

Virginia Settlement Services – A Practical Review

Description

Introduction



Non-attorney settlement agents are governed at the state level by the Virginia

Code^[1], the Virginia State Corporation Commission Bureau of Insurance^[2], and the Virginia State Bar RESA guidelines^[3], legal ethics opinions^[4], and unauthorized practice of law opinions^[5]. The rules and regulations are not necessarily complex, but may be open to interpretation.

The Seller's Side of a Transaction

If you function as a non-attorney settlement service provider it is critical that you understand what you are prohibited from doing, and what you are allowed to do. In the last 18 months the issue of what services non-attorney settlement agents may provide for a seller has again been under discussion. [UPL 197](#) addressed the topic of "Non-Lawyer Representation of Party to a Real Estate Transaction," but as with all UPL opinions the answers depend on the questions asked. It's similar to being required to answer Yes or No to "Have you stopped beating your spouse?" Matters UPL 197 have made clear:

- Non-attorney settlement companies do not represent anyone in a transaction. Only a Virginia licensed attorney in a residential transaction may represent someone.
- Virginia Code defines settlement agent in two separate Code sections. Neither definition allows a non-attorney licensed as a settlement agent to charge a settlement fee to the seller in a split settlement because they don't meet the statutory definitions.
 - [Â§ 55-525.8](#) "Settlement agent" means the person responsible for conducting the settlement and disbursement of the settlement proceeds and includes any individual, corporation, partnership, or other entity conducting the settlement and disbursement of loan proceeds.
 - [Â§ 55-525.16](#) "Settlement agent" means a person, other than a party to the real estate transaction, who provides escrow, closing, or settlement services in connection with a transaction related to real estate in the Commonwealth and who is listed as the settlement agent on the settlement statement or closing disclosure for such transaction. Any person, other than a party to the transaction, who conducts the settlement conference and receives or handles money shall be deemed a "settlement agent" subject to the applicable requirements of this chapter. "Lay real estate settlement agent" means a person who (i) is not licensed as an attorney under Chapter 39 ([Â§ 54.1-3900](#) et seq.) of Title 54.1,

(ii) is not a party to the real estate transaction, (iii) provides escrow, closing, or settlement services in connection with a transaction related to any real estate in the Commonwealth, and (iv) is listed as the settlement agent on the settlement statement or closing disclosure for such transaction.â?•

- o To correct this requires a statutory change in the definition of what is a settlement agent to omit the need for being listed as settlement agent on the closing disclosure or settlement statement, or to add language to allow non-attorney settlement agents to provide the same clerical services they provide when they are the settlement agent.
- o Possible solutions to the problem, short of a statutory change: (1) charge an administrative fee, a clerical fee, a coordination fee, but not a settlement fee; or (2) have the attorney doing the deed hire your company to provide the clerical services. The attorney charges the settlement fee and pays you from his operating account for the services you provide. Some attorneys for purchasers take exception to both of these options.
- o Remember that sellers do not have to pay purchaserâ??s settlement agents any fee at all unless they have agreed to do so. Some contract forms state the seller will pay normal, customary settlement fees. Others do not.
- â??If an attorney not directly employed by the title company prepared the deed, the fee charged for deed preparation should be itemized separately with the preparing attorneyâ??s name and paid to that attorney.â?• UPL 197. A title company may NOT have an on-staff attorney prepare deeds for sellers. The attorney as an employee of the title company cannot do the deed, just as the title company itself cannot do a deed.
- â??If the seller needs or desires legal representation, the seller cannot be represented by the attorney employed by the title company. The title company is a lay entity which is not authorized to practice law, and cannot employ its attorney to provide legal services to its customers. *Richmond Assn of Credit Men v. Bar Assn of City of Richmond*, 167 Va. 327, 189 S.E. 153 (1937); [UPL Op. #60](#) (1985). Under both CRESPA and the UPL rules, only an attorney engaged in private practice specifically retained by the seller may undertake legal representation of the sellerâ?• UPL 197. Nothing prohibits an attorney from having a private practice as well as being employed by a title company. Special care must be taken to maintain separation and avoid a conflict of interest.
- The fourth question in UPL197 asks if an attorney in his capacity as an owner/employee of a title company can provide legal services for clients of the title company? Clearly the answer is no. An attorney employed by a business as an employee cannot rise above the level of the employer. If the business is not a law office, then the attorney cannot, as owner or employee of a title and settlement service company, provide legal advice and services to the client. Nothing, however, prevents him from having a separate law practice, which question was not asked nor answered in LEO 197. Special care must be taken to maintain separation and avoid a conflict of interest.

Another question not asked nor answered in LEO 197 is whether there are any services a non-attorney can provide for a seller in a residential real estate transaction. When you focus on the purpose of Bar rules, which is to protect the public and not to give attorneys a monopoly on certain business functions, itâ??s difficult to see how the public is harmed if a non-attorney provides clerical functions for a seller in a split transaction, when essentially the same functions can be provided for the borrower in a refinance transaction, or exactly the same functions can be provided for a seller when the non-attorney settlement provider is handling both sides of the transaction. It appears people are dealing with semantics rather than protecting the public.

Forms

- Non-attorneys are prohibited from preparing legal documents, unless specifically authorized to do so. The Bar regulations^[6], based on statute, UPL opinions and LEOs allow:
 - completing form documents selected by and in accordance with the instructions of the parties to the transaction, but not drafting or selecting such documents;
 - drafting receipts and certificates of satisfaction, but not deeds, deeds of trust, deed of trust notes, or deeds of release; and
 - completing other forms such as the Owner's/Seller's Affidavit, Notice of Availability, and tax reporting forms including FIRPTA, 1099, VA R-5, and VA R-5E.
- A footnote to UPL 197 states "A non-lawyer settlement agent registered under CRESPA is authorized to prepare settlement statements and complete form documents and instruments selected by and in accordance with instructions of the parties to the transaction. Virginia Code § 6.1-2.20. A non-lawyer shall not, with or without compensation, prepare for another legal instruments of any character affecting the title to or use of real estate UPR 6-103 (A)."
- In connection with a real estate closing, the Virginia State Bar in its rules prohibiting the unauthorized practice of law, has stated that the following tasks, among others, may be performed by a non-lawyer Settlement Agent and do not involve the practice of law^[7]:
 - ordering a survey, termite or other inspection(s), casualty insurance or certificates of insurance, lien payoff figures, loan checks or title insurance;
 - creating or preparing a title abstract
 - determining the status of utility services and assisting in their transfer;
 - making mathematical calculations involving the proration of taxes, insurance, rent, interest and the like in accordance with the contract or local custom;
 - completing form documents selected by and in accordance with the instructions of the parties to the transaction, but not drafting or selecting such documents;
 - obtaining lien waivers from mechanics or materialmen in a form acceptable to the parties in interest, but not drafting such waivers or giving advice as to the legal sufficiency thereof;
 - preparing settlement statements, such as the HUD-1;
 - receiving and disbursing settlement funds;
 - drafting receipts and certificates of satisfaction, but not deeds, deeds of trust, deed of trust notes, or deeds of release;
 - completing other forms such as the Owner's/Seller's Affidavit, Notice of Availability, and tax reporting forms including FIRPTA, 1099, VA R-5, and VA R-5E.
- Virginia Code § 55-525.16 defines "Escrow, closing, or settlement services" as "the administrative and clerical services required to carry out the terms of contracts affecting real estate. These services include
 - placing orders for title insurance,
 - receiving and issuing receipts for money received from the parties,
 - ordering loan checks and payoffs,
 - ordering surveys and inspections,
 - preparing settlement statements or closing disclosures,
 - determining that all closing documents conform to the parties' contract requirements,
 - setting the closing appointment,
 - following up with the parties to ensure that the transaction progresses to closing,
 - ascertaining that the lenders' instructions have been satisfied,

- conducting a closing conference at which the documents are executed,
- receiving and disbursing funds,
- completing form documents and instruments selected by and in accordance with instructions of the parties to the transaction,
- handling or arranging for the recording of documents,
- sending recorded documents to the lender,
- sending the recorded deed and the title policy to the buyer, and
- reporting federal income tax information for the real estate sale to the Internal Revenue Service.â?•
- Questions:
 - **Can a title agent show parties a form that is acceptable for title insurance purposes?** Yes, a licensed title agent can clearly show parties a form that would be acceptable for title insurance purposes. The party involved need not use that specific form, but may provide one essentially the same. A problem arises, especially with indemnity agreements where one title underwriter is named in the agreement, but another underwriter is issuing the policy. In those cases, the title agent can require a specific form be used.
 - **Can a settlement agent determine if a form meets the requirements of the contract or title commitment?** Yes, thatâ??s one of the basic roles outlined by statute in the definition of escrow or closing services: â??determining that all closing documents conform to the partiesâ?? contract requirements.[8]â?• If the settlement agent is also a title agent they can also determine if documents are satisfactory to meet title insurance requirements.
 - **Can a settlement agent determine if the form is the proper form for a specific transaction?** This doesnâ??t seem significantly different from questions b, just above. Other than contract and title commitment requirements the only other documents involved generally come from a lender. The statute lists â??ascertaining that the lendersâ?? instructions have been satisfiedâ?• as an escrow function. Cases have arisen where lenders send the wrong forms and expect settlement agents to correct the problem at the settlement agentâ??s expense rather than admitting the lender made an error. If a settlement agent wants to continue to do business with that particular lender he must decide who to respond to such a demand. What types of things could be missing from a loan package a settlement agent might question: the deed of trust is missing a 1-4 family rider when the residential real estate is used for investment purposes; an HOA rider; the fact a HUD deed of trust form rather than a V.A. deed of trust form is being signed; etc. If you are aware this has occurred, question the lender prior to settlement, if possible.

Miscellaneous Matters

According to the Barâ??s UPL Guidelines[9] â??defining what is â??legal adviceâ?• is difficult; however, examples of â??legal adviceâ?• which, if provided by a Settlement Agent would be the â??unauthorized practice of law,â?• include:

- explaining the legal obligations of the parties under the real estate sales contract;
- explaining the meaning of legal terms used in taking title to property or advising the parties to the transaction which way to take title to the property;
- explaining the legal obligations of the parties under the loan documents;
- explaining the legal effect of an item reported as an exception in a title commitment;

- explaining the legal effect of a document in the chain of title;
- drafting legal instruments for a party to the transaction, other than completing form documents selected by and in accordance with the instructions of the parties to the transaction;
- selecting a legal instrument for a party if to do so requires the exercise of legal judgment;
- instructing or assisting a party in the completion of a legal document if to do so requires the exercise of legal judgment;
- providing legal opinions in response to the following types of questions:
 - “What should I do?”
 - “What are my rights or obligations under this document?”
 - “What are the lender’s rights or obligations under this document?”

However, as a title insurance agent you can discuss the coverage of the insurance product you are selling. Generally all communications explaining anything should be prefaced with “For title insurance purposes”

Questions to consider:

Can a non-attorney settlement agent

1. **determine contract terms have been met?** Va. Code § [55-525.16](#) defines “Escrow, closing, or settlement services” to include “determining that all closing documents conform to the parties’ contract requirements,” but does not specifically say a lay settlement company can determine contract terms have been met. Again, this may be a matter of semantics. If all the contract terms have not been met what options does the lay settlement agent have?
2. **refuse to handle a transaction?** As long as you are not discriminatory you may refuse to work for anyone in any transaction. Most settlement agents are happy to have all the business they can get, but sometimes you may have had experience with a particularly difficult purchaser, seller, real estate agent, lender or other party to a transaction. You have the right to decline to provide settlement services if you choose to do so in a case by case basis, as long as you are not discriminatory. For example, if a purchaser is hearing impaired for you must provide, at your expense under ADA, [\[10\]](#) a qualified interpreter, you may not refuse to handle the transaction nor charge a higher fee to cover the additional expense.
3. **change settlement date without a contract addendum?** This question has an “it depends” answer. Technically, taking the large view, oral contracts for real estate are perfectly legitimate. A buyer and seller can close based on a verbal agreement. However, the statute of frauds requires agreements regarding the sale of real estate be in writing to be enforceable if one party or the other changes their mind and the matter needs to be decided by the court. In addition, Va. Code statutes regarding real estate settlements and settlement agents require that the agents follow the written instructions of the parties to the transactions. Whether an addendum is needed to change the settlement date depends on the contract form being used and the customs and traditions in your part of Virginia. For example, in Northern Virginia it is common to have a “time is of the essence” statement in the contract, which means the contract is ended if the closing does not occur by the stated date. In that case you absolutely must have an addendum. In Central Virginia and other parts of the state, the contracts may say closing will be “on or about (date), or as soon thereafter as all documents may be prepared which in any case will not be more than (number) days after this date.” This gives the parties more flexibility and may not

- need an addendum. If you anticipate any problems, it's safer to have the change in writing.
4. **give a free home warranty to purchaser?** At this point in your head you should be hearing Robbie the Robot saying "Danger Will Robinson. Danger." The Bureau of Insurance has held since 1996 ([Administrative Letter 1996-2](#)) that offering a free home warranty with the purchase of a title insurance policy violates Va. Code [§38.2-509\(2\)](#) prohibiting rebates in all types of insurance. You may not "Pay, allow or give, or offer to pay, allow or give, directly or indirectly, as inducement to any insurance or annuity contract, any rebate of premium payable on the contract, any special favor or advantage in the dividends or other benefits on the contract, any valuable consideration or inducement not specified in the contract."
 5. **give a discount to veterans? Or others?** Va. Code [§38.2-4608](#) allows individual title insurance agents to "charge risk rates that it negotiates with any potential insured. Such negotiated rates shall be presumed not to be unfairly discriminatory and not to violate [§ 38.2-509](#) if such rates comply in all other respects with subsection A," i.e., is not discriminatory.
 6. **handle a commercial settlement?** Although RESA registration applies primarily to 1-4 family residential transactions, [§55-525.18](#) allow a properly licensed lay settlement agent to provide escrow services for any real estate transaction in Virginia. [§55-525.8](#) et. seq. Real Estate Settlements (the old Wet Settlement statutes) only apply to 1-4 family residential properties with a lender on a first deed of trust or mortgage. None of these sections apply to commercial transactions.
 7. **act as a short sale negotiator?** Nothing prohibits a settlement agent from being a short sale negotiator. The biggest risk is a potential UPL allegation regarding legal advice being given.
 8. **propose solutions when disagreements arise?** Take particular care in this situation. You cannot advise a customer. You can inform them within the context of title insurance coverage of how their title policy will cover them, or not, as the case may be.
 9. **deliver loan payoff to someone other than the lender if so instructed by seller's attorney?** Va. Code consistently says that funds are to be disbursed according to written instructions of the parties. Most of us believe the ALTA settlement statement or similar disbursement sheet to be sufficient to provide the instructions, coupled with the contract and other documents in the sale transaction. Federal law, outside the purview of this discussion, also requires disbursement according to the closing disclosure. Disbursing a payoff to a seller's attorney for that person to send to the seller's lender is not a sensible practice in this day and age. It costs the seller additional per diem interest as the funds are sent by check rather than wire, causing unnecessary delay. See also Va. Code [§ 55-525.24](#) and [§55-525.25](#). Isn't it misleading to say you are paying someone when, in fact, you are delivering the payment to another person?
 10. **add a legal description to a deed?** In many areas of the state it is common practice for the settlement agent to add the legal description to the deed provided by the attorney. Generally the attorney will provide instructions to do so. The rules allow settlement agents to complete documents under instructions from the person providing the document.
 11. **Record documents prior to funding?** Va. Code [§55-525.24](#), [55-525.8](#), and [55-525.11](#) In a purchase transaction secured by a deed of trust, the definitions state settlement doesn't occur until you have loan funds deposited in your account. Implied is the fact you need authority to disburse the funds prior to having settlement. "Funds shall be applied only in accordance with the terms of the individual instructions or agreements under which the funds were accepted." Also, "Funds held in an escrow account shall be disbursed only pursuant to a written instruction or agreement specifying how and to whom such funds may be disbursed."

Recording prior to funding is primarily an issue in refinance transactions. If you record prior to funding and the consumer revokes the transaction you must get the documents released of record. Better course of action is to withhold recording until funding is in your escrow account ready for use.

12. **Disburse funds prior to recordation?** Va. Code [Â§55-525.24](#), [55-525.8](#), and [55-525.11](#) The same rules apply: [â??â??](#) funds shall be applied only in accordance with the terms of the individual instructions or agreements under which the funds were accepted.â?• Also, [â??](#)Funds held in an escrow account shall be disbursed only pursuant to a written instruction or agreement specifying how and to whom such funds may be disbursed.â?• If the lender providing funds as well as the purchaser authorize disbursement prior to recordation, you may do so. Generally, if a clean title insurance policy is issued, i. e., no exception for anything affecting title that has been recorded since the date of the commitment, the insured may not object to recording prior to recordation. Be sure to have written authorization if you choose to do this.

References

[1] Va. Code [Â§ 55-525.16](#) et. seq. (Real Estate Settlement Agents) and Va. Code [Â§ 55-525.8](#) et. seq. (Real Estate Settlements)

[2] BOI administrative letters <https://www.scc.virginia.gov/boi/adminlets/index.aspx> ; licensing requirements <https://www.scc.virginia.gov/boi/pro/resa/reqtsa.aspx>

[3] [Real Estate Settlement Agent Overview](#); [Real Estate Settlement Agents regulations](#);

[4] [VSB Legal Ethics Opinions](#)

[5] [UPL Bar guidelines for S.A. as of 10/01/2010](#)

[6] [Unauthorized Practice of Law \(UPL\) Guidelines for Real Estate Settlement Agents](#)

[7] Id

[8] Va. Code [Â§ 55-525.16](#)

[9] ibid

[10] Americans with Disabilities Act, effective communication guidelines <https://www.ada.gov/effective-comm.htm>



Kay M. Creasman, Esq., VCTE, VCTSA

AVP & Counsel
Old Republic National Title Insurance Company

Kay M. Creasman is Assistant Vice President and Counsel for Old Republic Title in Virginia. She serves on the Real Property Section of the Virginia State Bar and is a frequent speaker for the Virginia Land Title Association.

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Author

vltaexaminer

VLTA Examiner