

# THE VOICE OF EXPERIENCE

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## Finding the Right Real Estate Lawyer

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**C**lients often seek legal advice regarding the sale, lease, or refinance of real property. This article will assist non-real-estate practitioners with advising such clients on the right real estate lawyer to choose, depending upon the nature of the proposed transaction. Alternatively, if a client seems poised to engage in a real estate deal with no lawyer, this article will help in explaining to such a client why that course of action is potentially impossible or unwise.

Timing matters too. Often clients execute important agreements relating to real estate and only seek a lawyer later on, when disputes arise. This article provides a guide to the right times to engage real estate counsel and strives to offer wisdom to be shared with clients undertaking those often financially significant deals that are anything but routine.

Delaware, where the authors practice and unlike many other states, defines all real estate closings, including residential purchases and mortgage refinancings, as matters involving the practice of law, and it requires them to be conducted by a licensed Delaware attorney. All funds in a real estate transaction must be disbursed through the bank account of an attorney acting as an officer of the Delaware courts. Since the



issuance of title insurance has been identified as involving the practice of law by the Delaware Supreme Court, only attorneys licensed to practice in Delaware can issue title insurance here. Title insurance companies are generally careful to select attorneys with real estate experience to become their issuing agents. As a result of these requirements, title insurance premiums in Delaware are

lower—often substantially lower—than in many other states where real estate closings and title insurance do not require the oversight of an attorney. States with similar requirements simply mandate the involvement of counsel in the purchase, sale, and finance of real property.

Regardless, however, of where the client's real estate transaction is

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taking place, consideration should be given to the selection and engagement of legal counsel with real estate experience. Disagreements over contract requirements and contingencies, disputes with neighbors as to deed restrictions, conflicting property line locations, questions about drainage, issues with easements, violation of subdivision and building codes, liability for unpaid community assessments, one-sided listing agreements, dual-agency waivers, and many other real estate problems can be avoided or resolved by experienced real estate counsel. Making the correct choice of lawyer in a timely manner can mean that potential difficulties are identified and addressed before they become major impediments, legal dollars are economized and well-spent, the client's expectations are met, and expensive pitfalls are avoided.

Despite the many sound reasons for involving experienced legal counsel with real estate experience from the outset, subtle but substantial pressures can combine either to influence clients to avoid this step or minimize it. The understandable objective of buyers, sellers, borrowers, lenders, real estate agents, and others involved in closings is to "get a contract signed" and to "get the deal closed" with minimal investment of time. This often results in a realtor-approved form contract being signed without the benefit of legal counsel, which then sets the stage for disappointments and disputes that may not surface until after settlement. Even in a state where attorney involvement is

required for closings, home buyers may receive recommendations to use an attorney whose practice primarily consists of a high volume of residential closings for which a set fee is charged. A high-volume settlement practice can minimize the time that the seller, buyer, lender, and realtor, as well as

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*A high-volume settlement practice can work well in routine transactions. But not all buyers or sellers are best served by a "streamlined" approach.*

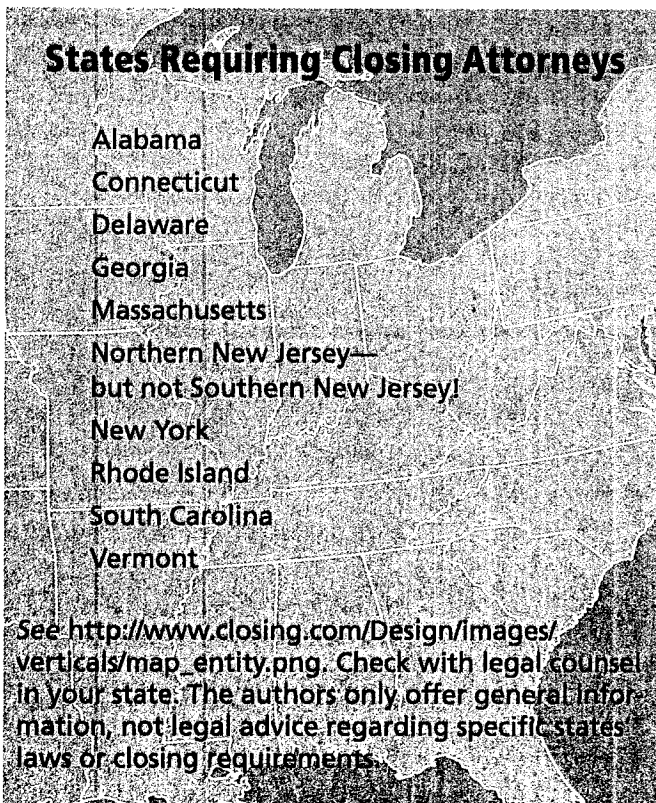
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the closing attorney, must spend to complete a transaction. This works well in routine transactions that are essentially free of problems in any event. But not all buyers or sellers are best served by a "streamlined" approach.

If your client's transaction involves one or more than one of the following situations, then consider guiding the client to obtain "concierge-level" closing services from a full service law firm that focuses on providing the full range of legal advice tailored to the parties' particular needs and objectives.

### When to Refer a Client to an Attorney for Concierge-Level Closing Services

- Value exceeds \$600,000 (whether primary or secondary residence)
- "Standard Form" realtor agreement is proposed for signature
- "Standard Form" listing agreement is presented to seller for signing
- "Standard Form" seller disclosure is presented to seller for signing
- "Dual Agency" waiver agreement is presented to parties for signing
- Transaction is contingent on buyer financing
- Transaction is contingent on sale of buyer's existing home
- Transaction involves a bankruptcy, divorce, or short sale
- Buyer or seller needs closing to occur on his or her schedule
- Buyer or seller needs to close outside the lawyer's office
- Transaction involves purchase of a second home
- Transaction involves (or could be set up for) a tax-free exchange by seller or buyer
- Buyer or seller uses professional tax preparer or financial planner



- Buyer or seller is a professional with liability exposure
- Property is (or should be) owned by trust, corporation, or partnership
- Property is being sold by an estate
- Property is being sold by a foreclosing lender
- Transaction anticipates extensive renovations or additions after closing
- Transaction includes (or anticipates creating) a rental property or apartment
- Transaction depends on (or contemplates) subdivision approval
- Transaction involves relocation from another state or country
- Estate plan and/or medical plan could benefit from updating
- Potential exists for disputes with neighbors or government over use of the property
- Sale depends on condition of property being as represented or remedied before closing

For examples of situations in which these matters arose and their eventual outcomes, you may wish to browse the sampling of matters handled by our firm's Real Estate Law practice that is described at [www.morrisjames.com](http://www.morrisjames.com).

Asking the following questions about the attorney that you are considering or the firm in which that attorney practices can help you determine if the range of legal services needed are readily available to structure the transaction favorably in the context of the parties' tax, estate, medical, employment, professional, and domestic situations.

#### Questions to Ask the Attorney to Determine Suitability for Real Estate Transactions

- Does the attorney or a partner have an LLM in taxation?
- Does the attorney or a partner concentrate in estate planning?
- Does the attorney or a partner concentrate on real estate litigation?
- Can the attorney structure "lease to sell" or other tax-advantaged transactions?
- Can the closing be held at the buyer's home or place of business?
- Does the attorney or law firm routinely handle closings in a variety of municipal and county jurisdictions?
- Does the attorney or a partner concentrate on land use, zoning, building, code, and/or construction law?
- Does the attorney or a partner have experience in home use for business purposes? For rental or ancillary apartment purposes?
- Has the attorney or his or her law firm been confronted with any title insurance claims or malpractice complaints involving real estate transactions in the past five years?

As to anyone buying, selling, or leasing land or buildings for any business purpose, each commercial transaction is unique and requires a disciplined approach and specialized knowledge to guide buyers, sellers, landlords, lessees, borrowers, and lenders. Good questions to ask before making a final decision as to the retention of a particular lawyer or law firm for a commercial transaction include the following.

#### Additional Questions for Commercial Real Estate Transaction Attorneys

- Does the attorney focus as least 75 percent of his or her time on commercial real estate?
- Does the attorney or a partner have a title license to insure title through at least one (and preferably four) of the major national title insurance companies?
- Has the attorney worked on comparable transactions of similar or greater size?

In summary, hiring a lawyer experienced in real estate law is almost always advisable, and it is mandatory in Delaware and a number of other states for closings and title insurance. High-volume, "streamlined" residential closing law firms have their advantages in some situations, but they are not necessarily right for transactions that are complex or for parties whose needs are not routine. This article identifies some of the transaction types and situations where careful consideration could be given to involving an experienced real estate attorney from the outset, before any document is signed.

It also suggests questions to ask in selecting legal counsel who will be right for your client's transaction and needs. Real estate transactions—buying, selling, financing, improving, and leasing real property—often have ramifications that are not immediately obvious, affecting tax and estate planning, retirement and medical care, domestic relations and liability limitation—in other words, ramifications that require a broad range of legal expertise. Almost invariably, real estate transactions are exciting and reflect a significant change in a client's life or business (or both!). Guiding a client toward the selection of the right real estate counsel can have beneficial effects lasting into the future, solidifying an attorney's status as a trusted, long-term advisor. **VOE**

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