

After the Closing: A Legal Tragedy That Didn't Need to Be

By Joshua Stein

Dozens of attorneys and paralegals worked through the night in six conference rooms in three cities to negotiate and close a highly complex and incredibly creative state-of-the-art, multimillion-dollar commercial real estate transaction. Each party was well represented by competent and careful counsel. Four hundred seventeen final closing documents affecting thirty-two sites in five states and creating a four-tier ownership structure with three levels of financing were complete and correct in every way. The closing was undeniably a thing of great beauty. Then all

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the attorneys and paralegals went back to their offices and to the next transaction, the next crisis, the pile of telephone messages unanswered.

Two years and three months later, the transaction went into default, then litigation, and finally bankruptcy court. At each stage of the dispute process no one could understand why the transaction was such a mess. Basic documents could not be located. Security interests had not been perfected or had expired. Important deadlines had been missed. Substantive rights had been waived by inaction. Documents that should have been recorded had not been. Parties that should have been notified of the closing had not been. Documents that parties were to have delivered within ten days after the closing, documents that were thought to be incidental but turned out to be fundamental, apparently had never shown up. In short, the transaction, so well-structured and competently and beautifully closed, had become a disaster. Although the 417 documents signed at the closing were still perfect, the transaction fell apart because the attorneys and paralegals failed to follow through after the closing.

The transaction described is fictitious, but it represents common problems caused by lack of attention to post-closing details. Post-closing follow-through rarely creates the same excitement and intellectual stimulation as the next new deal. Attorneys can and should delegate most post-closing work to paralegals; attorneys must, however, remember to do the delegating and need to follow through to assure that the delegated work has been completed, notwithstanding an endless procession of other work that seems to be more pressing and definitely is more exciting and fun.

One Who Hesitates Is Lost

Regardless of the amount of post-closing work, try to start on it as soon as possible after the closing as a continuation of the closing process. Convene a meeting of the closing team right after the closing and assign responsibilities and deadlines.

If post-closing work sits for a few weeks after the closing, memories begin to dull, papers begin to vanish, notes tend to get lost, people think about other things. It becomes harder and harder to reactivate and refocus all the people who were involved and remind everyone of what needs to be done. Some people move on to other

If the loose end doesn't really need to be tied up at closing, then you might also ask whether it really needs to be tied up at all. If the transaction and the documents would be satisfactory without tying up the loose end, then perhaps everyone should save time, trouble, and effort and ignore it. Your willingness to close the transac-

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jobs. Participants in the transaction quickly forget the names of many team members. All of this may lead to inefficiencies and delays in any post-closing activities.

The longer the delay in reconstructing the history of the closing becomes, the harder it will be to do and the less likely it will be done at all. Eventually, what was thought to be routine can become elevated to an emergency when the client calls asking why the transaction is not finished.

"I'll Get It to You After the Closing"

When some incidental document, such as an allegedly "minor" exhibit or certificate, is not ready and the transaction must close, attorneys and clients routinely promise to tie up the loose ends after the closing. In some cases it does not happen.

When the other side suggests leaving loose ends to be taken care of after the closing, heed the advice of Nancy Reagan: "Just say no." Take the position that a closing should close the transaction, leaving nothing "open" to be handled later except performance under the documents. Often the other side can tie up a supposedly intractable loose end in time for the closing if you simply make it very clear that you will not close until the loose end has been resolved.

tion without having the loose end resolved may be interpreted as meaning that you don't really care if the matter is ever resolved at all—especially if you don't insist on establishing meaningful consequences for failure to resolve it.

Once you decide you really do want the loose end tied up after the closing, you may want to establish a deadline to do so, with a letter confirming it. But what happens if the other side misses the deadline or fails to deliver the document, signature, certificate, exhibit, third-party report, or other item that it promised to "take care of right away" after the closing? You might instinctively want to make this failure an "Event of Default," triggering every remedy known to attorneys. In real life, however, no one will want to accelerate a loan, appoint a receiver, terminate a lease, initiate buy-sell procedures, or even threaten to do any of these things, just because the other side is a week or two late in delivering a post-closing exhibit or certification. Even if a party wanted to adopt such a draconian position, a court probably would not allow it.

Depending on the nature and size of each loose end, a lesser incentive may assure that the loose end gets tied up—something less than an Event of Default but more than a nasty letter. If the transaction is a loan, the lender

might block availability of future advances of the loan until the borrower has delivered the missing document or notch up the interest rate until the problem is solved. Such measures are certain to keep the borrower's attention. If the transaction is a lease, the tenant might defer the rent commencement date until the landlord takes care of the loose end. Another solution would be to set up an escrow that won't be released until the loose end has been resolved.

A helpful technique is to define specifically what the other side is supposed to do. For example, a lender against a portfolio of properties reluctantly agreed to lend against a ground lease that had been amended a dozen times. The lender asked the borrower to try to have the ground lease restated into a single document after the closing. Rather than merely accept a vague covenant to "exercise reasonable efforts" to have the ground lease restated, the lender established some specific requirements. The borrower was required to prepare a first draft of the restated ground lease by a certain date, to identify a particular individual with responsibility for the project, to report monthly on progress, and to spend a certain amount of money on the effort. If at any point the borrower stopped being diligent about the exercise, the lender could engage separate counsel to do the job.

Post-closing delivery of documents may also create substantive legal con-

cerns, which you should identify and bring to the client's attention. For example, if the borrower grants mortgages on ten sites at closing but has agreed to deliver an eleventh mortgage within thirty days, that last mortgage may be subject to attack in bankruptcy. Similarly, it is hard to argue that your client "relied" on a certificate of some kind if the certificate didn't exist at the time of closing. You need to bring these risks to your client's attention before the client agrees to take them.

Make a List; Check It Twice

If any significant loose ends remain to be dealt with after the closing, the attorneys may want to agree on a post-closing checklist similar to the checklist that preceded the closing. It should clearly identify who is responsible for what and, when possible, establish deadlines for performance. As soon as it becomes apparent that some loose end won't be resolved at the closing, add it to the checklist. To combat the natural tendency for post-closing follow-through to drift to the back burner and then slip into the dusty dark abyss behind the stove, you should mark your calendar to check on any delegated post-closing work at some reasonable time after the closing.

Although a checklist is important, the attorneys and paralegals that handle post-closing follow-through should not adopt a purely "checklist" mentality in which they receive an item, check

it off a list, drop it in a file folder, and forget about it. Post-closing documents that were supposed to be reviewed and approved need to be reviewed and approved, not just crossed off a list. Deliveries that are supposed to fulfill a condition subsequent need to be checked to confirm that they actually do fulfill the condition subsequent.

Title policies are an important example. They need to be checked against commitments. A paralegal should promptly report any deficiencies to the title company then persistently follow through, preferably in writing, to have those problems fixed. If the title company held any escrows or collected any overpayments at closing, these amounts should be disbursed or applied within a reasonable time.

In short, post-closing matters justify the same scrutiny and care they would have received at closing.

Tell Everyone About It

In preparing for the closing, the parties should have identified any landlords, lenders, tenants, other third parties, and sometimes government authorities that need or are entitled to receive notice of the closing. See that those notices go out and by the correct means of transmission. In any case, send the notice by at least one method that gives you proof of delivery, even if the documents don't require it. When the proof of delivery comes back, file it with the copy of what was sent. If it doesn't come back

Post-Closing Checklist

As a starting point, a post-closing checklist might include at least items such as the following, along with others discussed in this article:

- Title policies and reinsurance agreements.
- Recorded documents.
- UCC-1 filing confirmations.
- Proof of delivery of post-closing notices.
- Opinion back-up memorandum.
- Missing signatures (e.g., the lender's signatures on the loan agreement).
- Straggling estoppel certificates and other third-party certificates.
- Contact information, title numbers, file locations, document numbers, and other information that will simplify the necessary follow-through and the lack of which will lead to procrastination.

soon, do something about it.

In considering what notices need to be sent, think about any necessary securities law filing, foreign investment reporting forms, and city and state transfer tax returns. Certain governmental filings must be made very quickly, and you should see that they are made as one of the first post-closing projects.

Some of the necessary notices and filings might better be handled by your client or its managing agent. In those cases, set the process in motion, clearly assign responsibility for it, and make sure it happens. If it doesn't happen, the client may still blame you for the failure. If you formed new entities for the closing, finish up any housekeeping details for those entities, such as publication. If a transaction will involve a press release, review the draft and coordinate the announcement with the client and, when appropriate, its public relations advisers. If a title insurance company has agreed to record a document and then issue a policy of title insurance relating to the document, you can usually assume the recording will take place and the title policy will confirm it. But if a document will be recorded but not covered by title insurance, someone needs to confirm that the recording actually happens.

Add to your post-closing checklist all filings, recordings, and submissions to be handled. If they will require ancillary documents or forms, start that process as early as possible so you won't have last minute problems. For example, in New York, if you want to record a memorandum of lease you need to submit transfer tax forms and a copy of the underlying lease.

If a transaction involves security interests in substantial personal property, you may want to run an updated lien search (perhaps online) a month or two after the closing, just to confirm that the financing statements were actually filed and show up on a search.

The Mystery of the Missing Documents

Clients of all sizes, from small businesses to large institutions, and their attorneys often misplace original legal documents. Later, when the time comes to

pay off or transfer a note or prove rights in court, the absence of original documents can create procedural or even substantive problems. In many cases, no one even knows where the documents went or who last saw them. Prevent problems in this area by first obtaining enough original executed counterparts at closing. Don't be timid about having the parties sign more original documents when appropriate.

Once the transaction closes, distribute the original documents quickly, with a clear written record of who got what. When you close a loan for a lender, the original promissory note should typically go by messenger to your client immediately after the closing. Keep copies of the note. Deal with any original letters of credit the same way.

Immediately after the closing, ask your client whether he or she has any particular requirements or expectations for post-closing follow-through, such as immediate delivery of particular documents. Satisfy those requirements as quickly as possible. To the extent that the documents go to the client, your cover letter should list exactly what was sent, recite that the documents were originals, and advise the recipient to keep them in a safe place.

As an extra measure, you may want to have a signature block on the cover letter, where the recipient can sign and return a copy of the letter to acknowledge receipt of the original documents. This not only helps assure that the recipient focuses on the package, but it also establishes a clear written trail of responsibility for the document. You can even keep a copy of it in the closing binder. If you send out a document with a cover letter of this type, follow through to confirm that you receive the signed cover letter back; otherwise what was intended as a protective mechanism may come back later to bite you if you cannot show that the intended recipient ever signed for your package.

Over time, unless and until you have distributed full sets of documents to all parties, you will probably receive an increasing number of requests for copies or originals of various documents, which will result in unneces-

sary rounds of telephone tag, take time to handle, propagate too many cover letters, create confusion, increase the risk of misplaced or damaged documents, and otherwise cause trouble. Avoid this exercise by distributing original documents at the closing or almost immediately thereafter. Even if one or two items are missing, it will usually still make sense to make an almost complete distribution as quickly as possible, with a single supplementary distribution to follow when all missing documents are in place.

To the extent that any originals stay in your office, make sure you will be able to figure out, perhaps years later, where the original documents are. This often means filing them in their own subfiles separately from routine correspondence, perhaps in a vault, and maintaining a clear record of what went into which files and when. This exercise is particularly important for promissory notes, letters of credit, and other pieces of paper that may be legally essential down the road. As a risk management measure, you are probably safer if you unambiguously send all these documents to your client. But even if you would prefer not to be responsible for them, they may ultimately be safer—less likely to be lost—if they stay in your hands than your client's hands.

Bookmaking

Beyond distributing sets of original documents, most transactions of a significant nature justify preparing a closing binder, so that the clients and attorneys can refer to the documents in a single central reference source without risk of damaging or losing the originals. The cost of preparing closing binders is often much lower than the client expects—often far less than the cost of attorney or paralegal time to track down, collect, and organize the transactional documents when the client calls to ask a minor question about the closing. Although hard-bound closing binders cost a bit more than "velobound" books (about \$100 at time of writing), they last longer and are harder for people to lose. They also look better.

Regardless of the format of your closing binder, if any documents remain to be delivered post-closing, you have two choices. First, you can wait to prepare the binder until you have everything—which means that a single missing document will prevent you from distributing any closing binders, but at least when you do distribute the binders you will be finished. Second, you can prepare the binder almost immediately, and leave a pocket in the back for whatever is missing. But this means you are not finished, and you need to keep following through and then make more distributions.

Both for closing binders and for distributions of original documents, beware of possible problems caused by last-minute editing of the documents at the closing. If the timing of the transaction required extensive last-minute revisions of the documents, the documents you send out must reflect the final changes, and you must send identical documents to all parties.

It was once routine to include in closing binders a summary of major terms of the transaction and of important documents. Today, such summaries seem to be the exception rather than the rule because clients do not want to pay for their preparation.

Summaries of this type also may create needless interpretational questions if the matter ever goes into litigation.

If a transaction does justify a summary in the closing binder, you will maximize accuracy and minimize time spent if you prepare the summary immediately, while your memory is still fresh. Unless the client wants a full transaction summary, a minimal closing statement might contain only the following information:

- a one-paragraph description of the fundamental nature of the transaction;
- a brief list containing a shorthand reference to each document, enough to guide someone who wants to find it;
- where the money came from; and
- where the money went.

Include a pocket inside the back cover of the closing binder so that if the parties later amend the transaction or send fundamental notices (e.g., exercise of an option), copies can be distributed to everyone who has a closing binder, to be kept with the closing binders without thereafter getting lost. Add another pocket for the survey. If you keep it separately from the closing binder, you may waste hours trying to find it when someone asks for it.

The closing binder should, in short, collect all the final documents and deliveries that people will probably want to refer to regarding the transaction after the closing. Keep one unbound “master” closing binder in your file room so you can make more copies of the closing binder quickly when people ask for them.

One Computer File Is Worth a Million Words

When a transaction has closed, the computer files for the documents from that transaction (including closing checklists, players’ lists, any retyped legal descriptions, and other miscellaneous documents) can be extremely useful, both as precedents for future similar transactions and for use if questions arise about the first transaction or if you need to amend it. Promptly after a closing, check that those computer files will remain easily available in their final form without risk of subsequent changes.

If you use a document management system, perhaps someone should update the computerized index cards for the final documents to indicate that the transaction has closed. If you don’t use a document management system you can collect final documents from closed transactions as “read-only” files

Important Dates for the Record

Some examples of important future dates for the transaction might include:

- Deadline to file UCC-3 continuation statements.
- Rent adjustment dates.
- Deadlines to give notices.
- Time limits to request audits or to exercise similar rights.
- Option exercise dates.
- Nonintuitive statutory requirements. (For example, in New York, if a lease renews automatically unless the tenant opts out, such a clause isn’t enforceable unless the landlord gives the tenant a reminder notice.)
- Loan maturity.
- Requirements for future opinions of counsel or other deliveries.
- Expiration of insurance certificates or letters of credit.
- Delivery of financial statements or reports.
- Periodic requests for estoppel certificates.

Post-Closing Follow-Through

- Start your post-closing work—and finish all of it—as soon as possible after the closing.
- Minimize the number and size of post-closing loose ends.
- If loose ends must remain open after closing, create incentives for the parties to tie them up.
- At closing, carefully identify (and after closing confirm you actually receive) everything promised for “after the closing.”
- Make a post-closing checklist to keep track of what, who, and when.
- Notify all parties, government agencies, and others who need to know about the closing.
- Distribute originals of all documents as soon as possible, and consider getting receipts for what you distribute.
- Make an unambiguous record of where the original documents went.
- Prepare and distribute, quickly, a complete closing book with copies of all documents for the transaction.
- Identify and save for future use electronic versions of all the documents for future reference and amendments.
- Tell the client what it needs to know about the closing documents.
- Set up “tickler” reminders for important future dates.
- Determine whether periodic “news” searches involving the parties to the transaction are necessary.
- Set up routine entity maintenance after the closing, if the client so desires.

in separate subdirectories in a single archival area in your computer system or in some other machine-readable but readily available collection. The longer you wait to take these steps, the more likely your documents will vanish, get erased, get edited for other transactions, or otherwise become unavailable. Entropy seems to have a magnetic attraction to file servers and hard drives.

While you are thinking about the documents your client just signed, you might also consider whether you should update any of your model documents to reflect what you learned in the transaction you just closed.

Inform the Client

If your client will make future disbursements or take other post-closing actions contemplated by the documents, see that your client understands the process so that what really happens will track the requirements of the documentation; otherwise, whoever administers a transaction after closing may unintentionally waive rights or create problems while the docu-

ments sit in a file room or a drawer gathering dust until a dispute arises. The client may also miss valuable opportunities to monitor the transaction, such as obtaining title updates when appropriate.

You may want to advise your client formally about what the transactional documents say by pointing out what he or she needs to know to reduce potential risks, liability, problems, and defaults in the transaction. Whether you communicate that information through a meeting, a memorandum, or in some other way, the goal in each case is to connect the words on paper with the real world in which real people will live with and administer those words. Even if your client does not want complete advice of this type, you may want to prepare a brief memorandum calling the client's attention to any unusual or nonstandard provisions, deadlines, or requirements in the documents (in other words, mistakes and disasters waiting to happen). Such a memorandum might, among other things, summarize the

exact requirements for sending any formal notices that the transaction may later require. If the client moves, the client needs to remember to notify the other party formally of its new address. The same applies to a move or a personnel change affecting anyone else that is to receive a copy of any formal notices under the documents. If the parties negotiated any “deemed approvals,” in which a matter is deemed approved if the consenting party fails to object within a specified time after receipt of notice, you should probably also bring this to the client's attention. If the client has agreed to do anything after the closing that is not obvious, such as sending other parties copies of future communications, or other deliveries, you might summarize these requirements. In addition, try to identify what parts of the transaction seem particularly likely to produce problems or pressure points as the parties go forward and give the client some suggestions on how to prevent trouble. Alert the client to the need to involve counsel early if the parties

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ever want to amend or modify the transaction or if any disputes or problems begin to arise.

Save the Dates

Think about any important future dates for the transaction, whether or not specifically identified in the documents. Enter appropriate reminders in the firm's "tickler" file as far in advance of each deadline date as appropriate under the circumstances. Also notify the client in writing of these dates and remind the client of the possible need to file additional financing statements if the borrower relocates or changes its name.

News Watch

Many large transactions involve substantial parties, such as major public-company tenants, whose future success or failure may fundamentally affect the success or failure of the transaction. Other parties may be in the news in ways that might affect the transaction. Unless the client will administer the transaction closely enough to know with confidence that it will obtain all relevant information as it unfolds, you may want to suggest setting up an electronic "news watch" to keep an eye out for new developments affecting any party especially important to the transaction. News services make it easy, though potentially expensive, to set up a standing search of this type, with results reported as frequently as may be appropriate.

If a major party to the transaction is a publicly traded company, you may want routinely to obtain for the client a copy of every material SEC filing the company makes. These are easily available on the Internet, along with ever-increasing amounts of other information about the company. The need and the potential for any future

information gathering will vary tremendously among transactions. Having the right measures in place may make a difference. In appropriate cases, you might also want to order, in advance, automatic periodic title updates as a way to keep an eye on what happens at the property. For any mortgage loan, the lender may want to set up a tax reporting service to check the real estate tax records periodically. If the borrower decides to stop paying real estate taxes, the lender should try to become aware of the problem as early as possible.

Watch the Transaction

After a transaction closes, it may from time to time require attention. The other side may send a notice, with a copy to you. Calculations may need to be performed. Certificates may need to be prepared. You may need to release or modify collateral. Each of these little activities has the potential to destroy your client's expected benefits from the transaction, if handled incorrectly. Your client may need to remember to take certain actions or give certain notices on its own initiative, but your client may be counting on you to remember. Clients rarely give their lawyers enough lead time to think about any of these little follow-on activities. When notices do arrive or follow-on activities do need to be handled, they won't go away and they do require your attention. Give them the attention they need.

Routine Entity Maintenance

Find out whether the client expects you to handle routine paperwork and maintenance for any corporate or other entities that were established for the transaction. If so, be ready to assume that responsibility and try to confirm that the time you spend on it, even though relatively minimal, will still be billable. Often

these chores are handled by accountants. In any case, see to it that these responsibilities are clearly assigned, then follow through accordingly.

Conclusion

Follow through after any real estate closing, identify what needs to be done, and assure that it does get done. In the transaction described, tragedy could have been averted.■