

# TITLE ISSUES

## THE ROLE OF THE ATTORNEY IN THE RESIDENTIAL REAL ESTATE TRANSACTION

*Arthur Fedder*  
*Assistant Regional Counsel*  
*Chicago Title Insurance Company*

The role of the attorney in the residential real estate transaction has changed dramatically over the years, has changed very little over the years or has not changed at all over the years. Which of the concluding clauses is correct depends upon what point in time one selects to do the comparison and what area of the state one chooses to use as the basis for the comparison. For instance, one could select the days of abstracting and attorneys' opinions and find differing views as to whether or not the role of the attorney has changed. The reference period for this article will be that of the author's professional career, starting with his employment by Chicago Title and Trust Company in the DuPage County office in Wheaton, Illinois in January 1967.

At that time, most residential closings were conducted at the lender's office by an employee of the lender. The sellers would retain an attorney to prepare the deed, but it was not common practice for the parties to be represented by attorneys at the closing. The attitude amongst buyers seemed to be that the lender's attorney would review everything and correct any problems, title or otherwise.

Within a few years time, the location of most of the closings had shifted from the lenders' offices to title company offices. Without the safeguard of the lender's attorney at closing, buyers and sellers determined that, since no one represented them or was looking out for their interests, they needed to be represented by their own attorneys. It is still cus-

tomary in DuPage County for buyers and sellers to be represented by attorneys at the closings. I feel that the representation of either the buyers or the sellers is the role of the attorney and that this role has been actively supported by Chicago Title and Trust Company and Chicago Title Insurance Company over the years.

For the representation to be as complete as possible, it should start in the earliest stage of the transaction, preferably before the signing of the contract. Advice can be given at that time as to what provisions should or should not be included in the contract. If representation starts at the Attorney's Approval or Attorney's Review stage, there is still opportunity to advise the clients with respect to the transaction. Even if representation starts after that stage, there are still countless reasons why the buyers or sellers should be represented by an attorney before the closing, at the closing and post-closing.

Once the role of the attorney is determined to be representing buyers or sellers, several questions arise. How can that role be sustained in DuPage County and in other parts of Illinois where it has been traditional to residential closings? Also, how can that role be achieved in those parts of Illinois where it has not been the traditional role?

Educating the public as to the need for attorneys in real estate transactions has been recognized as the way to assure the use of attorneys and is the number one goal of the Northern Illinois Real Estate

Committee. To that end, Chicago Title is in the process of developing a brochure that will set forth reasons for having an attorney represent buyers and sellers and will describe various duties that would be performed by the attorney. If the general public saw Joseph R. Fortunato, Jr.'s seven page list of responsibilities of an attorney for a buyer in a residential real estate transaction, every buyer would be represented by an attorney. (Joe's list is not set forth herein due to its length and his copyright).

The next step in the educational process would be to educate the Realtor as to the role of the attorney, with emphasis on how an attorney can only help the Realtor in a transaction. A recent advertisement sponsored by a title company in cooperation with the local bar association illustrates this educational process. In the ad, a Realtor is quoted as supporting attorney representation for both buyer and seller in a residential real estate closing. Another example is the seminar for Realtors co-sponsored by the DuPage County Bar Association (DCBA) in which topics of interest to Realtors and attorneys are presented. Cooperation of this sort between Realtors and attorneys will ensure the use of attorneys and should replace friction presently found in many areas of the state.

It is also important for the real estate attorney not to be the "deal killer" characterized by the overzealous, highly competitive, win-at-any-cost personality. Perhaps all real estate practitioners should be required to listen to Robert V. Borla. In the talk he gave at the DuPage County Bar Association Real Estate Seminar in January 1995, he pointed out that the "win-at-any-cost" philosophy must be replaced by recognizing that the goal of all of the parties to the transaction is "closing the deal." All team players should be focused on that goal rather than on being combatants trying to win at someone else's expense. I would also recommend a reading of Bob's article in the May 1996 DCBA Brief entitled, "Restoring Civility and Professionalism to

the Practice of Real Estate Law." The rules he sets forth in the article are well worth following.

Once the role of the attorney has been established, I feel it is then incumbent upon the Bar to somehow insure that the representation will be competently performed. It may mean at some time a requirement of mandatory continuing legal education courses or even some form of real estate attorney certification. It certainly means that those attorneys whose practices are concentrated in other areas of the law should proceed cautiously before representing a friend or relative on an occasional basis.

In order to boost attorney competence, Chicago Title Insurance Company regularly sponsors free seminars in the Chicago Metropolitan area for recently admitted attorneys entitled: "Surviving Your First Real Estate Closing" and "Clearing Your Way to Closing." The first seminar covers the basics in representing the client from the contract stage through the closing. The latter seminar addresses additional topics, such as environmental matters, mechanics' lien claims, land trusts and probate matters. Some of these same topics are covered in booklets which Chicago Title publishes for distribution to attorneys. The list includes *Practical Aspects of Illinois Mechanics' Liens Claims*; *Land Measurement Manual*; *Rights of Heirs and Legatees*; *Land Trust Handbook* and several others. The *Lawyer's Supplement* to the *Guarantor* has been published by Chicago Title and distributed to attorneys for over 30 years and, in that same period, has covered topics from ALTA title policies to vacated streets. Another publication of Chicago Title's for distribution to attorneys on various matters relating to real estate is *Title Issues*. Also, a listing of transfer taxes is distributed on a regular basis. The list includes the taxing district, primary liability, amount of tax, who to contact and comments about any additional or special requirements in obtaining the transfer stamps.

In addition, Chicago Title has developed the

*Chicago Title Advantage* computer software to assist the residential real estate attorney in the preparation of most documents necessary in the residential closing. The *Advantage* is frequently updated in order to keep attorney users abreast of any changes in law, technology or industry practice.

Additionally, Chicago Title has opened several new offices within the last couple of years to make attendance at the closing more convenient for attorneys. These offices are located in Naperville, Northbrook, Elgin, Forest Park and Countryside.

Finally, the underwriters in many of our offices participate in the real estate committees of the local bar associations and are available to assist the attorney in various ways such as: answering questions, checking a title finding, reviewing an exception, drafting an endorsement, examining a survey, discussing the effect of a recent court decision or new legislation, etc. These individuals also participate in real estate activities and bar association activities at the state level, speak at seminars, write articles and author books. All of these activities promote the role of the real estate attorney.

In conclusion, the New Jersey Supreme Court, in a case which has been interpreted in various ways, did hold that both the seller and buyer would be better served if they were represented by an attorney from the beginning to the end of the transaction. Chicago Title has supported that role in the past and continues, through the ways set forth above, to assist attorneys in providing high quality representation of buyers and sellers in the residential real estate transaction.