

# NY Real Estate Attorneys Play Consumer Protection Role in Changing Era

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While the traditional responsibilities of real estate attorneys in New York are well understood, new and evolving consumer protection regulations, including the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Consumer Financial Protection Bureau (CFPB) and the new TILA RESPA Integrated Disclosures (TRID) are forcing attorneys to confront new challenges and presenting new opportunities.

The challenges and opportunities are magnified and complicated by the fact that attorneys in New York already address some of the very consumer protection issues that the new federal, one-size-fits-all, laws and regulations target, creating inherent tension between multiple approaches to the same problem.

Moreover, we are likely only at the mid-point in a major evolution at the federal level, with considerable uncertainty ahead. The landscape will continue to change given the new political leadership at the federal level. Despite this, attorneys in New York cannot simply wait for the full story to unfold. As a result, this article takes a half-time approach: reviewing the first two quarters and outlining opportunities for attorneys in the second half of this regulatory upheaval.

## Role of Attorneys

The central role of the attorney in New York is a product of statute, enhanced and expanded by custom and practice. At the most basic level, New York provides that "[n]o natural person shall receive directly or indirectly, compensation ... for preparing deeds, mortgages, assignments, discharges, leases or other instruments affecting real estate ... unless he has been regularly admitted to practice, as an attorney or counselor, in the courts of record in the state" (N.Y. Jud. Law §484). There are also prohibitions against voluntary associations or corporations performing the above services, although there are some limited exceptions for title insurance companies. (N.Y. Jud. Law §§495 (3.5)). Certainly, the above list does not represent all of the functions of a real estate attorney in New York, but it does demonstrate how difficult it would be to conduct a closing in the state legally without an attorney.

Custom and practice have expanded and further entrenched the role of attorneys. Home buyers and sellers, real estate professionals, and lenders in New York all routinely turn to attorneys. Arguably, the tradition of attorneys representing all parties to a transaction provides a level of consumer protection absent in other areas of the country. Given the relative rarity of New York's approach—in which the buyer, seller and lender are all represented by separate counsel—it is worth considering whether the new disclosure rules and CFPB requirements would have been as broad or forceful if the rest of the country held New York's model. At this point, however, that question is somewhere between academic and pure conjecture.

## Bank Attorneys

Regardless of origin—and partially regardless of what the ultimate landscape will look like—attorneys need to chart a course in today's environment. The most obvious impact is on bank attorneys. Although attorneys are exempt from enforcement action related to many of their state regulated functions pursuant to §1027(e) of Dodd-Frank, the substantial liability lenders hold for their third-party providers' actions means that lender's attorneys must comply with the new regulations. Thus, in spite of §1027(e)—and absent a dedicated compliance effort—lenders' attorneys can easily incur in liability under Dodd-Frank and other regulations. In fact, the CFPB has interpreted §1002(14) to include compliance with the Real Estate Settlement Procedures Act (RESPA) and certain other statutes and regulations. This extends to the routine transmission and receipt of Non-Public Personal Information (NPPI) as part of the closing process. Many lenders now require that bank attorneys have the ability to send and receive encrypted emails—and a consistent mechanism to ensure that compliance—for this reason.

Banks are taking—and demanding their attorneys take—other security measures that drive higher cost and complexity, including:

- Complete background checks, including criminal and financial history of attorneys and other key personnel
- On-site inspection of law offices to ensure adequate security measures, including overall building security, check-in and check-out procedures for visitors and employees, proper storage and safeguarding of paper files, computers, printers, copiers, fax machines, and other documents or devices that might contain information related to the bank's transactions, including client's NPPI
- Review of trust account records, including bank statements and reconciliations

- Thorough IT review to ensure adequate computer systems with emphasis on log-in and log-out procedures for computers, proper installation of security software, including malware and anti-virus programs, and adequate email capabilities that will allow attorney to send and receive encrypted emails and attachments

### Closing Disclosures

In addition to vetting, attorneys must comply with new disclosure requirements including preliminary preparation of TRID's new Closing Disclosure (CD), before handing it off to the lender to finalize. For some attorneys, the CD alone has forced them to increase staff or shift responsibilities within their office.

Unfortunately, it does not appear that the increased costs associated with compliance have led to a significant upward shift in average attorney fees for bank or other work. Absent increased fees, law offices and title providers need to increase efficiency in order to maintain previous profit margins.

TRID's preclosing timeline has also created more complexity given that changes to the CD within three days of closing can force the parties to postpone the closing. Thus, it is imperative that the attorneys, title company and lender work together efficiently and effectively to compile the information, prepare a final CD at least three business days before closing and get confirmation of receipt from the borrower. Without that confirmation from the borrower, the three-day clock cannot start. This process has become so critical to the closing process that many high-volume bank attorneys have hired additional staff to work exclusively on supplying the information to the lender for the final CD, track borrower receipt and minimize the number of closings that are postponed or disrupted.

As indicated above, the bank attorney generally takes on the responsibility of providing the information to the lender for the preparation of the final CD. However, the title provider and both the purchaser's and seller's attorneys are often responsible for securing the information required. Failure to coordinate this flow of information and materials can cause unnecessary delays and problems in the closing process when there is a loan involved in the transaction. This raises the importance of selecting a title provider that can accommodate change requests and provide them in a timely manner.

### Conclusion

While any business can benefit from establishing a reputation for good customer service and a superior skill set, the ability to navigate new requirements with little or no impact on the client's overall customer experience is challenging. Attorneys need to demonstrate to potential clients, lenders, and other real estate professionals that they are well versed in the new requirements and have adjusted their practices and procedures to accommodate the same.

Gone are the days when attorneys can wait to review documents until just prior to—or even at—the closing table. Today's consumers are rarely impressed by watching an attorney do work in front of them that could have been done prior to closing. Indeed, this likely simply magnifies the borrower's stress and can increase acrimony at the table. Moreover, rescheduling closings because a change that could have been foreseen but nonetheless triggers a new three-day waiting period simply due to last minute review risks reputational damage and expense for the attorney.

New York consumers have always benefited from having attorneys represent their interests in a transaction. The new rules and requirements placed upon lenders, attorneys, and title companies may play more of a consumer protection role in states where individuals do not have the benefit of an attorney who can properly explain the details of their financing and real estate investment. However, working with the new rules to improve your customer service and improve the overall efficiency of your firm could allow you to stand apart and attract more clients.

Finally, adapting many of the same security practices and procedures in other areas of your practice could assist you in maintaining your client's privacy and protecting their personal information. Cyber security and privacy issues are of significant importance for today's clients in all practice areas. Working towards compliance for your lender and real estate clients could prove to be a benefit to your practice and your clients.

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