

# Closings:

## Step by Step

Joshua Stein

*To prevent the closing of a substantial transaction from sinking into chaos, know what will happen before it happens and prepare for it.*

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**CLOSINGS.** Transactional attorneys handle closings. Lots of them. These closings often move quickly. They have many moving parts. They require the attorneys to do many different things, often under time pressure with clients watching. Just relax! (Actually this isn't very good advice for closings, in my experience.)

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The best bet is to be *prepared*, both by knowing what will need to happen and by setting it up in advance, to the extent possible, so it will go smoothly. If you are not prepared, a major transactional closing can become an overwhelming and confusing mass (and mess) of papers, unexpected issues, and complications. Therefore, to close a transaction successfully, you need to know what to expect and plan accordingly.

In this article, I will describe some steps you can take to make your closings as close to trouble-free as possible. This discussion emphasizes commercial real estate closings, but many of the same principles, ideas, and tasks also apply to the closing of any other substantial business transaction.

**SOME FUNDAMENTAL PRINCIPLES** • As a starting point, here are some general principles of the closing process.

### 1. The Closing State of Mind

A closing is like a Broadway show. When the curtain goes up, everything needs to be finished, ready, and in the right place. The one thing that isn't finished, ready, and in the right place can create a highly visible and highly embarrassing problem. It can totally undercut the professional appearance of the entire show.

In orchestrating any closing, our job is to make sure that when the curtain goes up our show looks good and goes forward on schedule. That means *every* piece of the show, not just *most* pieces of the show. The two or three pieces of the closing that aren't ready can make a dozen people sit around a closing table, fuming and wondering why you can't do your job—even if the missing pieces were really someone else's job.

Therefore, as you put the closing together, try to get your arms around each task. Understand the timing constraints. Pay particular attention to the names, roles, phone numbers, and working hours of third parties that you will need to pester for particular deliverables. Get each task done. Bring to each task the same persistence and goal-orientedness that you would bring to the task of getting to a final examination on time during college or law school. Don't drop a single ball, just as you wouldn't be late to a single final exam.

### 2. Use Common Sense

A good chunk of what happens at any closing just requires common sense. You often need to have the practical ability to understand a task and get it started and finished, as opposed to vast amounts of experience or expertise. Think about

what's going on and why. Understand what's needed and your role in getting it done. Then start doing it.

### 3. Pay Attention

Particularly for closings, you need to pay close attention to what you are being asked to do. There might not be time or opportunity to explain it again later. And it often needs to be done *now*.

### 4. Legal Content of Closings

A good chunk of the work required for any closing, whether corporate, real estate, or finance, or in any other practice area, has no obvious legal content. (By the way, the same is true of much of the work required to deal with document production, prepare for a trial or deposition, coordinate a settlement, and so on.)

If that is so, then why do clients use lawyers for closings? Answer: Lawyers are diligent, obsessive, and careful. Therefore, make sure you are diligent, obsessive, and careful (and not just in closings).

Another reason clients want lawyers to handle closings is that the nonlegal work (general expediting) needs to be coordinated with the legal work. Tasks that require legal awareness, competence, and skill will arise at random moments during the pre-closing and closing

process. For example, every time a missing document or delivery finally turns up, someone will need to look at it and think about it and make sure it's right.

You therefore must approach the task as both a logistical process and a legal process. While you need to "just get the job done" as a logistical matter, you also need to stay alert for issues and problems that raise legal concerns.

Typically these issues and problems sit somewhere on the borderline between "the real world" out there and the legal agenda that drives the documents. These issues and problems are hard to deal with because lawyers like dealing with legal issues and documents, but don't always like (and aren't always very good at) dealing with how those legal issues and documents interact with "the real world."

The table at the end of this article lists some "logistical" problems that can arise at closings, along with the related "legal" issues that lawyers need to remember when they deal with the "logistical" problems. As you can see from this table, logistical problems blend into legal issues all the time. Don't be so focused on the logistical mechanics of (for example) making sure you receive Delivery X that when you actually receive it you forget to stop, look at it, and think about it.

### 5. Delegate

A competent paralegal, competently supervised, can handle much of the work for any closing. But this requires planning and time, both of which we often lack. As a result, the lawyers get stuck coordinating non-legal minutiae because no one else is there to do it. To prevent that—and to keep the cost of the closing under control—you need to identify any opportunity to delegate as soon as it arises, and bring in the right help as early as you can. But you also need to stay involved enough so that when concerns arise that require a lawyer's expertise, you will be able to deal with them expeditiously.

**A T CLOSING** • The following list describes some of the steps you may want to take for any closing. As in any other business transaction or other context, though, the precise circumstances—the people, their goals, the timing, the size and nature of the transaction, and so on—always dictate the appropriate course of action.

Some measures suggested here may be inappropriate in some cases; others will be absolutely essential. Consider and refer to this list as appropriate in the circumstances, but of course do not assume it is complete.

### 1. Closing Conditions

Check the status of the closing conditions—events that need to take place, or deliveries that need to be made, before the transaction can close. In real estate work, common problems include:

- Appraisals;
- Environmental reports;
- Delivery of financial statements, guaranties, and certificates of insurance;
- Issuance or transfer of liquor and other licenses;
- Tenant estoppel certificates; and
- Completion of UCC pre-filing process.

Cross-check these issues with the client or third parties as appropriate.

### 2. Client Deliveries and Approvals

Also check with the client regarding any final client sign-offs and closing arrangements, such as budgets, bank accounts, holdbacks, and the issuance of letters of credit.

### 3. Title

Ask the title company to mark the title commitment, as if final, before the closing attorney reviews it at the closing. The closing attorney has too many things to do to negotiate normal, typical deletions of normal, typical pre-closing exceptions. This should have been

arranged before the closing. If the title company hasn't finalized its commitment until the actual closing, make sure that job gets done as early as possible. Then review the marked commitment purely on an exception basis for problems.

Make sure the title company's closing requirements have been identified and satisfied. Do not assume anyone else will deliver to the title company the documents they should deliver. Do not assume the title company will make its requirements plainly known to the right person.

Instead, if it's your closing, you need to make sure that every required document or other item has been delivered and the title company is satisfied with it. At an appropriate stage in the closing, ask the title company what, if anything, would prevent it from issuing its unconditional commitment right now.

#### **4. Escrow Terminations**

If any closing documents have been delivered in escrow, think about the conditions to termination of that escrow. What needs to happen? What has happened already? Comply strictly with the requirements of the escrow arrangement. If anything looks like it will be a problem, bring it the attention of the appropriate people as soon as you identify the problem.

#### **5. Attendance List**

If appropriate, prepare and circulate an attendance list. Ask latecomers to sign in, too.

#### **6. Powers of Attorney**

If anyone will sign by a power of attorney, you might want to call the principals to verify that the power has not been revoked, by death or otherwise.

#### **7. Copying**

If possible, collect all checks, documents, and other deliveries that require copying, so you can have someone do all the copying at once. This will avoid confusion and save a great deal of time.

#### **8. Continuation of Multi-Day Closings**

Occasionally a closing will continue over more than one day, although this usually means only that the transaction isn't really ready to close but the parties are pretending to close it just to catch everyone's attention. When a closing will need to continue to another day, check that the same conference room will still be available, and make whatever logistical arrangements you must so you can continue the closing process the next day. Give the appropriate directions to all closing participants. Ask the client whether the numbers need to

be recalculated or revised based on the delay in closing.

## **D**OCUMENTS AT CLOSING

• Ideally, all documents will have been fully prepared before the closing, and when the parties arrive they will be able to sign and run. This, of course, never happens. As a result, closings often become protracted exercises in document negotiation and finalization, and the parties become more concerned with that process than with getting the transaction closed and all the details in place. The following measures will help prevent chaos.

### **1. Document Control**

A single individual (preferably a paralegal) should control access to the documents in the closing room, including new documents, last-minute changes, substitution of pages, missing exhibits, and the like.

### **2. Final Document Negotiations**

If documents are being negotiated at the closing, try to keep a record of what drafts were distributed to whom, in case questions arise later. In the crush to get the documents finished, don't get sloppy about making sure everyone sees what you are doing. If you can, make formal cover letters so your file will show what happened. If you are handling substantive negotia-

tions at the closing, try to have someone else take primary responsibility for the mechanical logistics of the closing that need to be handled at the same time.

### **3. New Documents**

As new documents, side letters, certificates, and the like start to arise, maintain the same control over them that you do over the basic documents. Set up files and closing checklist entries to keep track of them as part of the overall organizational system for the transaction. When the documents start multiplying, that often means the transaction is finally really getting ready to close.

### **4. Negotiation Delays**

Although you should avoid negotiating documents at the closing, sometimes you can't avoid it. When it happens, see if you can use the resulting delay as an opportunity to handle routine deliveries, so you can cross them off the list of missing items. While one person is renegotiating the documents, perhaps someone else can deal with all the routine deliveries, so they will be finished when the transaction is substantively ready to close. This will avoid a "crunch" to deal with everything—even the routine stuff—at the moment when the final issues are finally resolved.

### 5. Other People's Documents

Attorneys from other firms will sometimes bring documents on diskette and then ask the host firm to handle editing and coordination of these documents. As soon as this happens, you should try to arrange appropriate secretarial support and then get out of the loop.

### 6. Signing the Documents

Once the documents are final, don't forget to have all the necessary people sign all the documents they need to sign.

This sounds easy and obvious. Under the time pressure of a closing, though, one or two documents can easily fall between the cracks.

Check all the signatures again when you think you're finished. Try not to let people leave until you are 100 percent sure that you have obtained every possible signature you might need—including affidavits, certificates, notices, side letters, title documents, and ancillary closing documents.

Cross-check your closing checklist to make sure you haven't missed anything at all.

This is yet another reason to prepare a complete closing checklist for every transaction, and then keep it current as the transaction heads toward a closing.

**H**ANDLING THE MONEY • Any substantial commercial closing will usually require the transfer of substantial sums of money, which will produce a variety of issues raising from minor logistical chores to major disagreements that could threaten the transaction, particularly if left until the last minute.

Closing attorneys will need to coordinate the movement of money with the larger transaction. Try to have the client handle all payment arrangements. In any case, have the client approve the final funds flow. Some common problems and crises:

- **Title premium.** Obtain the bill for the title insurance premium and arrange for payment of the bill. If possible, pay using an estimated bill delivered before the closing;
- **First advance.** Calculate the first advance of the loan, or the final adjusted purchase price;
- **Lender's internal funding procedures.** What steps does the lender (or buyer) need to take internally to release the funds for the transaction? What deliveries does it need? Counsel will need to handle the process of satisfying these conditions. Exactly what must be provided to whom, and when, to fund the advance? Often these requirements will not come up until the last minute. Try to flesh them out before then;

- **Wire instructions.** Obtain and verify wire instructions. Common problems: title company; lenders being paid off; and disbursements from special escrow accounts;
- **Certified checks.** In appropriate cases, verify with the bank any certified checks being delivered by a third party. It is not hard for anyone to create a purportedly “certified” check;
- **Security deposits.** Transfer the security deposits to the lender, if required. Set up any appropriate escrows;
- **Get paid.** One logistical detail is particularly crucial: Closing counsel should submit a bill and get paid. A closing often provides the best—and last—opportunity to get paid, easily, gracefully, and fully, for all the work the attorneys have done (and will do after the closing) on the transaction. People expect the attorneys to submit a bill at the closing. They see the payment of that bill as one of the less pleasant things that needs to be done at a closing to get their transaction closed and thereby achieve their business goals. If counsel does not remember to submit a bill at closing, then when the bill finally does show up no one is very interested in paying it; and
- **Tipping the title closer.** In New York and perhaps elsewhere, borrower’s or purchaser’s counsel will normally tip the title closer, at a rate

of at least \$20 to \$30 per hour with a minimum of \$100 for a commercial closing. Often tips are substantially higher. If the closer seems to have finished his or her work and has nothing else to do, but is lingering, this is a reminder that it’s time to pay the tip.

#### **Loose Ends and Post-Closing Activities**

A closing should “close” a transaction. That’s the whole point. Ideally, a “closed” transaction leaves nothing “open” to be handled later, except routine performance under the documents. Nevertheless, as hard as you try, you will often find that a few things just can’t get tied up at the closing. Keep a running record of all post-closing covenants and obligations of any party.

Whenever someone says they will do something after the closing, memorialize it in writing. If you can, set up a deadline and some consequences if the deadline is missed.

Consider obtaining an escrow or setting up some appropriate intermediate remedy for nonperformance, such as partial blockage of loan availability or a slight bump in the interest rate. It should be something less than an Event of Default but more than a nasty letter.

Try to minimize post-closing obligations, even if it means “wasting time” at the closing waiting for



something. You will often end up spending much more time, if you wait to deal with it after the closing. Even if a particular "loose end" was minor and tiny at the time of closing, it will grow hair after closing and never be as quick as everybody promised. Try very hard not to leave any loose ends.

Immediately after the closing, ask the client whether the client has any particular requirements or expectations for post-closing follow-through, such as immediate delivery of certain major documents.

Even if everyone delivers everything they were supposed to at the closing, you will still have a substantial amount of routine work to finish after the closing: checking title policies; tracking recorded documents; assembling and distributing closing sets; and preparing closing binders (which cannot be done if

even a single documents or delivery is still missing).

If the post-closing follow-through work is done incorrectly the transaction can go wrong later even if the closing itself was a thing of beauty.

Immediately after the closing, ask whether the client has any particular requirements or expectations for post-closing follow-through, such as immediate delivery of certain major documents.

You will not have the pressure of a deadline to get the post-closing work done, but at any random moment—typically around 3:30 on a Friday afternoon—you will get an angry call from a client asking why that transaction isn't finished and elevating any remaining work to an "emergency." Finish the post-closing work before you get that phone call.

#### APPENDIX

##### Coordinating Logistical Problems and Legal Issues in Closings

The following table shows how what looks like a "logistical problem" for a closing can become a "legal issue" at any given moment. This is why closing counsel can never stop thinking about legal issues.

##### Logistical Problem

Where's the insurance certificate?

##### Related Legal Issue

Does the insurance certificate provide the right coverage from an acceptable carrier? Does it name the right party? In the right capacity? Is it the correct form of certificate?

Where should the lender wire the loan proceeds?

Is the lender at risk if the loan doesn't close? How sure can we be that the proceeds will not be misapplied? Who has told us, in writing, that these are correct wire transfer instructions? What if they're wrong? What documents does the lender need to see before it will disburse funds?

Where's the person who needs to sign the documents?

Who is authorized to sign the documents? How many signers are needed? Do we have the right form of signature block? The right notarial acknowledgment?

Has Joe Blow signed off on the XYZ document?

What are Joe's comments on the document? Do they create risks or problems for us? Do they mean we should make changes in some other documents? Does Joe know what he's talking about? If we revise the documents, who else needs to see the changes? When? How?

Did we get a survey?

Does the survey have the right form of certificate? Does the title insurance provide the right survey coverage? Is the survey right? Does our transaction refer to the right property?

Where's the good standing certificate?

Why didn't the corporation pay its taxes? How much back tax does it owe? Can we set up an escrow to pay it?

Does the Release need to be delivered to the title company?

Shouldn't we set up an escrow for the Release? Just how much is the

lender entitled to require as payment for the Release? What are the other closing conditions for delivery of the Release? Is the Release in recordable form? Can we combine it with some other document? Who's the right party to sign the Release? Does anybody else need to join in or consent to the Release?

How much is the title insurance premium?

What title insurance endorsements will we require? Which can we eliminate? Can we save money on title insurance by qualifying for some discounted rate? Does the title company have the coverage capacity to issue this policy? Should there be reinsurance?

Did we get the title company's signature on the escrow instructions?

Is the "title company" really a title company or just an agency? Do we need proof of agency? Just how much money are we willing to entrust to this particular title company?

Will we have a closer from the title company at our closing at the right time?

Is the transaction ready to close? Have we resolved all the title issues and finalized the closing documents?

Did the old lender remember to notarize the mortgage assignment?

Is the mortgage correctly identified? Was it the right form of acknowledgment? What other documents do we need to obtain in order to effectively assign the old mortgage?

How much is the exact final loan amount?

Would the lender like us to review the closing statement? Does it adequately provide for all disbursements to be made at closing? Title premiums? Legal fees?

Does Mary know where and when the closing is, and how to get there?

Does Mary have all the approvals she needs? Can she sign by herself? Are the signature blocks right? Have we identified all the documents that Mary will need to sign? Are they all ready?

### PRACTICE CHECKLIST FOR

#### Closings: Step by Step

Without proper preparation, the commercial real estate closing can be a bewildering mass of unresolved issues, technical details, and undelegated clerical tasks. Proper preparation requires anticipation of the issues and a determination in advance of who will do what, when, and how.

- At the real estate closing, do the following, among other things:
  - Obtain all necessary signatures (it sounds dumb but it's often not as easy to do as it sounds);
  - Check the closing conditions. Make sure that all the conditions to the termination of any escrows have been satisfied;
  - Check client deliveries and approvals;
  - Assign a single individual control of the documents in the closing room, including new documents, last-minute changes, substitution of pages, missing exhibits, and the like. If possible, collect all documents that require copying at once;
  - Keep track of the location of current computer files for documents under active negotiation. Maintain a coordinated record of multiple drafts. Try to distribute redrafts, even if they are distributed in person at the closing. Include formal cover memos with the redrafts to maintain a reliable file record of what happened; and
  - Arrange for the funding of necessary disbursements. Coordinate these funding arrangements with the overall funds flow for the transaction. Try to have the client handle all payment arrangements.