

The House Closing
(Downstate)

by

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I. SELLER: PREPARING FOR CLOSING

The seller's attorney has the following basic functions to perform prior to the closing:

- A. Arrange for pay-off of loans. The seller should advise its bank of the projected closing date and request a pay-off letter. The seller's attorney should confirm the numbers with the seller and send the payoff letter to both the purchaser's attorney and the title company for review. The title company will advise the seller's attorney of the amount it will want to collect at closing to satisfy the loan. That amount will be a little more than the outstanding principal amount of the mortgage and accrued interest because the title company will want to collect a few extra days' interest to cover the lapse in time between the closing date and the date the pay-off check is delivered to the bank. Although the title company normally sends the check by overnight courier, there can be delays, and the title company will therefore collect sufficient money to give itself a little leeway. Be aware that if the house is encumbered by a HELOC (home equity line of credit), the title company will require the seller to terminate the HELOC before the closing and obtain a letter from the bank confirming that it has closed the line of credit, all of which takes time. For a house closing and condo closing, the title company will collect the funds needed to pay off the mortgage at closing, deliver the funds to the bank immediately after the closing, and obtain and record a satisfaction from the bank after the pay-off. A cooperative closing is handled differently, in that the seller's bank will send its attorneys to the closing to collect the payoff funds and deliver the original stock certificate and proprietary lease.

- B. Review of Title. The seller's attorney reviews the buyer's title report and arranges for removal of any exceptions to title that must be removed pursuant to the terms of the contract of sale. The objections are listed on Schedule B of the title report. The most common objection to title is a mortgage that has to be satisfied (see above). Other common objections include judgments, tax liens, easements, restrictive covenants, sidewalk violations, and potential water charges. Occasionally more esoteric exceptions are listed, such as a problem in chain of title. To determine how to eliminate title objections, the seller's attorney need only talk to the title

company's clearance attorney. Some matters can be dealt with by affidavit (e.g., confirmation that New York City has not performed any work that could be the basis for an emergency repair lien; and confirmation that seller has not been known by any other name for the past 10 years). Other matters must be removed prior to closing. For example, if there are any judgments against the seller, the title company will normally require seller to pay the judgment and obtain a satisfaction prior to the Closing.

- C. Schedule the Closing. When the purchaser and seller are both ready to close, the closing must be scheduled, which is an art in and of itself considering the number of parties involved. For a house, the seller, buyer, title company, and attorney for the buyer's bank must attend the closing, which is usually held (unless the contract otherwise provides) at the office of the lender's attorney. If the buyer is not borrowing money, a house closing is usually held at the office of the seller's attorney. The same rule applies to condos; but coop closings are usually held at the office of the coop's managing agent. Although it is the buyer's job to schedule the title company, it's not a bad idea for the seller's attorney to confirm the closing date with the title company once a date has been confirmed with the purchaser.
- D. Prepare/Obtain the Closing Documentation. The seller must prepare or obtain, among other things, (a) the closing documents required by the contract of sale, (b) transfer tax documentation, (c) the documentation required by the title company to clear title, (d) a closing statement or memorandum, and (e) power(s) of attorney if the seller(s) will not attend the closing.
- a. Contract of Sale Documents. The contract of sale provides a blueprint for the closing documents. For a house, that documentation will include:
- i. Bargain and Sale Deed (with covenants). A deed must be delivered at a house or a condo closing (although the language of a condo deed differs from the language of a house deed), but is not delivered at a coop closing.
 - ii. If the seller is a foreign national who does not reside in the United States, the buyer must pay over to the Internal Revenue Service 10% of the purchase price at the Closing, subject to certain exceptions. Assuming the seller is not a non-resident foreign national, the seller is required to deliver to the purchaser a

Certificate of Non-Foreign Status (not required by law for transactions where the purchase price does not exceed \$300,000, although the exemption is conditioned on continuing residency by the purchaser, but the certificate is required by contract).

- iii. Fuel statement. The seller should have its fuel oil company measure the fuel in the house's oil tank a day or two before the closing and provide the seller with a statement showing the amount of oil in the tank and its price.
- iv. Water meter reading. If the water consumption is measured by a water meter, DEP must be contacted several weeks before the closing to obtain a "final" water meter reading.

b. Title Company Documentation

- i. Seller's "Common Exceptions" Title Affidavit.
- ii. If water charges are listed in the title report as a possible title objection, Seller must provide a recent meter reading. This may involve calling the Dept. of Environmental Protection to obtain a "final" water meter reading. Such a reading should generally be ordered at least 2 weeks before the closing to give the Department time enough to read the meter and furnish a reading. Water meter readings are not required for condos or coops. If the title company is willing to pay the water bill, the funds for the meter reading can be delivered to the title company at closing.
- iii. Obtain other documentation required by the title company to clear title, including loan payoff letter and, if there's a HELOC in place, confirmation from the bank that the HELOC has been closed.
- iv. Obtain an invoice from the title company listing the amounts seller will have to pay at closing to the title company, including transfer taxes, any charges to record a power of attorney, and any charges billed by the title company for its services in satisfying the seller's mortgage.

- c. Transfer Tax Documents and Related Government Filings. For all transfers in New York State, a TP-584 (New York State Real Estate Transfer Tax Affidavit/Credit Line Mortgage Certificate) and RP-5217 (Transfer Report/Equalization Form) must be prepared (the forms can

be obtained through the website of the New York State Department of Taxation and Finance). Additional transfer tax documentation may be required in some local jurisdictions. For example, a New York City closing requires preparation of a TP-584 (New York State Real Estate Transfer Tax Affidavit/Credit Line Mortgage Certificate), NYC RPTT (New York City Real Property Transfer Tax Report), RP-5217 (Transfer Report/Equalization Certificate), smoke alarm affidavit, and Housing Preservation and Development Affidavit certifying that the house/condo/coop is not a multiple dwelling. To confirm the government filings to be made in any jurisdiction, check with the title company.

- d. Income Tax Documentation. If seller is an individual, partnership, estate or trust and is not a resident of New York, seller must complete a form IT-2663, which is an estimate of the seller's income tax liability to New York State with respect to the sale. Generally, the seller's accountant or the seller should prepare the form. If estimated income tax will be payable to New York State, a check for that amount will have to be delivered to the title company at closing along with the form IT-2663. Pre-clear with the title company the IT-2663 and the tax amount.
- e. Powers of Attorney. If the seller will not attend the closing, the seller's attorney will need to prepare a power of attorney, using the statutory form. Before having the power signed, a copy of the draft power should be delivered to both the title company and the purchaser for review. Once the form is approved, the seller's attorney should have it signed and acknowledged, and then send the signed, acknowledged form to the title company and purchaser for further review. The seller's attorney will need to confirm that the seller is alive at the closing and sign an affidavit that the power of attorney is in full force and effect. Accordingly, the seller should be advised to make himself or herself available by telephone at the Closing.
- f. Closing Statement/Memorandum. The attorney should prepare a closing statement or memorandum for the seller's review that, at a minimum, sets out all the financial elements of the transaction, including: (a) the seller credits, the buyer's credits, the adjustments, and the net balance of the purchase price payable at closing, (b) the disbursement of the down payment, (c) the disbursement of the balance of the purchase price, and (d) a list of closing expenses not already

reflected in the disbursement of the down payment and balance of the purchase price. A sample form of closing statement is set out below, which assumes the sale of a New York City house on August 5, 2012:

	<u>Due Seller</u>	<u>Credit to Purchaser</u>
Purchase Price:	\$1,100,000.00	
Downpayment		\$110,000.00
Real Estate Taxes: \$	18,080.70*	
Fuel Cost	\$ 100.00	
PCDA Credit		\$ 500.00
Subtotal:	<u>\$1,118,180.70</u>	<u>\$110,500.00</u>
Balance Due Of Purchase Price		<u>\$1,007,680.70</u>
Disbursement of Downpayment (\$110,000 plus \$82.31 interest):		
\$66,000.00	to ABC Broker for brokerage commission	
\$15,675.00	to Chicago Title Insurance Company in payment of New York City Real Property Transfer Tax (\$15,675), New York State Real Estate Transfer Tax (\$4,400), mortgage satisfaction fee (\$200), and recording charges for power of attorney (\$120)	
\$2,024.30	to MupsyBupsy P.C. (Seller's law firm)	
\$26,383.01	to John Smith (Seller)	
Payment of Balance of Purchase Price:		
\$808,450.23	to Citibank N.A., in payment of 1 st mortgage	
\$199,230.47	to John Smith (Seller)	

*\$20,000 (7/1/2012-6/30/2012)/365 days x 330 days (8/4/12-6/30/13) = \$18,080.70

E. Review Numbers with Seller and with Purchaser's Attorney. Once the closing statement is prepared, it should be reviewed with the seller. Once numbers are confirmed with the seller, the

computation of the balance of the purchase price, including apportionments, should be sent to the buyer's attorney for review. Note that it is not uncommon for apportionments to differ slightly because of rounding differences and just plain bad math. It is rarely economic to spend any time resolving apportionment differences.

- F. Reminders to Seller. Remind the Seller (preferably in writing) of the following:
- a. The required condition of the property (usually vacant and broom clean)
 - b. Bring keys, garage opener, security codes to the Closing
 - c. Bring photo identification to the Closing
 - d. Cancel insurance after the Closing
 - e. Cancel utilities after the Closing

II. PURCHASER: PREPARING FOR CLOSING

- A. The Purchaser's pre-closing tasks include:
- a. Clearing the Loan. The bank's issuance of a loan commitment to the buyer is only the first step in getting to the closing. The bank will not close until all the conditions of the commitment have been met and the bank's underwriters have signed off. Once the underwriters have signed off, closing can occur. The buyer's attorney needs to establish contact with the bank's attorney and monitor the status of underwriting clearance.
 - b. Review Title Search/Clear Title Objections against Buyer. Buyer's attorney should ask the title company to send copies of the title report to the seller's attorney and the attorneys for the buyer's lender. Once received, the buyer's attorney should review the title report and advise seller in writing of any objections to title. The report should also be reviewed for title objections relating to the buyer (in connection with the loan). For example, judgments against the buyer will have to be satisfied before the closing and proof of satisfaction furnished to the title company.
 - c. Prepare Closing Statement/Closing Memorandum. The buyer's attorney should prepare a closing statement or memorandum for the buyer's review that, at a minimum, sets out all the financial elements of the transaction, including: (a) the seller credits, the buyer's credits, the apportionments for taxes, water, fuel and any other charges, and the net balance of the purchase price payable at closing, (b) the disbursement of the balance of the purchase price, and (c) a list of closing expenses. Typical closing expenses include:

- i. Mansion Tax (1% of purchase price if purchase price is \$1,000,000 or more) (usually paid to title company).
- ii. Title company charges for (a) premium for owner's title policy and lender's title policy, (b) Mansion Tax (if applicable), (c) mortgage tax, (d) survey charges, and (e) additional title charges, including survey charges and recording charges.
- iii. Closing attendance fee/gratuity to title closer
- iv. Some local jurisdictions impose a transfer tax on buyers (e.g., the Peconic Bay region).

Review the closing statement with the purchaser and, once confirmed, review with the seller the calculation of the balance of the purchase price and apportionments.

d. Determine Net Loan Proceeds and Money Purchaser Will Need to Close.

- i. The lending bank normally pays a portion of the balance of the purchase price and the remaining balance is paid by the purchaser. Once the balance of the purchase price is computed, the buyer's attorney needs to know the net loan proceeds, in order to compute the amount the buyer must bring to the closing. For example, if the buyer is borrowing \$800,000, the bank will not fund \$800,000 at the closing. It will deduct from the loan amount certain charges, including prepaid interest, prepaid tax escrow, attorneys fees owed the bank's attorney (sometimes paid separately by the buyer at closing and sometimes deducted from the loan proceeds), and fees owing the bank. The loan amount less those charges is the "net loan proceeds." If the net loan proceeds are \$789,200 and the balance of the purchase price is \$1,007,580.70, then the buyer will need an official bank check in the amount of \$218,380.70 to pay the balance of the purchase price at closing, computed as follows:

\$1,007,580.70	balance of purchase price
\$ 789,200.00	net loan proceeds
\$ 218,380.70	official bank check needed from Purchaser

Unfortunately, the lending bank will often delay in providing the information as to the net loan proceeds until the day before the closing. Accordingly, "guesstimates" must be made in preparing the draft closing statement, and the numbers put in final form only after the bank's numbers are received.

- ii. The lending bank's attorneys must be advised of the requirement for an official bank check, since they may intend to bring an attorney escrow account check. In Manhattan, official bank checks are typically required. In some other areas,

- attorney escrow checks are accepted.
 - iii. Obtain from the Seller instructions on how the balance of the purchase price is to be disbursed and provide lending bank and purchaser with appropriate instructions.
 - e. Closing Documents. For a house sale, closing documents are generally prepared by the seller's attorney. However, it is generally a good idea for the buyer's attorney to bring to the closing:
 - i. A Certificate of Non-Foreign Status (in case the seller's attorney forgets).
 - ii. If there is no lender, a form 1099 information sheet to be completed by the seller, so the purchaser's attorney can file a 1099.
 - f. Reminders to Purchaser. The Purchaser should be advised of the following:
 - i. ALL checks for the balance of the purchase price must be official bank checks, including the lending bank's checks.
 - ii. Inspect the house (preferably the day of the closing) to determine if there has been any damage since the contract signing.
 - iii. Arrange for utilities.
 - iv. Arrange for insurance.
 - v. Advise purchaser to file for a STAR tax exemption (if applicable).
 - vi. If purchaser will not attend closing and the purchaser's attorney is acting under a power of attorney, advise the purchaser to be available by telephone at the closing.
 - g. Schedule the Closing. DO NOT forget to schedule the title company, as well as the seller, purchaser, and lender's attorneys.

III. CLOSING

a. NEVER FORGET

BUYER: Get the deed and title policy

SELLER: Collect the entire balance of the purchase price. Be sure checks are made out to the proper parties, currently dated, drawn on a local bank, and are either certified, cashiers, or official bank checks. Except in rare cases, **PERSONAL CHECKS ARE NOT ACCEPTABLE; NOR ARE CHECKS DRAWN ON THE BUYER'S OR THE BUYER'S LENDER'S ATTORNEY ESCROW ACCOUNT (UNLESS THE CHECK IS CERTIFIED, CASHIERS, OR OFFICIAL BANK CHECK).**

b. Typical Problems:

- i. Purchaser pays Seller cash at Closing for personal property, having failed to advise his/her attorney. A sales tax return must be filed, and sales tax must be paid. The buyer's and seller's attorneys can't ignore the sales tax obligation.
- ii. Damage to the apartment. It's not unusual for the buyer to note some damage at the pre-closing inspection. The form contract, unless it has been modified, provides that the buyer accepts the property in its "as is" condition as of the date the contract is signed. The question becomes then whether the damage was present at contract signing, or occurred after the contract signing; and the cost of repairs. It's generally a negotiation.
- iii. Bank's attorney comes to closing with a check that's not an official bank check. The risks of closing with what is essentially a personal check should be explained to the seller and the seller should make the decision (preferably with an acknowledgement in writing that it's against the attorneys' advice). The contract requires official bank checks, the safest money instrument is an official bank check, and an official bank check will generally clear immediately, whereas a personal check takes time (maybe a week) to clear – seems like a no brainer.

IV. POST-CLOSING

1. The title company will record all documents that have to be recorded and pay the transfer taxes.
2. If the seller's payoff bank was holding a tax escrow, the escrow is typically returned to seller after the closing.
3. A 1099 must be filed by January 31 of the calendar year following the calendar year in which the closing was held. If there was no bank representative at the closing, this duty normally falls to the buyer's attorney.

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PRE-CLOSING AND CLOSING

I. PRE-CLOSING

A) DUE DILIGENCE (OTHER THAN TITLE EXAMINATION)

1) Buyer's attorney and Seller's attorney each reviews contract and completes file and sets up closing checklist.

2) Seller's attorney obtains title documents (redated abstract of title and survey map, proposed deed and any other title documents in his possession) and sends to Buyer's attorney.

Note: Seller's attorney should note that the contract date for provision of title documents may predate the date for satisfaction of contingencies and therefore may need to obtain title documents before the contract contingencies have been satisfied. If only part of the parcel is being conveyed, a duplicate search should be obtained. Seller's attorney should confirm with abstract company and surveyor that the charges will be canceled if the order is canceled for failure of contingencies and the work product returned.

3) Seller's attorney orders mortgage payoff statements and discharges or releases of other liens and gathers information regarding all liens. Lender's or other lienor's policies and requirements for ordering payoff statements (e.g. closeout of credit lines) should be determined and followed. (For privately held mortgages, see RPAPL §1921).

4) Real property tax bills and receipts (county, town, school), tax searches (for all villages) and water bills ordered by Seller's attorney and forwarded to Buyer's attorney.

5) Buyer's and Seller's attorneys each advise the other regarding satisfaction of contract contingencies. If a contingency is not satisfied or removed by the contract date, the attorneys should determine status and consult with their clients concerning cancellation rights or obtaining written extensions of contingency dates.

6) Under the MCBA/GRAR Form Contract, acceptance of a mortgage commitment by Buyer is a waiver and satisfaction of the mortgage contingency. It is advisable that Buyer's attorney review commitment prior to acceptance. Buyer's attorney should make sure that either Buyer or attorney is resolving all conditions (including those that relate to septic system or well), that contract closing date precedes commitment expiration, (and, if not, consider negotiating earlier closing date or mortgage extension), and should advise Seller's attorney of any conditions to be met by Seller or with Seller's participation.

Protocol Note: Buyer's attorney should advise Seller's attorney of satisfaction of contract contingencies at the earliest opportunity. Special note should be made if there are any conditions which Seller must fulfill or cooperate in fulfilling. At this time, Seller's attorney should also be notified of survey certifications, the commitment expiration date and who the lender's closing attorneys are.

- 7) If commitment requires repairs, attorneys should determine responsibility under contract for making repairs or credits and, if necessary, arrange for Buyer's access to property to make repairs if Buyer is responsible.
- 8) Buyer's attorney reviews title and orders title insurance. Buyer's attorney needs to discuss availability of owner's title insurance with client. Check the commitment letter and check with lender's attorney for any special requirements.
- 9) Buyer's attorney to collect applicable documentation from Seller's attorney regarding all representations and warranties made by Seller in the contract (e.g. certificate of occupancy, zoning compliance, legal subdivision lot, copies of building permits for additions, copies of leases, operability of septic or well).
- 10) Buyer's attorney confirms whether Buyer needed and received: agricultural district disclosure (RPL §333-c); and whether resubdivision is required (RPL §333(1-e) (ii)). Resubdivision is required if only a portion of the lot is to be conveyed or if two or more lots are to be combined.
- 11) Respective attorneys determine who will execute documents:
 - a) Will power of attorney be used? If so, prepare, record, notify other attorney and mortgage lender's attorney and determine any requirements that they may have. Does power of attorney contain language to survive subsequent incompetency of principal? Provide affidavit of non-revocation of power of attorney or other documentation of authority of attorney-in-fact to act. (See General Obligations Law §5-1501 *et seq.*)
 - b) Are parties executing the documents competent? Authorized?
 - c) Some lenders will require a confirmatory phone call at closing from the principal executing the power of attorney.
- 12) Entities as parties.
 - a) Determine who is authorized to sign under entity documentation (partnership agreement, bylaws, operating agreement) and prepare authorization or resolution if necessary.
 - b) Corporate seller.
 - (i) If non-profit or religious corporation seller, determine whether court order is required and proceed to obtain (See NPCL § 511, RCL § 12).
 - (ii) Obtain franchise tax search.
 - (iii) If relocation company, note that contract may either give it power or authority to facilitate closing.

- (iv) If foreign corporation, get proof of authority to do business in New York State and Certification of Good Standing in State of incorporation.
 - (v) Corporate seal generally not required unless recited in acknowledgement.
 - (vi) Board of Directors resolution generally required.
- c) Limited Liability Companies/Limited Liability partnerships
- (i) Review: Articles of Organization, filing receipt, proof of publication, Certificate of Good Standing for the entity.
 - (ii) Review: Operating Agreement for LLC/LLP and any amendments thereto regarding requisite authority of managers/members to approve transaction and execute documents on behalf of the entity.
- Note: Any authorized member can execute documents on behalf of a member managed LLC).*
- (iii) Obtain and review appropriate consents and or certificates as required by the Operating Agreement.

13) Transfer Tax and "Mansion" Tax

- a) Transfer tax of \$2 for each \$500.00, or fractional part thereof, of consideration is due at closing (see New York Tax Law §§ 1400 *et seq.*). The tax is computed and reported on form TP-584 which must be filed with the Deed. The tax is usually paid by the Seller. (See MCBA/GRAR forms).
- b) Additional tax may be required if consideration for residential property is \$1,000,000 or more. (See Tax Law §§ 1402-a, 1404 *et seq.*).

14) Does the property include an interest in a Homeowner's Association? If so:

- a) Seller's attorney orders proof of payment of common charges from Association's managing agent.
- b) Both attorneys review contract to see if instrument survey map is to be provided. MCBA Form Contract (4/99) requires a survey.
- c) Both attorneys review contract to determine if homeowners insurance is under a master policy. If so, Seller's attorney provides all known information to Buyer's attorney so that he can order proof of insurance from managing agent. Remind Buyer to obtain separate insurance coverage for Buyer's personal property.

- d) Buyer's attorney obtains from Seller's attorney all documents listed in contract (Note that the offering plan is relevant if the offering is still open). Review with Buyer the impact of the recorded declaration.
 - e) Engineer's inspection
 - *Practice Pointer: Advisable for Buyer's attorney to call managing agent to inquire about special assessments, capital improvements, litigation and financial information.*
- 15) Is the property a Condominium? If so:
- a) Seller's attorney orders proof of payment of common charges from managing agent.
 - b) Maps – Seller's attorney orders and provides county clerk certified copy of condominium map filed in Civil Actions and Proceedings files of Clerk's Office.
 - c) Both attorneys review contract to determine if homeowners insurance is under a master policy. If so, Seller's attorney provides all known information to Buyer's attorney so that he can order proof of insurance from managing agent. Remind Buyer to obtain separate insurance coverage for Buyer's personal property.
 - d) Buyer's attorney obtains from Seller's attorney all documents listed in contract (Note that the offering plan is relevant if the offering is still open). Review with Buyer the impact of the recorded declaration.
 - *Practice Pointer: Advisable for Buyer's attorney to call managing agent to inquire about special assessments, capital improvements, litigation, and financial information.*
- 16) Are there rental units in the property? If so:
- a) Buyer's attorney obtains copies of leases (or representation of no written leases) and reviews.
 - b) Buyer's attorney verifies security deposits with Seller's attorney.
 - c) Buyer's attorney investigates need for and availability of Certificate of Occupancy ("C of O").
 - d) Even if no new C of O required, Buyer's attorney requests from Seller's attorney the original Certificate of Occupancy. If not available, request zoning compliance letter from municipality.

- e) Rent roll from Seller (lists tenants, terms of leases and expiration dates, rent, square footage rented or apartment number, security deposits).
- f) Security deposits to be transferred (see General Obligations Law § 7-105 and, if 6 or more units, § 7-108).
- g) Recommend Buyer meet, speak with tenants to determine existence of defaults by them or Seller.
- h) Consider requiring tenant estoppel certificates from tenants, certifying rental, security deposit, expiration date, existence of no defaults.
- i) Rental Rider; Lead Based Paint; EPA.

17) Is each Seller a U.S. citizen? If not, check need for Foreign Investment in Real Property Tax Act compliance (26 U.S. C. §§ 897, 1445, especially §1445(b)(2) and (b)(5)). Buyer and Buyer's agent has liability if you do not get affidavit.

18) Is a new certificate of occupancy required? For example, required in Village of Fairport, East Rochester, City of Canandaigua, and City of Rochester if two or more family dwellings).

19) Buyer's attorney reminds Buyer of issues Buyer is to cover such as pre-closing inspection or "walk-through", homeowner's insurance (including contents insurance if property is master-insured by condominium or homeowners association), flood insurance if property is in a flood hazard area, notification to telephone company, water company, measurement of fuel oil, etc. With respect to walk-through, attorney should encourage client to try appliances, plumbing, light switches, etc.; confirm the Seller has performed any repairs required under contract; make a list of any deficient or incomplete items (especially in new construction) and to contact Seller's attorney before closing, if possible, to report any problems. This enables Seller's attorney to work through any issues before closing.

B) CLOSING DOCUMENTS

- 1) Seller's attorney drafts and sends deed and other closing documents to Buyer's attorney for review.
- 2) Seller's attorney determines all documents which Seller must execute before closing.
- 3) Deed
 - a) Is it from all parties in title? Did all parties in title sign the contract?
 - b) If from a corporation, include representation that property is not all or substantially all of grantor's interest and is in the normal course of business (New York Business Corporation Law § 909(b)).

- c) Form of deed (warranty, bargain & sale, quit claim) – check contract.
- 4) Combined Real Estate Transfer Tax Return and Credit Line Mortgage Certificate (TP 584) (Seller). (See Tax Law §§ 1400 *et seq.*).
- 5) Real Property Transfer Report (EA 5217) (RPL § 333(1-e)). Non-resident reporting.
- 6) Smoke Detector Affidavit (Executive Law § 378(5)).
- 7) Carbon Monoxide Detector (Executive Law § 378(5)a)
- 8) Title curatives, if necessary:
 - a) Boundary Line Agreements
 - b) Judgment/Bankruptcy Affidavit.
 - c) Affidavit of tax exempt status.
 - d) Mortgage payoff statement and arrange for availability of discharge if privately held mortgage.
 - e) Authorization for entity (Board resolution, Partnership authorization, member’s consent).
 - f) Tax Bills.
 - g) Other.
 - h) Franchise Tax Search
 - i) Good Standing Certificate
 - j) Attorney Guarantees. Commonly used and accepted in this community for items such as water, unpaid taxes, etc. Confirm acceptability in advance of closing.

Note: Seller’s attorney should obtain MCBA Guarantee consent form (see Appendix) and have client sign. Attorney should take steps he deems necessary to issue and/or accept guarantee such as:

- a) Confirm parameters of liability.
- b) Is client moving out of jurisdiction?
- c) Is client a long-standing client of firm?
- d) Reputation of individual issuing guarantee.

Note: Guarantee is local custom only.

- 9) W-9 for Sellers and allocation of proceeds among multiple Sellers (not husband-wife).
- 10) Check on 1099 reporting requirement - See Section IIIA(2).
- 11) Purchase money mortgage documents, if provided for under contract. (Note, Mortgage, Mortgage tax affidavit if Mortgagee is natural person. Tax Law § 253(1-a)(a)), Proof of insurance naming Seller as mortgagee. Buyer's attorney should review before closing. Determine who prepares (usually Seller). Contract may prescribe form.
- 12) Certificate of Occupancy, if required.
- 13) Certificate of zoning compliance, if required.
- 14) Rental Property.
 - a) Assignment of Leases.
 - b) Originals of all Leases.
 - c) Assignment of Security Deposits.
 - d) Notice of Tenants of Transfer.
 - e) Security Deposit
 - f) Notice to Tenants of Transfer

C) FINANCIAL ASPECTS

- 1) Both attorneys verify deposit held by real estate broker.
- 2) Both attorneys review contract to note any credits, allowances, nonstandard charges or cost-allocation (especially prevalent in builders' contracts for new construction).
- 3) Calculate closing adjustments for pre-and post-paid taxes, other service contracts; can use 12 month/30 days, or 365 days. Recommend 365 days. Be careful in calculating adjustments for embellishments if not all installments are paid.
 - a) Taxes. No Adjustment – Re-levy.
 - b) Propane/Fuel oil – Seller arranges for tank to be filled prior to closing (topped off) with statement from oil company showing cost paid and total gallons in tank. Compute adjustment based on total gallons in tank.

- c) Sewer/Water – Establish whether town or village has separate bill and whether cost is included in taxes, and whether prospective or retrospective charge.
- d) Rent (tenants or pre- or post-closing occupancy) – actual number of days.
- e) Homeowner's Association/Condominium Charges – actual number of days.
- f) Interest on mortgage held by Seller – Actual number of days/using 365 days.
- g) Mortgage Assumption – Prorated interest based on actual number of days, also MIP, including day of closing.
- h) Security systems, other service contracts such as lawn, fertilizing, snow plowing – inquire with company; look to contract.

D) SCHEDULING THE CLOSING

- 1) Buyer's attorney coordinates with Seller's and Lender's counsel.
 - a) Obtain possible dates with client and Seller's attorney.
 - b) Schedule with Lender's attorney and inform all parties of closing date.
 - c) Confirm figures, remaining title issues and commitment conditions outstanding.
 - d) Cross check bank figures against commitment; advise Lender's attorney of all financial adjustments between Buyer and Seller for HUD-1 and possible re-underwriting of loan (particularly in new construction where extras and credits may affect price and loan to value ratio).
 - e) Advise clients of closing figures and funds that Buyer is required to bring to closing.

Note: Some lender's counsel require a title company representative be present at closing to examine curatives and "mark up" commitment.

- 2) Attorneys remind clients what to bring to closing.
 - a) Seller to provide to Seller's attorney – keys, garage door opener, warranties, security system information (especially if new construction).
 - b) Buyer – homeowner's insurance issued in accordance with requirements of commitment letter, any mortgage commitment curatives, extra funds to close. Advise client about availability and form of funds (bank check, wire, etc.).

3) Buyer's attorney confirms results of walk-through. Completion/repair escrow may be needed, even if Lender does not require, or in addition to what Lender requires. It is recommended that this be written. Cost estimates of repairs or replacements are recommended. There is no common/standard local form. Escrowed amount should be sufficient to enable third party to complete if Seller does not; 150% of estimated cost is standard.

4) Utilities – confirm final readings made.

5) Pre- or Post-Closing Possession Agreement (MCBA has a suggested form) should be received before closing. See MCBA suggested form in appendix.

II. A NOTE ABOUT USE OF TRUST ACCOUNTS AND THE FORM OF CLOSING PROCEEDS

A) TRUST ACCOUNTS

1) An attorney in possession of client funds is a fiduciary. In general, an attorney is required to segregate client funds in a separate account identified as the attorney's "Special," "Trust," or "Escrow" account. The account must be maintained in a banking institution which agrees to report dishonored checks to the Lawyer's Fund for Client Protection. The specific rules governing trust accounts are set forth in detail in 22 NYCRR §1200.46.

2) The Dishonored Check Rules set forth in 22 NYCRR §1300 require that the bank send to the Lawyer's Fund for Client Protection a dishonored check report:

“ . . . whenever a properly payable instrument is presented against an attorney special, trust or escrow account which contains insufficient available funds, and the banking institution dishonors the instrument for that reason.” (22 NYCRR §1300.1(c)) [emphasis added].

Unless withdrawn as erroneously filed due to a clerical error within ten (10) days, the report is forwarded to the appropriate attorney disciplining committee.

3) Issuance of a dishonored check report may trigger an investigation or audit by the Fourth Department Grievance Committee.

4) An attorney called upon at closing to disburse funds for closing expenses or mortgage payoffs faces a particular dilemma in complying with these rules. On the one hand, the attorney is required to write checks at closing which are intended to be paid either out of the closing proceeds, or funds received from the client just prior to the closing. On the other hand, funds representing the closing proceeds cannot be deposited until the closing has gone on record, and then must go through the bank collection process before being actually received in the attorney's account.

There is no single solution to this problem.

One solution might involve requiring clients to provide funds sufficiently in advance to enable them to be collected into the attorney's account prior to closing, or the use of a special closing account where the attorney pays the disbursements from his own funds and later reimburses himself once the client funds have been collected into the trust account.

See "*Management of Attorney Trust Accounts*" in Appendix, for additional information.

B) FORM OF CLOSING PROCEEDS

1) The MCBA/GRAR form contracts require that the closing proceeds be paid by certified check or official bank draft. Nevertheless, by long standing custom and practice in this community, attorneys have regularly accepted local attorney trust account checks in payment of closing proceeds.

2) There are occasions where acceptance of an attorney's trust account check in payment of closing proceeds may be impractical or unwarranted. For example, a certified check may be needed where funds must be wired to another location as soon as the closing has been recorded. The same may be true where a client's sale and purchase are scheduled to close "back to back." Other instances when an attorney's trust account check would not be an acceptable form of payment must be left to the individual attorney's judgment on a case by case basis.

3) In view of the local custom and practice, it is recommended that whenever an attorney representing a Seller intends to require strict adherence to the "official bank draft or certified check" provisions of the contract, he should so advise Buyer's attorney in writing. Such notice should be given sufficiently in advance of closing so as to enable Buyer's attorney to obtain the funds in the proper form without undue inconvenience to the attorney or the client. Arrangements will also need to be made with Buyer's lender concerning the form of any mortgage proceeds to be paid to the Seller.

4) In addition, to the extent possible, it would be wise for Buyer's and Seller's attorneys to prepare and confirm closing adjustments prior to closing.

5) Selling clients should also be made aware that funds might not be immediately available on the day of closing, or even the day after. The availability of funds from closing should be discussed with the client at the time the purchase and sale contract is approved.

III. CLOSING

A) CONDUCT OF THE CLOSING

1) Be courteous and patient.

2) Buyer's attorney uses checklist in the conduct of the closing to aid as he reviews all executed documents and confirm that he receives all title curatives and other documents expected. Consider addressing issues with Seller's attorney early to enable him to conclude presence at closing speedily, when possible and practicable.

3) Unless he knows the client, notary requests drivers license or other suitable identification to establish identity of those whose acknowledgments he is taking. (Buyer's/Seller's attorneys generally expected to take acknowledgments of their own clients.)

4) Closing is generally held at Lender's counsel's office.

5) Buyer's attorney should explain documents, including review of survey, tract restrictions, etc.

B) CLOSING DOCUMENTS

1) Review list of Closing Documents at Part III, Section 1B.

C) RECORDING

1) Recording of Documents. Lender's attorney generally delivers documents to abstract company with instructions to record (called "buck slip") and to notify Buyer's and Seller's attorneys when recorded.

2) Escrow. Sale and loan proceeds in residential closings are customarily disbursed in escrow, pending recording of documents. Some Lender's counsel require Seller's attorney to sign a written escrow receipt (their form – Buyer's attorneys may wish to use their own form.) For this reason, proceeds checks are frequently made payable to Seller's attorney in trust. The check itself is to be held in escrow and not deposited until the escrow is fulfilled by the recording of documents and notification by abstract company.

D) FINANCIAL ASPECTS

1) Amount of Funds. Lender's counsel will generally disburse a net amount, after deduction of some or all mortgage expenses. Funds are disbursed as Buyer directs, usually to pay off and satisfy Seller's mortgage and the balance to Seller's attorney. Buyer makes up the price difference. Buyer's attorney should be mindful of ethical considerations regarding available funds necessary for trust account checks or Buyer's endorsement of Buyer's bank/certified check.

2) Form of Funds. Contract calls for certified funds or official bank draft, but attorney trust account check is by local custom and usage commonly accepted. Some relocation companies and banks require certified funds.

See Note about use of Trust Accounts and the Form of closing Proceeds in Part III, Section II above.

3) Both attorneys review adjustments with clients. If property is benefited by Seller's tax exemption (veterans, old age), Buyer's attorney should advise Buyer of recapture of exemption amount from date of closing.

4) If \$10,000 or more in cash received, may be subject to currency transaction reporting (31 U.S.C. §§ 5311 *et seq.*).

5) Attorneys commonly render statements for their services at closing and collect their fees with other closing costs. Some send statements after closing, in normal course.

IV. POST-CLOSING

A) NOTIFICATIONS

1) Rental Properties.

a) Notices to tenants. See General Obligations Law §7-105.

b) Advice to client regarding lead paint disclosure obligations.
MCBA/GRAR Form (5/96).

2) 1099 Reporting. If Lender's counsel conducts closing, they report. If no Lender, look to IRS Regs (26 U.S.C § 6045(e), 26 C.F.R. § 1.6045-4 or 1099 form instructions (Instructions for Forms 1099, 1098, 5498 and W-2G, published by Internal Revenue Service) to determine whether Buyer's or Seller's attorney reports. Reporting not presently required if Seller is a corporation.

B) REMINDERS

When transmitting closing documents to client, remind client of any unusual aspects.

1) Buyer should obtain first tax bills from taxing authority (rolls may not change).

2) Eligible Buyer should be reminded to apply for tax exemption (Note STAR tax exemption applies to all homeowners).

3) Advise Buyer where abstract of title will be kept, including address and telephone number.

C) STATEMENTS

Both attorneys send "closing packages" to their respective clients, including copies of all significant documents, correspondence from attorney with reminders discussed in previous section, and closing statements. Closing Statement should include accounting of all funds received, held in and disbursed from attorney's trust account.

by A. Adjutori and S. Crane