

Senate Bill 425

By: Senators Tillery of the 19th, Albers of the 56th, Gooch of the 51st, Summers of the 13th and Anderson of the 24th

A BILL TO BE ENTITLED
AN ACT

1 To amend Article 3 of Chapter 19 of Title 15 and Article 1 of Chapter 17 of Title 45 of the
2 Official Code of Georgia Annotated, relating to the regulation of the practice of law and
3 general provisions regarding notaries public, respectively, so as to provide for the
4 modernization of certain legal, notarial, and court services using electronic means; to allow
5 an attorney to conduct a real estate closing for property in this state using electronic means
6 under certain conditions; to clarify the definition of the practice of law; to provide for
7 definitions; to prohibit witness-only closings; to prohibit the unauthorized practice of law;
8 to provide for penalties, liability, remedies, relief, and class action lawsuits; to provide for
9 legislative construction; to provide for legislative findings; to provide for certain notarial acts
10 to be performed remotely using electronic means when certain requirements are satisfied; to
11 provide for requirements and exemptions; to permit the use of an electronic seal of office;
12 to provide for criminal penalties and civil liability, including compensatory and other
13 damages; to provide for class action lawsuits; to provide for related matters; to provide for
14 an effective date; to repeal conflicting laws; and for other purposes.

15 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

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PART I

Real estate closing using electronic means

SECTION 1-1.

19 The General Assembly recognizes that the Supreme Court of Georgia, in the exercise of its
20 authority to govern the practice of law in this state, has issued several opinions addressing
21 real estate closings and the practice of law, including, but not limited to, Formal Advisory
22 Opinion No. 86-5 (86-R9) (May 12, 1989), Formal Advisory Opinion No. 00-3 (February 11,
23 2000), In re: Formal Advisory Opinion No. 00-3 (November 10, 2003), Formal Advisory
24 Opinion No. 04-1 (August 6, 2004), In re: Formal Advisory Opinion No. 13-1
25 (September 22, 2014), UPL Advisory Opinion No. 2003-2 (April 22, 2003), and In re: UPL
26 Advisory Opinion No. 2003-2 (November 10, 2003). The General Assembly finds that it is
27 in the public's interest to codify the rulings of such opinions on what constitutes the
28 unauthorized practice of law as it pertains to real estate closings in this state.

29

SECTION 1-2.

30 Article 3 of Chapter 19 of Title 15 of the Official Code of Georgia Annotated, relating to the
31 regulation of the practice of law, is amended by revising Code Section 15-19-50, relating to
32 "practice of law" defined, as follows:

33 "15-19-50.

34 (a) The practice of law in this state is defined as:

- 35 (1) Representing litigants in court and preparing pleadings and other papers incident to
36 any action or special proceedings in any court or other judicial body;
- 37 (2) Conveyancing, including the transfer of ownership of real property located in this
38 state or any act in a real estate closing that constitutes the practice of law;
- 39 (3) The preparation of legal instruments of all kinds whereby a legal right is secured;

- 40 (4) The rendering of opinions as to the validity or invalidity of titles to real or personal
41 property;
- 42 (5) The giving of any legal advice; and
- 43 (6) Any action taken for others in any matter connected with the law.
- 44 (b) Nothing in paragraph (2) of subsection (a) of this Code section shall prohibit acts taken
45 by an individual while solely representing himself or herself in the purchase or sale of real
46 estate property located in this state."

47 **SECTION 1-3.**

48 Said article is further amended by adding new Code sections to read as follows:

49 "15-19-50.1.

50 As used in this article, the term:

- 51 (1) 'In person electronic notarization' means a notarial act in which: the signatory appears
52 in front of and is identified by the notary in the same physical location at the time of
53 notarization; the document is presented in a digital format and signed using an electronic
54 signature; the notary witnesses the act of signing the document; and the notary uses an
55 electronic seal and signature to notarize the document.
- 56 (2) 'Real estate closing using electronic means' refers to the continuous, interconnected
57 series of events through which title to real property located in this state is conveyed from
58 one party to another party and includes all acts conducted in whole or in part using
59 electronic means as provided for in Code Section 15-19-50.2.
- 60 (3) 'Security instrument' means any written document presented for recording for the
61 purpose of conveying or creating a lien or encumbrance on real estate for the purpose of
62 securing a long-term note secured by real estate.
- 63 (4) 'Technology provider' means an individual or entity that offers the services of a
64 tamper-evident technology for electronic notarial acts.

65 (5) 'Witness-only closing' means a real estate closing in which an attorney presides over
66 the execution of deeds of conveyance and other closing documents but purports to do so
67 merely as a witness and notary and not as someone who is practicing law.

68 15-19-50.2.

69 (a) Any witness-only closing shall be unlawful in this state.

70 (b) An attorney conducting any real estate closing shall:

71 (1) Be licensed and present in this state at the time of such closing;

72 (2) Directly supervise and be responsible for the entirety of such closing, including all
73 employees, agents, and contractors who assist the attorney with such closing;

74 (3) Perform any and all duties otherwise required by law and by the rules and opinions
75 of the Supreme Court of Georgia; and

76 (4) Comply with subsection (c) of this Code section if conducting a real estate closing
77 using electronic means.

78 (c) In any real estate closing using electronic means, the participants shall have the
79 following duties:

80 (1) The attorney shall:

81 (A) Obtain consent from all participants to such closing, including any mortgage
82 lender, to the use of electronic means to facilitate such closing prior to such closing;

83 (B) Utilize two-way audio-video communication technology that is sufficiently secure
84 to prevent interference with the authenticity, integrity, and security of all documents for
85 such closing;

86 (C) Confirm the identity of any signatory through knowledge based authentication or
87 the presentation of a government issued form of identification and credential analysis;

88 (D) Ensure that two-way audio-video communication technology records such closing
89 and that such recording contains the following:

90 (i) The date and time of such closing, including any notarial act;

- 91 (ii) A description of the documents that are being notarized;
92 (iii) An attestation that the attorney is physically located in this state at the time of
93 such closing; and
94 (iv) A clear image of any government issued identification that was used to verify the
95 identity of each participant;
96 (E) Conduct only one real estate closing using electronic means at a time;
97 (F) Certify that the copy of the electronic record is an accurate copy of such record;
98 and
99 (G) Retain possession of all electronic documents, a copy of the audio-video recording,
100 and other records of such closing for at least six years;
101 (2) The witness shall:
102 (A)(i) Be in the same physical location as the signatory, able to see, hear, and
103 communicate with the signatory, and able to witness the signature; or
104 (ii) Be present in this state and able to see, hear, and communicate with the signatory
105 and witness the signature through two-way audio-video communication technology;
106 (B) Witness the signatory sign the document; and
107 (C) Immediately sign the document as a witness; and
108 (3) The notary public shall:
109 (A) Be the attorney conducting such closing and shall provide his or her bar number
110 on each notarized document;
111 (B) Be present in this state;
112 (C) Be able to see, hear, and communicate with the signatory and witness the signature
113 by being in the same physical location for an in person electronic notarization or by
114 using two-way audio-video communication technology for a real estate closing using
115 electronic means;
116 (D) Witness the signatory sign the document; and

117 (E) Immediately notarize the document using an electronic seal compliant with the
118 provisions of Code Section 45-17-6.

119 (d) Any person, including, but not limited to, a notary public, a technology provider, a
120 mortgage lender or its affiliates, employees, agents, and attorneys, or an attorney or the
121 attorney's employee or agent, that aids or abets another person in violating the provisions
122 of this Code section shall, upon the first or second conviction, be guilty of a misdemeanor;
123 provided, however, that, upon a third or subsequent conviction, such person shall be guilty
124 of a felony, punishable by imprisonment of not less than one year nor more than five years,
125 a fine of up to \$5,000.00, or both."

126 **SECTION 1-4.**

127 Said article is further amended by revising subsection (a) of Code Section 15-19-51, relating
128 to unauthorized practice of law forbidden, as follows:

129 "(a) It shall be unlawful for any person other than a duly licensed attorney at law:

130 (1) To practice or appear as an attorney at law for any person other than himself or
131 herself in any court of this state or before any judicial body;

132 (2) To make it a business to practice as an attorney at law for any person other than
133 himself or herself in any of such courts;

134 (3) To hold himself or herself out to the public or otherwise to any person as being
135 entitled to practice law;

136 (4) To render or furnish legal services or advice;

137 (5) To furnish attorneys or counsel;

138 (6) To render legal services of any kind in actions or proceedings of any nature;

139 (7) To assume or use or advertise the title of 'lawyer,' 'attorney,' 'attorney at law,' or
140 equivalent terms in any language in such manner as to convey the impression that he or
141 she is entitled to practice law or is entitled to furnish legal advice, services, or counsel;

142 or

143 (8) To advertise that either alone or together with, by, or through any person, whether
 144 a duly and regularly admitted attorney at law or not, he or she has, owns, conducts, or
 145 maintains an office for the practice of law or for furnishing legal advice, services, or
 146 counsel; or

147 (9) To perform any act that constitutes the practice of law under the law or under the
 148 rules and opinions of the Supreme Court of Georgia."

149 **SECTION 1-5.**

150 Said article is further amended by revising Code Section 15-19-58, relating to injunctive
 151 relief, venue, procedure, and other remedies not curtailed, as follows:

152 "15-19-58.

153 (a) The Attorney General, any district attorney, Either the State Bar of Georgia, the
 154 Judicial Council of this state, or any organized bar association of this state is authorized to
 155 institute in the proper superior court of this state an action or actions seeking injunctive
 156 relief, civil penalties not to exceed \$10,000.00 per violation, restitution for an ascertainable
 157 loss caused by such violation, and investigative costs, reasonable expenses, and attorney's
 158 and witness fees, against any person, firm, or corporation, ~~when it determines~~ after an
 159 investigation determines that such person, firm, or corporation:

160 (1) Is engaged in the unauthorized or unlawful practice of law;

161 (2) Reserved;

162 (3) Is in ~~in~~ violation of Code Section 15-19-55 or rules promulgated by the Supreme
 163 Court, is orally or by in writing, for a consideration then or afterwards to be charged or
 164 received by himself or herself or another, offering or tendering to another person, without
 165 the solicitation of such other person, the services of an attorney at law, resident or
 166 nonresident of this state, in order for the attorney to institute an action or represent the
 167 person in the courts of this or any other state or of the United States in the enforcement

168 or collection by law of any claim, debt, or demand of any such person against another or
169 is suggesting or urging the bringing of the action; or

170 (4) Is engaged in the practice of seeking out and proposing to other persons that they
171 present and urge through any attorney at law the collection of any claim, debt, or demand
172 of such person against another.

173 (b) The venue of any action authorized by this Code section shall be determined by the
174 constitutional and statutory provisions relating to cases in equity.

175 (c) The hearing, interlocutory or final, and the trial of actions authorized by this Code
176 section shall be governed by the laws of this state relating to injunctions, as shall appeals
177 from orders or judgments therein.

178 (d) In any action brought under this Code section, the final judgment, if in favor of the
179 plaintiff, shall perpetually enjoin the defendant or defendants from the commission or
180 continuance of the act or acts complained of. Restraining orders or temporary injunctions
181 may be granted as in other cases in which injunctive relief is sought. Any person who
182 violates the terms of an injunction, judgment, or consent order entered under the provisions
183 of this Code section shall forfeit and pay to the state a civil penalty of not more
184 than \$20,000.00 per violation of such injunction, judgment, or consent order, and
185 investigative costs, reasonable expenses, and attorney's and witness fees.

186 (e) This Code section and Code Section 15-19-57 shall not repeal or curtail any remedy
187 provided in cases of unauthorized or unlawful practice of law, and nothing contained in
188 these Code sections shall be construed as abridging the powers of the courts in such
189 matters."

190 **SECTION 1-6.**

191 Said article is further amended by revising Code Section 15-19-60, relating to consumer
192 action for damages for violations, as follows:

193 "15-19-60.

194 ~~Any consumer who is a party to a one-to-four family residential real estate transaction or~~
195 ~~a consumer debtor or a trustee of a consumer debtor in a bankruptcy case that involves a~~
196 ~~one-to-four family residential real property who is damaged by a violation of this article~~
197 ~~or a violation of the Supreme Court's rules or opinions governing the unlicensed practice~~
198 ~~of law shall be entitled to maintain a civil action to recover damages, treble damages,~~
199 ~~reasonable attorney's fees, and expenses of litigation. A claim for a violation of this Code~~
200 ~~section shall be asserted in an individual action only and shall not be the subject of a class~~
201 ~~action under Code Section 9-11-23. This Code section shall not prevent the activities~~
202 ~~authorized by Code Section 15-19-52, 15-19-53, 15-19-54, 15-19-59, or 43-40-25.1.~~

203 (a) Any buyer, seller, or borrower that is or was a party to a residential or commercial real
204 estate closing in which any person involved in such transaction engaged in conduct
205 constituting the unauthorized or unlawful practice of law or a class of such plaintiffs shall
206 be entitled to maintain a civil action to recover damages. Such damages shall include, but
207 not be limited to:

208 (1) Actual monetary losses incurred by the plaintiff or the class of plaintiffs as a result
209 of a violation of the provisions this article, or \$1,000.00 in damages for each such
210 violation, whichever is greater;

211 (2) Any expenses paid by the plaintiff or the class of plaintiffs for the services of any
212 person or entity that violated the provisions of this article; and

213 (3) De minimis or nominal damages incurred by the plaintiff or the class of plaintiffs as
214 a result of a violation of the provisions of this article.

215 (b) In addition to any other penalties provided for by law, if the court finds that the
216 defendant willfully or knowingly violated the provisions of this article, the court may, in
217 its discretion, increase the award to an amount equal to not more than three times the
218 amount available under paragraph (1) of subsection (a) of this Code section. The court
219 shall consider the frequency and persistence of noncompliance by the defendant, the nature

220 of such noncompliance, the extent to which such noncompliance was intentional, the
221 number of persons or sales impacted by the violation, the impact of the judgment, and the
222 resources of the defendant.

223 (c) Any person, including, but not limited to, a notary public, a technology provider, a
224 mortgage lender or its affiliates, employees, agents, and attorneys, or an attorney or the
225 attorney's employee or agent, that, while participating in a residential or commercial real
226 estate closing, engages in conduct that constitutes the unauthorized or unlawful practice of
227 law, knowingly aids and abets another person in committing such conduct, or otherwise
228 violates the provisions of this article regulating real estate transactions shall be liable for
229 damages resulting from such conduct.

230 (d) When the loan agreement for a real estate transaction contains an arbitration clause and
231 the mortgage lender or such lender's agent engages in conduct that constitutes the
232 unauthorized or unlawful practice of law or an unlawful notarial act, the arbitration clause
233 shall not be enforceable to the extent it restricts or excludes damages or remedies that
234 would be available to the plaintiff in court, including the right to participate in a class
235 action.

236 (e) The court may provide such equitable relief it deems necessary or proper, including
237 invalidating any security instrument in connection with the sale of the real estate property
238 at issue executed in violation of the provisions of this article and enjoining the defendants
239 from further violations of the provisions of this article.

240 (f) In a successful action to enforce the provisions of this article, a court shall award
241 plaintiffs costs, including reasonable attorney's fees. When a class of plaintiffs prevails,
242 class counsel shall be entitled to the greater of one-third of the class's recovery or the
243 number of hours billed at a reasonable hourly rate times a multiplier set by the court in its
244 discretion, whichever is greater.

245 (g) A person shall not be held liable for damages in any action brought under this article
246 if the person shows by a preponderance of the evidence that the violation was not

247 intentional and resulted from a bona fide error notwithstanding the maintenance of
248 procedures implemented to avoid such error.

249 (h) A cause of action brought under this Code section may be filed in any court of
250 competent jurisdiction within this state without regard to the amount in controversy. Such
251 cause of action shall be filed within one year from the date on which the violation occurred
252 or the date of discovery of the violation, whichever is later.

253 (i) This Code section shall not prevent the activities authorized by this article, Chapter 17
254 of Title 45, and Code Section 43-40-25.1."

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PART II

256

Notarization using electronic means

257

SECTION 2-1.

258 Article 1 of Chapter 17 of Title 45 of the Official Code of Georgia Annotated, relating to
259 general provisions regarding notaries public, is amended by revising Code Section 45-17-9,
260 relating to where notarial acts may be exercised, as follows:

261 "45-17-9.

262 (a) Notarial acts may be exercised in any county in the state, provided that the notary
263 public shall be physically located in this state and the notarial act is performed in the
264 physical presence of the notary public as provided in subsection (b) of this Code section
265 or is performed remotely as provided in subsection (c) of this Code section.

266 (b) Any notarial act to be performed in the physical presence of the notary public shall take
267 place in the same physical location and at the same time and close enough for the notary
268 public to see, hear, communicate with, and exchange tangible identification credentials
269 with the individual whose act is being notarized.

270 (c) Any notarial act to be performed remotely shall meet the following requirements:

- 271 (1) The notary public shall use real-time two-way audio-video communication
272 technology that allows the parties to see, hear, and communicate with each other and is
273 sufficiently secure to prevent interference with the authenticity, integrity, and security of
274 the transaction, corruption or loss of the recording of the transaction, and unauthorized
275 use of or tampering with the recording, record, and backup record;
- 276 (2) The signatory shall be physically located in the United States or one of its territories
277 or military bases or at a United States embassy, consulate, or diplomatic mission location
278 and present evidence of his or her identity and location;
- 279 (3) The notary public shall witness the signature;
- 280 (4) The notary public shall document evidence of the acts provided for in paragraphs (1)
281 through (3) of this subsection; and
- 282 (5) The notarial act shall not be performed to:
- 283 (A) Create or execute a will, codicil, or testamentary trust; or
- 284 (B) Notarize the signature on any security instrument or document executed for the
285 conveyance of real property located in this state, whether or not such security
286 instrument or document is recorded, except as provided for in Code Section 15-19-50.2.
- 287 (d) A notary public may use an electronic seal of office to perform a notarial act as
288 provided for in subsection (c) of this Code section or to perform an in-person electronic
289 notarization in a real estate closing using electronic means as provided for in Code
290 Section 15-19-50.2. Such electronic seal of office shall comply with the provisions of
291 Code Section 45-17-6."

292 **SECTION 2-2.**

293 Said article is further amended by revising Code Section 45-17-20, relating to penalty and
294 prosecution of violations of article, as follows:

295 "45-17-20.

296 (a) Any person who violates subsection (d) of Code Section 45-17-8 ~~shall be guilty of a~~
297 misdemeanor or performs any notarial act without complying with the provisions of this
298 article shall, upon a first or second conviction, be guilty of a misdemeanor; provided,
299 however, that, upon a third or subsequent conviction, such person shall be guilty of a
300 felony, punishable by imprisonment of not less than one year nor more than five years, a
301 fine of up to \$5,000.00, or both.

302 (b) Any person ~~who performs any notarial service without complying with the provisions~~
303 ~~of this article shall, upon the, including, but not limited to, a notary public, a technology~~
304 provider, a mortgage lender or its affiliates, employees, agents, and attorneys, or an
305 attorney or the attorney's employee or agent, that aids or abets another person in violating
306 the provisions of this article, including, but not limited to, directing the performance of an
307 unauthorized notarial act, shall, upon a first or second conviction, be guilty of a
308 misdemeanor and; provided, however, that, upon a third or subsequent conviction, such
309 person shall be guilty of a felony, punishable by imprisonment of not less than one year nor
310 more than five years, a fine of up to \$5,000.00, or both."

311

SECTION 2-3.

312 Said article is further amended by adding a new Code section to read as follows:

313 "45-17-21.

314 (a) Any person, including, but not limited to, a notary public, a technology provider, a
315 mortgage lender or its affiliates, employees, agents, and attorneys, or an attorney or the
316 attorney's employee or agent, that, while participating in a residential or commercial real
317 estate closing involving property located in this state, engages in conduct that constitutes
318 an unlawful notarial act, knowingly aids and abets another person in committing an
319 unlawful notarial act, or otherwise violates the provisions of this article regulating real
320 estate transactions shall be liable for damages resulting from such illegal conduct.

321 (b) Any buyer, seller, or borrower that is or was party to a residential or commercial real
322 estate closing involving property located in this state in which any person engaged in an
323 unlawful notarial act or other violation of the provisions of this article or a class of such
324 plaintiffs shall be entitled to maintain a civil action to recover damages. Such damages
325 shall include, but not be limited to:

326 (1) Actual monetary losses incurred by the plaintiff or class of plaintiffs as a result of a
327 violation of the provisions of this article, or \$1,000.00 in damages for each such violation,
328 whichever is greater;

329 (2) Any expenses paid by the plaintiff or class of plaintiffs for the services of any person
330 or entity that violated the provisions of this article; and

331 (3) De minimis or nominal damages incurred by the plaintiff or class of plaintiffs as a
332 result of a violation of the provisions of this article.

333 (c) In addition to penalties provided for in this article, if the court finds that the defendant
334 willfully or knowingly violated the provisions of this article, the court may, in its
335 discretion, increase the award to any amount equal to not more than three times the amount
336 available under paragraph (1) of subsection (b) of this Code section.

337 (d) When the loan agreement for a real estate transaction contains an arbitration clause and
338 the mortgage lender or such lender's agent engages in conduct that constitutes an unlawful
339 notarial act, the arbitration clause shall not be enforceable to the extent it restricts or
340 excludes damages or remedies that would be available to the plaintiff in court, including
341 the right to participate in a class action.

342 (e) The court may provide such equitable relief it deems necessary or proper, including
343 invalidating any security instrument executed in violation of Code Section 45-17-9 in
344 connection with the sale of the real estate property at issue and enjoining the defendants
345 from further violations of the provisions of this article.

346 (f) In a successful action to enforce the provisions of this article, a court shall award the
347 plaintiff costs, including reasonable attorney's fees. When a class of plaintiffs prevails,

348 class counsel shall be entitled to the greater of one-third of the class's recovery or the
349 number of hours billed at reasonable hourly rate times a multiplier set by the court in its
350 discretion, whichever is greater.
351 (g) A cause of action brought under this Code section may be filed in any court of
352 competent jurisdiction within this state without regard to the amount in controversy. Such
353 cause of action shall be filed within one year from the date on which the violation occurred
354 or the date of discovery of the violation, whichever is later."

355

PART III

356

Effective date and repealer

357

SECTION 3-1.

358 This Act shall become effective upon its approval by the Governor or upon its becoming law
359 without such approval.

360

SECTION 3-2.

361 All laws and parts of laws in conflict with this Act are repealed.