

**STATE BAR OF GEORGIA
FORMAL ADVISORY OPINION NO. 23-1**

QUESTION PRESENTED:

Can a lawyer fulfill his or her duties of “presence” at a real estate closing as required by Formal Advisory Opinion No. 00-3 and of overseeing and participating in the execution of instruments conveying title and being in control of the closing process from beginning to end as required by Formal Advisory Opinion No. 13-1 when using video conference?

SUMMARY ANSWER:

A lawyer closing a real estate transaction can satisfy their obligations under the Georgia Rules of Professional Conduct by performing those responsibilities incumbent upon them by the use of video conference so long as the lawyer is in control of the closing process from beginning to end.¹

OPINION:

The question presented is whether the Georgia Rules of Professional Conduct prohibit a lawyer from supervising the closing of a real estate transaction by video conference rather than being physically present at the closing of the transaction. More specifically, can a lawyer fulfill his or her duties of “presence” at a real estate closing as required by Formal Advisory Opinion No. 00-3 and of overseeing and participating in the execution of instruments conveying title and being in control of the closing process from beginning to end as required by Formal Advisory Opinion No. 13-1 by the use of video conference?

While neither statutory law nor the Georgia Rules of Professional Conduct require an in-person meeting of all parties to a real estate transaction to consummate the transfer of title, it has been customary, particularly in the residential real estate closing practice, that a “closing” attended by some or all of the parties occurs. Previous opinions have addressed scenarios where a paralegal attends a closing in lieu of the responsible lawyer with the lawyer being available by telephone, concluding that such conduct was impermissible as encouraging the unauthorized practice of law.² The specific reference in Formal Advisory Opinion No. 00-3 to the physical presence of the lawyer at closing was set in the context of where a paralegal was in the presence of the clients and overseeing the execution of documents. In that

¹ The term “video conference” refers to a remote conference of persons in different locations that is facilitated by technology that enables each of the participants in the closing – the lawyer, the parties to the transaction and any representatives of the parties – to see, hear, speak to and display documents to each of the other participants in real time.

² Formal Advisory Opinion Nos. 00-3 and 86-5

instance, the paralegal announced to the borrower that she was there to assist the lawyer in the closing process, yet the lawyer came into the closing only after it had begun. In this context, the Court determined that the lawyer's delegation of oversight of the closing resulted in assistance of the "unauthorized practice of law by creating the reasonable appearance to others that the lawyer was substituting a nonlawyer's legal knowledge and judgment for his or her own," and by doing so would be "misrepresenting the nature of the services provided and the nature of the representation in violation of Standards of Conduct 4 and 5." Formal Advisory Opinion No. 00-3 states "...the critical inquiry is what constitutes the participation of the attorney in the closing transaction. The lawyer must be in control of the closing process from beginning to end. The supervision of the paralegal must be direct and constant."

These opinions, however, do not directly address the issue of the use of video conference whereby the attorney attends the real estate closing, and participates in the closing from beginning to end. Additionally, the Supreme Court of Georgia in its Emergency Order of March 27, 2020³, reserved concluding that "physical presence" of an attorney at a closing was an "absolute" requirement. The Order states "The Court expresses no opinion about whether any of the Rules of Professional Conduct or any of these formal advisory opinions absolutely requires a lawyer to be physically present at the closing of a real estate transaction, and the Court issues this order only to alleviate any uncertainty about the obligation of closing attorneys to personally interact with others in close physical proximity during the ongoing COVID-19 outbreak".

The use of video conference technology to conduct personal and professional meetings has become commonplace among the public and within the practice of law. The use of such technology has become routine for legal proceedings such as depositions, hearings and even bench and jury trials. In the context of real estate transactions, the Supreme Court of Georgia filed the Emergency Order March 27, 2020, permitting lawyers to use "remote attendance" at real estate closings. In such cases, the use of video conference technology is the equivalent of physical presence.

Neither the Georgia Rules of Professional Conduct nor the previous opinions of this Board expressly prohibit a lawyer from the use of video conference to attend and conduct a real estate closing, including the use of such technology for the remote notarization of documents necessary to close such transactions if authorized by applicable State or Federal legislation. However, the attorney participating by video conference must comply with those rules and safeguards that are already adopted by the State Bar of Georgia and the Supreme Court of Georgia, which are applicable generally under the Georgia Rules of Professional Conduct in addition to those formal advisory opinions specifically addressing the real estate practice. The lawyer shall

³ In Re: Georgia Rules of Professional Conduct and Lawyers Participating in Closings of Real Estate Transactions, March 27, 2022.

maintain full professional and direct responsibility for the entire transaction and for the services rendered to the client.⁴ Additionally, the use of remote attendance by video conference must not be used to advance or encourage the unauthorized practice of law whereby the lawyer serves to delegate to a non-lawyer the duties of the lawyer, nor limit the scope of their responsibility. Finally, the lawyer in all real estate transactions must control the closing process from beginning to end, consistent with Formal Advisory Opinion No. 13-1.

⁴ See Formal Advisory Opinion No. 13-1