the credit of a major tenant that is leasing 300 sites, shouldn't someone who knows tell you that the right people signed the documents on behalf of that tenant? If so, add it to the closing checklist.

**Local Counsel**

For the local counsel opinion, ask local counsel to transfer the form of opinion to their system, edit and modify it as they consider necessary, and print it out (with changes marked) for careful and prompt review by you.

This can be a good way to obtain local counsel comments, issues, and problems early in the transaction, and prevent last-minute negotiations or changes in deal documents.

**Delivery from Local Counsel**

Try to obtain a signed, undated opinion of local counsel to hold in escrow for closing. Make it clear that local counsel won't have a final opportunity to see copies of signed documents at closing, and that the opinion should be structured accordingly.

**INSURANCE (OTHER THAN TITLE INSURANCE)** • Insurance often causes last-minute problems. Give it the same attention as any other complex third-party delivery.

Try to persuade the client to review and approve insurance coverage itself, if it has people who can do that. Otherwise, the client should often hire an outside consultant just to advise on insurance.

Insurance is a strange world of its own. Although lawyers can sometimes handle "plain vanilla" insurance questions, many insurance issues should be reviewed and approved by a competent insurance expert. When you do review insurance, here are some thoughts on what to look for:

**Requirements**

Review the documents to identify all insurance requirements for closing. Arrange insurance coverage, and pre-approve the form and scope of coverage. In particular, focus on:

- The type of insurance required;
- The names of certificate holders; and
- The required notice of cancellation.

Either provide written instructions regarding these matters, or (as a better choice) give "the insurance

people” copies of the relevant pages of the documents and ask them to handle the insurance.

Review the proposed form of insurance certificate, to confirm compliance with the documents. Coordinate the insurance with the party who requires it and with the client’s outside insurance brokers or consultants. Ask the insurance brokers or consultants to review insurance requirements to confirm they are consistent with the existing insurance program.

#### **Insurance “Certificates”**

For any closing, insurance brokers usually try to deliver a “Certificate of Insurance,” which provides significantly less comfort to a lender than an “Evidence of Property Insurance” (ACORD Form 27).

If possible, insist on an ACORD Form 27 for all insurance coverage, including liability coverage. Because the ACORD Form 27 refers only to “property insurance,” it may need to be marked up to refer to liability coverage too.

As an alternative, try to insist that the Certificate of Insurance be modified to conform to an ACORD Form 27, so it provides the same level of comfort as an ACORD Form 27. The necessary changes to a “Certificate of Insurance” are:

- Delete the paragraph at the upper right-hand corner starting with: “This Certificate is Issued as a Matter of Information Only.”
- After “paid claims” in the language following “Coverages,” add the following statement: “The following policies of insurance are in force and provide all the rights and privileges afforded under such policies.”
- Immediately above the “Authorized Representative” signature, delete the words “endeavor to” and all language from “but failure to” through end of the sentence.

For hazard, casualty, or property coverage (or evidence or certificates thereof), the lender should be identified “as mortgagee pursuant to a lender’s loss payable endorsement.”

For liability insurance coverage, the lender should be identified as an “additional insured.”

For all policies, include the lender’s full, complete, and accurate name (including any representative capacity, such as “collateral agent” or “trustee”) and mailing address. Many lenders insist that even trivial and nonsubstantive errors in the lender’s name be corrected, such as spelling out “National Association” rather than saying “N.A.” or vice versa.

If coverage is being provided through a "blanket" policy, the insurance documents should provide a schedule of locations, showing how much coverage is reserved for each location.

Check the expiration date. If it will occur within six months, notify the client, preferably in writing. If it will occur within three months, you may want to insist that the policy be extended.

**PRE-CLOSING PROCESS •**  
**P** As the actual date of closing approaches, you need to keep pushing forward in all the areas described above and in the first installment of this article, but also make your final preparations for the closing. Those include the following.

#### **Third Parties**

Continue to expedite the satisfaction of all third party requirements, including:

- Subordination and nondisturbance agreements with lessees;
- Cure rights and other mortgagee protections; consents (may conceivably be needed for any assignment of anything);
- Existing lender consent, waiver, or payoff;
- Estoppel certificates;

- Survey certificates; and
- Insurance and other certificates.

#### **Third-Party Deliveries**

If third parties (e.g., lenders being paid off) need to deliver routine documents for the closing, but don't otherwise need to attend the closing, try to persuade them to deliver their documents to you or the title company in escrow. Set up the escrow conditions so they can be satisfied as early as possible—e.g., transmission of wired funds rather than confirmation of receipt of the funds. Escrow conditions should be simple and mindless, to avoid any question about whether the escrowee acted properly.

Unless the third-party documents and deliveries are utterly routine, ask to see drafts of each before closing, for pre-approval. For example, ask for drafts of letters of credit, insurance certificates, consents, or amendments as needed.

#### **Entities**

Form all appropriate entities, taking into account relevant tax and business considerations.

#### **State-Specific Requirements**

For each state involved in your transaction, obtain:

- Recording requirements;

- Form of acknowledgment;
- Affidavits, tax returns, mandatory disclosures, etc., for recording any document; and
- Special signature requirements (witnesses, attestations, number of signers, required recitals, a seal for corporations, etc.).

Assign responsibility to obtain and fill out tax filing documents. Determine whether the state uses mortgages or deeds of trust. In the latter case, select an appropriate trustee consistent with state law and practice.

#### **Transfer Taxes**

Understand the calculation of, and filing requirements for, any transfer or mortgage taxes, whether state or municipal. Obtain necessary forms, if any, for all taxes. If the transaction will involve significant personal property, consider the possible application of state sales taxes, and what you can do to minimize these taxes. Consult local counsel.

Allocate consideration as necessary. Coordinate with your client and with seller's personnel regarding allocations of purchase price or loan amount; copies of documents to be attached to tax forms if facts are unusual; and preparation of tax forms generally.

#### **Client Approvals**

Identify matters that will require approval or involvement by the client, such as the issuer bank for letters of credit, loan allocations, holdback determinations, final budget, and insurance certificates. Involve appropriate personnel of the client as early as possible.

#### **Acknowledgments**

To the extent possible, try to fill out notarial acknowledgments in advance. Include at least the names of the signing entities, if not their specific officers or representatives. Label each acknowledgment to indicate the signer to which it applies.

In some cases, rather than attach acknowledgments to each individual document, treat each entity's acknowledgment as a separate document for the closing and prepare a pile of them to be attached as needed. (At closing, though, the notary must physically see the signer and have the signer confirm that he or she signed the documents and was authorized to do so.)

#### **UCC Filings**

Prepare a broad collateral description. Use the same description consistently when referring to the same collateral. Determine whether a title company or a code service

will arrange filings. Consider the need for pre-filing of UCC-1 financing statements, and whether to file separate fixture filings.

If the loan will be assigned, include the assignee's name (unless confidential) as part of the original UCC-1 filing. If it is confidential until post-closing, then after the closing has occurred obtain the borrower's consent to type in the name of the assignee before making the filing.

Some states require the secured party, as well as the borrower, to sign UCC-1 financing statements. Ask local counsel. Somewhere on each UCC-1 financing statement, identify the office where it is to be filed.

#### **Title**

Have all title problems been resolved? Ask the title company to bring a clean updated commitment to the closing if necessary; otherwise the title company may expect to mark up the commitment previously provided to you during the pre-closing process.

Confirm that the title company will be able to consider problems that may arise at closing. For example, if the home office will have to review every decision, make sure someone at the home office will be available.

#### **Bank Accounts**

If any new bank accounts or lockbox/escrow mechanisms need to be established at the closing, communicate as soon as possible with any banks that will hold and administer these accounts. They tend to have their own requirements for documents to be signed. Work out the exact wording for account title and disbursement procedures. Obtain signature cards and account agreements or instructions to be executed at the closing. If possible, have the client handle all bank account mechanics.

#### **Sign in Advance**

If documents are ready before the closing, consider whether it makes sense to have any of them signed in advance.

#### **All-Hands Conference Calls**

Periodically through the pre-closing period, you may want to convene an "all-hands" conference call to go over each of the elements of the closing and to confirm that all participants understand and are working on the elements for which they are responsible.

**FINAL CLOSING PREPARATIONS** • As the pre-closing process moves into its last day or two, you need to make final ar-

rangements so the transaction will close smoothly.

#### **Status of Closing Conditions**

Check with your client regarding the status of closing conditions and elements within the client's responsibility, such as final sign-off of appraisal, financial statements, other approvals, or documentation. Also check whether your client wants to delay closing or renegotiate any elements of the transaction.

#### **Date and Time**

Make sure that everyone knows the date, time, and location of the closing. Put it in writing. Identify the conference room. Indicate the direct-dial incoming number for that conference room, as well as the main fax number for the office. Provide a contact person for logistical arrangements during any major closing.

Try not to schedule the closing until the transaction is truly ready to close—as opposed to scheduling a premature closing for purely theatrical reasons—and all documents have been fully negotiated and you have been given 24 hours to run final closing sets. This is a terrific idea but in practice it rarely happens. Instead, the parties often spend a great deal of time, effort, and legal fees sitting in a room wait-

ing for the transaction to get ready to close. The resulting time pressure will increase the likelihood of last-minute mistakes.

#### **Client Attendance**

Particularly for a loan closing, try to encourage your client to arrive only after any issues have been resolved or identified as "client issues." Even better, try to arrange for your clients to arrive only after all other parties have signed all the documents, so your clients can "sign and run."

It can be distracting and frustrating for all concerned if the principals sit around during a closing, while you are trying to finalize documents and close up technical details. It also invites negotiations and requests.

#### **Arrivals of Other Parties**

Coordinate arrivals of other closing participants in a way that minimizes the risk of problems at closing. Don't force a cranky seller to sit at the closing, waiting, doing nothing (and potentially in the worst case walking out of the transaction) while the purchaser finalizes loan document negotiations.

See if you can have people of the same seniority level arrive and leave at about the same time, to try to prevent offending anyone.



**Title Company**

Arrange for title company attendance. The title company's representative should arrive early and stay late. Ask the title company to provide a bill in advance, with a generous estimate of recording charges, tax pay-off figures, and so on, so calculation and payment of the bill at closing won't become a problem or crisis. Any excess payment would be refunded post closing. Ask the title company to provide written wire transfer instructions in advance.

**Documents**

Verify that all documents have been prepared, including all exhibits. Figure out how many originals or copies of each will be needed. Ordinarily you need one; your client needs one; and other parties have various requirements. The normal minimum, for a two-party transaction, would be four execution original counterparts (but only one original of any promissory note). You will often want to add two originals for any document that will be recorded.

**Signatories**

Identify who will sign, and make sure they will attend. Common problems: guarantors; limited partners; variations in signing authority among entities; vacations; other closings; "I didn't know I had to be

at the closing." Make sure the requisite officers will be available for each signing entity.

If people involved in the transaction won't attend the closing, find out where they can be reached if problems arise.

**Powers of Attorney**

Consider any possible need to obtain powers of attorney, if only as a backup measure. Pre-clear the use of powers of attorney, including the form and parties. If you will be using powers of attorney, try to have the principals reachable during the closing, in case other parties insist on speaking to them to confirm that they are alive. If you know the principal won't be reachable under any circumstances, you may wish to so advise the other participants, to try to avoid problems at the closing.

**Tools**

Remind the client to bring any of the following that apply or make sure that you bring them if you're responsible for them:

- Certified or cashier's checks;
- Blank checks;
- Corporate seal;
- Corporate minute books;
- Certifications and other documents prepared or to be delivered by the client;

- Diskettes with any closing-related documents;
- Backup for closing disbursements;
- Rent roll;
- Portable computer; and
- Any other similar items.

#### **Operational Matters**

Arrange for the client to check or cross-check representations and warranties, and preparations to transfer management and control, as appropriate for closing.

#### **Closing Folders**

Set up manila folders for every document to be executed or delivered at the closing, with labels. If appropriate, obtain accordion racks to hold the closing folders.

#### **Adjournments**

If closing is adjourned or rescheduled, notify all participants, including the title company representative.

**T**HE MONEY • Nearly every closing involves the calculation and disbursement of money. This is a troublesome part of the closing because it is quite important, yet the lawyers often expect

the clients to handle it and the clients often expect the lawyers to handle it. Usually, it will be postponed until the last minute. Often, no matter how many times you ask the client, or another consultant (e.g., managing agent, accountant, title company) to handle the money, the lawyers will end up doing the calculations. Some thoughts on how to prevent problems:

#### **Payments**

If any party must provide checks at closing, notify that party in writing of the amounts, payees, and required type of such checks. Make each such memo as complete as possible. For payments by wire transfer, obtain and communicate (in writing) the necessary account information and instructions. This information can and should be obtained far in advance, but rarely is.

Make sure that the client has considered the exact amount of payments to be made at closing and who should receive them and how. This matter, although crucial, is commonly delayed until the last minute and turns out to be more complicated than anyone expected.

Understand wiring schedules and minimize the need for succes-

sive or sequential wires of funds. Figure out in advance who will wire when and to whom.

Arrange for wire recipients to be ready to immediately invest any substantial sums received.

If possible, transfer all responsibility for payment calculations, mechanics, confirmations, and reinvestment to someone in the client's accounting department. Except to cross-check the overall payment structure, finally confirm that the transaction has closed, and authorize the final release of funds, there is really no reason for an attorney or paralegal to be involved in any payment or disbursement arrangements.

Rather than wait and wait until you can determine final exact wiring figures, consider whether it is possible to wire an (over-) estimated amount into an escrow for closing.

Wire transfers are much easier to accomplish when both the transferor and transferee have accounts in the same branch of the same bank. The trouble saved may justify setting up temporary accounts just for this reason.

#### **Funding Arrangements**

Include title insurance, purchase price payments, other payments to third parties, unpaid real estate taxes, reserve deposits, other real

estate charges, per diem interest, and legal fees. Make sure the correct party ends up paying each expense.

Understand any wire transfer or check writing deadlines. Try to plan ahead so they aren't a problem. Cut checks in advance if necessary. If you will be handling disbursements, be ready to disburse when you are expected to disburse.

If an escrow will be necessary, try to persuade the title company to handle it, and set up the process in advance. Prepare written escrow instructions for review by all parties, the same as any other document.

Find out exactly what documents your client needs to see to disburse money. A final closing statement? A trust receipt? The first and last pages of the note? A closing certificate by counsel?

#### **Adjustments**

For a purchase and sale, calculate—or, better, have your client calculate—adjustments and incidental payments and reimbursements, including such matters as:

- Real estate taxes;
- Security deposits;
- Proration of rental income;
- Payroll;
- Vacation pay;

- Reimbursement for tenant improvement expenditures and outstanding leasing brokerage commissions if negotiated;
- Utilities;
- Service contracts; and
- Other operating costs.

Try to persuade someone to prepare a draft closing statement and circulate it before closing so all participants can be comfortable with the overall scope and approach, even if the numbers aren't yet final. For example, if the parties have a misunderstanding about the treatment of security deposits, a draft closing statement is just as good as a final closing statement as a way to identify the disagreement.

Problems and issues with the closing statement, like most other problems and issues, are better dealt with before rather than at the closing.

#### **Your Bill**

Take advantage of the closing as an opportunity to get your bill paid easily and quickly. Provide advance wire transfer instructions if the bill will be significant. In all the last-minute closing excitement, don't lose track of one of the major reasons you're doing all of this. And keep your bill current.

#### **Escrow Disbursements**

If you are holding funds or documents in escrow for closing, obtain them so they will be available for closing, even after normal business hours. This may require liquidating an escrow deposit or having the escrow checkbook in the closing room.

#### **Tax Escrows**

Calculate the amount of any tax escrows to be funded at closing. Try to have the clients handle this directly. The calculations need to reflect not only the requirements of the documents, but also the details of when and how the various taxing authorities calculate real estate taxes, as reflected in the title work previously distributed.

#### **Security Deposits**

Obtain a schedule of any security deposits to be transferred as part of the transaction. Consider the mechanical arrangements for transfer, including reissuance or other transfer of any letters of credit.

**SERVICES AND LOGISTICS AT CLOSING** • A large commercial real estate closing can require a great deal of logistical support. You may need to meet the needs of a small army of people for potentially a significant period.

This will require people and planning. Here are some points to think about, although the actual requirements will vary widely among transactions:

- Reserve conference rooms. Will you need more than one? For example, one room for people, another for documents or for caucuses.
- Arrange secretarial and duplicating support. For large closings, try to have at least one secretary available in the conference room or directly outside.
- Make sure a notary will be available.
- Purchase food and beverages for the participants in bulk if you can, rather than by taking individual orders. But are there any dietary restrictions you need to accommodate?
- Decide whether you will need any special equipment, including photocopiers, computers, etc. If so, decide where it should be installed. Does the computer need a printer or a network connection? Where should the printer go? Get enough paper and toner cartridges. If clients will want to use special software, have it installed and properly configured.
- Test your computer installation. Any computer installation is guaranteed not to work the first time you try to use it.
- Some closing delays result from long waits for poorly addressed fax transmissions that get lost. For major closings, you may want to install a dedicated fax machine, with an outside direct-dial number, in your closing room.
- Be ready to recommend hotels or make reservations.
- Expect a constant stream of logistical requests from closing participants—outgoing faxes, lost incoming faxes, copies, typing, diskettes, directions to the bathroom, client codes, etc.—which will significantly impede an orderly and quick closing. Try to have these requests deflected to someone other than the attorneys.
- Arrange after-hours air conditioning if necessary.
- Let the fax room know who will attend the closing, so the fax room will know what to do with incoming faxes. Try to instruct the fax senders to indicate the name of the recipient and their conference room—with an attorney name—to maximize the likelihood that faxes will find their way to their recipients quickly.

Although all these logistical measures can become incredibly tedious, time-consuming, and distracting, they can also become very embarrassing if handled incorrectly. And the embarrassment reflects not only on you, but also on your client.

You may have noticed that not one of these "logistical" matters requires any legal training. Delegate them to your nonlegal staff, along with as many other elements of the pre-closing process as you reasonably can.

As with so much other delegation, though, you can do it only if you think of it in advance. If you

wait until the actual need arises, you will often win the booby prize and have to deal with problems yourself.

If you can delegate effectively, control all the logistics, and understand all the substantive and procedural steps to bring about a major commercial real estate closing, you will be ready to close your transaction with no problem at all. It's easy.

### **PRACTICE CHECKLIST FOR Preparing for the Commercial Real Estate Closing (Parts 1 and 2)**

Preparing for the commercial real estate closing requires organization and attention to detail.

- First, assemble the closing team. It will include not only your own attorneys and paralegals, but also representatives of the title insurer, the other side, and other concerned parties. Identify who will be involved in the closing and find out how to contact them.
- Determine the basic elements of the transaction, such as exactly which properties are involved. Perhaps send a form checklist to the other side at the outset soliciting basic information.
- Develop, distribute, and maintain a current closing checklist. It is vital to a successful closing. List every document and indicate for each who must sign it, who will prepare it, and its status. List events and deliveries that must occur before or at closing. Keep the checklist current and distribute it frequently and widely.
- Identify and obtain any necessary approvals that you will need as early as possible, including from lenders, governmental authorities, and other third parties. Pay special attention to subordination, nondisturbance and attornment agreements where needed. These approvals, consents, and documents are some of the most common causes of delay at closings.
- Plan due diligence carefully. It can easily get out of control.

- Treat the opinion of counsel as an important transactional document; don't put it off until the last minute.
- Try to have the client review the proposed insurance using internal or outside insurance experts. Identify insurance requirements and confirm compliance.
- As the pre-closing process moves into the last day or two, check the status of closing conditions, verify the date and time with everyone, and confirm that all documents have been prepared and are ready to sign.
- Determine the procedures for funding and disbursement of funds at the closing. Try to have someone else handle the financial calculations and transfers of money.

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## GROUNDBREAKERS

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*(Continued from page 7)*

to fish on the portion of the river through its land.”

### **COAL, GAS, AND SEVERED ESTATES**

In *Amoco Production Company v. Southern Ute Tribe*, 1999 WL 358961 (U.S. June 7, 1999), the Court considered whether a conveyance of coal interests included the coalbed methane gas (“CBM”) associated with the coal.

In 1909 and 1910, Congress passed acts that authorized the U.S. Government to issue land patents to homesteaders in certain western lands held by the United States. The issuance was subject to ‘a reservation to the United States of all coal

in said lands, and the right to prospect for, mine, and remove the same.’ Among the lands patented to settlers were reservation lands the United State had acquired from the Southern Ute Indian Tribe.

In 1938, the United States restored to the tribe, in trust, those former reservation lands that it still held, as well as the coal rights to those and the 20 million acres of former reservation lands that had been patented to settlers. The Southern Ute Tribe owned the coal under about 200,000 acres of this land.

The tribe sued the U.S. government and the lessees of the patented land. The tribe sought a declaration that Congress’s reservation of