

CLOSING FUNCTIONS PURSUANT TO PUBLIC

ACT 19-88

ACTIVITY	PART OF CONDUCTING THE CLOSING (YES OR NO)	MEMO REFERENCE
Title Searching	NO	C.(1)
Preparation of Closing Documents which do not transfer title / affect legal rights	NO	C.(3)
Preparation of Closing Documents which DO transfer title / affect legal rights	YES: Connecticut Attorney must at least actively supervise the drafting of these documents	C.(3)
Presiding Over the Signing at the Closing	YES: Connecticut Attorney must conduct and /or arrange for the meeting where documents are executed	C.(4)
Attorney Presence at Closing	YES: Connecticut attorney must be present and available when documents are executed	C.(4)(c)
Disbursement of Funds	YES: Connecticut Attorney must at least oversee and supervise	C.(5)
Recording of Documents	NO	C.(6)(a) and (b)

FAQS PURSUANT TO PUBLIC ACT 19-88

ACTIVITY	PROHIBITED OR PERMITTED	MEMO REFERENCE
May Paralegals/Notaries Notarize Documents	PERMITTED: Connecticut Attorney must be present and available	C.(4)(b)
Witness Only Closings	PROHIBITED	C.(4)(d)
Mail-Away Closings (Including Remote Execution of Sale Documents)	PERMITTED	C.(4)(e)

Senate Bill 320/Public Act 19-88 Memorandum

Executive Summary

Many people have approached the Connecticut Bar Association regarding Public Act 19-88, “An Act Concerning Real Estate Closings,” (the “Act”) and the Act’s effect on certain practices that have occurred in residential real estate purchase and sale transactions and refinances. The Real Property Section of the Connecticut Bar Association concludes that given the language of the Act, a Connecticut admitted attorney must be meaningfully involved in conducting a real estate closing as set forth herein.¹

Introduction

Effective October 1, 2019, Connecticut law requires that attorneys admitted in Connecticut in good standing conduct real estate closings. The newly enacted statute, Public Act 19-88, leaves some terms undefined. This memorandum considers the individual tasks that must be undertaken by a Connecticut licensed attorney to complete a residential real estate transaction (i.e. “conduct” a “closing”). Additionally, this memorandum considers whether the attorney may delegate such tasks and, if so, what level of supervision is required from the attorney?

¹ *The Connecticut Bar Association, Real Property Section is a voluntary association consisting of attorneys admitted to practice law in the state of Connecticut. The opinions expressed herein are advisory and are not intended to be binding on the Statewide Grievance Committee or the courts but are provided by way of guidance as to what it means to conduct a closing as those terms are commonly interpreted by practitioners in Connecticut. Also, this paper is expressly limited to closings involving residential real estate. The topic of the effect of Public Act 19-88 on commercial real estate closings may be addressed at a later date.*

Public Act 19-88 states as follows:

Section 1. (a) Notwithstanding any provision of the general statutes, no person shall conduct a real estate closing unless such person has been admitted as an attorney in this state under the provisions of section 51-80 of the general statutes and has not been disqualified from the practice of law due to resignation, disbarment, being placed on inactive status or suspension. For the purposes of this subsection, "real estate closing" means a closing for (1) a mortgage loan transaction, other than a home equity line of credit transaction or any other loan transaction that does not involve the issuance of a lender's or mortgagee's policy of title insurance in connection with such transaction, to be secured by real property in this state, or (2) any transaction wherein consideration is paid by a party to such transaction to effectuate a change in the ownership of real property in this state.

(b) Any person who violates the provisions of subsection (a) of this section shall have committed a violation of subdivision (8) of subsection (a) of section 51-88 of the general statutes and be subject to the penalties set forth in subsection (b) of section 51-88 of the general statutes.

The Practice of Law is defined in section 2-44A of the Connecticut Practice Book, attached hereto in the Appendix to this memorandum.

Analysis

A. Proper Framework for Statutory Interpretation

“When construing a statute, [the court's] fundamental objective is to ascertain and give effect to the apparent intent of the legislature.” *C.R. Klewin Northeast, LLC v. Fleming*, 284 Conn. 250, 261 (2007). To determine that intent, “[t]he meaning of [the] statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.” Conn. Gen. Stat. § 1-2z. “In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage

of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly.” Conn. Gen. Stat. § 1-1. “When a statute is not plain and unambiguous, [the Court] also look[s] for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter.” *State v. Orr*, 291 Conn. 642, 651 (2009).

B. Key Legislative Terms: Real Estate Closing, Attorney and Conduct

To understand the requirements imposed by P.A. 19-88, one must discern the meaning of the phrase “real estate closing” and the words “attorney” and “conduct”. Conduct (run the closing meeting) is not defined at all. The Act defines “real estate closing” as a “closing” with limited exceptions and provides a clear definition of “attorney.” All closings are included within the scope of the Act other than home equity lines of credit, mortgages without title insurance and transactions involving a change in ownership where no consideration is paid. There is no specific definition of the term “closing.”

B. (1) Real Estate Closing Defined (in PA19-88, section1(a) (1)-(2))

To ascertain the plain meaning of words used in a statute, Connecticut courts often look to Black’s Law Dictionary (See e.g., *Redding Life Care, LLC v. Town of Redding*, 331 Conn. 711 (2019)), which defines a real estate closing as:

“The final meeting between the parties to a transaction, at which the transaction is consummated; esp. in real estate, the final transaction between the buyer and seller, whereby the conveyancing documents are concluded and the money and property transferred. Also termed *settlement*.” Black’s Law Dictionary 8th Edition (2004)

With purchase and sale transactions, the parties either a) generally meet to exchange documents and disburse funds or b) arrange for the proper delivery of the required documents to the other party and arrange for the proper disbursement of the funds. For refinancing transactions on primary residences, however, the “final meeting” contemplated in the dictionary definition actually takes place as two separate events: first when the borrower signs the mortgage and related financing documents and, second, after the expiration of the required rescission period (See 15 U.S.C. §1635), when the loan proceeds are disbursed. Typically, the parties do not meet to exchange the funds, but instead the settlement agent receives the lender’s funds and sends those funds directly to the various parties listed on the closing statement. Nevertheless, even in the absence of a second “meeting”, the “closing” under the Act should be understood to mean both the meeting with the borrowers whereby the conveyance documents are executed and the subsequent disbursement of the funds.

Note that with a purchase and sale transaction, more than one person may be “conducting” the closing by acting in concert; for example, the attorney for the seller, the attorney for the buyer and even perhaps the attorney for the lender.

B.(2) Attorney Defined

The term “attorney” is clearly defined in the Act as one who “has been admitted as an attorney in this state under the provisions of section 51-80 of the general statutes and has not been disqualified from the practice of law due to resignation, disbarment, being placed on inactive status or suspension.” Thus, the Act makes clear that the term “attorney” refers only to lawyers who have been admitted to practice law in the state of Connecticut and who are in good standing. Lawyers admitted to practice law in other states, but not in Connecticut, are not

considered attorneys within the meaning of the Act and thus are not permitted to conduct closings for Connecticut real property.

B. (3) Conduct Defined

B. (3) (a) Conduct Cannot Be Conclusively Defined Using the Plain Meaning Rule

The plain meaning of the statutory term “conduct” is not clear and unambiguous and therefore its meaning must first be determined by reference to other statutes and then by legislative history surrounding the enactment of P.A. 19-88. Black’s Law Dictionary defines “conduct” as: “*n.* Personal behavior, whether by action or inaction; the manner in which a person behaves.” *supra*. Conduct in P.A. 19-88 is used as a transitive verb, so the law dictionary’s definition is likely inapposite. Merriam Webster defines “conduct” as a transitive verb with four possible definitions:

- 1 a: to direct or take part in the operation or management of; b: to direct the performance of; c: to lead from a position of command
- 2: to cause (oneself) to act or behave in a particular and especially in a controlled manner
- 3: to bring by or as if by leading : GUIDE
- 4 a: to convey in a channel; b: to act as a medium for conveying or transmitting

While the first definition seems most likely, it does not provide clarity as to exactly what the attorney must do and what a lay person cannot do. Since the meaning of this word is not plain and unambiguous, we must look beyond the text of the statute to understand its meaning.

Where the plain meaning rule does not control, courts apply a well-established process of statutory interpretation under which “we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. In seeking to determine that meaning, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the

legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter.” (Internal quotation marks omitted.) *Lombardo's Ravioli Kitchen, Inc. v. Ryan*, 268 Conn. 222, 230-31, 842 A.2d 1089 (2004).

B. (3) (b) Related Statutes Imply that Some Component of “Conduct” under P.A. 19-88 is the Practice of Law under Conn. Gen. Stat. §51-88 and Connecticut Practice Book § 2-44A

First we look to the broader statutory scheme to understand the word “conduct”. There are two related rules which must be considered: Conn. Gen. Stat. §51-88 and Connecticut Practice Book § 2-44A. P.A. 19-88 Subsection 1 (b) states:

“(b) Any person who violates the provisions of subsection (a) of this section shall have committed a violation of subdivision (8) of subsection (a) of section 51-88 of the general statutes and be subject to the penalties set forth in subsection (b) of section 51-88 of the general statutes.”

Conn. Gen. Stat. §51-88 (a) states in relevant part:

“(a) Unless a person is providing legal services pursuant to statute or rule of the Superior Court, a person who has not been admitted as an attorney under the provisions of section 51-80 or, having been admitted under section 51-80, has been disqualified from the practice of law due to resignation, disbarment, being placed on inactive status or suspension, shall not: ... (8) otherwise engage in the practice of law as defined by statute or rule of the Superior Court.” (Emphasis added.)

Conn. Gen. Stat. §51-88(b)(1) declares that conduct which constitutes the unauthorized practice of law is a Class D Felony. (It should be noted that a person who solicits, requests, commands, importunes and intentionally aids another in conduct which constitutes the unauthorized practice of law can be prosecuted under Conn. Gen. Stat. §53-8).

Given that P.A. 19-88 makes it a violation of the Unauthorized Practice of Law statute, Conn. Gen. Stat. §51-88(a)(8), for a person who violates subsection (a) to “conduct” a real estate closing, it is logical to conclude that the legislature intended to incorporate the definition of the

practice of law, as set forth in Practice Book §2-44A, into the meaning of “conduct.” With that in mind, conducting a closing means, at least in part, ministering to the legal needs of e.g., the client seller by applying legal principals and judgment to the client’s objectives; drafting any necessary legal documents; and giving advice or counsel to the client, as needed, regarding the preparation, evaluation or interpretation of the documents or procedures involved in transferring property, perfecting legal interests and securing obligations.

OLR Summary of PA19-88

The act makes violating this provision an unauthorized practice of law. Under existing law, the unauthorized practice of law is generally a class D felony or, if the person is admitted in another jurisdiction, a class C misdemeanor (see Table on Penalties). Under the Connecticut Practice Book, giving advice to or representing someone, including drafting legal documents, in a real estate transaction constitutes the practice of law (Connecticut Practice Book §§ 2-44A(a)(3) & (5)).

B (3) (c) Some of the activities which fall under the definition of conducting a closing under P.A. 19-88 are the Practice of Law under Conn. Gen. Stat. §51-88 under Connecticut Practice Book § 2-44A

This understanding of the term “conduct” is in accord with the legislative history. In the Senate debate, Senator Bizzarro identified three problems the statute was intended to remedy: first, that borrowers are often not advised at the closing that there is a difference between insurable title, which the lender requires, and marketable title, which the borrower likely prefers; second, that borrowers may be influenced by lenders to make changes to the title to their property without understanding the legal ramifications of doing so, and third, that the notaries meeting with the borrowers to execute the documents may not explain things for fear of

engaging in the unauthorized practice of law. See Senate debate May 28, 2019. All of these problems can be solved by having an attorney “conduct” the closing and thereby be available to minister to the parties’ legal needs by providing advice and counsel. Thus, to conduct a real estate closing is, at least in part, to practice law with respect to that closing, that is to perform the services described in Practice Book §2-44A.

B (3) (d) “Conduct” under P.A. 19-88 Includes Activities Which Are Not the Practice of Law with Respect to the Closing.

Were the term “conduct” limited to actions which constitute the practice of law with respect to a closing, P.A. 19-88 would be superfluous. Conn. Gen. Stat. §51-88 and Connecticut Practice Book § 2-44A already bar non-attorneys from practicing law at real estate closings. “[I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous.” *Dorry v. Garden*, 313 Conn. 516, 525 (2014).

Turning back to the first dictionary definition of “conduct”: a: to direct or take part in the operation or management of; b: to direct the performance of, or c: to lead from a position of command, it is clear that there are activities which would not constitute the practice of law, but could still be considered directing, managing or leading with respect to the closing. For example, were a lay person to meet with the borrower and direct the borrower to sign particular documents in a particular form (with a middle initial, without a middle initial, as trustee, with a Junior or Senior etc.) such action could be considered conducting the closing under P.A. 19-88. Further, if the lay person instructs the witness as to when it is appropriate for her to watch the borrower sign the mortgage, and then instructs her where to sign as a witness, that would not be the practice of law, but could be considered conducting the closing

because it is clearly “directing the performance of” the closing. There are many other ways in which a lay person could meet the ordinary definition of the verb “to conduct” which would not be considered the practice of law in Connecticut.

That conducting a closing encompasses more than practicing law at the closing table is borne out by the legislative history. During the Senate debate Senator Bizzarro in detailing the problems the bill was intended to address argued: “And then you have situations where notaries may not explain documents to borrowers, because they might fear that they'd be accused of practicing law illegally.” Senate debate, *supra*. The senator specifically cited an example of a practice that was probably legal before P.A. 19-88 that is, a lay person conducting a closing without practicing law, in support of his argument that the law should be changed.

C. The Tasks Necessary to Complete a Real Estate Transaction

Given this understanding of the terms “real estate closing” and “conduct” we now turn to an examination of the discreet tasks that must be performed to complete a real estate transaction involving title insurance.

C. (1) Title Searching

An attorney need not perform the title search so long as that process is a “mere review of the land records and reporting of what they disclose.” *Grievance Committee of the Bar of New Haven County v. Payne*, 128 Conn. 325, 331 (1941). See also, *Connecticut Attys. Title Ins. Co. v. McDonough*, 1996 Conn. Super. LEXIS 3312. Using the definition from Black’s Law Dictionary, a real estate closing is defined under P.A. 19-88 as “the final meeting between the parties to a transaction, at which the transaction is consummated; esp. in real estate, the final

transaction between the buyer and seller, whereby the conveyancing documents are concluded and the money and property transferred.” Nothing in this definition would indicate that the General Assembly intended to include title searching as part of a real estate closing. This function is typically performed prior to the meeting of the parties to execute the documents and to disburse the funds.

C. (2) Issuance of Title Insurance

The issuance of title insurance and its related functions: soliciting title insurance business, collecting premiums, determining the insurability of a risk in accordance with underwriting rules and standards prescribed by the title insurer, and issuing title policies, is probably not the practice of law. The practice of law does not include tasks which the legislature has authorized lay persons to perform. See Practice Book § 2-44A (b)(2)(B). Conn. Gen. Stat. §38a-402(13) specifically authorizes those lay-persons who held a valid title agent license prior to June 12, 1984 to act as a title agent. Licensed title insurance companies may also perform these services. See Conn. Gen. Stat. §38a-403(2). Neither are these title insurance functions associated with the execution of the closing documents or the disbursement of the closing proceeds such that they fall within the definition of “real estate closing” under the Act.

Accordingly, the attorney need not perform these tasks.

C. (3) Preparation of Closing Documents

The act of preparing documents does not meet the definition of a real estate closing, which is a meeting; However, such acts may constitute the practice of law pursuant to Practice Book § 2-44A(a)(3), particularly if those documents effectuate a change in ownership of a

property (i.e. deed). Parties are generally free to prepare their own documents and the Practice Book provides a carve-out to the general prohibition for the selling of legal document forms previously approved by a Connecticut lawyer. *supra.* at (b)(1). Most lenders use the services of two document production providers for their loan packages—Ellie Mae and DocMagic. Presumably both companies have employed Connecticut lawyers to review their pre-drafted forms, and, when these forms are sold to lenders who fill them in with borrower names and other loan terms, there is no unauthorized practice of law. Verifying the factual assumptions contained herein is beyond the scope of this memorandum.

Filling in forms such as the Closing Disclosure or ALTA Settlement Statement would likely be considered a ministerial act which would not in and of itself constitute the practice of law. It may be relevant however, that the Practice Book rule provides exceptions for providing clerical assistance in completing forms for protection from abuse, harassment and violence and for the preparation of tax returns, see Practice Book § 2-44A(b)(5) and (10) respectively, but does not provide such an exception for closing disclosures or other settlement statements. There is no case law in Connecticut directly addressing this issue.

Existing case law would likely approve such activity by lay persons. See *State Bar Ass'n v. Conn. Bank & Trust* 145 Conn. 222 (1958). While the decision pre-dates the codified definition of the practice of law in Practice Book §2-44A, the court stated that the dispositive question was whether the actions taken by the bank's lay trust officers are "commonly understood to be the practice of law." The Supreme Judicial Court of Massachusetts has held that filling in closing forms is not commonly considered the practice of law. See *Real Estate Bar Ass'n v. National Real Estate Information Serv's* 459 Mass. 512, 946 N.E.2d 665 (2011). There, the court distinguished between the preparation of deeds which create legal rights, and the filling

out of pre-printed forms like the HUD-1 which merely document the transaction. Since copying data from one form to another would generally not be considered the practice of law, this function likely would not be considered a violation of Rule 2-44A.

The closer question is whether calculating the amounts due to pay off secured debts through the closing and adding those amounts to a settlement statement constitutes the practice of law. Typically, lenders prepare their own Closing Disclosures with respect to their fees, but they usually ask the settlement agent to calculate amounts due to secured creditors and to calculate the recording costs. Making such calculations arguably requires more than merely documenting the transaction because some interpretation is involved. On the other hand, in practice, secured creditors generally provide written demand letters indicating the amounts due through the disbursement date, and recording calculations can be made by simple reference to readily available charts. As such, this function would likely not be considered the practice of law. However, where the lender or settlement agent will estimate the pay off in accordance with Conn. Gen. Stat. §49-8a (b)(2), an attorney should perform that function to avoid the unauthorized practice of law as much more judgment is involved in calculating the estimate than copying the amounts shown on a demand letter.

C. (4) Presiding Over the Signing of Closing Documents

Given this memorandum's conclusion that a "real estate closing", as that term is used in P.A. 19-88, includes, in part, the meeting during which the documents are executed, it is clear that the Connecticut attorney must conduct that meeting. As previously discussed, to conduct the meeting means (a) to direct or take part in the operation or management of; (b):to direct the performance of; or (c) to lead from a position of command.

C. (4)(a) A Lay Person May Not Preside Over the Closing

The legislative history of P.A. 19-88 indicates that requiring an attorney to be present during the signing was the primary purpose of the Act.

Senator Bizzarro, in support of the bill, argued:

“And then what happens is the lender will just have a notary site [sic] down with the borrowers and have the documents executed, and then nobody bothers to file an appropriate release of the previous mortgage or mortgages on the land records. Now, that may be acceptable to the lender because the lender is satisfied that there’s what’s called insurable title, and the lender’s not particularly concerned with marketable title. But then if you fast-forward several years later when that borrower, that homeowner tries to sell the property, a prospective purchaser might discover in the course of a routine title search several unreleased mortgages in the chain of title. And then those encumbrances might prevent that borrower from selling the property.” Senate debate, *supra*.

He went on to say:

“In refinance transactions in my own experience, I’ve seen many cases where a lender might, might influence a borrower to quick [sic] claim somebody on to the title, a co-borrower going on title just for the purpose of qualifying the borrower for the transaction. And nobody explains to the borrower the ramifications, the legal ramifications of doing that. So for instance, there could be gift tax implications. There might be a situation where that homeowner or the person being quick-claimed [sic] on to the property loses what’s called the stepped-up basis that they might otherwise be entitled to.” *Id.*

In addition, Senator Bizzarro argued: “And then you have situations where notaries may not explain documents to borrowers, because they might fear that they’d be accused of practicing law illegally.” *Id.* Every one of these scenarios can be alleviated by a reading of P.A. 19-88 which requires the attorney to be present during the signing to explain the legal implications of the course of action presented to the borrower by the lender. A statute should be read first and foremost to give effect to the legislative intent, and thus an attorney must be present at the signing to comply with the Act.

C. 4 (b) Paralegal Notary May Notarize Documents Provided that 19-88 has been complied with

The Act has no impact on a notary's legal right to take an acknowledgement with respect to a real estate transaction. Senator Bizzarro posed a question to Senator Lesser and the following colloquy is reported:

Senator Bizzarro:

“Madam President, it is accepted practice in Connecticut and in most states for that matter for many lenders to permit notaries who are employed by an attorney, so for instance a paralegal, to actually notarize documents provided that the attorney is actually overseeing the transaction and has a role in conducting the transaction. I don't see anything in this bill that would change that custom, but through you, Madam President, if I may just inquire of the chairman of the Insurance Committee if in fact that is his understanding as well.”

Senator Lesser:

“Yes, thank you. There is nothing in the bill that speaks to that so, through you, Madam President, I think that may very well convey the legislative intent.” Senate debate, *supra*.

While the paralegal may notarize documents, the attorney must be present to oversee the transaction. Nothing in this debate indicates the paralegal may go beyond notarizing documents; as the discussion above indicates, were the paralegal to begin explaining documents or directing the format of the borrower's signatures, he would be conducting the closing in violation of the Act. Were an attorney to sanction this type of behavior by the notary by purporting to “oversee” him without being present, the attorney would be aiding and abetting the unauthorized practice of law in violation of Rules of Professional Conduct, Rule 5.5.

A lawyer may delegate certain functions to non-attorney support persons. The Committee on Professional Ethics of the Connecticut Bar approved a ministerial role for non-lawyers at signings when it opined that the act of delivering documents to and from a closing does not constitute the unauthorized practice of law, but:

“...the [paralegal] should not compromise his or her function as a messenger by providing information regarding the legal implications of a document. It is expected that the [paralegal] will contact an attorney in the firm during the closing for instructions, if any questions are raised about the execution of the documents, changes in adjustments or price, or other matters involving the documents or funds.” Informal Ethics Opinion 96-16

On its face IEO 96-16 could have been read to allow an attorney to send a paralegal to the actual meeting with the borrowers where the documents are executed so long as the paralegal calls the attorney should any questions arise. However, whether or not the opinion comported with the law when issued, it flies in the face of the Act which defines a real estate closing, at least in part, as the meeting where the documents are executed, makes conducting the closing, at least in part, the practice of law and was enacted primarily for the purpose of eliminating “witness only” closings by laypersons. Accordingly, a portion of IEO 96-16 is overruled by the Act. For example, the attorney, not merely the paralegal, must be present during the execution of the loan documents to minister to the legal needs of the client by counselling, interpreting and evaluating the documents and the processes involved in the closing. However, the use of a paralegal or messenger to deliver sale documents that have already been executed in accordance with 19-88 would still be permitted.

C. (4) (c) Attorney Presence Required at Signing

Given that conducting a closing means to direct or take part in the operation or management of; to direct the performance of; or to lead from a position of command with respect to the closing, it is clear the attorney must be present during the signing to provide such direction. The question thus becomes: what form must that presence take?

A look at how other jurisdictions have answered this question is instructive. In Georgia, the closing attorney must be physically present in the same location as the borrower during the

signing because, as of the year 2000, the Georgia Supreme Court believed that requiring physical presence was the only way to ensure that the attorney's supervision of the closing would be "direct and constant." See Formal Advisory Opinion 00-3 Georgia Supreme Court (2000). Nonetheless, the court's focus on the need for the attorney to be fully engaged in the signing dovetails with the broad definition of the word "conduct" in P.A. 19-88. While the Connecticut attorney need not necessarily be in the same room as the borrower, the attorney's oversight should be direct and constant. Sending a paralegal notary to a remote closing with instructions to "call if anything comes up" clearly does not comply with the Act.

South Carolina has a similar requirement with respect to the presence of an attorney at the closing table. The South Carolina Supreme Court recently sanctioned a process where an attorney "met with the borrowers in person, explained the legal effect of the loan documents, answered any questions the borrowers had, and supervised the borrowers' execution of the legal instruments." *Boone v. Quicken Home Loans, Inc.*, 420 S.C. 452, 458, 803 S.E. 2d 707, 710 (2017).

Roughly the same standard applies in Massachusetts, where the Supreme Judicial Court stated:

The closing is where all parties in a real property conveyancing transaction come together to transfer their interests, and where the legal documents prepared for the conveyance are executed ... we believe that a lawyer is a necessary participant at the closing to direct the proper transfer of title and consideration and to document the transaction, thereby protecting the private legal interests at stake as well as the public interest in the continued integrity and reliability of the real property recording and registration systems. *Real Estate Bar Ass'n for Mass. v. Nat'l Real Estate Info. Servs.*, 459 Mass. 512, 532-33, 946 N.E.2d 665, 684 (2011)

While it is unclear exactly what form the attorney's presence at the closing must take, it is certain that the Connecticut attorney must actively oversee the closing during the signing process by explaining the documents and the process throughout.

C. (4) (d) Witness Only Closings Prohibited

While the Act limits the persons who can conduct a closing to Connecticut attorneys, it is the attorney's ethical obligations which prevent him from conducting so-called "witness only" closings.

'Witness-only closings'" occur when notaries, signing agents and other individuals who are not a party to the real estate closing preside over the execution of deeds of conveyance and other closing documents, but purport to do so merely as a witness and notary, not as someone who is practicing law. *In re UPL Advisory Opinion 2003-2*, 277 Gs. 472, n 3, 588 S.E. 2d 741 (2003)

As the Supreme Judicial Court of Massachusetts held:

Implicit in what we have just stated is our belief that the closing attorney must play a meaningful role in connection with the conveyancing transaction that the closing is intended to finalize. If the attorney's only function is to be present at the closing, to hand legal documents that the attorney may never have seen before to the parties for signature, and to witness the signatures, there would be little need for the attorney to be at the closing at all. *Real Estate Bar Ass'n for Mass. v. Nat'l Real Estate Info. Servs. supra* at 534.

The purpose of P.A. 19-88 is to protect the public from consummating real estate transactions without access to a trained professional who can offer advice and counsel with respect to the terms and conditions of that transaction. An attorney who conducts a closing has an ethical obligation to be fully informed as to the facts and circumstances preceding the closing, the sufficiency of the procedures followed to arrive at the point of signing and the plan to complete the transaction after the execution of the documents. See Rules of Professional Conduct Rules 1.1 and 1.3 and section 7 below. Merely showing up with a set of documents, where no Connecticut attorney has reviewed

the title, the closing statement or any other aspect of the closing, does not comply with the attorney's obligations of diligence and competence. Nor is it acceptable for the attorney to ship the documents off to a lay person without assurance that a Connecticut attorney will be responsible for the disbursement and recording.

C. (4) (e) Mail-Away Closings Permitted

While an attorney's oversight of the signing must be direct and constant, in certain circumstances it will not be possible for the attorney to be in the same location as the client. For example, where the client is located outside of the state, the attorney need not travel to the client's location, nor require the client to travel to the attorney to properly conduct the closing. In such cases, the attorney should employ procedures to ensure that the client has adequate instruction as to how and where to sign the documents, and wherever possible, utilize technology that will allow the client to communicate directly with the attorney during the signing so that she can explain the documents and answer questions.

C. (5) Loan Proceeds Disbursement

While writing out checks and providing wiring instructions to a bank are certainly ministerial in nature and can be delegated to non-attorney assistants, P.A. 19-88's definition of a real estate closing encompasses the transfer of the final funds. Since the attorney must conduct the closing, and since his oversight should be constant and direct, the lawyer must actively supervise the non-attorney assistant in the ministerial functions that are required to disburse the funds.

Opinions of the North Carolina Bar may provide some useful guidance in this regard. In that state, title searching is considered the practice of law but it is common to delegate the abstracting of the public records to non-attorneys. See *Dallaire v. Bank of Am., N.A.*, 224 N.C. App. 248, n. 1, 738 S.E. 2d 731 (2012) and 2002 Formal Ethics Opinion 9, North Carolina State Bar, n. 1, available here: <https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2002-formal-ethics-opinion-9/>

Even though assistants may search the public records, the attorney must actively supervise the lay abstractor to ensure the lawyer's ethical obligations are met under Rules of Professional Conduct Rule 1.1 and Rule 5.3(2). See RPC 29, North Carolina State Bar, available here: <https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-29/>. The requirement of direct supervision is not fulfilled merely by vetting the lay-person's credentials to determine competence, but the attorney must also provide the assistant with proper ongoing instruction and supervision. See RPC 216 North Carolina State Bar available here: <https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-216/> and 2007 Formal Ethics Opinion 12, North Carolina State Bar available here: <https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2007-formal-ethics-opinion-12/>.

These opinions provide a basic framework within which the Connecticut attorney may operate with respect to disbursing loan proceeds. While the attorney need not personally perform the functions necessary to complete the transfer of funds, the attorney must at all times supervise the persons who do so. Those people should be carefully vetted by the attorney in advance to ensure competence and trustworthiness, should be adequately trained on the procedures necessary to safeguard the client's funds, and should be actively supervised in the

performance of their functions by the attorney. See Rules of Professional Conduct Rules 1.15 and 5.3(2).

C. (6) Attorney's Obligations with Respect to Recording the Documents

C. (6) (a) Recording is Not Part of the Statutory Definition of Real Estate Closing, Nor the Practice of Law

By the plain meaning of the phrase "real estate closing" recording the documents need not be performed by a Connecticut attorney. This task is not part of the execution of conveyance documents nor the transfer of the funds. Neither is this task the practice of law as defined by the Practice Book. Where the plain meaning is clear, courts may not look to legislative history to interpret a statute. Conn. Gen. Stat. § 1-2z.

C. (6) (b) Attorney's Obligations with Respect to Recording the Documents

While the recording of documents falls outside the plain meaning of the phrase "real estate closing", the definition of the practice of law contained in Connecticut Practice Book § 2-44A(5)(b) includes "... the evaluation or interpretation of procedures to implement such transaction, where such transaction, documents, or procedures affect the legal rights, obligations, liabilities or interests of such person." For example, while recording is not necessary to make a mortgage deed valid as between the borrower and lender, the lender's legal rights are clearly affected by a failure to properly record the mortgage. See Conn. Gen. Stat. §47-10 (a). Given that part of conducting the closing is practicing law with respect to the closing, and given that part of that practice is to evaluate the procedures to implement the transaction, the attorney has an ethical duty to oversee the recording process because recording the documents properly is

essential to perfecting the legal rights of the client. See Rules of Professional Conduct Rules 1.1 and 1.3.

The legislative history, while not always relevant with respect to the statutory interpretation, certainly guides the attorney in what level of diligence is required to fulfill her ethical obligations. In support of the bill, Senator Bizzarro stated "nobody bothers to file an appropriate release of the previous mortgage or mortgages on the land records." Senate debate, *supra*. During consideration by the House, Representative Smith spoke in support of the bill stating:

"As an attorney who has done thousands of closings we have seen over the years where there are many folks coming in from out of state and actually doing witness only closings and closings without attorneys which creates not only title issues but also issues with the deeds as they get recorded or not recorded, so I thank the Chairman for his efforts in bringing this Bill forward and the Ranking Member of making this Bill with the Amendment what it is and this is something we should stand behind to make sure that title was transferred properly when doing a closing. Thank you, Mr. Speaker." House debate, June 5, 2019.

Requiring attorney oversight of the recording process is in accord with the rules in South Carolina. The South Carolina Supreme Court stated:

The closing lawyers also required Respondents [title agency] to provide the recording date and the book and page numbers of the recorded loan documents, which the lawyers then used to obtain copies of the recorded loan documents to confirm all necessary documents were properly recorded. Indeed, in each of the transactions at issue, the closing attorney's file contained a copy of the recorded mortgage. Because the attorneys were required to verify the proper disbursement of the loan proceeds and that all of the necessary documents were recorded properly in the correct county, there is no basis for finding Respondents [title agency] committed U[nauthorized] P[ractice of] L[aw] in this step of the closing process. *Boone v. Quicken Home Loans, Inc.*, *supra* at 468.

While the attorney may delegate these tasks to lay persons, he maintains full responsibility to ensure these functions are handled properly. See Rules of Professional Conduct Rule 5.3(2).

D. Ethical Considerations

D. (1) General Considerations

Since conducting the closing is, at least in part, the practice of law, the attorney must minister to the legal needs of the client during the closing by providing advice and counsel and by offering an evaluation and interpretation of the closing documents and the procedures for completing the transaction. The attorney's duty of competence and diligence requires that the attorney, in offering her evaluation of the processes, should be familiar with the entire set of tasks necessary to complete the client's objectives, all the way from title searching, through the issuance of title insurance including the steps necessary to clear title, the document preparation including calculation of the payoff amounts shown on the closing statement, the disbursement of the proceeds and the recording process. See Rules of Professional Conduct Rule 1.1 and Rule 1.3.

D. (2) Intermediary May Not Exercise Control Over Attorney

A lawyer shall not practice in such a way that a nonlawyer has the right to direct or control the professional judgment of the lawyer. Rules of Professional Conduct, Rule 5.4 (d)(3). See also Rule 1.8(f)(2) and *King v. Guiliani*, 1993 Conn. Super. LEXIS 1889 (J.D. of Fairfield at Bridgeport, Spear, J. 1993). Where a lay person attempts to exert control over the lawyer's performance of his duties to his client or interposes himself between the lawyer and the client, the lawyer must avoid an inappropriate intermediary relationship. *Real Estate Bar Ass'n for Mass. v. Nat'l Real Estate Info. Servs. supra* at 532. The key question is who exercises and retains control over the attorney. "The relation of an attorney to his client is pre-eminently confidential." *State Bar Ass'n v. Conn. Bank & Trust, supra* at 234. The practice of law is personal, confidential and fiduciary. *Real Estate Bar Ass'n for Mass. v. Nat'l Real Estate Info.*

Servs. supra at 531. There must be a genuine attorney-client relationship, and direction and control over the attorney's actions cannot rest with a third party. *Id.*

Conclusion

In conclusion, Public Act 19-88 has affected significant changes to the residential closing process in Connecticut, especially with regard to the residential refinance process. As set forth above, attorneys must now actively supervise the document execution, the disbursement of the closing proceeds and the recording of the documents necessary to perfect title. During the signing, the attorney should explain the conveyancing documents and loan documents to her client, answer the client's questions and ensure the documents are properly executed, witnessed and notarized. The attorney should be sufficiently familiar with the title searching and title insurance processes to provide an evaluation of their adequacy. The attorney has an obligation to safeguard client funds and directly supervise the persons handling those funds. Finally, the attorney must ensure that all documents necessary to complete the transaction are properly recorded.

APPENDIX

Reference Materials:

Sec. 2-44A. Definition of the Practice of Law

(a) General Definition: The practice of law is ministering to the legal needs of another person and applying legal principles and judgment to the circumstances or objectives of that person. This includes, but is not limited to:

(1) Holding oneself out in any manner as an attorney, lawyer, counselor, advisor or in any other capacity which directly or indirectly represents that such person is either (a) qualified or capable of performing or (b) is engaged in the business or activity of performing any act constituting the practice of law as herein defined.

(2) Giving advice or counsel to persons concerning or with respect to their legal rights or responsibilities or with regard to any matter involving the application of legal principles to rights, duties, obligations or liabilities.

(3) Drafting any legal document or agreement involving or affecting the legal rights of a person.

(4) Representing any person in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in any administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.

(5) Giving advice or counsel to any person, or representing or purporting to represent the interest of any person, in a transaction in which an interest in property is transferred where the advice or counsel, or the representation or purported representation, involves (a) the preparation, evaluation, or interpretation of documents related to such transaction or to implement such transaction or (b) the evaluation or interpretation of procedures to implement such transaction, where such transaction, documents, or procedures affect the legal rights, obligations, liabilities or interests of such person, and

(6) Engaging in any other act which may indicate an occurrence of the authorized practice of law in the state of Connecticut as established by case law, statute, ruling or other authority.

``Documents" includes, but is not limited to, contracts, deeds, easements, mortgages, notes, releases, satisfactions, leases, options, articles of incorporation and other corporate documents, articles of organization and other limited liability company documents, partnership agreements, affidavits, prenuptial agreements, wills, trusts, family settlement agreements, powers of attorney, notes and like or similar instruments; and pleadings and any other papers incident to legal actions and special proceedings.

The term "person" includes a natural person, corporation, company, partnership, firm, association, organization, society, labor union, business trust, trust, financial institution, governmental unit and any other group, organization or entity of any nature, unless the context otherwise dictates.

The term "Connecticut lawyer" means a natural person who has been duly admitted to practice law in this state and whose privilege to do so is then current and in good standing as an active member of the bar of this state.

(b) Exceptions. Whether or not it constitutes the practice of law, the following activities by any person are permitted:

(1) Selling legal document forms previously approved by a Connecticut lawyer in any format.

(2) Acting as a lay representative authorized by administrative agencies or in administrative hearings solely before such agency or hearing where:

(A) Such services are confined to representation before such forum or other conduct reasonably ancillary to such representation; and

(B) Such conduct is authorized by statute, or the special court, department or agency has adopted a rule expressly permitting and regulating such practice.

(3) Serving in a neutral capacity as a mediator, arbitrator, conciliator or facilitator.

(4) Participating in labor negotiations, arbitrations, or conciliations arising under collective bargaining rights or agreements.

(5) Providing clerical assistance to another to complete a form provided by a court for the protection from abuse, harassment and violence when no fee is charged to do so.

(6) Acting as a legislative lobbyist.

(7) Serving in a neutral capacity as a clerk or a court employee providing information to the public.

(8) Performing activities which are preempted by federal law.

(9) Performing statutorily authorized services as a real estate agent or broker licensed by the state of Connecticut.

(10) Preparing tax returns and performing any other statutorily authorized services as a certified public accountant, enrolled IRS agent, public accountant, public bookkeeper, or tax preparer.

(11) Performing such other activities as the courts of Connecticut have determined do not constitute the unlicensed or unauthorized practice of law.

(12) Undertaking self-representation, or practicing law authorized by a limited license to practice.

(c) Nonlawyer Assistance: Nothing in this rule

shall affect the ability of nonlawyer assistants to act under the supervision of a lawyer in compliance with Rule 5.3 of the Rules of Professional Conduct.

(d) General Information: Nothing in this rule shall affect the ability of a person or entity to provide information of a general nature about the law and legal procedures to members of the public.

(e) Governmental Agencies: Nothing in this rule shall affect the ability of a governmental agency to carry out its responsibilities as provided by law.

(f) Professional Standards: Nothing in this rule shall be taken to define or affect standards for civil liability or professional responsibility.

(g) Unauthorized Practice: If a person who is not authorized to practice law is engaged in the practice of law, that person shall be subject to the civil and criminal penalties of this jurisdiction.

(Adopted June 29, 2007, to take effect Jan. 1, 2008.)