

Why the Deal Hasn't Closed

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Everything's done. Everyone's finished negotiating the loan documents. Title is in order. The borrower got enough tenant estoppel certificates to satisfy the lender. But the deal still hasn't closed. Why not?

It's usually some unexpected thing at the last minute, especially if the parties haven't worked together before. The lender will have some sudden requirement for a document that nobody mentioned before. They need the original note—not a PDF copy—to be able to fund. It's not enough for the lender's counsel to have the original. That original actually has to be in the lender's hands. So the closing will take another day.

Or the lender might need a memo from counsel confirming that the documents are finished, satisfactory

and signed. Without that memo, the back room can't release funds.

Or it might be the minor detail of the money. How much has to go into the closing? How much has to come out? And where should it go? You can't figure out those details and finalize the numbers until you have all the information—not just most of it. So if one or two numbers are still missing from the closing statement, you aren't ready to close. Not a single penny will get disbursed to anyone.

Because we have mostly abandoned sit-down closings, the parties have to sign and notarize their documents a day or two in advance and then scan them and send them by overnight delivery to the closing. If one thing is wrong—one signature missing, an absent or defective notarial acknowledgment, an expired notarial commission, one page misprinted, not enough copies of something, an important blank in the document—then depending on the parties' flexibility (typically not high), the closing might slip another day.

Once upon a time, when everyone sat in one room and worked out the final details and then signed everything, it was a lot easier to deal with little problems as they arose. Technology may have sped up many things, but if something goes a little bit wrong in the closing process, the technology may end up getting in the way.

There is also the problem of signers. Even if a transaction has been under negotiation for weeks, when it's ready to close the people who now need to sign the documents never seem to stick around. They're traveling. They didn't sign signature pages in advance. It's another mad scramble. While everyone was having fun negotiating documents, no one thought of finding a pen and putting it in the hands of the signers.

Opinions of counsel offer their own unique set of potential last-minute problems. Sometimes only an original will do, and it needs to have the right date on it. The date can't be left blank until closing as one might for an ordinary document. Opinions are regarded as so incredibly important that they must be delivered as perfect, pristine originals. So, if no one adequately focused on that particular requirement, it can cause an emergency and delay the closing.

All these examples come from my own experience, based of course only on the mistakes of others. I am obviously faultless and have never dropped a ball or neglected a detail.

How do we prevent these problems? It's not very hard. It takes organizational skills more than legal or financial skills. As soon as any transaction begins, think about how it will end—the closing. What will the closing require? Exactly what documentation will the back room need in order to wire funds? Who will collect the original closing documents? Which documents must absolutely be delivered as originals, as opposed to PDF images of scanned documents?

Who will actually sign? Where will they be? It often makes sense to “sign first, negotiate later,” but that only works well if the signer signs everything, not just almost everything. If some new document enters the scene at the last minute, you may find yourself in a mad dash to locate the signer and get them to sign a second time. Again, you need to identify everything at the beginning, so it is all lined up at the end.

If there's some non-obvious minor requirement—an affidavit or a letter from a third party—identify it right at the beginning, and make sure it comes through. Sometimes, the person who presents the last-minute problem isn't actually part of the team that negotiates the documents and plans the closing. That person might be in the back room and might not come into the picture until late in the game. Whoever runs the closing should reach out early in the process and find out what to expect at the last minute.

Of course, everything always goes more smoothly when the parties have closed deals together before—yet another argument for long-term repeat relationships rather than one-off transactions with the most attractive counterparty at the moment.

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