

Real Property Law Section NEWSLETTER

State Bar of Georgia

A Publication for Real Property Lawyers

Spring/Summer 2003

CLOSING COMMENTS FROM THE CHAIR

By: Eldon L. Basham, *Outgoing Section Chair*
Moore, Ingram, Johnston & Steele

My year as chair of the Executive Committee ended concurrently with the May 2003 Real Property Law Institute. The year was a delightful blur as time does fly when you're having fun. I truly believe that we have an outstanding section membership of committed professionals. Our commitment to serving our clients, however, deflects our attention away from various groups which are making inroads into the closing practice through the unauthorized practice of law. Quite by accident, and reactive in nature, the focus of the Executive Committee during my term was to deal with the UPL issues. This will be discussed in more detail in another article so I will not dwell on the issue further.

We did manage to grow the section to the largest section membership of the State Bar. Members of the Executive Committee were able to meet with Bill Smith, General Counsel for the State Bar and other State Bar representatives to have a working session of what goes on with the real estate practice. We believe that many members of the General Counsel's office had been litigators by nature and had very little idea of what it is that a real estate closing attorney actually does and what the process of closings is all about. We felt it important that those in the General Counsel's office investigating complaints understand the nature of the closing practice so that they would have a better understanding of whether a complaint was justified and whether an attorney was involved in fraudulent or criminal conduct. For example, the concept of flipping real estate in transactions has recently been discussed as evidence of a fraudulent transaction, when in fact, flipping may be a perfectly legitimate practice in many instances if value has been added, disclosures have been made or other reasons exist.

Amidst battling the UPL issues, we were able to take care of the usual business of putting on the five seminars which are cosponsored by the Section. Our legislative committee worked through the legislative session to support bills which made sense and to oppose those that appear detrimental to practitioners and the public at large regarding real estate. Our title standards committee revised the title standards and obtained the

approval of the Board of Governors. The revised title standards are available on the Real Property Law Section web site although they are currently still listed on the web site as the proposed revisions to title standards. We were able to update the report on legal opinions to third parties in Georgia real estate secured transactions, also available on the web site.

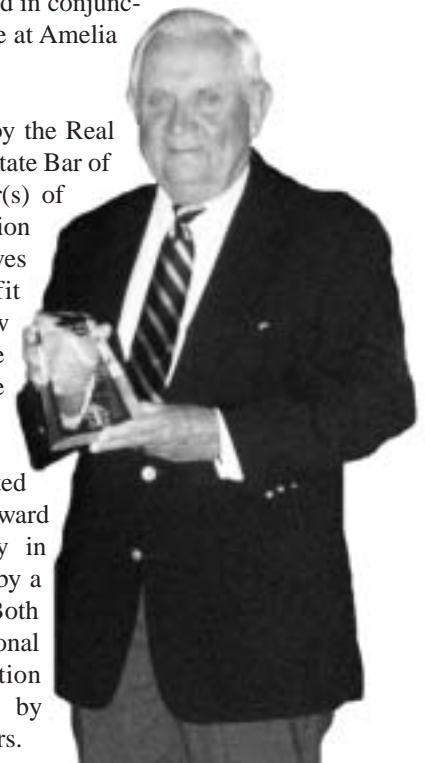
I want to especially thank the members of the Executive Committee for their support and enthusiastic participation, all of which made serving as the Chair a pleasure. I now look forward to a relaxing year as past chair.

TWO PINDAR AWARD RECIPIENTS

A.B. Martin, of Morris, Manning & Martin, and R. E. Thomas, Jr., of Thomas, Kennedy, Sampson & Patterson, were this year's recipients of the George A Pindar Award, presented at the Real Property Law Section's annual meeting, on Saturday morning, May 10th, 2003, held in conjunction with the ICLE conference at Amelia Island, GA.

The Pindar Award is given by the Real Property Law Section of the State Bar of Georgia, to honor a member(s) of the Real Property Law Section of the Bar who unselfishly gives of him or herself for the benefit of the Real Property Law Section of the Bar and whose lifetime contributions have been significant to the Bar.

Mr. Martin personally accepted his award. As Mr. Thomas's award was presented posthumously in his memory, it was accepted by a member of his former firm. Both Martin and Thomas's professional careers continue the tradition of excellence represented by previous Pindar Award winners.



A.B. Martin, of Morris, Manning & Martin, accepts Pindar award at RPLS annual meeting in Amelia Island, GA. R.E. Thomas, Jr., of Thomas, Kennedy, Sampson & Patterson was also presented the award posthumously.

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NEW UPL ADVISORY OPINION RE CLOSINGS

Pursuant to notice as required by law, a spirited public hearing took place at the State Bar of Georgia's new headquarters in Atlanta. After hearing and reviewing the testimony and other information available to it, on April 22, 2003, The Standing Committee issued Advisory Opinion No. 2003-2.

The public hearing filled the hearing room to capacity. All interested parties from the public were allowed to speak and be heard. In addition to the US Department of Justice, Federal Trade Commission, the Georgia Real Estate Closing Attorney's Association (GRECAA) and the Real Property Law Section of the State Bar of Georgia, submitted position papers and or spoke.

The Opinion has been forwarded to the Georgia Supreme Court for its review and consideration. The Court can accept it as is in its entirety, reject it in its entirety, remand it for additional work, or revise it. There is no time limit for the Court to act. Aided by the Georgia Legislature, the Court regulates the practice of law in the State of Georgia.

In the interest of informing the real property lawyers in Georgia, a copy of the Opinion follows (See Insert). It will be available on the State Bar's Website, see link to Real Property Law Section: www.gabar.org.

PATRIOT ACT COMMENTS RESPONSES

On June 9th, 2003, the Real Property Law Section, joining many other legal organizations, electronically responded to the Department of Treasury's request for Comments on the proposed rules concerning Anti-Money Laundering requirements, regarding ".....persons involved in real estate closings and settlements."

PRACTICE HINTS

- On refinances, take the opportunity to confirm with the borrower what will happen to the existing escrow account on the loan being satisfied. If it is being offset against the payoff, that will advise the borrower not to expect a refund. If not offset, then the borrower can expect the refund. Many borrowers have not thought about the escrow so your information is a nice surprise for them and they appreciate your detailed concern.
- When you have a loan package with an amortization schedule, explain how it is set up to the borrowers. Moreover, explain that they can double check their end of year statement entry on interest paid, by adding up the interest figures for that year from the schedule. Again, a piece of useful advice that is helpful to the borrowers and one that they will remember.
- Look to see if the borrowers have filed for Homestead Exemption. If they have not, you will have really done a good turn by reminding them to file. If they have the exemption, they nonetheless appreciate you checking on it for them.

The USA Patriot Act (Providing Appropriate Tools required to Intercept and Obstruct terrorism Act), could have far reaching effects on your practice. If you are not familiar with it, you should check it out ASAP.

2003 Legislative Update

2003 was a year of remarkable change in Georgia politics. In spite of a shift in power both in the Governor's office and in the Senate, some favorable legislation for real property practitioners was enacted, and some unfavorable legislation was defeated, during the 2003 legislative session. Some of the high points are as follows:

1. At the initiative of the Real Property Law Section, legislation was passed which will exempt from transfer tax any transfer by individuals to a corporation, partnership or LLC in exchange for an interest in that entity, or any distribution by a corporation, partnership or LLC to its owners in liquidation of that entity.

2. The Georgia Fair Lending Act (or "predatory lending law" as it is sometimes known) was amended so as to protect third party purchasers of mortgage loans who are not involved in the origination of those loans. With these changes, Standard & Poors and other rating agencies have resumed rating pools of mortgage loans including Georgia properties.

3. Legislation proposed by the Superior Court Clerks and others to end the sunset on recording fees pursuant to O.C.G.A. §15-6-77 was defeated. Therefore, recording fees will go down to \$5.00 for the first page and \$2.00 for each additional page on January 1, 2006, unless new legislation is passed before that time.

4. Indigent defense legislation advocated by the State Bar of Georgia was passed. When this legislation becomes fully effective, there will be a chief public defender in each of the State's 49 judicial circuits, who will receive a salary comparable to the salary payable to district attorneys. There will be a consistent system for handling indigent defense throughout the State, and a State commission to oversee indigent defense.

5. New legislation has been enacted relating to mobile homes and manufactured homes. This legislation provides for a Certificate of Permanent Location to be filed both with the Clerk of Superior Court and with the Commissioner of Motor Vehicle Safety at the time a manufactured home is affixed to a permanent foundation. This will make it easier to determine when a manufactured home becomes real property.

6. Filing fees for corporations, LLCs and other entities with the Secretary of State will increase effective July 1, 2003.

Information regarding legislation enacted during the 2003 legislative session may be obtained on the internet at www.legis.state.ga.us. Ideas for legislative initiatives of the Real Property Law Section may be sent to David Burge at dburge@sgrlaw.com.

RECORDING FEES INCLUDE COST OF RETURN

Recently, several Superior Court Clerks sent out notices for self-addressed stamped return envelopes in conjunction with recording documents.

Danny Bailey, chairman of the RPLS Clerks' Liaison Committee, resolved the matter quickly by pointing out to David Williams, Executive Director, GSCCCA, that O.C.G.A. 15-6-77 specifies that the recording fee includes **recording and returning** the recorded instrument.

Mr. Williams' follow up with the Clerks included the following: "Until January 1, 2006, sums for filing documents, instruments, etc pertaining to real estate or personal property, such sums to include recording and returning where applicable, shall be:

- (1) (A) (i) Filing all instruments pertaining to real estate including deeds, deeds of trust, affidavits, releases, notices, certificates, and cancellation of deeds,
 first page \$ 9.50
 Each page after the first 2.00

I know we are all working under tight budgets, but, I believe the law is pretty clear. We do not have the authority to require envelopes with prepaid postage. Let's all be on the same page with this one. Thanks."

If this should be occurring in your area, please advise your clerk accordingly and Danny Bailey if it is not amicably and quickly resolved.

EXECUTIVE COMMITTEE – REAL PROPERTY LAW SECTION

Your Executive Committee is your eyes and ears on real estate matters. Each board member is interested in ideas, thoughts and opinions of the section members. Please call any of them at any time. There names and numbers are listed below.

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(Executive Director)

UPCOMING 2003-2004 CALENDAR DATES REAL PROPERTY LAW SECTION STATE BAR OF GEORGIA

— 2003 —

AUGUST 28th, 2003
PREDATORY LENDING
 (See RPLS website for details)

OCTOBER 2nd, 2003
TITLE STANDARDS SEMINAR

NOVEMBER 13th, 2003
**COMMERCIAL REAL
ESTATE SEMINAR**

— 2004 —

FEBRUARY 6th, 2004
**REAL ESTATE PRACTICE AND
PROCEDURE AT GPTV**

FEBRUARY 12th, 2004
**REPLAY OF R.E. PRACTICE
AND PROCEDURE**

APRIL, 2004
**FORECLOSURE PRACTICE
SEMINAR**
 (location and exact date TBA)

MAY 6th, 7th, & 8th, 2004
**REAL PROPERTY LAW INSTITUTE
(AMELIA ISLAND)**

Virtual Tour

Everyone is familiar with the department store billing inserts that provide a sample of a wonderful new fragrance. Well, we cannot provide in this newsletter the fresh sea air of Amelia but we can suggest you go to the Section Web Site for a sample of some of the presentations at the Real Property Institute. If any topic interests you, either obtain the materials from a friend or order them from ICLE. Then, plan on attending next year to smell the salt air for yourself!

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FORMS EXCHANGE

Do you have a form that you think is particularly useful? Are you willing to share it with the section membership (we will give credit, but no royalties!!)? Please send it in and we will publish it for everyone's benefit.

***WE ARE TRYING TO INCREASE
MEMBERSHIP IN OUR SECTION.
PLEASE ENCOURAGE YOUR
FELLOW ATTORNEYS TO JOIN.***

***CURRENTLY, WE HAVE THE
LARGEST MEMBERSHIP AND
WE NEED TO MAINTAIN THAT
AND GROW SO WE WILL
CONTINUE TO HAVE
INFLUENCE AT
THE STATE BAR.***

UPL Advisory Opinion No. 2003-2

Issued by the Standing Committee on the Unlicensed Practice of Law on April 22, 2003.

Note: This opinion is only an interpretation of the law, and does not constitute final action by the Supreme Court of Georgia. Unless the Court grants review under Bar Rule 14-9.1(g), this opinion shall be binding only on the Standing Committee on the Unlicensed Practice of Law, the State Bar of Georgia, and the petitioner, and not on the Supreme Court of Georgia, which shall treat the opinion as persuasive authority only.

QUESTION PRESENTED

Is the preparation and execution of a deed of conveyance (including, but not limited to, a warranty deed, limited warranty deed, quitclaim deed, security deed, and deed to secure debt) considered the unlicensed practice of law if someone other than a duly licensed Georgia attorney prepares or facilitates the execution of said deed(s) for the benefit of the seller, borrower and lender?

SUMMARY ANSWER

Yes. Under Georgia law, the preparation of a document that serves to secure a legal right is considered the practice of law. The execution of a deed of conveyance, because it is an integral part of the real estate closing process, is also the practice of law. As a general rule it would, therefore, be the unlicensed practice of law for a nonlawyer to prepare or facilitate the execution of such deeds.

OPINION

In answering the above question, the Committee looks to the law as set out "by statute, court rule, and case law of the State of Georgia." Bar Rule 14-2.1(a). "Conveyancing," "[t]he preparation of legal instruments of all kinds whereby a legal right is secured," "[t]he rendering of opinions as to the validity or invalidity of titles to real or personal property," "[t]he giving of any legal advice" and "[a]ny action taken for others in any matter connected with the law" is considered the practice of law in Georgia. O.C.G.A. §15-19--50. Moreover, it is illegal for a non-lawyer "[t]o render or furnish legal services or advice." O.C.G.A. §15-19-51.

There are certain exceptions to these statutory provisions. For example, "no bank shall be prohibited from giving any advice to its customers in matters incidental to banks or banking...." O.C.G.A. §15-19-52. A title insurance company "may prepare such papers as it thinks proper or necessary in connection with

a title which it proposes to insure, in order, in its opinion, for it to be willing to insure the title, where no charge is made by it for the papers." *Id.* Nonlawyers may examine records of title to real property, prepare abstracts of title, and issue related insurance. O.C.G.A. §15-19-53. O.C.G.A. §15-19-54 allows non-lawyers to provide attorneys with paralegal and clerical services, so long as "at all times the attorney receiving the information or services shall maintain full professional and direct responsibility to his clients for the information and services received."

In addition to the acts of the Georgia legislature, the Supreme Court of Georgia has made it clear that the preparation of deeds constitutes the practice of law, and is to be undertaken on behalf of another only by a duly qualified and licensed Georgia attorney. For example, the Court has issued the Rules Governing Admission to the Practice of Law in Georgia. Under Part E of those rules, an individual can be licensed as a "foreign law consultant," and thereby be authorized to "render legal services and give professional legal advice on, and only on, the law of the foreign country in which the foreign law consultant is admitted to practice...." Since such an individual has not been regularly admitted to the State Bar of Georgia, the Court prohibits foreign law consultants from providing any other legal services to the public. For purposes of this discussion, it is noteworthy that Part E, §2(b) states that a foreign law consultant may not "prepare any deed, mortgage, assignment, discharge, lease, trust instrument, or any other instrument affecting title to real estate located in the United States of America."

The Committee concludes that, with the limited exception of those activities expressly permitted by the Georgia legislature or courts, the preparation of deeds of conveyance on behalf of another within the state of Georgia by anyone other than a duly licensed attorney constitutes the unlicensed practice of law.

The Committee turns its attention to the execution of deeds of conveyance. Pro se handling of one's own legal affairs is, of course, entirely permissible, and there is nothing in Georgia law to "prevent any corporation, voluntary association, or individual from doing any act or acts set out in Code Section 15-19-50 to which the persons are a party...." O.C.G.A. §15-19-52. The Committee instead focuses on "notary closers," "signing agents," and others who are not a party to the real estate closing, but nonetheless inject themselves into the closing process and conduct, for example, a "witness only closing." A "witness only closing" is one in which an individual presides over the execution of deeds of conveyance and other closing documents, but purports to do so merely as a witness and notary, not as someone who is practicing law.

The Supreme Court of Georgia periodically issues advisory opinions relating to attorney conduct. Under Court rule, such

opinions have "the same precedential authority given to the regularly published judicial opinions of the Court." Bar Rule 4-403(e). It would be proper, then, for the Committee to turn to any relevant advisory opinions for guidance.

In Formal Advisory Opinion 86-5, the Supreme Court of Georgia interpreted the word "conveyancing" as set out in O.C.G.A. §15-19-50, and considered what the term meant in relation to the closing of a real estate transaction. The Court viewed a real estate closing "as the entire series of events through which title to the land is conveyed from one party to another party...." That being the case, the Court concluded "it would be ethically improper for a lawyer to aid nonlawyers to 'close' real estate transactions," or for a lawyer to "delegate to a nonlawyer the responsibility to 'close' the real estate transaction without the participation of an attorney."

In Formal Advisory Opinion 00-3, the Court restated its view that the real estate closing is a continuous, interconnected series of events. The Court made it clear that, in order for an attorney to avoid possible disciplinary sanctions for aiding a nonlawyer in the unauthorized practice of law, "[t]he lawyer must be in control of the closing process from beginning to end. The supervision of the paralegal must be direct and constant." The Court held that "[e]ven though the paralegal may state that they are not a lawyer and is not there for the purpose of giving legal advice, circumstances may arise where one involved in this process as a purchaser, seller or lender would look to the paralegal for advice and/or explanations normally provided by a lawyer. This is not permissible." A lawyer who aids a nonlawyer in the unauthorized practice of law can be disbarred. Georgia Rule of Professional Conduct 5.5.

The Committee finds that those who conduct witness only closings or otherwise facilitate the execution of deeds of conveyance on behalf of others are engaged in the practice of law. As noted above, "conveyancing" is deemed to be the practice of law, and the very purpose of a deed is to effectuate a conveyance of real property. In reviewing the foregoing opinions of the Supreme Court of Georgia, the Committee concludes that the execution of a deed of conveyance is so intimately interwoven with the other elements of the closing process so as to be inseparable from the closing as a whole. It is one of "the entire series of events through which title to the land is conveyed from one party to another party." To view the execution of a deed of conveyance as something separate and distinct from the other phases of the closing process--and thus as something other than the practice of law--would not only be forced and artificial, it would run counter to the opinions of the Court. Such an interpretation would mean that a nonlawyer could lawfully preside over the execution of deeds of conveyance, yet an attorney who allowed an unsupervised paralegal to engage in precisely the same activ-

ity could be disbarred. An interpretation of Court opinions that leads to such an incongruous result cannot be proper. Rather, the view consistent with those opinions is that one who facilitates the execution of deeds of conveyance is practicing law.

Accordingly, the Committee concludes that, subject to any relevant exceptions set out by the Georgia legislature or courts, one who facilitates the execution of a deed of conveyance on behalf of another within the state of Georgia is engaged in the practice of law. One does not become licensed to practice law simply by procuring a notary seal. A Georgia lawyer who conducts a witness only closing does not, of course, engage in the unlicensed practice of law. There may well exist, however, professional liability or disciplinary concerns that fall outside the scope of this opinion.

Refinance closings, second mortgages, home equity loans, construction loans and other secured real estate loan transactions may differ in certain particulars from purchase transactions. Nevertheless, the centerpiece of these transactions is the conveyance of real property. Such transactions are, therefore, subject to the same analysis as set out above.