ICLE

COMMERCIAL REAL ESTATE

PROGRAM MATERIALS
November 6, 2018

Tuesday, November 6, 2018 **ICLE: State Bar Series**

COMMERCIAL REAL ESTATE

6 CLE Hours including
1 Ethics Hour | 1 Trial Practice Hour

Sponsored By: Institute of Continuing Legal Education

The Institute of Continuing Legal Education's publications are intended to provide current and accurate information on designated subject matter. They are offered as an aid to practicing attorneys to help them maintain professional competence with the understanding that the publisher is not rendering legal, accounting, or other professional advice. Attorneys should not rely solely on ICLE publications. Attorneys should research original and current sources of authority and take any other measures that are necessary and appropriate to ensure that they are in compliance with the pertinent rules of professional conduct for their jurisdiction.

ICLE gratefully acknowledges the efforts of the faculty in the preparation of this publication and the presentation of information on their designated subjects at the seminar. The opinions expressed by the faculty in their papers and presentations are their own and do not necessarily reflect the opinions of the Institute of Continuing Legal Education, its officers, or employees. The faculty is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. This publication was created to serve the continuing legal education needs of practicing attorneys.

ICLE does not encourage non-attorneys to use or purchase this publication in lieu of hiring a competent attorney or other professional. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

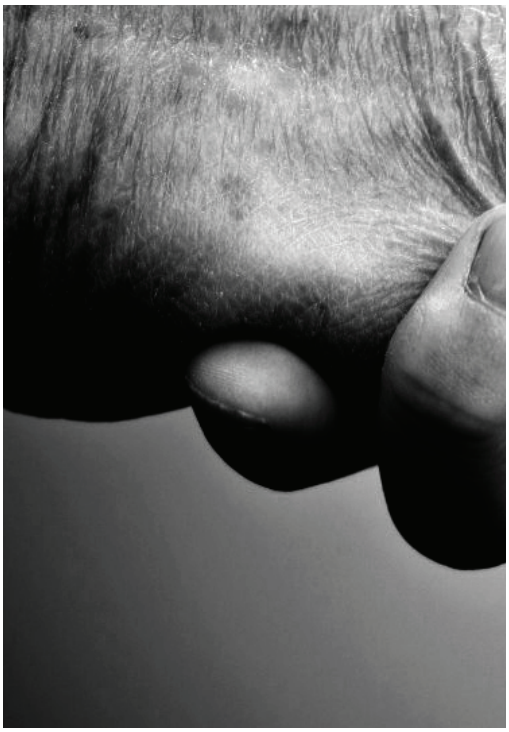
Although the publisher and faculty have made every effort to ensure that the information in this book was correct at press time, the publisher and faculty do not assume and hereby disclaim any liability to any party for any loss, damage, or disruption caused by errors or omissions, whether such errors or omissions result from negligence, accident, or any other cause.

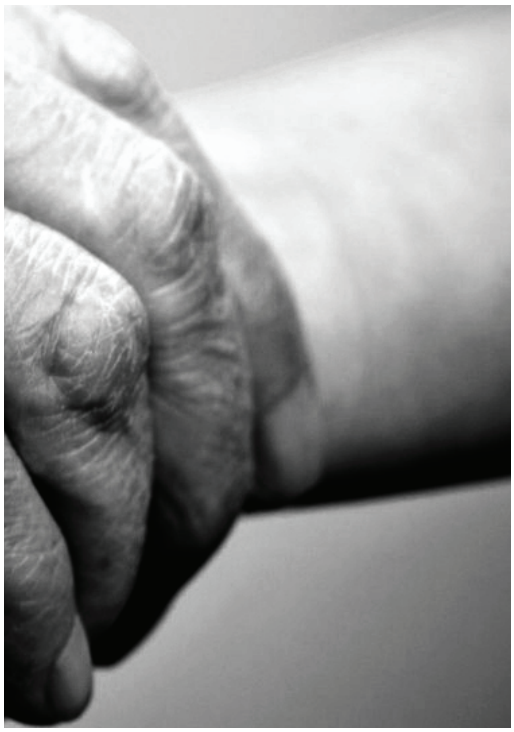
The Institute of Continuing Legal Education of the State Bar of Georgia is dedicated to promoting a well organized, properly planned, and adequately supported program of continuing legal education by which members of the legal profession are afforded a means of enhancing their skills and keeping abreast of developments in the law, and engaging in the study and research of the law, so as to fulfill their responsibilities to the legal profession, the courts and the public.

Printed By:

SOLACE
Support of Lawyers, All Concern Encouraged

HOW CAN WE HELP YOU?





Who are we?

SOLACE is a program of the State Bar of Georgia designed to assist those in the legal community who have experienced some significant, potentially life-changing event in their lives. SOLACE is voluntary, simple and straightforward. SOLACE does not solicit monetary contributions but accepts assistance or donations in kind.

How does SOLACE work?

If you or someone in the legal community is in need of help, simply email SOLACE@gabar.org. Those emails are then reviewed by the SOLACE Committee. If the need fits within the parameters of the program, an email with the pertinent information is sent to members of the State Bar.

What needs are addressed?

Needs addressed by the SOLACE program can range from unique medical conditions requiring specialized referrals to a fire loss requiring help with clothing, food or housing. Some other examples of assistance include gift cards, food, meals, a rare blood type donation, assistance with transportation in a medical crisis or building a wheelchair ramp at a residence.

Contact SOLACE@gabar.org for help.

The purpose of the SOLACE program is to allow the legal community to provide help in meaningful and compassionate ways to judges, lawyers, court personnel, paralegals, legal secretaries and their families who experience loss of life or other catastrophic illness, sickness or injury.

TESTIMONIALS

In each of the Georgia SOLACE requests made to date, Bar members have graciously stepped up and used their resources to help find solutions for those in need.

A solo practitioner's quadriplegic wife needed rehabilitation, and members of the Bar helped navigate discussions with their insurance company to obtain the rehabilitation she required.

A Louisiana lawyer was in need of a CPAP machine, but didn't have insurance or the means to purchase one. Multiple members offered to help.

A Bar member was dealing with a serious illness and in the midst of brain surgery, her mortgage company scheduled a foreclosure on her home. Several members of the Bar were able to negotiate with the mortgage company and avoided the pending foreclosure.

Working with the South Carolina Bar, a former paralegal's son was flown from Cyprus to Atlanta (and then to South Carolina) for cancer treatment. Members of the Georgia and South Carolina bars worked together to get Gabriel and his family home from their long-term mission work.

Contact SOLACE@gabar.org for help.

FOREWORD

Dear ICLE Seminar Attendee,

Thank you for attending this seminar. We are grateful to the Chairperson(s) for organizing this program. Also, we would like to thank the volunteer speakers. Without the untiring dedication and efforts of the Chairperson(s) and speakers, this seminar would not have been possible. Their names are listed on the **AGENDA** page(s) of this book, and their contributions to the success of this seminar are immeasurable.

We would be remiss if we did not extend a special thanks to each of you who are attending this seminar and for whom the program was planned. All of us at ICLE hope your attendance will be beneficial as well as enjoyable We think that these program materials will provide a great initial resource and reference for you.

If you discover any substantial errors within this volume, please do not hesitate to inform us. Should you have a different legal interpretation/opinion from the speaker's, the appropriate way to address this is by contacting him/her directly.

Your comments and suggestions are always welcome.

Sincerely,
Your ICLE Staff

Jeffrey R. Davis
Executive Director, State Bar of Georgia

Tangela S. King
Director, ICLE

Rebecca A. Hall
Associate Director, ICLE

AGENDA

PRESIDING: ***Amanda F. Calloway,*** Program Chair, Calloway Title & Escrow LLC, Atlanta

7:45 **REGISTRATION AND CONTINENTAL BREAKFAST**
(All attendees must check in upon arrival. A removable jacket or sweater is recommended.)

8:20 **WELCOME AND PROGRAM OVERVIEW**
Amanda F. Calloway

8:30 **PLANTATION POTPOURRI:**
REAL ESTATE ISSUES UNIQUE TO PLANTATION PROPERTIES
Ellen W. Smith, Parker Poe Adams & Bernstein, Atlanta

9:30 **ETHICS, SCHMETHICS:**
ETHICAL CONSIDERATIONS IN COMMERCIAL REAL ESTATE TRANSACTIONS
Kyle J. Levstek, Calloway Title & Escrow LLC, Atlanta

10:30 **BREAK**

10:45 **WHY PENDING PUBLIC PROJECTS AND POTENTIAL CONDEMNATIONS SHOULD BE ON EVERY CLOSING ATTORNEY'S DUE DILIGENCE LIST**
Christian F. Torgrimson, Pursley Friese Torgrimson, Atlanta

11:45 **LUNCH** (Included in registration fee.)

12:15 **PROFESSIONALISM**
T. Matthew Mashburn, Aldridge Pite LLP, Atlanta

1:15 **ENDORSEMENTS FOR TITLE POLICIES INSURING COMMERCIAL REAL ESTATE**
Timothy C. "Tim" Raffa, Old Republic National Title Insurance Company, Alpharetta

2:15 **BREAK**

2:30 **TAX DEEDS AND QUIET TITLES**
Carolina D. Bryant, Ayoub & Mansour LLC, Atlanta
John A. B. Ayoub, Ayoub & Mansour LLC, Atlanta

3:30 **ADJOURN**

TABLE OF CONTENTS

8:20 **WELCOME AND PROGRAM OVERVIEW**
Amanda F. Calloway

8:30 **PLANTATION POTPOURRI: REAL ESTATE ISSUES UNIQUE TO PLANTATION PROPERTIES**

Ellen W. Smith, Parker Poe Adams & Bernstein, Atlanta

9:30 **ETHICS, SCHMETHICS:**
ETHICAL CONSIDERATIONS IN COMMERCIAL REAL ESTATE TRANSACTIONS
Kyle J. Levstek, Calloway Title & Escrow LLC, Atlanta

10:45 **WHY PENDING PUBLIC PROJECTS AND POTENTIAL CONDEMNATIONS SHOULD BE ON EVERY CLOSING ATTORNEY'S DUE DILIGENCE LIST**

Christian F. Torgrimson, Pursley Friese Torgrimson, Atlanta

Think Eminent Domain Doesn't Apply In a Closing? Think Again: Why A Search of Public Projects Should be On Every Closing Checklist

By Christian F. Torgrimson, Esq.
Pursley Friese Torgrimson, LLP

From title reports to tax assessments and surveys, due diligence checklists provide a comprehensive way to ensure that all the complex and various demands and risks of a commercial real estate transaction are discovered and addressed on the front end to ensure no issues arise on the back end. Most transactions, however, typically overlook one important contingency – public projects. Valuable commercial real estate in a busy market can attract the need for roads and infrastructure. The government's exercise of eminent domain for a public infrastructure project can affect any commercial or residential property in a project corridor at any time, but it rarely comes to mind in real estate transactions. The failure to investigate current pending or even future potential public projects that may impact the transaction or use of the property being sold could leave buyers and sellers with their money and investments at risk. This article offers a brief examination of eminent domain laws and shows why a public project review is a necessary element of due diligence in order to protect the transaction.

(i) Georgia Eminent Domain Laws and Public Projects

By constitutional and statutory authority in Georgia, every type of property and every property right are subject to being taken or damaged by a governmental entity in order to support a public project, provided that owners first receive "just compensation."[1] Just compensation includes the value of the real estate, improvements, fixtures, relocation costs, and sometimes business damages. Georgia is in the minority of states in which property owners are entitled to pursue a separate claim for business value or damages as part of just compensation for a taking of property.[2]

[1] *See* AMERICAN BAR ASSOCIATION, CONDEMNATION, ZONING & LAND USE COMMITTEE, *FIFTY-STATE SURVEY: THE LAW OF EMINENT DOMAIN*, (William G. Blake ed., 2012), State of Georgia Chapter (Christian Torgrimson, Georgia ed.) pp. 113-124.

[2] *See id. See also* George Pindar*, Part I. Real Property and Public Law, Chapter 2. Eminent Domain, Part G. Compensation, § 2:50 Loss of income or rentals*, 1 Ga. Real Estate Law & Procedure § 2:50 (Daniel F. Hinkel ed., 7th ed. 2018).

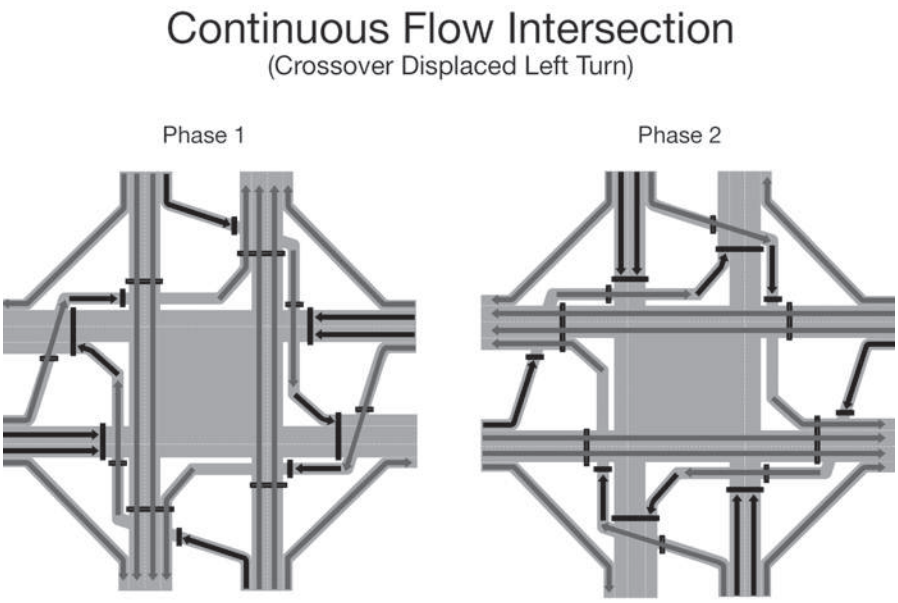
GDOT I-85 Bridge Replacement Project

In a continuing effort to stay ahead of traffic and population growth, the Georgia Department of Transportation relies heavily on this authority, wrapping up one of its most active years, with more infrastructure projects on the horizon well into 2040.[3] Likewise, municipal and county governments around the State are becoming more adept at and willing to use eminent domain to address urbanization and demand for a localized tax base.[4] These projects can be a barometer of current and projected economic growth, ensuring roads and utilities can accommodate increased traffic demands. However, it can come at a cost to individual properties and businesses. Transportation and public works entities are finding new and creative ways to balance these demands, including for example the latest trend, the continuous flow intersection ("CFI") or displaced left turn

[3] *See* Jim Parsons, *Georgia DOT Steps Up to Meet Infrastructure Challenge*, Engineering News Report Southeast, Feb. 26, 2018 (https://www.enr.com/articles/44046-georgia-dot-steps-up-to-meet-infrastructure-challenge). *See also* GEORGIA DEPARTMENT OF TRANSPORTATION PLANNING DIVISION, *2018 STATEWIDE STRATEGIC TRANSPORTATION PLAN*, (2018), http://www.dot.ga.gov/InvestSmart/Documents/SSTP/Plan/2018SSTP-Final.pdf.

[4] *See* Chris Joyner, *Watchdog: Georgia bill lets cities take blighted land for developers*, The Atlanta Journal-Constitution, March 29, 2017 (https://politics.myajc.com/news/state--regional-govt--politics/watchdog-georgia-bill-lets-cities-take-blighted-land-for-developers/CYHlIymNbqUH72G1GVT6zI/). *See also* Brentin Mock, *The Deal That Might Just Break Georgia Into Pieces*, Citylab, May 17, 2018 (https://www.citylab.com/equity/2018/05/the-deal-that-may-have-just-broken-georgia/560528/).

intersection.[5] Intended to keep high volume traffic at highway intersections moving at a fast clip, the CFI design reduces left turns by preventing cross traffic.[6]



In theory, the design works for avoiding traffic stacking and backups. In reality it can be a killer for pin corner retail and commercial properties by preventing customers from convenient ingress and egress to the properties aligning the CFI.

GDOT Continuous Flow Project in Dawsonville, GA

[5] *See* Federal Highway Administration, *Alternative Intersections/Interchanges: Informational Report*, (https://www.fhwa.dot.gov/publications/research/safety/09060/09060).

[6] *See* Deb Weaver, *Continuous Flow Intersections Are A Safe Bet for Motorists*, November 30, 2017, (https://meadhunt.com/continuous-flow-intersections).

Because it involves taking or damaging of private ownership and use of property, the exercise of eminent domain can be devastating, financially, legally and physically. Minimizing the impacts caused a public project and taking, and/or maximizing compensation for owners requires navigating the authority that allows the taking of private property for public use. While Georgia has enacted eminent domain laws to provide some protections for landowners,[7] condemnation procedures generally include only the current owner of record, often ignoring potential or future buyers and the reality of the real estate market in which ownership, uses, and development change as growth continues. If the buyer fails to check for upcoming public projects, there is no safety net for the "buyer beware" rule and what a buyer doesn't know at the time of the transaction can hurt. For sellers, a pending project may last ten years in the design phase, creating a cloud on title until the condemning authority pulls the trigger on the project. A taking is not a taking until a closing occurs or a declaration of taking with an order and judgment is filed, shifting title to the condemning authority.[8] There are no limits on when a condemning authority can seek to condemn regardless of a private transaction in progress, leaving buyers and sellers scrambling to claim rights to the land and the compensation.

(ii) Due Diligence and the Need for Public Project Review

Dealing with a public project may be rare for some. So what's the real risk here? Whether a current or future project, or whether involving a direct taking of the property or merely a change in the market area, a project can result in a loss of some or all of the elements that attract the buyer to the property in the first place. With a retail property for example, a road widening can disturb front parking areas, severely damage access by changing them from full turns to right in/right out turns or include new retaining walls making the property unsightly or difficult to find.

So how best to reduce the risk of the unknown with a public project? Vetting pending or potential projects in and around the immediate market area as part of the initial due diligence process. If one is discovered, conduct a thorough and knowledgeable review of the project, including: (1) determining whether the project will directly affect the property with a taking, or directly affect the property by changing access, traffic flow or the market area; (2) analyzing the project plans and details to determine how the property will be reduced, impacted, and/or damaged by the project; (3) evaluating if these impacts the property will not interfere with the future use of the property and thus, the sale transaction; and (4) confirming that the transaction can move forward as intended.

Failure to uncover or disclose a project can harm the parties to a transaction in a variety of ways. As part of a formal condemnation proceeding, Georgia law provides that a claim or right to compensation is assignable from seller to buyer.[9] However, the taking,

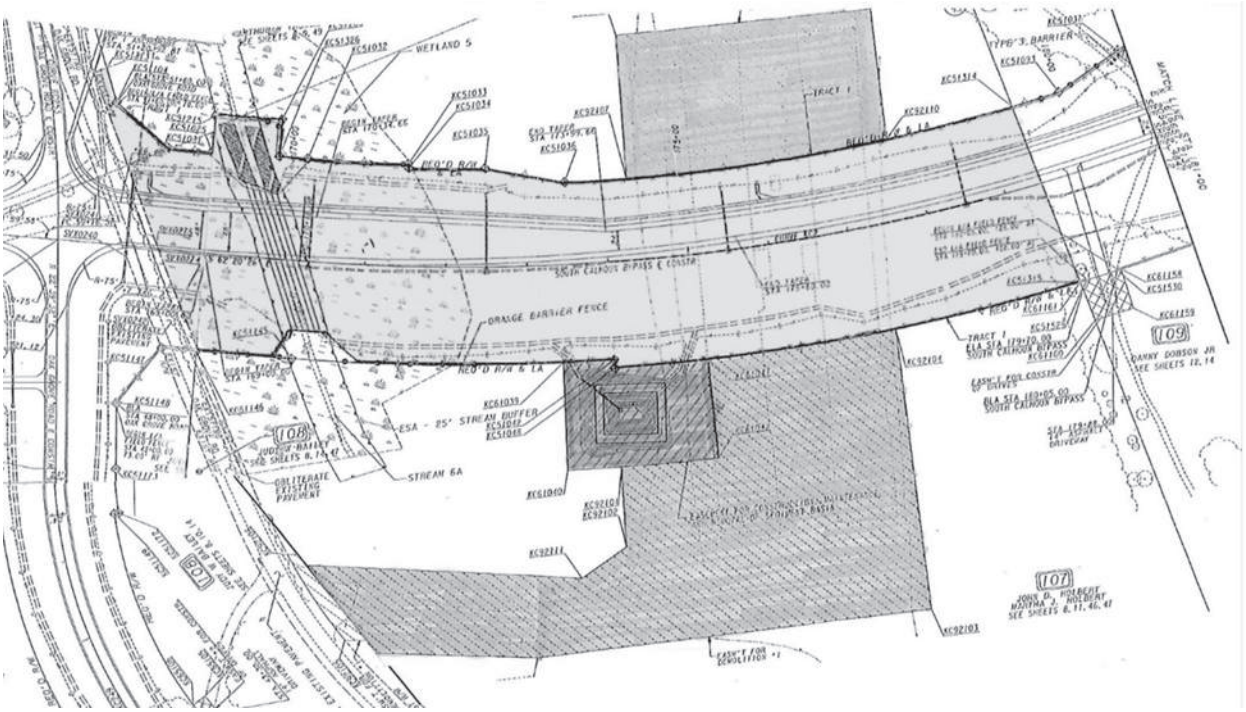
[7] *See e.g.*, Ga. Code Ann. § 22-1-9; *City of Marietta v. Summerour*, 302 Ga. 645, 807 S.E.2d 324 (2017).

[8] *See* AMERICAN BAR ASSOCIATION, CONDEMNATION, ZONING & LAND USE COMMITTEE, *supra* note 1 at 115-116.

[9] *See, e.g.*, *McGregor v. Bd. of Regents of Univ. Sys. of Georgia*, 249 Ga. App. 612, 613, 548 S.E.2d 116, 118 (2001) (holding a party "contracted away his constitutional right to compensation.").

any resulting damage, and the condition of the remaining property must be fully understood and carefully described in the closing documents in order to protect these rights. An assignment of these rights can create conflicts as to who receives what and when. The seller may know what's coming and receive all the compensation, leaving the buyer with no way to recover for a loss.[10]

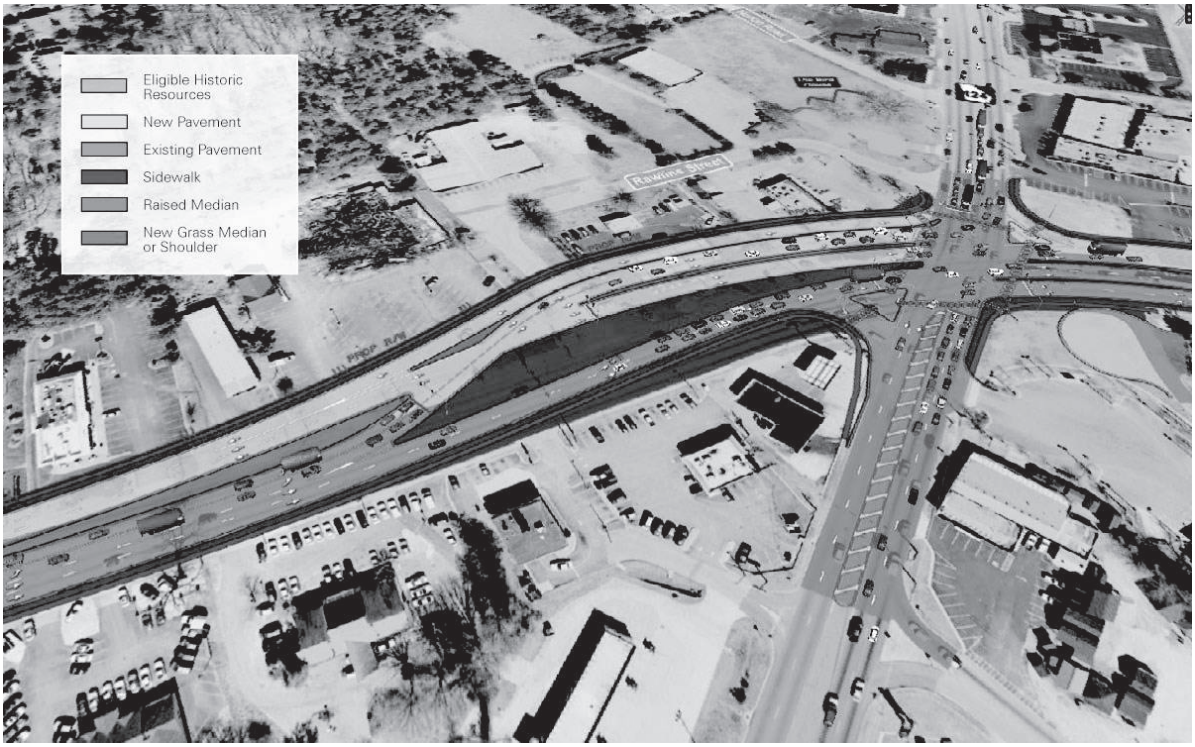
Furthermore, a review by someone unfamiliar with engineering or right of way project plans may miss major issues hidden in the hatch marks and cross sections such as a loss of existing access, elevation changes and uneconomic remnants:



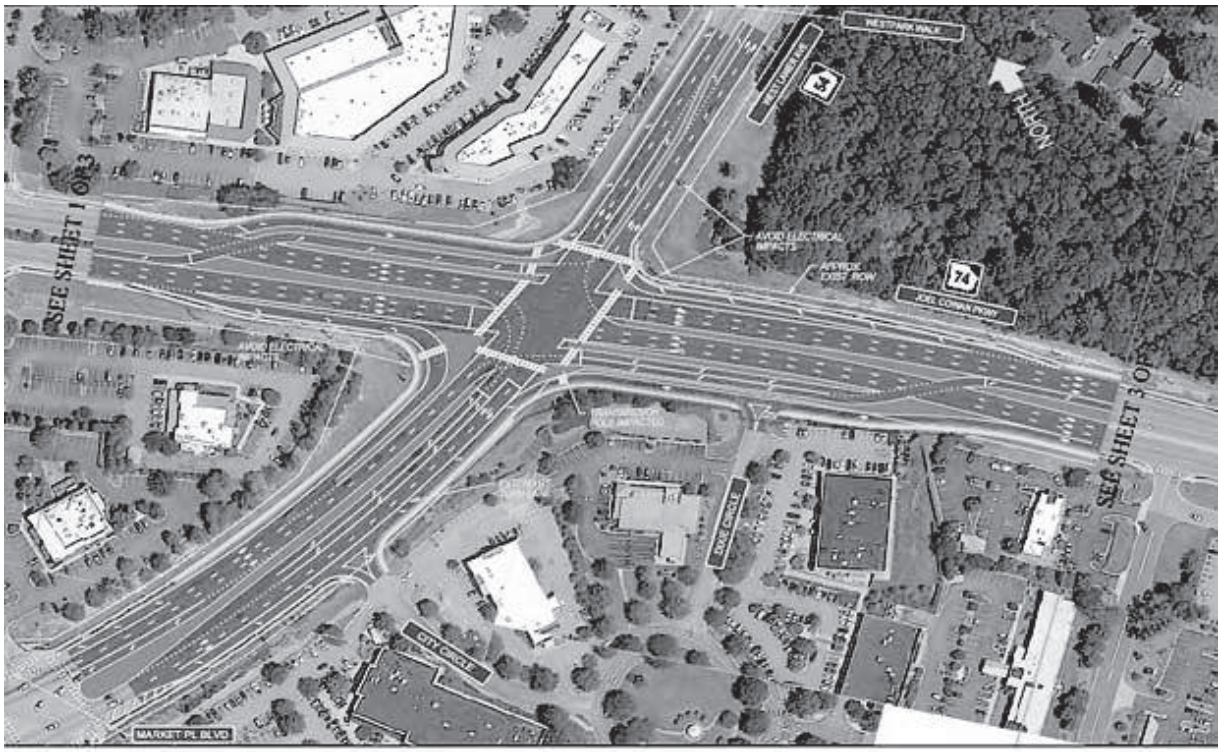
GDOT Right of Way Plan showing a new bypass across agricultural land with no driveway to the property, and a total loss of existing access due to a shift in the existing road away from the property.

Understanding the reality of a complicated road project, such as the CFI discussed above, can be difficult without a trained eye and a qualified engineer to interpret the change of traffic flow and access and explain it in layman's terms to the buyer or seller. In Georgia, the CFI design is becoming more popular:

[10] *See, e.g.*, *Simmons v. Krall*, 201 Ga. App. 893, 895, 412 S.E.2d 559, 562 (1991) (holding that even though the land was under contract for sale, because the sale had not yet closed, only the sellers had claim to the condemnation proceeds).



Continuous flow intersection plan illustration in Snellville, GA[11]

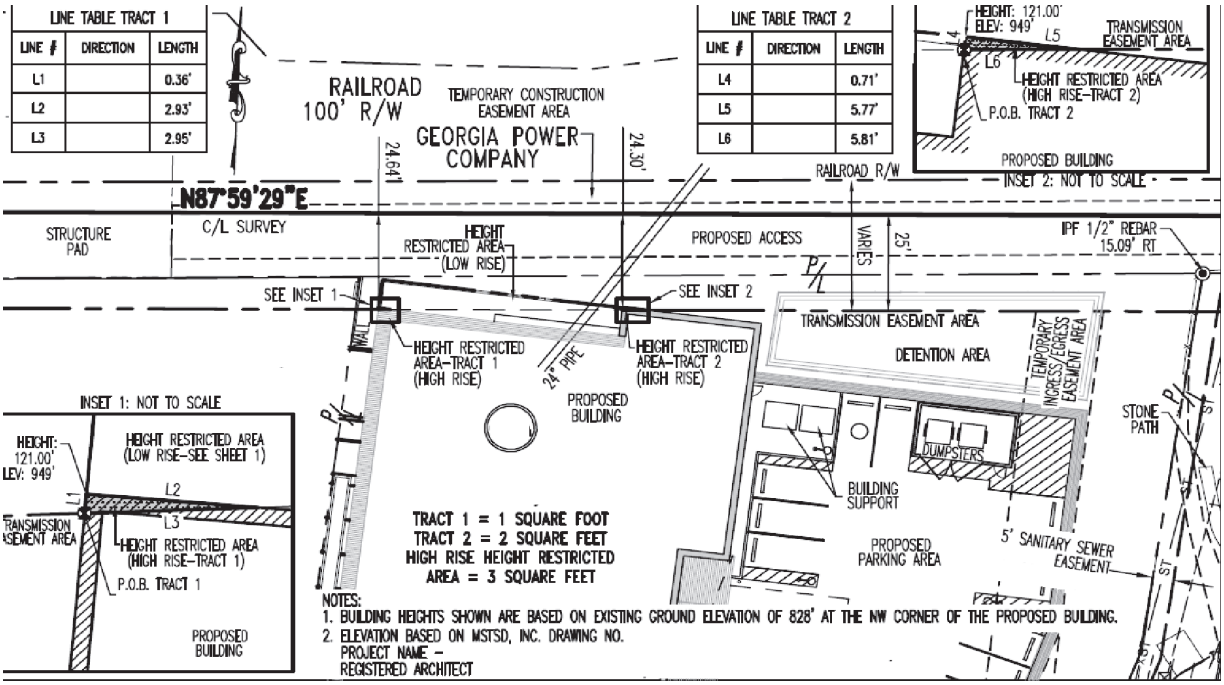


Continuous flow intersection plan illustration in Peachtree City, GA[12]

[11] *See* Gresham Smith, *US 78 at Georgia SR 124 Improvements*, (https://www.greshamsmith.com/project/us-78-at-georgia-sr-124-improvements/).

[12] *See* Ben Nelms, *Peachtree City's Hwys. 54-74 intersection to be reconstructed in 2020*, October 26, 2016 (https://thecitizen.com/2016/10/26/peachtree-citys-hwys-54-74-intersection-be-reconstructed-2020/).

Likewise, a small area for a taking of fee or easement rights may look innocuous to an untrained eye, but condemnations often take more rights than the actual square footage of land. Damages can result from driveway closures and reduced access, retaining walls of undetermined heights, to utility relocations. The condemning authority may limit an owner's use of their own land through vague language in the easements. The remainder property may be damaged by existing zoning requirements than the taking due to setbacks or buffers, parking and signage limitations.



Utility expansion plan showing existing building and planned development encroaching into new easement with impacts caused by zoning building height limitations.

A thorough review can ensure a full understanding of any options to reduce these damages and how to pursue potential claims for recovery of just compensation. Knowing a public project is coming allows informed decisions, full and fair negotiations (both between the parties to a transactional and with the condemning entity) and proactive exploration of remedies. While construction of the public project may take years to complete condemning authorities have a right to take the necessary property rights to support a project at any time, regardless of a pending closing. Once the eminent domain process has begun, it is very difficult to stop a public project entirely. Instead, owners can and should focus on negotiating compensation, and on reducing or mitigating the effects of a taking, in order to protect the property and its use including as part of a sale.

Christian Torgrimson, Esq., CRE, is an eminent domain attorney and managing partner with Pursley Friese Torgrimson, LLP, is an Atlanta-based commercial real estate law firm.[13]

[13] The author would like to thank Ashlynn Waddill, a third year law student at Emory School of Law and a law clerk at Pursley Friese Torgrimson, LLP, for her research and writing assistance.

12:15 **PROFESSIONALISM**
T. Matthew Mashburn, Aldridge Pite LLP, Atlanta

Professionalism in Law Office Management –
Intermediate Level Trust Account Issues,
Signing for Other People and Mental Wellness
as a Professional Responsibility

Presentation to ICLE Real Estate Seminar by
Matt Mashburn - November 6, 2018

"We remember what we understand; we understand only what we pay attention to; we pay attention to what we want." - Edward Bolles

Why should we aspire to Professionalism in Law Office Management?

1. The difference between Ethics and Professionalism. See *King v. State*, 262 Ga. 477, 421 S.E.2d 708, 709 (1992), Benham J., concurring. ("Recently, in commenting on the need for professionalism, Chief Justice Clark said, 'Ethics is that which is required and professionalism is that which is expected.'").

2. The difference between "following the Rules" and Ethics & Professionalism. See *Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C.,* 265 Ga. 374, 453 S.E.2d 719 (1995), Benham, J., concurring. ("While I applaud the desire of this court to clear up perceived confusion in the trial of legal malpractice cases and agree with the disallowance of ethical violations as a basis for malpractice actions, I must sound a note of caution with regard to our holding that ethical rules are relevant to the standard of care in legal malpractice actions.").

3. The difference between ethically supervising your staff and running your law office like a Professional.

What are the Characteristics exhibited by a Professional?

Honesty.
Trustworthiness.
Truthfulness.
Integrity.
Fairness.
Civility.

See *King v. State*, 262 Ga. 477, 421 S.E.2d 708, 709 (1992), Benham J., concurring. (Professionalism comes when one realizes that all of the problems encountered in a closing practice cannot be solved by passing laws, rules or regulations).

See "A Lawyer's Creed" or The Aspirational Statement on Professionalism,

A Professional also has a client, who is either a human or the authority of which can be traced to a direct grant from one or more humans.

A Professional can not represent a "Closing" any more than a Professional could represent the Tree that Owns Itself or a Sidewalk. Or a Swing set. Or a Porch. Or a Deed. Or a Stapler.

How would a "Closing" execute an engagement letter? How would a "Closing" write a check?

People will fight me as to whether it's ethical; but nobody can seriously argue with a straight face that it's professional.

Hypothetical Number 1:
Attorney's Spouse is the office financial manager.
Spouse has an undergraduate accounting degree and an MBA.
Prior to working with Attorney's firm, Spouse worked for seven years at a Bank.
The Bank also held the law firm's IOLTA and operating accounts.
Attorney and Spouse also opened a coffee shop for which Spouse handled all of the operations.
Attorney and Spouse held monthly meetings to review the Firm's account reconciliations; but the Spouse presented altered bank statements to remove the fact that Spouse had been stealing money out of the IOLTA account and diverting the proceeds to the coffee shop.
In addition, Spouse created an automatic overdraft protection so that overdrafts were covered and no notices of overdrafts went to the State Bar's Trust Account Overdraft Notification Coordinator.
After a late payoff, the Firm's title insurance company performed an audit and discovered that the IOLTA account had been overdrawn 50 times.
In all, Spouse managed to steal over $2.3 million dollars from the IOLTA Trust Account.

Is this ethical? It was not as unethical as the Bar's investigator thought.

Is this professional? No. See, Creed, Lines 1-5

Response: The attorney is ethically responsible for the account. If the Attorney is aspiring to reflect professionalism, the Attorney should not only know how to reconcile the accounts, the Attorney should be an active participant in all aspects of the operation of the account.

See *In re Michael Anthony Eddings* S16Y0825 (December 15, 2016)("…we agree that [Attorney] violated Rules 1.15(I)(c) and 1.15(II)(b)…") Attorney given public reprimand, required to accept services of State Bar's Law Practice Management Section, required to take and pass the next available MPRE and to make restitution of losses not covered by title insurance within five years (failure of any of which might subject the Attorney to additional discipline).

IOLTA Trust Account Basics

What is an IOLTA account and what are its characteristics?

A **segregated** account for the purpose of holding money received **in trust**.

Short term account (don't put long term escrow money in your IOLTA closing account).

Each and every single closing within the IOLTA should balance to zero (there should be no "excess" in your IOLTA trust account and for goodness sake there should not be a "deficit.").

The interest on the IOLTA account goes to the Georgia Bar Foundation.

Participation in the IOLTA program is mandatory.

Trust Account Basics (continued)

Setting up the Account

Use only an "approved institution" (i.e one that has agreed to operate in according with the Bar's IOLTA rules). Not every bank is an approved institution.

*Practice Note: If I try to set up an IOLTA account and the business services officer knows less than I do, I will ask for their supervisor or go to another bank.

If your Law Firm's policies and procedures allow, you may have more than one IOLTA account and you may have IOLTA accounts at more than one Bank.

There is no requirement that the signer be a lawyer. (A Professional would say "What, are you, crazy?!"). Can you see the difference between Professionalism versus the minimum of what is required here?

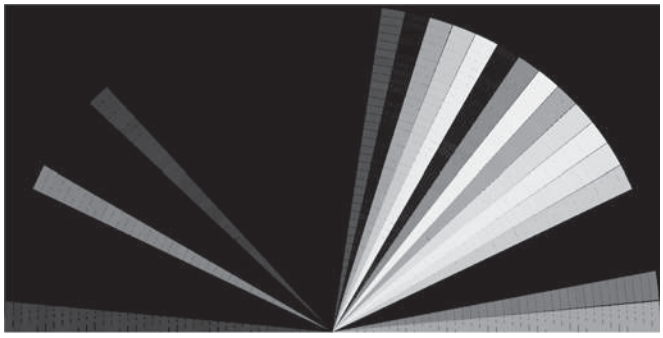
Receiving and Disbursing from a Trust Account

Moving other people's money around safely, accurately and leaving a paper trail.

Our first efforts were to eliminate the thinking that an IOLTA account is "one bucket" full of fungible dollars.

We're seeing your trust accounts start to show separation; but it's still a little fuzzy.

What your Trust Account ***SHOULD*** look like



Each Closing or Each Matter within the Trust Account
is in its own column with no crossover to any other Closing or Matter

You are responsible for the funds from the second you accept the funds to the second that you properly disburse the funds (but only if you properly disburse the funds).

Transfer funds to your Firm's operating account as soon as the fees are earned, but leave a trail showing conclusively the date, the amount and the reason that the funds were transferred. *In the Matter of Shanina Nashae Lank*, S16Y0723, S16Y0724, S16Y0725 (January 23, 2017)(…the $59.88 item that presented against insufficient funds in her attorney trust account was a re-occuring renewal payment for the law firm's website hosting services…") *Id.* at 4. Why was this lawyer drawing website hosting fees out of a trust account?

DO NOT UNDER ANY CIRCUMSTANCES EVER WITHDRAW MONEY FROM AN IOLTA ACCOUNT USING AN ATM.

IN FACT, DON'T EVEN GET AN ATM CARD OR ANY OTHER KIND OF CARD FOR AN IOLTA ACCOUNT.

Hypothetical Number 2:

Attorney is retained to handle a personal injury matter.

Attorney obtains a $75,000 settlement in the personal injury matter.

Attorney fails to promptly disburse the settlement funds to the client or the client's medical providers.

Attorney fails to render a full accounting of the funds to his client.

Voluntary surrender of license accepted.

"The maximum penalty for a single violation of Rule 1.15(I) is disbarment."

In re: Richard V. Merritt, S18Y0387 (January 29, 2018)

Maintaining Trust Account Records

Cash in minus cash out equals zero. All the time, every time.

Maintain a "general trust account ledger" to tell you the amount in your account and a "client ledger" to tell you how the amount in your account is divided among your clients.
Reconcile early, reconcile often. Reconcile, reconcile, reconcile. (One of the most important "red flags" of trust account theft is revealed through either reconciliation or the LACK of reconciliation).
You are required to maintain records on your account for six years after the termination of the client's matter. (Bar Rule 1.1.5(1)(a)).
What if I bounce a check? DON'T. JUST DON'T.

1. Don't write checks off of your deposits until you know that they have cleared.
2. Disburse only off of wired funds.
3. Don't wire out before you receive the wire in. (i.e. Don't float a wire out.)

Why do the checks have to say that the account is a trust account? (It is helpful in the prevention of fraud. It might just save you).

What are the Advantages of Three Way Reconciliation?

Three way reconciliation is your canary in the coal mine to let you know about trouble before it hits. See Creed, Lines 62-66.

A Professional will use Reconciliation to be **AHEAD** of the following becoming a crisis:

1. Find out that payoffs have not been sent.
2. Find out that documents have not been recorded.
3. Find out that there is a delay in issuing title policies.
4. Find out that you are being stolen from.
5. Find out that taxes have not been paid on a timely basis.
6. Find out that you have any number of post closing problems

- An Honest lawyer does not steal from a trust account.
- An Ethical lawyer does not allow others to steal from a trust account.
- A Professional knows how to do the job of every person who touches the lawyer's trust account and not only exercises general supervision of the trust account but is aware of every aspect of the trust account's operation.

Professionalism

Trust Account Security

There are three sources of attack on Trust Accounts

Insiders
Outsiders
The Attorney

For just about all agents, there will be some attempt to take money from their accounts at some point.

Whether the attempts are successful depends on the preventive measures the agent has incorporated into their processes

The Security of a Trust Account is directly proportional to the interest and attention the lawyer devotes to the oversight and operation of the account. Curiosity not only kills unwanted cats, it stops you from being ripped off.

1. Separation of Powers is not only good for government, it's good for trust account security.
2. Limit the possible damage by setting transactional limits per person.
3. Maintain physical control over unused checks, escrow files and un-deposited receipts.
4. Apply the advice that you give to your clients and "paper" everything.
5. Management Review. Somebody's got to have your back.

Practical Tips for Trust Account Safety

1. Have your bank require an actual signature before any outgoing wire is sent unless you, yourself, are the one initiating the wire. (I know that some of you have the ability to wire from your desktop). Professional responsibility, not an ethical duty.

2. Don't ever, ever, ever, ever, ever use a signature stamp. Ever. Professional responsibility, not an ethical duty.

3. Don't ever, ever, ever, ever, ever sign a blank check. Professional responsibility, not an ethical duty.

4. Breaks in check numbers don't always mean that a check is uncashed, sometimes it means that somebody stole checks from the back of your checkbook. Professionalism tip, not an ethical duty.

5. Be very, very suspicious of payoff checks where the endorsement on the back shows an account number and nothing else. Professionalism tip, not an ethical duty.

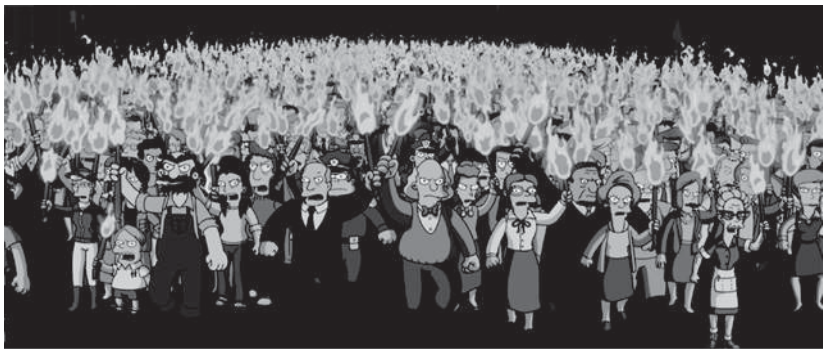
Professionalism Tips (Continued), none of these are REQUIRED by the ethics rules.

5. Bank statements and correspondence regarding the trust account should be periodically opened by someone other than the bookkeeper.

6. The person who is the most indignant about you asking questions is probably the most likely to be stealing from you.

7. Be curious, ask questions, check statements, look at the check register.

8. Title company auditors report that the most likely person to be embezzling from trust accounts is the person who is "the most trusted employee in the Firm."



Mashburn goes from Preaching to Meddling.

Remember, this is a Professionalism Hour
We're aspiring to do better than just the minimum

When is it ok to sign someone else's name?

Never

Not on any document that you want me to insure or any document that provides authority for any document that you want me to insure.

Let's don't worry about the past for a moment, let's worry about doing it right going forward.

FORGERY

Fake	Fraud	Copy	Replica
Counterfeit	Sham	Imitation	Conformed Copy
Falsification			
Faking			
Pirating			
Identity Theft			

German is a language where a word literally describes what the matter is or what the thing does. For example, Stinktier (literally an animal that stinks instead of skunk). The German word for forgery tells you all that you need to know: Fälschung.
Derivative of the word "Falsch"
which is exactly what you think it means, False.

Fraud

- Embezzle
- Bribery
- Perjury

Theft

- Conspiracy
- Money Laundering
- Smuggling
- Misrepresentation
- Defamation

People also search for:

Forgery

- Forge: To invent; to create.
- First Known Use: 1583

A Lawyer must not forge.
A Professional does not appear to forge. A Professional makes it very very who is signing. Creed, Lines 51, 53.

Entymology of the Word

Ask Yourself: What is the purpose to create/invent this signature on this document?

Is the purpose to appear as if the purported signor executed the copy?

What are you trying to do that can't be done through a conformed copy?

What impression are you trying to create in the recipient?

What conclusion are you trying to have the recipient draw?

Other signature problems

Attorney notarized the wife's signature on a deed.
Closing proceeds were paid jointly to order of H and W.
Attorney believed that the spouse had signed a deed.
Closing proceeds were deposited in joint account.
Attorney did not see the wife sign the deed.
Wife later ratified the sale of the property.
The wife did not sign the document in the attorney's presence.

Voluntary discipline rejected.

In re Edward Neal Davis, S17Y1993 (May 7, 2018).

Involves **FOUR** misrepresentations when "signed, sealed and delivered in the presence of" is not.

1. Not signed,
2. Not sealed,
3. Not delivered,
4. Not in the presence of.

Also involves violation of Oath of Office when involving a notary public and not "just" an unofficial witness. "I do solemnly swear or affirm that I will well and truly perform the duties of a notary public to the best of my ability; and I further swear or affirm that I am not the holder of any public money belonging to the state and unaccounted for, so help me God."
- O.C.G.A. § 45-17-3.

The biggest problem that I experienced trying to prohibit the unauthorized practice of law in the closing arena is lack of proper witnessing by lawyers.

Subscribing Witness

- Where does the second witness at a "witness only closing" come from?

Rule 8.4(a)(4): "It shall be a violation of the Georgia Rules of Professional Conduct for a lawyer to…engage in professional conduct involving dishonesty, fraud, deceit[,] or misrepresentation."

Creed – Lines 51 and 53.

More information - Witness

- Rule 8.4(a)(4) does NOT require harm and it does NOT require an intent to mislead or deceive. Rather, Rule 8.4(a)(4) can be violated by conduct "likely to mislead or deceive another." *In re Davis*, at 3.
- Lack of intent to deceive is a mitigating factor. *Id.*, at 4.

More information - Witness

- "Based on that record, this Court agreed to accept West's renewed petition for voluntary discipline without an admission of a Rule 8.4(a)(4).
- *In re West*, 301 Ga. 901 (804 SE2d 340) (2017). Petition for Voluntary Discipline of Review Panel Reprimand accepted.

"The Bar adds that a reprimand is appropriate where an attorney's misconduct includes signing a client's name to a document, even where violation of Rule 8.4(a)(4 is found, and says that it is not aware of any case in which this court has imposed a suspension where the sole misconduct was improperly signing a client's name." *In re West*, 804 SE2d at 342

The Signatures of Others

Hypothetical Number 2:

Husband and Wife purchased a home in Dekalb County.
Husband and Wife refinanced first loan with a new loan.
Wife was not present at the refinance.
Wife was not listed as borrower on the note.
Husband testified that he did not sign a security deed at the closing.
Both Husband and Wife testified that neither of them ever signed a Deed to Secure Debt.
Later, an Affidavit of Lost/Misplaced Deed for Recording Was recorded to which was attached a purported copy of The Deed to Secure Debt signed by BOTH Husband & Wife.
Husband received a call from the DeKalb County Clerk's Office "advising him that someone was requesting to 'force' A security deed into the records for the Property."
The trial court found that the filed DSD was forged.

The Signatures of Others

Hypothetical Number 2:

Trial Court denied request for reformation and for declaratory judgment.
Trial Court declined to equitably subordinate against two other creditors who appeared in the meantime.
Trial Court awarded attorneys fees to Husband and Wife.

Ruled: No equitable subordination due to unclean hands. Attorney fees reversed for factual findings supporting the award. (The only reference to attorney fees was a statement by the borrower's attorney during closing argument that they incurred costs "upwards of $9,000" in defending the case).

Bank of New York Mellon v. Edmondson, A17A1640 (March 1, 2018)

The Signatures of Others

Ask yourself: "If it's not important that the actual person sign the document, why is the document being signed in the first place?"

Law firm required to pay nearly $1.2MM in damages plus $550,000 in attorney fees. Associate alleged to have "forged the signature of an associate general counsel at [well regarded company] on a visa document." ABA Journal, March 22, 2018 accessed May 29, 2018. Law Firm says associate "signed the document on the corporate lawyer's behalf after Plaintiff told associate that Plaintiff had power of attorney that permitted Associate to sign." *Id.* Defense admits associate "had made some mistakes, but it was wrong to characterize her signature as a forgery…" *Id.*

If you are signing for someone else, don't.
But if you do, make it absolutely clear that you are not that person.
"Well, that defeats the whole purpose if I did that!" is NOT the right response.

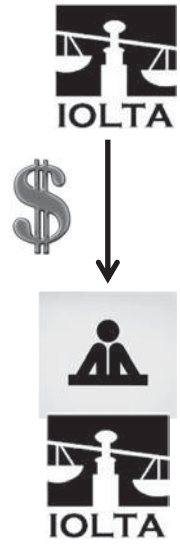
Signing for other people

The closer it looks to the person's actual signature or initial, the more likely it becomes that the signature is an "invention" which is being "forged" to look like that which it is not (the real person's real signature), and therefore a forgery.

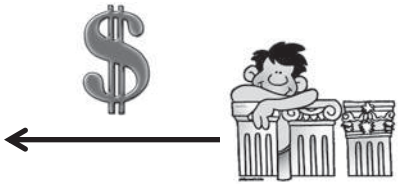
The more "lifelike," the more an "invention" and the more an invention the more likely that it was "forged."

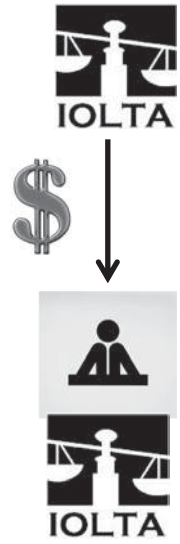
Ask yourself, "How close do I sound to the drinking driver who responds to the field sobriety test with "I couldn't even do that if I was sober!"

Initialing for other people



A Common Practice is to "reimburse" the IOLTA Account for costs that exceed expectations by a few dollars. For example, a deed recorded at the courthouse costs $5.00 more than anticipated. You cut the correct amount in your check to the Clerk and reimburse the IOLTA account $5.00 from your operating account.





However, it would be better practice to cut the check from the IOLTA for the amount predicted and cut your check to the CLERK rather than to reimburse IOLTA. You are still cutting one check from the Operating Account, all you have done is change the Payee.

It's easy!

Professionalism

Fact Pattern # 1. Attorney self reported an overdraft in his IOLTA Trust Account.

The Office of Disciplinary Counsel did a forensic analysis of his accounts.

The Attorney paid all sums owed to respective clients.

Attorney disbursed from his IOLTA account all or part of his attorneys fees and out-of-pocket expenses in anticipation of receipt of settlement proceeds for the cases associated with those fees.

He also distributed to some clients their shares of anticipated settlement proceeds from his IOLTA trust account before he received the settlement proceeds in their cases.

He used IOLTA funds that belonged to other clients and his own earned fees from settled cases to cover the money improperly withdrawn from his trust account.

The amount of money the attorney used belonging to others was approximately $180,000.

HELD: While this was not deliberate stealing from the trust account, it does represent "an egregious example of an attorney who took virtually no steps to maintain even the semblance of an accounting of his clients' funds." Suspended for no less than 7 months.

In re Foust, Supreme Court of Montana, PR16-0301 (June 6, 2017).

Professionalism

Fact Pattern # 2. Attorney became subject to collection efforts after he was hospitalized due to illness and unable to work while on bed rest.

He made withdrawals for personal expenses from his trust account.

He deposited personal funds into his trust account to conceal them from his creditors.

After Attorney's Bank notified the Bar of trust account NSF, the Bar advised attorney to attend a general consultation on trust account management with the Bar's Law Practice Management Program.

Attorney's participation in the Law Practice Management Program cited as mitigating factor.

Attorney cooperated with the Bar by submitting a detailed letter concerning his misconduct to the State Bar and has expressed remorse for his conduct.

Six month suspension.

In re Clarence R. Johnson, Jr. S16Y1709 (October 3, 2016) S17Y1918 (January 29, 2018)

Professionalism

Fact Pattern # 3.

Attorney's bank notified the State Bar about insufficient funds checks.

Attorney admitted that he misappropriated funds for his personal use and did not otherwise account to his client for funds.

Attorney admitted that he provided false and misleading information to the Office of General Counsel during its investigation of the matter.

Voluntary surrender of license, tantamount to disbarment, accepted.

In re Lorne Howard Cragg, S18Y0269 (January 29, 2018).

Examine how the two cases turned out:

Cooperation v. Misleading.

Remorse v. No remorse.

Explaining the situation to the investigators v. the investigators having to dig out the information.

Penalties: Six month suspension versus voluntary surrender or disbarment.

What do the cases suggest? (This is not advice):

1. Self report (but do your own investigation first so that you know what you are reporting and that your reporting is accurate and thorough).

2. Know *WHY* your account was out of balance and immediately put in place remedial measures and correct systemic flaws so that it doesn't happen any more.

Professionalism

Fact Pattern # 4.

Attorney completed all conditions for reinstatement following Attorney's suspensions by the Court.

Attorney ordered reinstated to the practice of law in the State of Georgia.

Reinstated. *In the Matter of Tony C. Jones,* S11Y1626, S13Y0138, S15Y1641 (January 19, 2016)

A FINAL WORD ON PROTECTING YOU FROM YOURSELF (AND YOUR CLIENTS AND THE PUBLIC FROM UNPROFESSIONALISM).

There is a stigma to bankruptcy; but the stigma of having your law license revoked is much greater.

Always remember that you can file bankruptcy and still practice law; but you won't be allowed to practice law if you take money from a trust account.

If it ever gets so bad that you think your only option is to take money from your trust account, call me up any time of the day or night and explain it to me. I promise that I will listen for as long as you want to talk. You are ethically required to seek help and We have a professional duty to help you.

Fact Pattern Number 4:

When Attorney's longtime secretary was hit by a MARTA bus, he continued to pay her even though she could no longer work.

Attorney had settled a wrongful death case for $100,000.00.

The injury was on videotape and Attorney claims that he showed the videotape to other clients so that they would authorize him using the other clients' proceeds to fund the MARTA case.

Attorney claims that his other clients authorized the use of their funds to fund the MARTA litigation for $5,000 a piece plus a percentage of the settlement proceeds from the case against MARTA. The Agreement was verbal and not in writing.

Attorney explained, "I gambled that I could settle the MARTA case before I had to repay the [other client's] funds."

Violation of Rules 1.15(I) and 1.15(II). Disbarred. *In re Richard Allen Hunt*, S19Y0099 (October 22, 2018).

Professionalism

TOPIC TWO

MENTAL WELLNESS AS AN ETHICAL DUTY **AND** A PROFESSIONAL RESPONSIBILITY

Is there a Problem?

21 percent of licensed, employed lawyers qualify as problem drinkers.

For lawyers under age 30, its 31.9 percent.

By comparison only 6.8 percent of the adult population as a whole has a drinking problem.

Lawyers have twice the rate of problem drinking than among surgeons.

Krill, Johnson & Albert, The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys, *Journal of Addiction Medicine* (February, 2016)

The same study reports that the most common barrier to a lawyer seeking treatment for a drinking problem is the concern that others will find out that they need help.

"Upon arrival, though, instead of making a brilliant argument before a judge, these young lawyers may find themselves competing with their similarly gifted peers for the privilege of proofreading documents for a high-ranking partner. If they do a great job, they may get to proofread all weekend." Smith, The most terrifying part of my drug addiction? That my Law Firm would find out. *Washington Post*, March 24, 2016.

For the First time in my lifetime:

Lawyers have passed Dentists in the rate of suicide;

Lawyers have passed Nurses and Teachers in self-rated "Low Decision Latitude" (the second highest contributing factor behind family history in predicting coronary artery disease and heart attacks) Ridley, *Genome: The Autobiography of a Species in 23 Chapters* (Harper Perennial 2006)(citing a study of 17,000 British civil servants and another study of over 1,000,000 employees of Bell Telephone Company); and

Younger lawyers (those under 30) have surpassed Native Americans in alcoholism rates.

In addition to high rates of substance abuse and alcoholism, lawyers have three times (3.6 actually) the rate of depression than society as a whole. Lukasik, wwwlawyerswithdepression.com, November 2, 2016 citing Hazelden Betty Ford Foundation study).

Lawyers self reporting issues that they themselves had experienced during their career as a Lawyer:

Anxiety	61.1%	19% currently experiencing
Depression	45.7%	28% currently experiencing
Social Anxiety	16.1%	
Suicidal Thoughts	11.5%	
Panic Attacks	8.0%	
Self-Injury	2.9%	
Suicide Attempt	0.7%	

Among the lawyers who used a drug, how many used that drug in the last *week:*

Stimulants	74.1%
Sedatives	51.3%
Tobacco	46.8%
Marijuana	31.0%
Opiods	21.6%

Krill, Johnson & Albert, The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys, *Journal of Addiction Medicine* (February, 2016)

One risk factor not present in other professions is the ***requirement*** of a pessimistic thinking style to do the job of lawyering well.

One study tested the entire entering class of the University of Virginia Law School in 1990 and followed the students throughout their three year career. As a whole, pessimists outperformed the optimists in grade point average and law journal success. Seligman, Ph.D., Why are Lawyers so Unhappy? from *Authentic Happiness: Using the New Positive Psychology to Realize Your Potential for Lasting Fulfillment.*

If you think about it, all of due diligence is based on pessimism.

The ability to anticipate the whole range of problems and betrayals that non-lawyers are blissfully blind to is highly adaptive for the practicing lawyer who can, by doing so, protect clients from dangerous events.

In what other professions do we see the same traits of hyper-vigilance and the anticipation of existential threat as being required for survival?
Combat Infantry. Kimble MO, Fleming K, Bennion K. *The Hypervigilance Questionnaire: Assessment of hypervigilance in a trauma sample*. Paper presented at the 25th Annual Meeting of the International Society for Traumatic Stress Studies; Atlanta, GA.. (Nov. 2009).
Police Officer. Kevin M. Gilmartin, *Emotional Survival for Law Enforcement*, (E-S Press, Tuscon, AZ), pg. 35
("The average citizen has the neurological advantage of stimulus habituation. The capacity to be non-reactive to stimuli whose threshold of perceived potential danger is insufficient to warrant attention. The law enforcement perceptual style considers stimulus habituation to be potentially lethal carelessness.")

In other words, just like a police officer and a combat soldier, a lawyer must develop a skill to recognize when "things just don't look right" in order to survive.

No wonder that so many lawyers suffer from less intense but similar symptoms as combat veterans who come back with post-traumatic stress disorder. Vincent, Lawyers and Post-Traumatic Stress Disorder, *Michigan Bar Journal*, June, 2015.

"Angry or irritable outbursts," "self-destructive behavior," "hyper-vigilance," "exaggerated startle response," and in more severe cases "problems with concentration," and "sleep disturbance."

Remind you of anybody you know?

REAL ESTATE LAWYERS ARE USUALLY VERY GOOD AT RECOGNIZING AND SOLVING PROBLEMS.

The adversarial nature of law, trial by combat, confrontation, maximizing billable hours and the "ethic" of getting as much as you can for your clients are not going away.

You (i) either already have the ability to turn it off when you go home; (ii) you can learn to turn it off when you go home (your spouse and family will thank you); (iii) you can take it home with you and you and those around you will suffer from it (or most likely already do) or (iv) you live in a household where pessimistic judgment is embraced within the household. If not and there is no let up, you will either (i) become completely reliant on some sort of coping mechanism (almost certainly one that is probably bad for you); (ii) suffer from a serious bout of depression (or worse) or (iii) do both. Seligman, Verkuil & Kang, Why Lawyers are Unhappy, 10 *Deakin Law Review* 49 (2005).

But what you CAN do is treat your mental wellness as your professional duty (just as important as reconciling your trust accounts and getting your CLE Professionalism hour).

Professionalism

Fact Pattern # 5.

An Assistant District Attorney overheard a Criminal Defendant's Attorney on a telephone call in the courthouse men's restroom apparently attempting to purchase controlled substances for himself.

The telephone call was on the afternoon before the beginning of a jury trial.

The ADA brought the Attorney's behavior to the attention of the presiding judge.

The next morning, the Attorney appeared in court for jury selection but seemed to be under the influence of a controlled substance.

The Attorney had bloodshot eyes and welts and bruises on his face.

The Attorney fell asleep at counsel's table.

The Court held the attorney in contempt and imposed jail time to be immediately served.

The Attorney failed to refund the unearned portion of the retainer paid to the Attorney by the client.

Disbarred. Multiple offenses and a pattern of misconduct. Failed to timely respond.

In re Ricky W. Morris, Jr., S17Y1329 (January 29, 2018).

Professionalism

Hypothetical Number 3. In response to Bar Complaint, Attorney:

Referred to the proceeding as "a Star Chamber proceeding."

Referred to the special master as the "High Executioner."

Suggested that the hearing be held at the Varsity restaurant in Athens.

Referred to the Special Master as "Ms. Hyphenated."

Inquired as to whether the Special Master was married so as to get her spouse the "Congressional Medal of Honor and/or sainthood."

After being instructed by the Special Master not to contact her *ex parte* persisted in sending emails about his case without copying counsel for the State Bar.

After presenting seven character witnesses in mitigation, abruptly walked out of the hearing remarking that he had a more pressing engagement – a card game – to attend.

The seven character witnesses testified only that he had a reputation as an effective advocate, that he generally got good results for his clients, and that he had not made any false statements of which they were aware.

Disbarred.* *In the Matter of Christopher G. Nicholson,* S16Y1446 (October 3, 2016).

"Mental Wellness as a Professionalism Issue rather than an Ethical Issue"
The Special Master found that Attorney's behavior was proof of an ongoing mental health issue.

The Special Master found that if the Attorney were not mentally ill, the Special Master would recommend disbarment.

The Special Master recommended one year suspension minimum with conditions.

The Review Panel recommended two year suspension minimum with conditions.

Attorney disavowed any mental illness.

Georgia Supreme Court: "With all of the outrageous conduct throughout this disciplinary process, it is easy to forget what this case is about: dishonesty."

Thus, LYING was an ETHICAL BREACH; but there is no doubt that the behavior was a Professionalism breach. Creed, Lines 2-5, 64-65. Did the lawyer witnesses comply with their professional obligations to the client and the public and the lawyer (Creed, Lines 13-15) or did they just "not lie"?

Remember that true professionals know when to ask for help and delegate responsibility. Be familiar with the resources available to you - be they personal or professional - and utilize them. If you feel you are constantly "stressed out," depressed, or struggling with substance abuse/dependence issues, get professional help immediately. **Just as any psychologist would consult an attorney when addressing legal issues outside of their area of expertise**, so too, an attorney should be prepared to consult a mental health worker if a lawyer feels ill-equipped to address the psychological stressors in the lawyer's life. Latham, The Depressed Lawyer, *Psychology Today*, May 2, 2011 (emphasis added)

While the image of "A Psychiatrist drafting a Deed" might be silly, the consequences of an attorney attempting to "heal thyself" could be devastating, even deadly.

Consider that you have an ethical duty to seek help when you are in a crisis; but a Professional seeks out help before there is a crisis.

You've already paid for six sessions. Why not get your money's worth? If you wait until you're thirsty to take a drink of water…

You're already dehydrated.

- We have an Ethical Duty to ourselves. We have a Professional Obligation for each other.
- "To my colleagues in the practice of law, I offer concern for your welfare." Chief Justice's Commission on Professionalism's "A Lawyer's Creed."
- "What could have helped?...I still wish for that chance to try." Barclay, The Importance of Lawyers Abandoning the Shame and Stigma of Mental Illness *Georgia State Bar Journal*, June, 2018 p. 79.

Kind-hearted listening

The State Bar of Georgia Wellness Program

https://www.gabar.org/wellness/about.cfm

The Wellness Program has four major parts:

Lawyer Assistance Program

Suicide Awareness Campaign

SOLACE | Support of Lawyers, All Concern Encouraged

Law Practice Management

All of them are free, all of them are confidential.

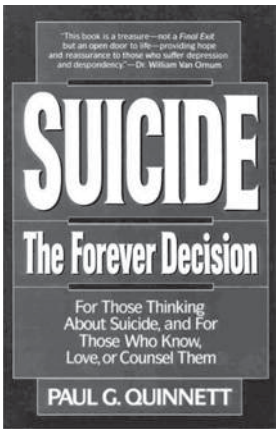
While it's too early to have a cite to a Bar Complaint where participation in the Wellness Program was cited as a positive, mitigating factor, doesn't it make sense that one would rather be the one who sought help than one who didn't?

Additional Resources:

Helping Others:
Quinnett, *Suicide The Forever Decision* Crossroad Publishing Company (1992).

Helping Ourselves:
Blauner, *How I Stayed Alive When My Brain was Trying to Kill Me: One Person's Guide to Suicide Prevention* William Morrow Paperbacks (2003).

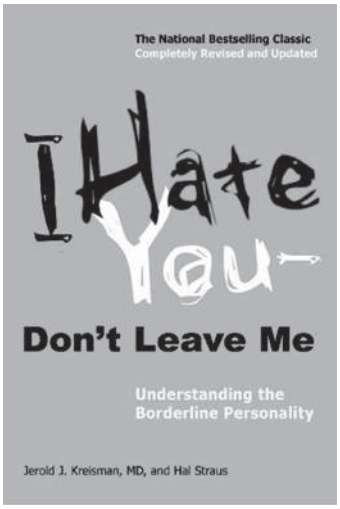
Understanding the Issues:
Joiner, *Why People Die by Suicide* Harvard University Press (2007).



Helping Others:
Kreisman, MD *I Hate You – Don't Leave Me: Understanding the Borderline Personality* TarcherPerigee; Revised, Updated edition (2010)

Helping Ourselves:
Haynes, *My Kind of Crazy: Living in a Bipolar World* Booksurge (2009)

Understanding the Issue:
Roth, *Surviving a Borderline Parent: How to Heal Your Childhood Wounds and Build Trust, Boundaries and Self-Esteem* New Harbinger Publications (2004)



A Final Word on Professionalism

Amateur athletics has "Sportsmanship" as its good.

Teaching has "Learning" as its good.

Medicine is a practice that has "Healing" as its good.

What does the practice of law have as its good if not "Professionalism in the Administration of Justice?"

A Final Word on Professionalism

A Professional NEVER utters the words
"Well, if nothing else, we have title insurance"
PRIOR to a closing.

It's not an ethical violation to say that but it
sure identifies you as unprofessional.

1:15 **ENDORSEMENTS FOR TITLE POLICIES INSURING COMMERCIAL REAL ESTATE**

Timothy C. "Tim" Raffa, Old Republic National Title Insurance Company, Alpharetta

OLD REPUBLIC TITLE

TITLE INSURANCE ENDORSEMENTS FOR COMMERCIAL REAL ESTATE

By Tim Raffa
VP, Georgia Commercial Underwriting Counsel
Old Republic Title National Insurance Company

OLD REPUBLIC INSURANCE GROUP

INTRODUCTION

TITLE POLICIES: Owner, Lender & Leasehold Policies are all utilized in Commercial real estate transactions. In **Georgia,** the policies issued come from the **American Land Title Association ("ALTA")** and are standardized in their Coverage, Exceptions & Exclusions. However, the policies can be modified through **Endorsements to provide additional insurance or limit the effect of an Exception, Exclusion or Condition in the policy**. As a result, Endorsements are the method used to **customize Title Insurance coverage** as desired by the insured.

OLD REPUBLIC TITLE

ENDORSEMENTS

History: Over the years, title insurance Endorsements have evolved from free-form documents, to a series of standardized and state specific Endorsements for use in transactions.

Forms: Georgia utilizes the ALTA Endorsement forms. Some states have developed their own state specific forms. Namely, California ("CLTA"), Texas, Florida and New York.

OLD REPUBLIC TITLE

ENDORSEMENTS

Underwriting: The issuance of Endorsements is not automatic. Many of the Endorsements require additional documentation and Underwriting in order for them to be issued. There is also an additional cost for most Endorsements which can vary depending upon the increased risk the Endorsement creates for the Company and the amount of insurance.

Customized: Not every transaction will require the same type or number of Endorsements. This can vary from the type of loan, how many parcels or whether the insured property is in a highly developed urban area or rural location.

OLD REPUBLIC TITLE

ALTA 3 SERIES: ZONING

Purpose: Commercial lenders and purchasers desire assurance that the property can be **used for its intended purposes**.

Paragraph 1(a) of the Exclusions From Coverage section **specifically excludes building and zoning ordinances** from coverage under Owner and Loan policies.

Coverage: The **ALTA 3** Endorsements insure:

1) The **land described in the policy is zoned a specific classification**; and,
2) The **use of the property is permitted under that classification**.

OLD REPUBLIC TITLE

ALTA 3 SERIES: ZONING

3) They do not insure against loss or damage due to the existence of zoning ordinances.

4) Do not insure that the zoning ordinance has been complied with.

5) It does not guarantee that the building code has been complied with, if contained in the ordinance.

ALTA 3.1 & 3.2: There is **limited affirmative coverage** as to:

a. Area, width or depth of the Land as a building site for the structure;
b. Floor space area of the structure;
c. Setback of the structure from the property lines of the land; or
d. Height of the structure; or
e. Number of parking spaces

OLD REPUBLIC TITLE

ALTA 3 SERIES

ALTA 3.0 – Unimproved: Used for **vacant land or acreage.**

ALTA 3.1 – Completed Structure: Used for land with **completed structures**.

ALTA 3.2 – Land Under Development:

1. **An ongoing or contemplated construction project with incomplete improvements;**
2. **Where existing plans and specifications depict the contemplated improvements.**

OLD REPUBLIC TITLE

ALTA 3 & 3.1 GUIDELINES

1) Obtain a **"Zoning Letter"** from the **Zoning Department** where the property is located (city or county) that sets forth:
   a) the **zoning classification,** and
   b) **authorized or permitted use** of the property;

Note: A **Zoning Certification** obtained during Due Diligence can be substituted for the Zoning Letter.

2) Obtain a copy of the applicable **zoning ordinance**, (www.municode.com);

3) Is it a **permitted non-conforming** use **("grandfathered in"),** based upon an **exception or a variance**? Please attach information to the Endorsement.

OLD REPUBLIC TITLE

ALTA 3.2-06 GUIDELINES LAND UNDER DEVELOPMENT

1) Obtain a **"Zoning Letter"** from the **Zoning Department** where the property is located (city or county) that sets forth:

a) the **zoning classification,** and
b) **authorized or permitted use** of the property;

2) The Zoning Letter should state that the proposed improvements, comply with:

a) area, width or depth of the land as a building site,
b) floor area space of the structure,
c) setback of the structure,
d) height of the structure, and
e) number of parking spaces.

3) Copy of the projects plans, including site and elevation plans and survey.

OLD REPUBLIC TITLE

ALTA 3.2-06 GUIDELINES

4) Surveyor's certification as to:

a) the zoning classification and authorized use,
b) compliance of the existing and proposed Improvements with the zoning ordinance, and
c) compliance with the zoning ordinance as to number of parking spaces – fill out your Table A properly.
d) The survey must contain an **overlay of proposed Improvements**, which reflects the Plans including site and elevation plans made by the architect or engineer

5) Obtain a copy of the applicable **zoning ordinance**, (www.municode.com);

OLD REPUBLIC TITLE

ALTA 9 SERIES ENDORSEMENTS

Purpose: The **ALTA 9 series Endorsements** provide coverage against:

1) violations of Covenants & Restrictions;
2) encroachments over easements, building lines or property lines;
3) damage by reason of mineral or other subsurface substance development;
4) Affirmative coverage for forced removal for violation of over restrictions, encroachments and mineral interests; and
5) Often referred to as the **"Comprehensive" Endorsement**.

OLD REPUBLIC TITLE

ALTA 9 SERIES IMPORTANT NOTES

1) Matters items that are to remain as **exceptions t**o the endorsement **must be expressly excepted in Schedule B.**

2) If there will **NOT be coverage for an item within an instrument**, it **must be set out** on Schedule B as an **exception**:

a. Restrictions or specific restriction within a document (easements, ROFR, divestment);
b. Identified encroachments or building line violations;
c. Mineral interests, leases or reservations to which exception is being taken.

3. Why?: See, *Nationwide Life Insurance Co., v. Commonwealth Land Title Insurance Co.,* 687 F.3d 620, (2012): Coverage provided for "any instrument" that contained conditions, easements, covenants and restrictions unless "expressly excepted" in Schedule B. When issuing the ALTA You cannot except to the document in its entirety which contains excepted provision.

4. The result was a revision of the ALTA 9 in 2012, new additional versions of the ALTA 9 that had limited specific coverage, the development of the ALTA 28's and ALTA 35's.

OLD REPUBLIC TITLE

ALTA 9-06

Purpose: In broad terms, the **ALTA 9-06 is the "Comprehensive" Endorsement** and provides protection for Improvements for a lender against:

1. Violation of Covenants, Conditions and Restrictions record against the property;
2. Encroachments – easements, building lines, etc.
3. Exercise of Mineral Rights or Interests;
4. Issued with a Loan Policy Only.

Requirements: On a **commercial loan**, it should never be given without:

(1) a current survey of the property; or,
(2) a personal inspection of the property: Extraction activity;
(3) Items that are to be excepted to MUST be set out as exceptions on Schedule B.

NOTE: Surveys: Many Title Companies will wave the requirement for a new survey for the lender on transactions under $5,000,000.00 and less than 10 Acres.

OLD REPUBLIC TITLE

ALTA 9 - COVENANTS

Covenants: The ALTA 9-06, indemnifies a lender against:

1) any covenant which **divests, extinguishes or subordinates** the lien of an insured mortgage;
2) renders the **lien of the insured unenforceable**;
3) can cause a **loss of an insured's title** after foreclosure;
4) A violation of a Covenant at the time of the Policy unless Excepted to on Schedule B;
5) Violation of a **building Set-back line** – **enforced removal of an improvement**;
6) Covenants relating to **environmental protection only if notice** of the violation is **recorded** at Date of Policy.

Practice Points:

1) **Forfeiture**: If the covenants have **forfeiture provisions**, it **must be expressly subordinated** to the lien of the Insured. **If not subordinated, then you must delete Section 3(a).**

2) **Liens: Any lien** authorized by the Covenant(s) **must be expressly subordinate to** the lien of **the Insured**. **Verify** that mandatory **fees, dues and prior assessments are paid** before or at closing. If the lien is **not expressly subordinated to the Insured Mortgage, delete Section 3(a).**

3) **Use**: Confirm that the **use of the property does not violate** the **Covenant(s).** If it does, the **violation must be an exception in Schedule B.**

OLD REPUBLIC TITLE

ALTA 9 - ENCROACHMENTS

Coverage: **Loss or damage to the improvements** due to:

1) encroachments of **improvements** located on the land **onto adjoining land**;
2) **Improvement on adjoining land onto the insured land**;
3) any encroachment of **improvements** on the land **onto any easement;**
4) **damage to improvements** that encroach an easement due to the **exercise of easement rights**;
5) a **court order requiring the removal encroaching improvement** from the insured land onto the adjoining land.

Practice Points - Underwriter Questions:

1) If the **survey reveals an encroachment over a building or setback line, property line, or easement**, it must be listed as an exception in Schedule B.
2) If Improvements **encroach into an easement**, then Section 4(c)(i) of the Endorsement is to be deleted.
3) **Improvements** encroaching **over adjoining land or onto a right of way**, require the deletion of Section 4(b).
4) **Check with your Underwriter**. Depending on the extent of the violation or encroachment, coverage may be permissible. This may lead to utilization of a **different ALTA 9 Endorsement** and issuance of an **ALTA 28 Series Endorsement**.

OLD REPUBLIC TITLE

ALTA 9 – MINERAL INTERESTS

Coverage: Section 4(c)(ii):

1) **Damage to improvements** located on the insured land, including lawn, shrubbery or trees which arise,
2) from the **exercise of mineral rights, including extraction & development**, or
3) other **subsurface substances**,
4) **excepted** in the legal description or Schedule B.

Guidelines: Obtain the **approval of an Underwriter** or meet one of the following requirements:

1) Confirm that there are **governmental restrictions that would limit or prevent mineral or other subsurface development**;
2) Confirm that there is **no ongoing or anticipated mineral or other subsurface development** in the area.;
3) **If not** verifiable or obtainable, **delete Section 4(c)(ii).**

OLD REPUBLIC TITLE

ALTA 9's FOR OWNERS

ALTA 9.1-06: **Owners Unimproved Land**: Provides Purchaser coverage: 1) **against violations** of **Covenants** in effect **at Date of Policy unless** the violation is **specifically excepted in Schedule B** of the policy; and, 2) covenants relating to **environmental protection only if notice** of the violation is **recorded** at Date of Policy. **Note: Coverage for encroachments and minerals has been eliminated.**

Guidelines: 1) Confirm that there is **no existing violation** of the **Covenant(s)**. If there is, the violation **must** be an **exception in Schedule B**; and 2) If a **notice** of **violation** of an **environmental covenant** is recorded, it must be **excepted on Schedule B**.

ALTA 9.2-06: Owners Improved Land: Equivalent of the Lender ALTA 9-06. Provides Coverage for: 1) **violations of any enforceable Covenant**(s) unless excepted to in Schedule B; 2) removal of improvements due to **encroachments onto setback lines** disclosed on a recorded plat; 3) notice of a **violation of environmental protection liens if recorded** in the public records. **Note: Coverage for encroachments and minerals has been eliminated.**

Guidelines: 1) Confirm that there is **no existing violation** of the **Covenant(s)**. If there is, the violation **must** be an **exception in Schedule B; 2) Review of a current survey – can be existing survey if no changes.**

OLD REPUBLIC TITLE

ALTA 9.3-06 IMPROVED LAND

Coverage: Provides **lenders coverage** for certain losses due to **violations of a Covenant, setback lines** and **notices of violations** of **environmental protection laws** or related Covenant(s).

An insured lender is **covered** as to a **violation of Covenants** causing:

1) loss of priority, enforceability and validity of an insured mortgage; or,
2) loss of title after foreclosure - forfeiture; or,
3) loss as a result of any current violation; or,
4) enforced removal of an improvement as a result of an encroachment onto a setback line; and,
5) violation of environmental protection laws or regulations but only with notice recorded in the public records.

Requirements: Confirm there **no existing violation of the Covenants**; and review of **survey** reflecting the **current improvements** and **setback lines**. All building **setback line violations** must be **excepted** to **in Schedule B**.

Practice Notes:

1) All coverages are effective unless excepted to in Schedule B of the policy.
2) Coverage for encroachments and minerals has been eliminated.
3) The notice of the violation must be recorded at Date of Policy.

OLD REPUBLIC TITLE

ALTA 9.7-06
LAND UNDER DEVELOPMENT

Purpose: Extends multiple coverages as to **Covenants, building line violations, encroachments and mineral rights** to Lenders **for future improvements** made pursuant to **specific Plans** incorporated into the Endorsement.

Coverages: Most of the same coverages under ALTA 9-06, but adds **Future Improvements made pursuant to specific Plans on the insured property**.

1) **Covenants**: violations by a **Future Improvements**, including building line violations, unless excepted for in Schedule B.

2**) Encroachments**: **Adds Future Improvements** to some coverages, but deletes enforced removal:

a) encroachments of **improvements and future improvements onto adjoining land**;

b) encroachment of **improvements and future improvements onto any easement;**

c) damage due to the **exercise of easement rights**;

d) Improvement (only) on adjoining land onto the insured land.

3) Mineral Rights: coverage is provided for damage to an Improvement or Future Improvement resulting from the right to extract or develop minerals or other subsurface substances excepted in the policy.

OLD REPUBLIC TITLE

ALTA 9.7-06

Requirements:

1. Review the Covenants.
2. Obtain a Copy of the Plans for the development as they must be made a part of the Endorsement:

"Plans" means the survey, site and elevation plans or other depictions or drawings prepared by [Name of Architect or Engineer] dated ____, last revised____, designated as [Project Name]consisting of ___ sheets.

3. Review current survey, if there are existing improvements, except for existing Building line violations and encroachments
4. Except for any violation of covenants, encroachments onto the land, mineral interests.

OLD REPUBLIC TITLE

MORTGAGE MODIFICATION ALTA 11

Purpose: The ALTA 11 Series Endorsements are issued on current Loan Policies where a mortgage is **modified after its original date by agreement of the parties**.

Coverage: Insures a Lender:

1) against loss due to invalidity or non-enforceability of the Mortgage as a result of the terms of the **Modification Agreement**.

2) that **priority of the Mortgage**, as modified, **continues over any defects, liens and encumbrances** on the title, other than those listed as **exceptions** in the Policy or the Endorsement.

Requirements:

1) review the mortgage modification agreement; and,

2) Update the title.

Notes:

1) Intervening matters not released must be shown as exceptions.

2) The ALTA 11 Series endorsements are not the same as a "date-down" endorsement, they do not extend all the coverages under the policy to the date of recording of the mortgage modification agreement.

OLD REPUBLIC TITLE

MODIFICATION ALTA 11.1-06

Coverage: The ALTA 11.1-06 provides the same coverage as the ALTA 11-06, but is used where an **intervening lien** appears in the chain of title and was **subordinated** to the modification.

Guidelines:

1) Follow the same underwriting guidelines as for the ALTA 11-06.

2) **All subordinated intervening matters must be listed in the endorsement**.

OLD REPUBLIC TITLE

MORTGAGE MOD INCREASED COVERAGE

Coverage: The **ALTA 11.2-06** is issued when a mortgage is being **modified** or amended and the a**mount of the mortgage is being increased.**

Guidelines:

1) Follow the same underwriting guidelines as for the ALTA 11-06.
2) All **subordinated intervening matters** must be listed in the endorsement.
3) Add the **amount** by which the **insurance is increasing** in the endorsement.

Form Notes:
1) Section 1(a) insert the **modification and recording information;**
2) In Section 1(b) **the date the modification is recorded;**
3) Set out subordinated intervening matters.

OLD REPUBLIC TITLE

ALTA 11.2-06 MORTGAGE MOD

Form Notes Continued:

4) Section 2 - the **new total amount of insurance** being issued.

5) Section 3 - the **affirmative coverage** which the endorsement provides.

Note that Section 3. b. allows the insurer to **insert any new exceptions for defects, liens or encumbrances which have arisen** and are reflected in the public land records subsequent to the date of recording the mortgage and prior to the date of recording the modification.

6) Section 4 - **creditors' rights exclusion** pertaining to the transaction creating the modification.

7) Section 5 - **optional provision** for those states which impose a **mortgage tax** on the principal amount secured by a mortgage or deed to secure debt.

OLD REPUBLIC TITLE

ALTA 12-06 - AGGREGATION

Purpose: Often referred to as the **"tie-in"** Endorsement and is utilized where:
1) Security deeds on **multiple properties** secure the **same indebtedness**; or
2) In **multi-state transactions**, where mortgages on different properties secure the same debt.

Coverage:
1) The Policies are "tied" together so that insurance under the **Loan Policy** in the Endorsement is the **combined sum of all mortgages and coverage under each Loan Policy in the Endorsement**.
2) Any **payments made by the title insurer under one policy reduces the aggregate amount of coverage available under all** of the policies listed in the endorsement.

Form Notes:
1) Section 1: requires the policy information of the policies being "tied-in": **policy number**, the **state** where the real **property** is **located** and the **individual policy amount or allocation**.

2) Section 3: **The total or aggregate amount of insurance** for all policies.

3) Sections 4, 5 and 6: Set forth the modifications of the loan policy to reflect that the individual policy liability is being aggregated with other policies reflected in Section 1 of the Endorsement.

OLD REPUBLIC TITLE

ALTA 12.1-06

Purpose: The ALTA 12.1-06 is for use when policies insuring Security Deeds in **more than one state** are aggregated in the amount of the combined sum of all security instruments, **but the total aggregated exceeds the single risk limitation in one or more of the states.**

Form Notes:

1) Section 3.b.: **limits** the aggregate amount of **insurance coverage** the insurer is willing to provide **to the single risk limit** applicable to the **particular state(s)** and **amount(s)** listed in Section 3.b.

2) Section 6(b)(ii): reflects that certain **payments made will not reduce the Aggregate Amount of Insurance** (a defined term in both 12 series endorsements) set forth in Section 3.b. **until the Aggregate Amount of Insurance** applicable **in Section 3.a.,** computed according to the terms of the Conditions, **is reduced** below the Aggregate Amount of Insurance **set forth in Section 3.b**.

OLD REPUBLIC TITLE

FUTURE ADVANCES: ALTA 14'S

Purpose:

1) Protects a Lender **against a loss of priority of future advances of principal made after the Date of Policy,** but pursuant to the loan**,** including advances for taxes, insurance, foreclosure and other costs to protect the lien.
2) Loan must be secure **both present and future advances pursuant to an agreed upon "line of credit**," or "revolving line of credit."
3) Not for use with "open end" mortgages, i.e. "dragnet clauses," in which future advances are usually optional, revolving line of credit advances are usually obligatory up to the stated maximum mortgage amount.

Coverage:

1) ALTA 14 Series insure that the **priority of the mortgage** will not be impaired by liens or encumbrances on title and **Future Advances** will enjoy the **same priority** as advances made as of the **date of closing**;
2) Provide **protection against** provisions of the note or loan agreement which may cause the lien of the mortgage to become **split in priority** as to **earlier and subsequent advances** due to payment of interest on interest, the addition of accrued interest to the principal balance of the loan, or changes in the rate of interest.

OLD REPUBLIC TITLE

ALTA 14-06 & 14.1-06

Guidelines:

1) The **ALTA 14-06** may only be issued **when the advances under the loan agreement are obligatory on the part of the lender**.
2) They **must be obligatory** if they are **to have the same priority** as the **recording date of the mortgage**.
3) A careful **examination of the loan agreement**, the promissory note, and the Mortgage is needed to determine:
   a) that the Insured Lender has a legal obligation,
   b) which can be enforced by the borrower,
   c) to make the advance when called upon,
   d) unless the borrower is in default, has exceeded his credit limit or the advance would cause the borrower to exceed his credit limit.
4) The recorded security instrument must **state that it secures future advances**, even though provisions for future advances are in a separate agreement
5) The **ALTA 14.1-06** provides the **same coverage but excepts liens, encumbrances or other matters, actually known to the insured, and occurring subsequent to the date of policy and prior to the date of a subsequent advance.**

OLD REPUBLIC TITLE

ALTA 15 SERIES NON-IMPUTATION

Purpose: Issued for **Owners Policies only when there are new investors** in existing Partnerships, LLCs and Corporations, that hold title; or, **lenders with participation or shared appreciation interests in loans that require a percentage interest in the borrowing entity.**

Issue: New Investor or Lender:

1) Is charged with the knowledge by **imputation** by operation of law which can result in **adverse consequences in its investment due to a title loss**.

2) Can **request assurance that liability** under the policy **will not be denied on the grounds** that:
   a) the **insured had knowledge of adverse matters imputed to it by operation of law;**
   b) **through existing, former or departing partners**, **individuals associated with the entity,** lenders, or borrowers.

Partnerships: The **knowledge of any partner** is imputed to **all other partners** and the **partnership entity** itself.

Corporations: knowledge may be **imputed to the entity** through officers, directors, shareholders and managers depending on applicable state law.

Limited liability company: knowledge may be imputed to the entity through its **members**.

OLD REPUBLIC TITLE

ALTA 15-06 & 15.1-06

Coverage: the Endorsement **covers off-record matters** that are **imputed by law to the insured**, but **not matters known to the new investor.**

Key Point: There is usually **no conveyance of the property itself, only a change in the participants in the business entity which holds title**.

ALTA 15-06: Coverage for when a **transfer** of the **entire equity interest** of the **entity holding title** occurs**.**

ALTA 15.1-06: Coverage for a **partial transfer** of the **equity interest.** The **coverage is limited** to the **percentage acquired** by the new investor in the entity holding title.

Practice Note: The **ALTA 15.1-06** identifies the new investor (the **"Additional Insured")** as the insured on the Endorsement and requires the **consent of the original Insured** on the policy to the issue the Endorsement.

OLD REPUBLIC TITLE

ALTA 15.2-06

ALTA 15.2-06: Utilized when the **Owner's Policy** specifically **names** the **new investor as the "Insured"** in Paragraph 1 of Schedule A.

Practice Notes:
1) In Paragraph 2 of Schedule A, the **interest being insured** must be **identified** as the type of interest (**membership, partnership, or shareholder**) **acquired by the new investor**.

2) The **Amount of Insurance** should be **limited** to the **value paid** by the Insured for the interest acquired.

REQUIREMENTS: The following items are required:

1) A detailed **analysis of the transaction**;

2) A satisfactory **affidavit and indemnity** from the existing or departing partners, etc., **("Non-Imputation Affidavit")** and;

3) A review of **audited financial statements** offered by **indemnitors**.

OLD REPUBLIC TITLE

MEZZANINE FINANCING

Mezzanine Financing involves a loan based upon the equity of the titleholder that is not secured by the real property but by a pledge of the ownership interests in the titleholder or owners of interests in the titleholder. There is no security instrument against the real property, but the Mezzanine Lender does obtain title insurance through a Mezzanine Endorsement to the titleholder's Owners Policy. The Mezzanine Lender may request a UCC Insurance Policy as well.

OLD REPUBLIC TITLE

ALTA 16-06
MEZZANINE FINANCING

Coverage:

1) A **Mezzanine Lender** is an individual or entity that **secures its loan with an ownership interest** in the **entity that holds title** rather than the real estate itself.

2) The Mezzanine Lender becomes an **assignee of payments** under the **Owner's Policy, if there is a loss,** not to exceed the debt owed to the Mezzanine Lender.

3) The ALTA 16-06 also operates as a non-imputation Endorsement as **to matters known to the insured owner, but not known to the mezzanine lender.**

4) For **Exclusions in the Policy to apply to the Mezzanine Lender**, they must have had **knowledge** of the matter.

OLD REPUBLIC TITLE

ALTA 16-06

Requirements:

1) Execution of the **Non-Imputation Affidavit by the "Insured**" under the Owner's Policy;

2) Audited Financial Statements from the Affiants;

3) **Signature of the Insured named** in Schedule A of the Owner's Policy on the **Mezzanine Endorsement**, evidencing its consent;

4) **Signature of the Mezzanine Lender** on the **Endorsement a**s set forth in Paragraph 1 of the Endorsement;

5) **Underwriting Approval**.

OLD REPUBLIC TITLE

ALTA 17's ACCESS

Purpose: Commercial Lenders and Owners want assurance of both **vehicular and pedestrian access,** from a **public road** either by **direct access or an easement** as well as the **use of existing curb cuts** or other entries along the **public right of way and the right of access for utilities to the property.**

ALTA 17-06: I**nsures direct vehicular and pedestrian access to a public right of w**ay that is abutting the insured property.

Guidelines:

1) Verify through a **recent survey, plat, official map** or inspection, that the insured **property abuts a public right of way;** and,
2) Verify there is **actual access to the street** or public right of way via a **curb cut** or other means; and,
3) The property owner has **the legal right to use** that means of **access**; and,
4) There are **improvements** on the land!

OLD REPUBLIC TITLE

ALTA 17.1-06

Coverage: Insures there is vehicular and pedestrian **access to a public right of way pursuant to an easement** identified in Schedule A of the policy.

Guidelines:

1) Verify through a recent survey, plat, official map or inspection, that the access **easement runs to** both the **insured parcel and abuts a public right of way**; and,
2) The **street is open** and **access from the easement** to the street exists; and,
3) There is a **legally enforceable right to use the easement**; and,
4) The use **cannot be terminated** by the enforcement or **foreclosure** of a prior interest affecting the burdened property.

OLD REPUBLIC TITLE

17.2-06 UTILITIES

Coverage: Insures the **right of access to specific utilities or services** over, under or upon rights-of-way or easements **to the property** because of:

1) **gaps or gores between the boundaries** and the rights-of-way or easements; or,
2) **gaps between** the boundaries of the rights-of-way or easements; or,
3) **termination** by a grantor, or its successor, of the rights-of-way or easements.

Requirements:

1) Verify through a **recent survey,** or other means, that the **utility or service** specified in the Endorsement **does have access** to the property;
2) **Confirm** the existence of **an easement or right-of-way** that provides **access for the utility** or services via recorded, platted and/or are shown on the survey
3) **Confirm** that the specified **utility or service** line **actually services** the **premises**.
4) **Other basis for verifying utilities**: Certification from utility company; certification from city or county; Engineer's certification; or, Affidavit from current owner combined with independent evidence.

OLD REPUBLIC TITLE

SINGLE TAX PARCEL ALTA 18-06

Coverage: The Company insures against loss or damage sustained by the Insured by reason of:

1) the Land being **taxed as part of a larger parcel** of land or
2) failing to constitute a separate tax parcel for real estate taxes.

Guidelines:

1) Confirm the property consists of **one tax parcel** via tax records, and,
2) Confirm the property is **not taxed as part of another tax parcel.**

OLD REPUBLIC TITLE

MULTIPLE PARCELS ALTA 18.1

Coverage:

1) Insures **several different parcels each** have a **unique tax identification number** and containing no more or less property than the property described in Schedule A.

2) Insures against loss if the insured **easement(s) can be cut off by non-payment of real estate taxes** or assessments against the burdened property.

Guidelines:

1) Confirm that each parcel is taxed as a separate tax parcel via the tax records.

2) Confirm each parcel is not taxed with other land.

3) Confirm **real estate taxes** against the **burdened property** for any insured easement were paid through the year that the easement was created.

OLD REPUBLIC TITLE

CONTIGUITY

ALTA 19-06: Multiple Parcels: insures that **two or more parcels insured** in Schedule A **are contiguous to each other without any gaps or gores along their common boundary**.

ALTA 19.1-06 Single Parcel: insures that the insured parcel is **contiguous to another, uninsured parcel of land along defined lines or boundaries.**

Requirements: Review survey of the property and legal descriptions for gaps & gores.

OLD REPUBLIC TITLE

ALTA 25
SAME AS SURVEY

Coverage: **Insures** against loss or damage in the event the **land insured** in the policy is **not the same** as that delineated **on a designated survey** bearing a specific date.

Alternately put, the endorsement insures the property set forth in the legal description in Schedule A of the Policy, is the same property shown on the survey.

Guidelines:

1) A **current survey** of the land prepared by a licensed surveyor or registered engineer.
2) Review of the survey to verify that description of the land in your policy is **identical** to the land shown on the survey.

OLD REPUBLIC TITLE

ALTA 27 - USURY

Issue: Paragraph 5 of the Exclusions from Coverage of 2006 ALTA Loan Policy, excludes from coverage a loss resulting from the invalidity or unenforceability of the insured mortgage, if the mortgage is found to be **usurious**.

Georgia: O.C.G.A. § 7-4-2, for loans in excess of $250,000.00 parties can enter into any agreement as to the interest rate. But, **O.C.G.A. § 7-4-18, makes any interest rate greater than 5 percent per month illegal and a misdemeanor**. Violation of the statute results in the **lender only being able to collect the principal on the loan. The interest is forfeited** by the lender.
See, *Norris v. Sigler Daisy Corporation*, 260 Ga. 271 (1990).

Coverage: Insures against loss or damage arising in the event that the **lien of the insured mortgage** is deemed **invalid or unenforceable** because the **interest rate** provided in the loan documents secured by the insured mortgage **violates local usury laws**.

Thoughts:

OLD REPUBLIC TITLE

INSURING ENCROACHMENTS

Issue: Survey reveals an encroachment of an improvement over a building line, into an easement, over the property line or an encroachment onto the insured property. Commercial Lenders desire affirmative coverage for these items.

ALTA 28-06: Damage – Forced Removal: Indemnifies the insured against loss or damage arising from:

1) **damage to an existing building located on the land; or,**
2) **any court order directing the removal or alteration of an existing building located on the land;**
3) **due to the enforcement of rights granted in a specifically described easement.**

OLD REPUBLIC TITLE

ALTA 28's

ALTA 28 Guidelines:

1) Review **current survey** to determine **location of the building in relation to the easement**; or,
2) Approval or **consent** from the **holder of** the **easement; or,**
3) Obtain an **abandonment of easement.**
4) For Loan Policy Only.

ALTA 28.1-06: Boundaries & Easements: Provides **limited coverage** as to **loss/damage or forced removal** because of:

(1) an **encroachment** of an "**Improvement" onto adjoining land**;
(2) the **"Improvements" encroaching onto an easement**; or,
(3) an **encroachment from adjoining land onto the insured's land**.

OLD REPUBLIC TITLE

ALTA 28's ENCROACHMENTS

ALTA 28.1-06 - Guidelines:

1) **Survey** with **current improvements** on the property.
2) All **encroachments must be** set out on **Schedule B** as **exceptions**.
3) Encroachments of more than **one-half of the easement** must be listed in **Section 4** of the Endorsement. **(Consult Underwriter)**
4) Encroachment of **improvements onto a road** must be listed in **Section 4**. **(Consult Underwriter)**
5) **Encroachments from adjoining land must be listed in Section 4**.

Form Note: Section 4 of the Endorsement must specifically list the Items which you are listed on Schedule B which **you are not providing any coverage for.**

OLD REPUBLIC TITLE

CONSTRUCTION LOAN ENDORSEMENTS

Purpose: The **ALTA 32-06, 32.1-06, 32.2-06 and 33-06** are designed for use where there is **limited or no priority for the lien of the Insured Mortgage over potential mechanics' liens** due to **commencement of work prior to the recording** of the mortgage or security instrument.

They may also be used for situations where the recorded mortgage or deed of trust has priority over mechanic's liens, but priority for subsequent draws or advances may be lost due to potential mechanics' liens.

The coverage afforded by the ALTA 32 series is **significantly more limiting in the lien coverage** provided than any other previously issued ALTA products as these endorsements are **intended to avoid the potential of having a Loan Policy operate as a payment bond.**

OLD REPUBLIC TITLE

ALTA 32-06
LOSS OF PRIORITY

Coverage: The **ALTA 32-06 provides coverage only** to the extent that:

1) **Charges for the services and/or materials provided;**
2) **Were designated for payment in the documents supporting a Construction Loan Advance e.g. Construction Contract or draw schedule;**
3) **Disbursed by or on behalf of the Insured;**
4) **On or before the Date of Coverage.**

The **Company/Agent is not required to disburse the construction funds.**

Plain Language: Coverage for a mechanics lien only if the provider was listed for payment in a draw schedule and was paid from loan proceeds on or before closing.

OLD REPUBLIC TITLE

ALTA 32.1-06
DIRECT PAYMENT

Coverage: Provides coverage **only** to the extent that:

1) **Direct payments to labor & material suppliers have been;**
2) **Made by the Company/Agent ;or**
3) **By the Insured with the Company's written approval; and**
4) **Only for services, labor, materials or equipment for which the Mechanic's Lien is claimed.**

Requirement: **disbursements must be made by the Company/Agent directly to labor & material suppliers or by written authorization** for such payment to be made.

Plain Language: Coverage for a mechanics lien only if the Co./Agent made a direct payment to the provider or if the Co., authorized the insured to make payment.

OLD REPUBLIC TITLE

ALTA 32.2-06
INSURED DIRECT PAYMENT

Coverage: Provides **coverage only** to the extent that:

1) **Direct payments to labor & material suppliers have been;**
2) **Made by the Insured or on Insured's behalf;**
3) **On or Before the Date of Coverage; and**
4) **Only for services, labor, materials or equipment for which the Mechanic's Lien is claimed.**

Note: The Company/Agent is NOT required to make disbursements.

Plain Language: Coverage for mechanic liens only if the Insured made a direct payment to the provider on or before the date of closing.

OLD REPUBLIC TITLE

DISBURSEMENT & DATE DOWN

Purpose: The **ALTA 33-06** acts as a **date down endorsement** for construction disbursements and draws and is to be **used solely** in connection **with the ALTA 32-06, 32.1-06, or 32.2-06**.

Coverage: It changes the **Date of Coverage** as defined in the **ALTA 32** series, **but does not change the Date of Policy** or any other Endorsements issued in connection with the policy.

Requirement: Any additional exceptions resulting from the title search update must be added to the endorsement.

Note: This can **only** be issued in conjunction with the ALTA 32 series endorsements.

OLD REPUBLIC TITLE

MINERAL RIGHTS
ALTA 35 SERIES

Coverage: They are designed to provide **limited coverage for enforced removal, alteration or damage to "improvements"** located on the surface of the land due to the **development or extraction of minerals** or other subsurface substances **excepted in Schedule B**.

The **main distinction** between the ALTA 35's, is the **definition of "improvements"** as set forth in each Endorsement.

Requirements: Mineral development must not be **not active in the area**, **or other restrictions (covenants, zoning, etc.) prohibit mineral development.**

Note: The Endorsement is issued in lieu of deleting the standard mineral rights exception in the policy.

OLD REPUBLIC TITLE

ALTA 35-06
BUILDINGS

Definition: For purposes of this endorsement only, **"Improvement" means a building on the Land at the Date of Policy.**

Form Note: In Item 4., in each endorsement sets forth the exceptions to the coverage provided by the endorsement. Item 4.c., allows for the insertion of Specific Exceptions on Schedule B that are to remain exceptions to the policy.

OLD REPUBLIC TITLE

ALTA 35.1 & 35.2 IMPROVEMENTS

ALTA 35.1:

Definition: "Improvement" means a building or structure located on the surface of the Land, and any paved road, walkway, parking area, driveway, or curb, affixed to the Land at Date of Policy and that by law constitutes real property, but excluding any crops, landscaping, lawn, shrubbery, or trees.

Form Note: In Item 4., in each endorsement sets forth the exceptions to the coverage provided by the endorsement. Item 4.c., allows for the insertion of Specific Exceptions on Schedule B that are to remain exceptions to the policy.

ALTA 35.2

Definition: "Improvement" is left blank to insert the specific improvements for which coverage is being provided.

Form Note: In Item 4., in each endorsement sets forth the exceptions to the coverage provided by the endorsement. Item 4.c., allows for the insertion of Specific Exceptions on Schedule B that are to remain exceptions to the policy.

OLD REPUBLIC TITLE

ALTA 35.3 UNDER DEVELOPMENT

Definition: "Improvement" includes the definition as set forth in the ALTA 35.1-06; as well as **"Future Improvements"** as designated and located on **identified "Plans."**

The term "Plans" is defined as: "the survey, site and elevation plans or other depictions or drawings prepared by _____, dated _____, last revised _____, designated as _____ consisting of ____ sheets."

A copy of the Plans will be needed for review and to complete the endorsement.

Form Note: In Item 4., in each endorsement sets forth the exceptions to the coverage provided by the endorsement. Item 4.c., allows for the insertion of Specific Exceptions on Schedule B that are to remain exceptions to the policy.

OLD REPUBLIC TITLE

Thank you!

Tim Raffa
Vice President | Georgia Commercial Underwriting Counsel
T: 770.475.6199 Ext. 15850 | D: 678.746.5850
traffa@oldrepublictitle.com
Old Republic Title | Old Republic Insurance Group

OLD REPUBLIC TITLE

2:30 **TAX DEEDS AND QUIET TITLES**

Carolina D. Bryant, Ayoub & Mansour LLC, Atlanta

John A. B. Ayoub, Ayoub & Mansour LLC, Atlanta

TAX DEEDS AND QUIET TITLES

Carolina D. Bryant, Esq.
John A.B. Ayoub, Esq.
Ayoub & Mansour LLC
The Highland Building
675 Seminole Avenue, Suite 301
Atlanta, Georgia
cdbryant@ayoubmansour.com
ayoub@ayoubmansour.com
Telephone: 404.892.2599
Facsimile: 404.806.7414
http://www.ayoubmansour.com/

INTRODUCTION

This paper is designed to give attorneys and title examiners an outline of what a tax deed is and what to look for if you come across one in a chain of title. As litigators who specialize in tax deeds, we encounter a lot of title attorneys and closing attorneys who seem terrified to be involved in any transaction involving a tax deed. The purpose of this paper is to arm you all with the information you need to knowledgeably assess what a tax deed means in a chain of title and what to do when you see one. We will include statutory references and case law throughout the paper and talk. We also address a few title scenarios unique to tax deeds that pop up frequently prior to a closing. Anyone should feel free to reach out to the authors and presenters with questions about tax deeds if you come across them in your practice.

I. What is a tax deed?

A tax deed evidences that property has been sold for unpaid taxes. The statues governing the assessment of taxes and their collection can be found in O.C.G.A. §§ 48-2-30 et seq., and 48-3-1 et seq. These provisions are are harsh because they are intended to create significant incentive to pay one's property taxes. All owners of non-exempt[1] real property must pay taxes on their real property, at a rate determined by the property's fair market value. O.C.G.A. § 48-5-6. Each county in Georgia, has its own specific due date for the taxes, which should be stated on the face of the bill. Nonetheless, tax executions for unpaid taxes are issued as of December 20 of each year. O.C.G.A. § 48-5-161(a). The terms tax fi.fa., tax execution, and tax lien can be used interchangeably, although a tax fi.fa. most specifically refers to an execution that has been added to the general execution docket of the pertinent county. Tax executions automatically arise as of January 1st of each year whenever the taxes are unpaid. O.C.G.A. § 48-2-56 states:

> Except as otherwise provided in this Code section, liens for all taxes due the state or any county or municipality in the state shall arise as of the time the taxes become due and unpaid and all tax liens shall cover all property in which the taxpayer has any interest from the date the lien arises until such taxes are paid.

[1] Examples of exempt categories of land are: public property; churches and church property; charitable institutions; nonprofit hospitals open to the public; educational institutions; and nonprofit cemeteries.

Property tax liens are prior to all other taxes, including federal taxes. They are prior to any other liens against the property as well, including open security deeds, mechanics' liens, and any other personal judgments. Tax liens remain alive for seven years from the date of issue or seven years after the date of recording in the general execution docket. O.C.G.A. §§ 48-3-21 and 48-3-22. Georgia case law has interpreted these statutes to mean that an execution must be issued and recorded by the taxing authority within seven years from the date that it could have been issued. Suttles v. Dickey, 192 Ga. 382 (1941). The taxing authority's failure to issue and record a tax execution within seven years from the date that an execution could have been issued renders the tax liability null and void. Id.

All taxes are a personal debt, and the Tax Commissioner of the pertinent county, or his agents, may attach any property of a delinquent taxpayer for nonpayment of property taxes. O.C.G.A. § 48-2-55. Tax executions are issued against the owner of the property if known, although they also attach to the land. "[T]axes are not only against the owner but against the property itself as well. The only concern as to an owner at all, is merely to know against whom the assessment is to be made, whilst the tax itself, and the lien therefor is against the property." Verdery v. Dotterer, 69 Ga. 194, 199 (1882). See also Townsend v. McIntosh, 205 Ga. 643 (1949). Where the owner of property is unknown, the executions may be issued solely in rem. O.C.G.A. § 48-4-2.

A. Non-Judicial Tax Sales

It is the Tax Commissioner's prerogative to present the execution to the levying officer for levy and sale. O.C.G.A. § 48-5-161(b). See O.C.G.A. § 9-13-12. In most Georgia counties, the Tax Commissioner sells the properties on the courthouse steps in his capacity as "ex-officio sheriff." O.C.G.A. § 48-5-137. In some instances, and in some counties, tax fi.fas. seem to be presented to the levying officer for levy instantly and in other cases or counties, a significant lag can occur between the time the execution arises and when it is presented to the levying officer for levy.

A tax lien issued against a property owner is a directive to the levying officer of the County that he or she may levy and sell property belonging to the taxpayer in order to satisfy the unpaid taxes. O.C.G.A. § 48-3-1. Once recorded, the property can be sold at any time thereafter. A levying officer must levy on any tax execution that is presented to him or her that appears regular and proper on its face and unless it is void on its face, the levying officer has no discretion or authority to decline to enforce it. Vesta Holdings, LLC v. Freeman, 280 Ga. 608 (2006).

Prior to the sale taking place, the levying officer must adhere to certain levy and notice requirements that can be found in O.C.G.A. § 48-3-9, § 48-4-1, and § 9-13-12. See also Tharp v. Vesta Holdings I, LLC, 276 Ga. App. 901 (2005). Primarily, the responsibilities entail providing 20 days written notice to all parties with an interest in the property prior to the levy, sent by certified return receipt mail. Additionally, the levying officer must publish notice of the tax sale in the County legal organ once per week for the four weeks immediately preceding the sale. Lastly, the levying officer must also send written notice, by certified return receipt mail, to the owner of record 10 days prior to the sale. If a federal tax lien is involved, the County should notice the United States of America, Internal Revenue Service pursuant to the provisions found in 26 U.S.C. §7425. If interested parties, owners or those with a recorded interest against the property being sold for taxes do not receive notice of the levy or tax sale, it is not necessarily fatal to the validity of the sale. Saffo v. Foxworthy, Inc., 286 Ga. 284 (2009). All tax sales take place on the first Tuesday of each month. In summary,

> [a]ll owners of non-exempt real and tangible personal property are subject to taxation on the property's fair market value as of January first of each year. In order to secure payment of these taxes when they fall delinquent, the law creates a lien which extends not only to the property giving rise to the tax obligation, but also to all other property owned by the taxpayer. Generally, a lien for delinquent ad valorem taxes arises at the time the taxes become due and unpaid, and covers all property in which the taxpayer has any interest from the date the lien arises until such taxes are paid. When taxes are not paid, the Tax Commissioner is authorized to issue a writ of fieri facias (or tax execution), which is a directive to the appropriate officer (often the sheriff) to levy upon the property, sell it and collect the unpaid taxes. Nat'l Tax Funding, L.P. v. Harpagon Co., 277 Ga. 41, 42 (2003).

Title gained by a nonjudicial tax deed is inchoate and defeasible. Brown Inv. Group, LLC v. Mayor of Savannah, 303 Ga. App. 885 (2010). Tax deed purchasers are liable for property taxes (Patterson v. Florida Realty & Finance Corp., 212 Ga. 440 (1956) and homeowner association dues (Croft v. Fairfield Plantation Prop. Owners Ass'n, 276 Ga. App. 311 (2005)), but do not have a right to possess the property until they foreclose the right of redemption.

B. Judicial In-Rem Tax Sales

Counties may also employ judicial in-rem tax sales to sell property for unpaid taxes, which are governed by O.C.G.A. § 48-4-75 et al. These differ from the traditional tax sales in that the county or municipality that issued the tax fi.fa. files a lawsuit in order to effect the foreclosure. The redemption period is shorter (60 days) and redeeming parties do not have to pay a premium

to redeem the property. The tax deed purchaser does not have to foreclose the right of redemption after the 60-day period; he or she is vested with fee simple title by the passage of that 60 days period, where no redemption has occurred.

In a judicial in rem action, all parties with an interest in the property are named as respondents and are given an opportunity to defend their interest in the property or make the tax payment before the foreclosure; typically, there is also a scheduled hearing. At any time during the proceeding, an interested party can redeem the property. O.C.G.A. § 48-4-80. Once an order is signed allowing the property to be sold for taxes, the property must be advertised as a non-judicial tax foreclosure would be. O.C.G.A. § 48-4-81. As stated, after the sale, the property owner or other interested parties have only 60 days to redeem the property, as opposed to the 12 months for nonjudicial tax sales. After 60 days the right to redeem the property will automatically terminate, O.C.G.A. § 48-4-81(c)(3).

Tax Commissioners infrequently use this procedure for a number of reasons. The first is that they are expensive. Attorneys have to be hired to file a lawsuit for each property that is delinquent, which is more expensive than sending out notices to notify taxpayers that they need to pay their taxes or bear consequences; particularly since a large number of tax payers pay their taxes once they receive the notice of tax sale. Furthermore, following the decision, Canoeside Props. v. Livsey, 277 Ga. 425 (2003), an in rem tax sale may be invalid if the taxpayer transfers the property to a third party prior to the date of the filing of the In Rem proceeding.

II. What to do if you see a tax deed in the chain of title?

If you are examining title for a closing or for a potential client, a tax deed in the chain of title should give you pause.

> In Georgia, when property is sold for unpaid taxes, the tax sale purchaser obtains a deed to the property. See Bennett v. Southern Pine Co., 123 Ga. 618, 621 (51 SE 654) (1905). This deed, however, does not provide the tax sale purchaser with absolute title to the property, but rather gives the purchaser a defeasible fee interest therein with the title remaining subject to encumbrance for at least one year after purchase due to other interested parties' statutory rights of redemption. Land USA, LLC v. Georgia Power Co., 297 Ga. 237 (2015).

However, a tax deed is not the end of the world if you are armed with the knowledge of how to examine whether it has been foreclosed or whether it needs to be redeemed. Thus, the first follow-up question is: “has this tax deed been redeemed and if so, by whom?”

A. Redemption Quitclaim Deeds

O.C.G.A. § 48-4-44 governs redemption quitclaim deeds. It states:

> **(a)** In all cases where property is redeemed, the purchaser at the tax sale shall make a quitclaim deed to the defendant in fi. fa., which deed shall recite:
>
> **(1)** The name of the person who has paid the redemption money; and
>
> **(2)** The capacity in which or the claim of right or interest pursuant to which the redemption money was paid.
>
> **(b)** The recitals required by subsection (a) of this Code section shall be prima-facie evidence of the facts stated.

So, if you see a quitclaim deed from the tax deed purchaser back to the owner at the time of the tax sale that contains the recitals stated above, you can safely assume the tax deed has been redeemed. The effect of a redemption quitclaim deed (when done by the owner at the time of the sale) is basically to cancel the tax sale and return title to the property to the way it was the day before the tax sale. O.C.G.A. § 48-4-43.

If the redemption was by someone other than the owner at the time of the tax sale, we look to O.C.G.A. § 48-4-43, which states:

> If the redemption has been made by any creditor of the defendant or by any person having any interest in the property, the amount expended by the creditor or person interested shall constitute a first lien on the property and, if the quitclaim deed provided for in Code Section 48-4-44 is recorded as required by law, shall be repaid prior to any other claims upon the property.

This redemption lien is very powerful and has been given "super-lien status" by Nat'l Tax Funding, LP v. Harpagon Co., 277 Ga. 41 (2003). The holder of a redemption lien can foreclose upon the property to satisfy this lien, so if you see these on title, they need to be satisfied or otherwise addressed.

PRACTICE TIP: All redemption tax deeds are issued from the tax deed purchaser back to the named defendant fi. fa on the tax deed. A property transferred by the defendant in fi. fa. after a tax sale to a third party is not invalidated by the redemption quitclaim deed. Instead, the doctrine of "after acquired title" operates to vest title in the current owner once the property is redeemed and the tax deed purchaser executes the redemption quitclaim deed. See Reece v. Smith, 276 Ga. 404 (2003) also see Land USA v. Georgia Power, 297 Ga 237 (2015).

B. How is a tax deed redeemed?

O.C.G.A. § 48-4-42 governs how a tax deed is redeemed. It states:

> **(a)** The amount required to be paid for redemption of property from any sale for taxes as provided in this chapter shall with respect to any sale made after July 1, 2002, be the amount paid for the property at the tax sale, as shown by the recitals in the tax deed, plus:
> **(1)** Any taxes paid on the property by the purchaser after the sale for taxes;
> **(2)** Any special assessments on the property; and
> **(3)** A premium of 20 percent of the amount for the first year or fraction of a year which has elapsed between the date of the sale and the date on which the redemption payment is made and 10 percent for each year or fraction of a year thereafter.
> **(b)** If redemption is not made until more than 30 days after the notice provided for in Code Section 48-4-45 has been given, there shall be added to the sums set forth in subsection (a) of this Code section the sheriff's cost in connection with serving the notice and the cost of publication of the notice, if any.
> **(c)** With respect to any sale made after July 1, 2016, there shall be added to the sums set forth in subsections (a) and (b) of this Code section any sums:
> **(1)** Paid from the date of the tax sale to the date of redemption to a property owners' association, as defined in Code Section 44-3-221, in accordance with Code Section 44-3-232;
> **(2)** Paid to a condominium association, that is an association, as defined in Code Section 44-3-71, in accordance with Code Section 44-3-109; or
> **(3)** Paid to a homeowners' association established by covenants restricting land to certain uses related to planned residential subdivisions.
> **(d)** All of the amounts required to be paid by this Code section shall be paid in lawful money of the United States to the purchaser at the tax sale or to the purchaser's successors.

Thus, a tax deed is redeemed by paying the statutory amount to the tax deed purchaser, typically in certified funds, before the tax deed purchaser has foreclosed the right of redemption or otherwise perfected its title to the property. Note, tax deed purchasers must pay property taxes and homeowner associates dues, and those must be repaid to the tax deed purchaser along with the premium. Harvest Assets, LLC v. Northlake Manor Condominium Association**,** 340 Ga. App. 237 (2017). Additionally, a party seeking to redeem the tax deed must make an actual, bona fide, and continuous tender before the redemption deadline. Machen v. Wolande Mgmt. Group, 271 Ga. 163 (1999).

III. Perfecting Title from a Tax Deed

A tax deed holder can perfect his title in a tax deed by foreclosing the right of redemption and then filing a quiet title action. Alternatively, a tax deed holder can also adversely possess the property for a period of fours years pursuant to O.C.G.A. § 48-4-48.

A. Foreclosing the right of redemption

O.C.G.A. §§ 48-4-45 and 48-4-46 govern foreclosing the right of redemption. Twelve months after the date of the tax sale, a tax deed purchaser can foreclose the right of redemption by delivering Notices to all occupants of the property, owners, lienholders, and parties in interest and publishing in the legal organ. O.C.G.A. § 48-4-45 governs to whom the notices must be directed and how they must be served and published. O.C.G.A. § 48-4-46 governs the form of the Notice and also specifies that delivery of the notice can be waived in writing and that leaving a copy of the Notice at the residence of any person required to be served is sufficient.

B. Adversely Possessing a Tax Deed

A tax deed purchaser can adversely possess a tax deed by exerting actual, exclusive, continuous, and notorious ownership over the property for a period of four years. Nix v. 230 Kirkwood Homes, LLC**,** 300 Ga. 91 (2016). However, see Patterson v. Florida Realty & Finance Corp., 212 Ga. 440, 93 (1956) and Moultrie v. Wright, 266 Ga. 30 (1994) for tax deeds issued before July 1, 1982 allowing a seven year statute of repose for the ripening of a tax deed. See BX Corp. v. Hickory Hill 1185, LLC**,** 285 Ga. 5 (2009) (for all tax deeds issued after July 1, 1982 a four year period of prescription/adverse possession required).

Following the foreclosure of the right to redeem of all interested parties, as outlined in §§ 48-4-45 and 48-4-46, if no party redeems the property, a tax deed holder becomes the fee simple owner of the property free and clear of all interests in the property. Land USA, LLC v. Ga. Power Co., 297 Ga. 237, 240 (2015) and Nat'l Tax Funding LP v. Harpagon Co., 277 Ga. 41, 42 (2003). However, for purposes of obtaining title insurance, a tax deed purchaser must usually undergo a quiet title action.

Georgia law allows for two types of quiet title actions to remove the equities of redemption: a conventional quiet title per O.C.G.A. § 23-3-40 and specifically, O.C.G.A. § 23-3-44; also a quiet title against all the world can be used pursuant to O.C.G.A. § 23-3-60.

PRACTICE TIP: Liens originating after the tax sale such as post tax sale taxes and homeowner association dues typically remain encumbrances on the property and must be

paid at closing. On the other hand, water bills originating after the tax sale may not be a problem if issued against a prior owner or were unrecorded or were specifically resolved by the quiet title. Similarly, water bills arising before the foreclosure deadline stated in the Notice of Foreclosure of the Right to Redeem should not be the responsibility of a tax deed purchaser who does not have a right to possess the property before that right of redemption is foreclosed.

1. Conventional Quiet Title Actions

As stated, O.C.G.A. § 23-3-44 states: "[p]roceedings quia timet may be used to remove clouds on title caused by equities of redemption following tax sales." A conventional quiet title action does not require the appointment of a special master. O.C.G.A. § 23-3-43 and Patel v. Patel, 342 Ga. App. 81 (2017). Also, there is no right to a jury trial. O.C.G.A. § 23-3-43. In order to effectively clear title of the equity of redemption, the same parties who were served with the Notice of Foreclosure of the Right to Redeem should be served in the quiet title action. [2] The quiet title action provides the forum for them to raise objections to the Notice they received. The Final Order obtained from the Court should be recorded in the real estate records of the County where the property lies.

2. Quiet Title Against All the World

O.C.G.A. § 23-3-60, et seq. govern a quiet title against all the world. These actions are often employed if there is also a question about a boundary line dispute or a claim for adverse possession is being made. "Unknown parties with any interest in the property" are named as Respondents and served by publication. A special master must be appointed, and in fact, the Court does not have jurisdiction over any of the Respondents until the Special Master enters his Determination/ Entitlement to Service. Woodruff v. Morgan County, 284 Ga. 651 (2008). However, there is a right to a jury trial, if the evidence presents a question of fact. Mancuso v. TDGA, LLC, 301 Ga. 671 (2017). Additionally, adjoining landowners are often served in these actions so they can raise objections to boundary lines. Like with conventional quiet title actions, the quiet title against all the world provides the forum for those served with the Notice of Foreclosure of the Right to Redeem to raise objections to the Notice they received. (See Footnote 2). The Final Order obtained from the Court should be recorded in the real estate records of the

[2] Though see O.C.G.A. § 48-4-47, which often requires that a defendant tender the redemption price before sustaining a claim to challenge a tax sale.

County where the property lies. Under the Supreme Court's holding in TDGA, LLC v. CBIRA, LLC, 298 Ga. 510 (2016), sovereign immunity protects a state governmental entity such as the Georgia Department of Revenue from being named in a *conventional* quiet title action, but does not protect the State from being named in a Quiet Title action against all the world. Therefore, if you see a lien held by a state entity on title check to see if the tax deed purchaser has filed the correct type of quiet title action or otherwise garnered some agreement with the State such as a consent order or the if lien is otherwise cancelled or legally unenforceable. For instance, some liens are unenforceable because the requisite statute of limitations has expired for enforcement of the lien.

PRACTICE TIP: The United States of America may be named in a conventional quiet title action to resolve Internal Revenue Service tax liens because the federal government has by statute expressly waived sovereign immunity to be names in judicial actions.

Conclusion

This paper was designed to provide a summary of issues relating to tax deeds and quiet titles. Tax deeds can be nuanced, but they are straightforward where the procedures of O.C.G.A. §§ 48-4-45 and 48-4-46 are followed. Furthermore, because tax deed holders file quiet title actions after completing this process, they should not be as feared in a chain of title as they often are.

TAX DEEDS AND QUIET TITLES

JOHN AYOUB, ESQ.
CAROLINA D. BRYANT, ESQ.
AYOUB & MANSOUR, LLC 675 SEMINOLE AVENUE, SUITE 301 ATLANTA, GEORGIA 30307

INTRODUCTION

- Don't feel scared if you see a tax deed!
- Always reach out to us with questions:
  - Carolina D. Bryant: cdbryant@ayoubmansour.com
  - John Ayoub: ayoub@ayoubmansour.com

WHAT IS A TAX DEED?

- Evidences property has been sold for unpaid taxes
- O.C.G.A. §§ 48-2-30 and 48-3-1 govern assessment of taxes and their collection
- All owners of non-exempt real property must pay taxes on their real property, at a rate determined by the property's fair market value. O.C.G.A. § 48-2-56:
  - "Except as otherwise provided in this Code section, liens for all taxes due the state or any county or municipality in the state shall arise as of the time the taxes become due and unpaid and all tax liens shall cover all property in which the taxpayer has any interest from the date the lien arises until such taxes are paid."
- Property tax lien is prior to all other interests

WHAT IS A TAX DEED?

- "[T]axes are not only against the owner but against the property itself as well. The only concern as to an owner at all, is merely to know against whom the assessment is to be made, whilst the tax itself, and the lien therefor is against the property." Verdery v. Dotterer, 69 Ga. 194, 199 (1882). See also Townsend v. McIntosh, 205 Ga. 643 (1949).
- Where the owner of property is unknown, the executions may be issued solely in rem. O.C.G.A. § 48-4-2. Otherwise, it is both in rem and in personam

NON-JUDICIAL TAX SALES

- Tax Commissioner presents tax executions to the levying officer for levy and sale. O.C.G.A. § 48-5-161(b)
  - In most Georgia Counties, Tax Commissioner serves as ex-officio Sheriff. O.C.G.A. § 48-5-137
- Prior to the sale, levying officer must adhere to certain notice requirements:
  - O.C.G.A. § 48-3-9, § 48-4-1, and § 9-13-12. See also Tharp v. Vesta Holdings I, LLC, 276 Ga. App. 901 (2005).
- Tax sales take place first Tuesday of the month
- Title gained at a tax sale is inchoate and defeasible

JUDICIAL IN REM TAX SALES

- Counties can also employ judicial in-rem tax sales to sell property for unpaid taxes. This process is governed by O.C.G.A. § 48-4-75
- County/City must file a lawsuit
- Redemption period is only 60 days (compared to non-judicial as discussed further soon) and after 60 days the right to redeem automatically terminates. O.C.G.A. § 48-4-81(c)(3)
- Not commonly used for a number of reasons: expensive; and, after Canoeside Props. v. Livsey, 277 Ga. 425 (2003) decision, tax sale may be invalid if taxpayer transfers the property to a third-party prior to the date of the filing of the in rem proceeding

WHAT TO DO IF YOU SEE A TAX DEED IN THE CHAIN OF TITLE?

- Has the tax deed been redeemed and if so, who has redeemed it?
- Redemption quitclaim deed on title? See O.C.G.A. § 48-4-44:
  - (a) In all cases where property is redeemed, the purchaser at the tax sale shall make a quitclaim deed to the defendant in fi. fa., which deed shall recite:
    - (1) The name of the person who has paid the redemption money; and
    - (2) The capacity in which or the claim of right or interest pursuant to which the redemption money was paid.
  - (b) The recitals required by subsection (a) of this Code section shall be prima-facie evidence of the facts stated.

WHAT TO DO IF YOU SEE A TAX DEED IN THE CHAIN OF TITLE?

- If redemption is by someone other than the owner at the time of the tax sale, we look to O.C.G.A. § 48-4-43:
  - "If the redemption has been made by any creditor of the defendant or by any person having any interest in the property, the amount expended by the creditor or person interested shall constitute a first lien on the property and, if the quitclaim deed provided for in Code Section 48-4-44 is recorded as required by law, shall be repaid prior to any other claims upon the property."
  - "super-lien" – See Nat'l Tax Funding, LP v. Harpagon Co., 277 Ga. 41 (2003)
- Holder of a super-lien can foreclose on the property so these liens need to be satisfied or otherwise addressed

WHAT TO DO IF YOU SEE A TAX DEED IN THE CHAIN OF TITLE?

- PRACTICE TIP: All redemption tax deeds are issued from the tax deed purchaser back to the named defendant fi. fa on the tax deed. A property transferred by the defendant in fi. fa. after a tax sale to a third party is not invalidated by the redemption quitclaim deed. Instead, the doctrine of "after acquired title" operates to vest title in the current owner once the property is redeemed and the tax deed purchaser executes the redemption quitclaim deed. See Reece v. Smith, 276 Ga. 404 (2003) also see Land USA v. Georgia Power, 297 Ga 237 (2015).

HOW IS A TAX DEED REDEEMED?

- A tax deed is redeemed by paying the statutory amount to a tax deed purchaser. O.C.G.A. § 48-4-42 governs what amount has to be paid and how.
  - 20% for the first year (no proration)
  - 10% for each additional year
  - Taxes, HOA assessments, and special assessments must also be repaid with the premium
  - Costs of foreclosing the right of redemption if redeemed 30 days after Notices were sent out
- "[A] party seeking to redeem the tax deed must make an actual, bona fide, and continuous tender before the redemption deadline." Machen v. Wolande Mgmt. Group, 271 Ga. 163 (1999).
- Redemption is a self-help remedy

PERFECTING TITLE FROM A TAX DEED

- Step1: Foreclose the right of Redemption
- Step 2: Quiet Title Action
- Alternatively, tax deed holder can adversely possess the property for 4 years pursuant to O.C.G.A. § 48-4-48 and BX Corp. v. Hickory Hill 1185, LLC, 285 Ga. 5 (2009).

PERFECTING TITLE FROM A TAX DEED

- Foreclosing the Right of redemption
  - O.C.G.A. §§ 48-4-45 and 48-4-46 govern. Notices must be given either through personal service, certified return receipt mail, or by publication.
  - O.C.G.A. § 48-4-45 governs to whom the notices must be directed and how they must be served and published.
  - O.C.G.A. § 48-4-46 governs the form of the Notice and also specifies that delivery of the notice can be waived in writing and that leaving a copy of the Notice at the residence of any person required to be served is sufficient.

PERFECTING TITLE FROM A TAX DEED

- PRACTICE TIP: Liens originating after the tax sale such as post tax sale taxes and homeowner association dues typically remain encumbrances on the property and must be paid at closing. On the other hand, water bills originating after the tax sale may not be a problem if issued against a prior owner or were unrecorded or were specifically resolved by the quiet title. Similarly, water bills arising before the foreclosure deadline stated in the Notice of Foreclosure of the Right to Redeem should not be the responsibility of a tax deed purchaser who does not have a right to possess the property before that right of redemption is foreclosed.

CONVENTIONAL QUIET TITLE ACTIONS

- O.C.G.A. § 23-3-44 states: "[p]roceedings quia timet may be used to remove clouds on title caused by equities of redemption following tax sales."
- Does not require appointment of special master (O.C.G.A. § 23-3-43 and Patel v. Patel, 342 Ga. App. 81 (2017))
- Not appropriate for resolving governmental interests because any State entity can raise the defense of sovereign immunity. TDGA, LLC v. CBIRA, LLC, 298 Ga. 510 (2016).
  - USA can be named

QUIET TITLES AGAINST ALL THE WORLD

- These actions are often employed where there is a question as to boundary lines or unknown parties have to be named
- Special master must be appointed and Court does not have jurisdiction over any Respondent until the Special Master enters his Determination/ Entitlement to Service. Woodruff v. Morgan County, 284 Ga. 651 (2008).
- There is a right to a jury trial but only if there is a question of fact. Mancuso v. TDGA, LLC, 301 Ga. 671 (2017)

CONCLUSION

- This has been a summary of issues surrounding tax deeds
- Questions?

Appendix

ICLE BOARD

Name	Position	Term Expires
Ms. Carol V. Clark	Member	2019
Mr. Harold T. Daniel, Jr.	Member	2019
Ms. Laverne Lewis Gaskins	Member	2021
Ms. Allegra J. Lawrence	Member	2019
Mr. C. James McCallar, Jr.	Member	2021
Mrs. Jennifer Campbell Mock	Member	2020
Mr. Brian DeVoe Rogers	Member	2019
Mr. Kenneth L. Shigley	Member	2020
Mr. A. James Elliott	Emory University	2019
Mr. Buddy M. Mears	John Marshall	2019
Dean Daisy Hurst Floyd	Mercer University	2019
Mr. Cassady Vaughn Brewer	Georgia State University	2019
Ms. Carol Ellis Morgan	University of Georgia	2019
Hon. Harold David Melton	Liaison	2019
Mr. Jeffrey Reese Davis	Staff Liaison	2019
Ms. Tangela Sarita King	Staff Liaison	2019

GEORGIA MANDATORY CLE FACT SHEET

Every "active" attorney in Georgia must attend 12 "approved" CLE hours of instruction annually, with one of the CLE hours being in the area of legal ethics and one of the CLE hours being in the area of professionalism. Furthermore, any attorney who appears as sole or lead counsel in the Superior or State Courts of Georgia in any contested civil case or in the trial of a criminal case in 1990 or in any subsequent calendar year, must complete for such year a minimum of three hours of continuing legal education activity in the area of trial practice. These trial practice hours are included in, and not in addition to, the 12 hour requirement. ICLE is an "accredited" provider of "approved" CLE instruction.

Excess creditable CLE hours (i.e., over 12) earned in one CY may be carried over into the next succeeding CY. Excess ethics and professionalism credits may be carried over for two years. Excess trial practice hours may be carried over for one year.

A portion of your ICLE name tag is your **ATTENDANCE CONFIRMATION** which indicates the program name, date, amount paid, CLE hours (including ethics, professionalism and trial practice, if any) and should be retained for your personal CLE and tax records. **DO NOT SEND THIS CARD TO THE COMMISSION!**

ICLE will electronically transmit computerized CLE attendance records directly into the Official State Bar Membership computer records for recording on the attendee's Bar record. **Attendees at ICLE programs need do nothing more as their attendance will be recorded in their Bar record.**

Should you need CLE credit in a state other than Georgia, please inquire as to the procedure at the registration desk. ICLE does not guarantee credit in any state other than Georgia.

If you have any questions concerning attendance credit at ICLE seminars, please call:
678-529-6688

Follow ICLE on social media:

http://www.facebook.com/iclega

bit.ly/ICLELinkedIn

#iclega

State Bar of Georgia

INSTITUTE OF CONTINUING LEGAL EDUCATION

www.gabar.org/ICLE