Practice Tips for Commercial Real Estate Closings: a Checklist of Checklists

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Often "more experienced" real estate attorneys are asked to share practice tips to ensure commercial real estate closings run smoothly for "less experienced" attorneys. This article is a summary of 35 years of lessons learned by the author.

1. Checklists.

Do not close a commercial transaction without using checklists. There are checklists for everything.[1] If you don't use a checklist, chances are you will overlook something critical.

2. Deadlines.

One of the first things you need to do is verify all deadlines. As soon as you are given a signed contract to close, check the due-diligence deadline, the closing deadline and any other deadlines (such as a deadline for title objections). "Tickle" these deadlines. Verify with your client sufficiently before the expiration of the due-diligence period that the client desires to proceed to close. If you don't, and the earnest money "goes hard" after the expiration of the due-diligence period, your client will likely be unhappy at the loss of non-refundable earnest money (and, worse, maybe unhappy with you).

For each deadline, check to see if there is a "time of the essence" provision. If the due-diligence deadline and the closing deadline do not provide that "time is of the essence," is there a catch all "time is of the essence" provision in the boiler-plate provisions? In NC, a "time is of the essence" provision means the deadline is firm. Do not assume it will be waived!

If your client asks you to amend the contract to extend the due-diligence deadline and/or closing deadline, should you include a "time is of the essence" provision for each of the new dates? Make sure you consider this in drafting the amendment.

3. Documents.

Before preparing any documents for closing, check to make sure the contract did not include pre-negotiated forms as exhibits. If so, you need to use those.

[1] For a variety of checklists, see Margaret Shea Burnham and Erin Sloan Cowan, "Commercial Real Estate Purchase Agreements: Agreeing to Disagree" (NCBA, August 2016) [copy available at www.nexsenpruet.com/professionals/margaret-burnham].

Also, the contract may include required terms to include in the closing documents, such as an "AS IS" clause. Make sure you comply with all custom provisions included in the contract.

In preparing documents that are "fill in the blank," beware of careless mistakes. For example, if using a form Deed of Trust to secure a Guaranty, be sure to modify the language in the form that presumes the Deed of Trust would secure a Note.

Also, remember what you learned in law school – the Rule Against Perpetuities ("RAP") is alive and well in NC.[2] Be sure to take the RAP (both statutory and common law) into account when drafting options and rights of first refusal.

In preparing documents for recording, pay attention to the "prepared by" block required for recording.[3] First, if you are local counsel, consider adding your firm's information below out-of-state counsel's information with a notation along the lines of "[serving as NC local counsel]." Second, consider a notation to make it clear, where appropriate, which party you are representing. For example, if you are preparing an easement for the Grantee's benefit, consider adding the following after your firm's information: "[prepared as counsel for Grantee]." This might eliminate a claim later that you also owed a duty to the Grantor. Third, be aware of recent amendments to NCGS §47-17.1 (Session Law 2018-80 effective 6/25/18).[4]

As seller's counsel, two issues will arise before you begin drafting the Deed. First, is the deed a General Warranty Deed or a Special Warranty Deed? Second, will the exceptions be "general" (such as easements, restrictions and rights of way of record, if any) or limited to "permitted exceptions" (typically being the list from the buyer's title commitment). Hopefully, these issues have been addressed in either the purchase contract or the form Deed attached as an exhibit to the purchase contract. If not, these are issues to be discussed/negotiated with buyer's counsel *prior to* closing to avoid a dispute *at* closing. What if the parties cannot agree on the form of the Deed?

Also, as seller's counsel, it is customary to add qualifying language that "no title search was performed" on the first page of the Deed after the drafter's name. In preparing a Deed for the seller as *buyer's counsel*, be familiar with 2004 FEO 10.

Besides the Deed, consult a closing checklist for all other documents needed (and consult the purchase contract for all necessary and appropriate custom documents). At a minimum, you will need the applicable lien affidavit, the IRS 1099-S (and possibly the NC-1099NRS for non-

[2] To refresh your memory on the RAP, watch Kathleen Turner and William Hurt in the 1981 movie "Body Heat."
[3] See NCGS §47-17.1 (amended effective 6/25/18).
[4] The recent amendment to NCGS §47-17.1 provides: "For the purposes of this section, the register of deeds shall accept the written representation of the individual presenting the deed or deed of trust for registration, or any individual reasonably related to the transaction, including, but not limited to, any employee of a title insurance company or agency purporting to be involved with the transaction, that the individual or law firm listed on the first page is a validly licensed attorney or validly existing law firm in this State or another jurisdiction within the United States."

resident sellers), and the FIRPTA certificate.[5] Be aware that completion of the 1099 and FIRPTA involves an inquiry as to any "disregarded entity" status.[6] Frequently, the contract provides for the seller (and maybe the buyer) to sign a certificate that the representations and warranties contained in the purchase contract are still true and correct.

On occasion, you will need a Hypothecation Agreement for a commercial closing. This is a simple, one-page form used to document consideration when applicable. For example, if a third party is pledging collateral, the Hypothecation Agreement would be used to set forth the relationship of the pledgor to the borrower to document consideration for the pledge of collateral.

When drafting any closing document, professional courtesy dictates that you provide counsel for the other side a "redline" to call out any changes from prior drafts.[7]

4. Dating documents.

It is essential in NC to make sure the Note and Deed of Trust have matching dates.[8] If your Deed of Trust says it secures a Note "of even date herewith," it is your responsibility to make sure the Note and Deed of Trust are dated the same date.

If you are giving an opinion that the loan documents are valid, binding and enforceable, have you taken into account whether the documents have all been dated the same date? What if the lender (and not you as borrower's counsel) will be dating the documents after you rendered your opinion? If you are not personally dating the documents, add an "assumption" to the opinion letter that you assume the loan documents will be dated the same date by the lender or lender's counsel. See *Section 15* below for more tips on opinion letters.

5. Executing documents.

Don't assume the parties executing the closing documents are authorized to do so. The easiest way for you to gauge your responsibility is to review the execution of the documents as though you were being asked to render an opinion to the lender. For example, if you were issuing an opinion letter, you would verify that each party was duly authorized to sign, backed up by the appropriate entity consents and good-standing certificates.

For a foreign entity, also check that the entity is in good standing in its home state and whether the entity is required to qualify to do business in North Carolina.

It gets a bit more complex when there are multiple entities in one signature block. In this event, it is wise to verify the authority and good-standing status for each entity. And, carefully proof all signature blocks and notary acknowledgements to make sure they match the authorized signatories. Also, the notary acknowledgements need to be in a form acceptable to record in

[5] For recent changes on FIRPTA regulations, see Chris Burti, "FIRPTA Requirements Changed February 16, 2016," Statewide Title Newsletter and Legal Memorandum (Vol. 22, No. 2, February 25, 2016).
[6] See 26 CFR §301.7701-3(a).
[7] See Lefever v. Taylor, No. COA08-1278, 2009 WL 2177323 (N.C. Ct. App. Jul. 21, 2009).
[8] See In re Head Grading Co., Inc. (Beaman v. Head), 353 B.R. 122 (E.D.N.C. 2006).

North Carolina, complying with NC notary laws or satisfying the requirements for a notary acknowledgment in a sister state.[9]

6. Escrow closings.

If you are the closing attorney, you are *de facto* in charge. Make sure all parties know what they have to sign and when. Make sure when documents are returned they have been properly completed (with all exhibits attached), dated (the same date), signed (by all), and notarized. Be familiar with North Carolina State Bar ethics opinions when serving as escrow agent. See 2008 FEO 7, 99 FEO 8 and 98 FEO 11.

7. Escrow closing instruction letters.

If you are conducting the closing and you receive an escrow closing instruction letter, read it carefully. What are the conditions before you can record? Can you comply? If not, what modifications are necessary?

If you have prepared the seller documents and you are forwarding originals to the buyer's counsel for a closing, and neither you nor your client plans to attend, what will be your closing instructions as seller's counsel to buyer's counsel to protect your client? Have you ensured the closing instruction letter has been signed before you forward originals?

Likewise, what do you need to have signed before you transfer the earnest-money deposit to buyer's counsel (to ensure its safe and timely return if closing does not occur for some reason)?

8. Closing statement and addendum.

Of course it is up to you as the closing attorney to make sure the closing statement is accurate in all respects and that it balances. Likewise, it is up to you as the closing attorney to verify you have "good funds." [10] This is obvious and not new. What is new is the practice of some law firms to add an "addendum" to the closing statement. The addendum might cover some or all of the following:

- receipt of "good funds" as a closing contingency;
- accuracy of the wire instructions;
- accuracy of the closing figures;
- calculations of prorations and whether or not the parties will re-calculate prorations when "final" figures are available (or accept the estimated prorations);
- whether or not the parties will agree to correct the closing statement with regard to inadvertent errors;
- representations and warranties;
- any open issues (such as an escrow or punch-list items)

[9] See NCGS §47-2.2 for requirements of notary acknowledgements taken in a sister state.
[10] See NCGS §45A-1 et seq.; see also RPC 191 and 2013 FEO 13.

- execution formalities (execution by counterparts, execution by facsimile or electronic signatures, etc.); and
- authority of closing attorney to disburse.

If you are seller's counsel and you receive a closing-statement addendum from buyer's counsel, read the addendum (usually with a host of footnotes) carefully. Are the terms redundant of provisions already in the purchase contract? Do the terms effectively modify the purchase contract? Are the terms fair and appropriate? Are the terms self-serving? Would you ask the other party to sign the same? You are not obligated to agree to new terms in a closing-statement addendum that are not in the purchase contract. The only obligation in the (typical) purchase contract is to have a closing statement signed by the buyer, the seller, and the closing attorney. On the flip side, have you considered drafting a closing-statement addendum when you are buyer's counsel? What terms would you include?

9. Scams.

It is your responsibility to stay on top of the latest scams.[11] The most recent scams have involved interception of wires via falsified wire instructions and falsified payoff statements. Protect yourself, your firm and your client. At a bare minimum, you will need to verify the wire instructions and the payoff statement. Consider the standard of care for such verification. If the email has been intercepted, you obviously cannot rely on the contact information in the intercepted email to verify this information. Also, have your firm use encrypted email to safeguard your emails.

10. On-line title searches and e-recording.

The advent of on-line title searches and e-recording raise new issues for closing attorneys. Some of the emerging issues to consider are:

- what documents are available on line in the subject jurisdiction?
- how current and complete are the on-line records?
- how are you searching records that are not available on-line through the office of the Register of Deeds, such as judgments, special proceedings, taxes, water liens (if applicable), etc.?
- are you doing just the initial search on line or also your update?
- for the update, what additional issues do you need to consider?
- do you need to make a disclosure to your client that you are relying upon on-line records (and e-recording)?[12]
- do you need to make a disclosure to the title company in your preliminary/final opinion on title that you are relying upon on-line records (and e-recording)?[13]

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[11] See, for example, T. Crawford, *Warning: New Twists In Fraud – Interception Of Incoming Wires*, The Property Line, Vol. 38, No. 2 (N.C.B.A. Real Property Section, April 2017).

[12] See sample client disclosure form attached hereto as Exhibit A.

[13] Examples of possible disclosures to include in your preliminary/final title opinion:

(a) "Any inaccuracies in the public records obtained for this opinion via online access."

- Is the document you are submitting as the "original" an exact duplicate of the signed "original?"

If you plan on e-recording, have you checked to make sure the applicable Register of Deeds where you are e-recording is set up for e-recording? Some are not! And have you checked to see if a particular county has tacked on an e-recording fee (apart from the service provider's e-recording fee) to collect on the closing statement? Learning about the fee after the closing statement has been signed is too late! *You* are now paying the fee!

Once you have e-recorded, what steps are you taking to preserve the "original" that you scanned to the Register of Deeds? There does not seem to be a clear answer as to what constitutes the "original" when e-recording. Even if you assume the "original" is the recorded version, the lender will (typically) require in its loan instructions that the "original" loan documents be returned to the lender. Suggestion: Print the recorded version of the e-recorded document and take the first page showing the book and page where/when recorded, and clip that to the "wet ink" original. Invest in a (red) stamp that says "**ORIGINAL/E-recording**" and stamp the "wet ink" original. Decide which party will be entrusted with that "original" just as you would other originals that have been recorded the traditional way at the Register of Deeds.

In e-recording, also consider whether there are contractual terms imposed on you by the service provider (that takes your scanned "copy" of the original and then uploads it to the Register of Deeds). Are there also contractual terms imposed by the Register of Deeds? Are all such terms acceptable?

11. Loan documents.

First of all, read the loan commitment. Do the loan terms (interest rate, term of loan, etc.) comply with the commitment letter?

Second, read the loan documents OR get a waiver from your client that your client is satisfied with the lender's standard loan documents and does not desire that you to read them, verify them, explain them or negotiate them!

In reviewing loan documents, do not assume that the loan documents are non-negotiable! There are certain provisions that "most" lenders will agree to modify. For example, if your client is a small family company where there are anticipated family transfers of membership interests from time to time, the lender may agree to modify the "due on sale" provision to exempt certain family transfers. Often times, these approved modifications are documented in the form of an addendum to the standard-form loan documents.

(b) "Any inaccuracies in the judgment search through the automated civil case processing system ("VCAP") provided by the NC Administrative Office of the Courts."
(c) "Any inaccuracies in the public records as a result of (i) original documents being electronically recorded, or (ii) delays in recording caused by the e-recording process."

12. Due diligence.

This article primarily focuses on the closing itself. However, when you are given a contract to close, make a due-diligence checklist. Verify with the client which portions of the due diligence the client will conduct and which the client wants you to conduct.[14] Some clients will do the vast majority of their due diligence themselves, looking for you just to do the title search/UCC search and to order the zoning letter. Other clients will have you do everything. The important thing is to make sure nothing slips through the cracks. Always keep in mind that NC is a *caveat emptor* state.[15]

If a client decides to waive certain due diligence inspections, against your recommendation, document the waiver in a signed writing that you advised that the due diligence be conducted. The better practice in using such a waiver would be to have it signed at the commencement of the due diligence period and not to wait until closing (when it is too late to persuade your client to undertake the missing due diligence inspections).

A thorough review of due diligence is beyond the scope of these practice tips for closings; however, surveys and environmental due diligence deserve special mention.

Surveys, and proper drafting of metes and bounds legal descriptions, require attention to detail. It is your responsibility to make sure the new legal description can be located on the ground (with a proper "beginning point") and "closes." Drafting a legal description is really an art form.[16] In reviewing the survey, carefully study each item shown on the survey and read each "note." Matters shown on the survey need to be listed on your title opinion. Look for gaps, encroachments, discrepancies from the legal description in your chain, discrepancies in acreage, etc.

Environmental due diligence is especially important. Suffice it to say that no commercial property should be purchased without a Phase I environmental site assessment which conforms to "all appropriate inquiry" regulations promulgated by the U.S. Environmental Protection Agency. Verify the party responsible for ordering the report and that it can be completed prior to the expiration of the due diligence period. If the report identifies any "Recognized Environmental Conditions," you should recommend that your client review and discuss with an environmental attorney (or at least with the environmental consultant who prepared the Phase I report). The Phase I must be completed before closing to preserve the bona fide prospective purchaser defense under federal law. Additionally, certain components of the Phase I environmental site assessment must be conducted within 180 days of closing and the entire assessment must be conducted within one year of closing. Also make sure the Phase I report is in the name of the party taking title. Frequently, a Phase I report is ordered before a "special purpose entity" is formed to take title. That means the Phase I may be in the name of the party

[14] For an example of what can go wrong with due diligence inspections, see Clouse v. Gordon, 115 N.C. App. 500, 445 S.E.2d 428 (1994).
[15] See Margaret Burnham, "Caveat Emptor and the Disgruntled Buyer" (updated April 2008)[copy available at www.nexsenpruet.com/professionals/ margaret-burnham]
[16] Ann M. Cantrell, NCCP, "Preparing Efficient and Effective Legal Descriptions," Paralegal Perspectives (Vol. 12, No. 4, NCBA Legal Assistants Division, June 2009).

ordering the report and not necessarily in the name of the party taking title at closing. If so, the environmental consultant can provide a reliance letter for the entity taking title. Depending on the nature of the property and any proposed redevelopment, environmental due diligence may also include a wetlands determination, asbestos survey, lead paint inspection, radon inspection and other inspections to determine the suitability of the property for use and redevelopment. [17]

13. Insurance.

Insurance is a good example of why you need a checklist. If there is no lender to require evidence of insurance as part of the closing instructions, don't you still want to make sure it is in place? Will your buyer remember? Keep Murphy's Law in mind: If there is no insurance in place, something calamitous will happen. When reviewing evidence of insurance, you obviously won't be the expert on the amount of coverage that is appropriate. However, you can verify the stated coverage is appropriate with the client (and lender if there is one). You can easily verify the proper name of the insured (and, in a loan closing, adding the lender as an additional insured), the effective date of coverage, the property description, etc.

14. Title insurance.

Title insurance is a topic unto itself. Keep in mind a couple of beginner tips:

- check with your client for consent to "tack" (see RPC 99);
- consider the standard of care in updating from an owner's policy versus a mortgagee's policy (see 2009 FEO 17, modifying a portion of RPC 99);
- if there is a loan, check to see if your client desires additional coverage for the delta between the loan amount and the purchase price;
- consider appropriate standard endorsements to the policy (checklists for available endorsements are readily available from title insurance companies);
- consider any appropriate "custom" endorsements;
- check LIENSNC.com for any MLA filings; and
- check for any broker liens.[18]

15. Opinion letters.

A lot has been written about opinion letters, and you must become totally familiar with this area of practice before issuing your first opinion.[19] In fact, if you are in a law firm, you may be prohibited from signing an opinion letter without it being reviewed by a partner or an opinion-letter committee.

In issuing an opinion, consider what is different about your transaction and modify the opinion letter accordingly. For example, if your opinion involves a foreign lender, and you are

[17] The author is grateful for the input from her law partner, Joan Hartley, Esq., for the update to the environmental due diligence provisions.
[18] NCGS §44A-24.1, et seq..
[19] Margaret Shea Burnham, "Opinion Letter Do's and Don'ts" (NCBA, Real Property Section, Vol. 34, No. 1, September 2012).

not giving an opinion as to whether the lender needs to be licensed or qualified in NC to do business, carve that out. If you are only NC counsel and there are issues involving something out of state, carve that out also.

Have you properly included all necessary assumptions and qualifications? Have you read all of the documents listed in the opinion (or, in some cases, the documents incorporated by reference into other documents)? If you are only giving an opinion on a Deed of Trust, don't include other documents in the list of documents "reviewed." Did you see all parties execute the loan documents? If not, you need to carve out the parties you did not personally see sign. Did you date all of the loan documents yourself so that you can verify they are all the same date? If not, you need to add an assumption that the lender or lender's counsel will date all documents the same date. These are just a few examples of the types of issues that arise with opinion letters to give you a flavor of the issues involved.

16. Shared document sites.

There are many commercial closings in which some type of on-line document-sharing system is utilized. Make sure the site is secure. If you don't know, check with an IT professional. Your duty to safeguard client confidentiality means this matters to you before you upload documents.

17. Conflicts.

Many conflicts arise in the context of a commercial closing because of the number of parties, and the fact that many law firms do work for lenders that in turn make loans to other clients of the law firm.[20] Make sure you have identified all parties to the transaction. For example, if there is a new limited liability company being formed, who owns it? Should each "member" of the limited liability company be listed in the conflicts check?

If there is a conflict, the parties may be agreeable to waiving the conflict. Typically, a conflict letter provides that the conflict waiver is for this transaction only and that if the parties later have a dispute, the law firm will not handle litigation against the lender. Make sure to get the conflict waiver in writing from both parties.

Note that the North Carolina State Bar has issued an ethics opinion that an attorney may not generally represent both a lender and a borrower in a commercial real estate closing (absent satisfaction of an eight-part test).[21]

Even when there is no conflict, you may be well served to have a conflicts disclosure signed by any party not represented by counsel clarifying what party you represent and what party you do not represent.[22]

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[20] See, e.g., Kingsdown, Inc. v. Hinshaw, No. 14 CVS 1701, 2015 WL 1406311 (N.C. Ct. App. Mar. 25, 2015)(see also multiple related references to this opinion).
[21] See 2013 FEO 14.
[22] See Broyhill v. Aycock & Spence, 102 N.C. App. 382, 402 S.E.2d 167, aff'd per curiam, 330 N.C. 438, 410 S.E.2d 392 (1991).

EXHIBIT A
Sample client disclosure form

Disclosure regarding [insert law firm]'s practices concerning on-line title searches and e-recording

Traditionally, title searches were conducted in person at the applicable offices where public records are located, including the Register of Deeds, the Clerk of Court (judgments and pending civil actions if applicable), Special Proceedings (foreclosures, incompetency and guardianships, etc.), Tax Department, and applicable City services (such as water liens if applicable). Much of this information is now available on line. For example, many Registers of Deeds provide on-line access to all of the same deeds, deeds of trust, easements, etc. that are available at the Register of Deeds. Likewise, judgments may now be checked by an online database provided by the Administrative Office of the Courts. These services provide comparable data but may not be considered the "official" version. In an effort to reduce attorney time and to practice law efficiently, we have incorporated on-line searches when available and when we believe the on-line search to be the reasonable equivalent of the public records available in a traditional title search.

Similarly, North Carolina now permits e-recording in counties which have implemented this service. Electronic recording ("e-recording") means that original documents previously recorded by presentation at each applicable Register of Deeds office (in person or by mail) can now be scanned and uploaded for e-recording. The "original" (wet signature) remains at the law firm since the scanned copy (an exact duplicate of the "wet signature" original) is what is uploaded and then recorded. Our firm's practice is to print a copy of the front page of the recorded document to attach to the "wet signature" original, which we then stamp "Original – E-recording" to identify and preserve the "wet signature" original to distribute to the appropriate party (lender, buyer, seller, tenant, etc.).

We have considered the issues regarding on-line title searches and e-recording and it is our opinion that on-line searches and e-recording protect client interests at the same time as lowering client costs.

If you have any questions about our practices, please let us know. If you prefer that title searches be performed only in the traditional manner, that can be arranged. If you prefer that actual originals be recorded by traditional presentation to the Register of Deeds (in person or by mail), that also can be arranged. In the absence of your objection, we will continue to use on-line title searches and e-recording when available.

Acknowledgement by Client:

Individual:	Company:
By:_____ Printed name:_____ Date:_____	Name:_____ By:_____ Printed name:_____ Date:_____