

The House Committee on Judiciary offers the following substitute to SB 425:

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 certain notarial acts to be performed remotely using electronic means when
9 certain requirements are satisfied; to provide for requirements and exemptions; to permit the
10 use of an electronic seal of office; to provide for penalties, liability, remedies, and relief; to
11 provide for legislative findings; to provide for legislative construction; to provide for related
12 matters; to provide for an effective date; to repeal conflicting laws; and for other purposes.

13 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

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PART I

Real estate closing using electronic means

SECTION 1-1.

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

27

SECTION 1-2.

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

31 "15-19-50.

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

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

38 (4) The rendering of opinions as to the validity or invalidity of titles to real or personal
39 property;

40 (5) The giving of any legal advice; and

41 (6) Any action taken for others in any matter connected with the law.

42 (b) Nothing in paragraph (2) of subsection (a) of this Code section shall prohibit acts taken
43 by an individual or entity representing themselves in the purchase or sale of real estate
44 property located in this state.

45 (c) In the event of a conflict between the terms of this article and any ruling of the
46 Supreme Court of Georgia as to the practice of law or the unauthorized practice of law,
47 such ruling shall control."

48 **SECTION 1-3.**

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

50 "15-19-50.1.

51 As used in this article, the term:

52 (1) 'In person electronic notarization' means a notarial act in which: the signatory appears
53 in front of and is identified by the notary in the same physical location at the time of
54 notarization; the document is presented in a digital format and signed using an electronic
55 signature; the notary witnesses the act of signing the document; and the notary uses an
56 electronic seal and signature to notarize the document.

57 (2) 'Real estate closing' refers to the actual settlement of the conveyance of the title to a
58 one-to-four family residential real property located in this state from one party to another
59 party. The actual settlement of the conveyance of title to any property other than a
60 one-to-four family residential real property shall not constitute a real estate closing for
61 purposes of this article.

62 (3) 'Real estate closing using electronic means' refers to the continuous, interconnected
63 series of events through all acts that are part of a real estate closing that are conducted in
64 whole or in part using electronic means as provided for in Code Section 15-19-50.2.

65 (4) 'Security instrument' means any written document presented for recording for the
66 purpose of conveying or creating a lien or encumbrance on real estate for the purpose of
67 securing a promissory note, guaranty, or other instrument.

68 (5) 'Technology provider' means an individual or entity that offers the services of a
69 tamper-evident technology for electronic notarial acts.

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

73 15-19-50.2.

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

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

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

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

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

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

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

85 (1) The attorney shall:

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

- 88 (B) Utilize two-way audio-video communication technology that is sufficiently secure
89 to prevent interference with the authenticity, integrity, and security of all documents for
90 such closing;
- 91 (C) Confirm the identity of any signatory through knowledge based authentication or
92 the presentation of a government issued form of identification and credential analysis;
- 93 (D) Ensure that two-way audio-video communication technology records such closing
94 and that such recording contains the following:
- 95 (i) The date and time of such closing, including any notarial act;
96 (ii) A description of the documents that are being notarized;
97 (iii) An attestation that the attorney is physically located in this state at the time of
98 such closing; and
- 99 (iv) A clear image of any government issued identification that was used to verify the
100 identity of each participant;
- 101 (E) Conduct only one real estate closing using electronic means at a time;
- 102 (F) Certify that the copy of the electronic record is an accurate copy of such record;
103 and
- 104 (G) Retain possession of all electronic documents, a copy of the audio-video recording,
105 and other records of such closing for at least six years;
- 106 (2) The witness shall:
- 107 (A)(i) Be in the same physical location as the signatory, able to see, hear, and
108 communicate with the signatory, and able to witness the signature; or
- 109 (ii) Be present in this state and able to see, hear, and communicate with the signatory
110 and witness the signature through two-way audio-video communication technology;
- 111 (B) Witness the signatory sign the document; and
- 112 (C) Immediately sign the document as a witness; and
- 113 (3) The notary public shall:

- 114 (A) Be the attorney conducting such closing and shall provide his or her bar number
115 on each notarized document;
- 116 (B) Be present in this state;
- 117 (C) Be able to see, hear, and communicate with the signatory and witness the signature
118 by being in the same physical location for an in person electronic notarization or by
119 using two-way audio-video communication technology for a real estate closing using
120 electronic means;
- 121 (D) Witness the signatory sign the document;
- 122 (E) Immediately sign the document as a notary public; and
- 123 (F) Immediately notarize the document using an electronic seal compliant with the
124 provisions of Code Section 45-17-6.
- 125 (d) Any person, including, but not limited to, a notary public, a technology provider, a
126 mortgage lender or its affiliates, employees, agents, and attorneys, or an attorney or the
127 attorney's employee or agent, that willfully and knowingly aids or abets another person in
128 violating the provisions of this Code section shall, upon the first or second conviction, be
129 guilty of a misdemeanor; provided, however, that, upon a third or subsequent conviction,
130 such person shall be guilty of a felony, punishable by imprisonment of not less than one
131 year nor more than five years, a fine of at least \$20,000.00, or both."

132 **SECTION 1-4.**

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

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

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

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

- 140 (3) To hold himself or herself out to the public or otherwise to any person as being
 141 entitled to practice law;
- 142 (4) To render or furnish legal services or advice;
- 143 (5) To furnish attorneys or counsel;
- 144 (6) To render legal services of any kind in actions or proceedings of any nature;
- 145 (7) To assume or use or advertise the title of 'lawyer,' 'attorney,' 'attorney at law,' or
 146 equivalent terms in any language in such manner as to convey the impression that he or
 147 she is entitled to practice law or is entitled to furnish legal advice, services, or counsel;
- 148 or
- 149 (8) To advertise that either alone or together with, by, or through any person, whether
 150 a duly and regularly admitted attorney at law or not, he or she has, owns, conducts, or
 151 maintains an office for the practice of law or for furnishing legal advice, services, or
 152 counsel; or
- 153 (9) To perform any act that constitutes the practice of law under the law or under the
 154 rules and opinions of the Supreme Court of Georgia."

155 **SECTION 1-5.**

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

158 "15-19-58.

- 159 (a) The Attorney General, any district attorney, Either the State Bar of Georgia, the
 160 Judicial Council of this state, any attorney, or any organized bar association of this state
 161 is authorized to institute in the proper superior court of this state an action or actions
 162 seeking injunctive relief, civil penalties of at least \$20,000.00 per violation, restitution for
 163 an ascertainable loss caused by such violation, and investigative costs, reasonable
 164 expenses, and attorney and witness fees, against any person, firm, or corporation, when it
 165 determines after an investigation determines that such person, firm, or corporation:

- 166 (1) Is engaged in the unauthorized or unlawful practice of law;
- 167 (2) Reserved;
- 168 (3) Is in violation of Code Section 15-19-55 or rules promulgated by the Supreme
169 Court, is by reason of orally or by in writing, for a consideration then or afterwards to be
170 charged or received by himself or herself or another, offering or tendering to another
171 person, without the solicitation of such other person, the services of an attorney at law,
172 resident or nonresident of this state, in order for the attorney to institute an action or
173 represent the person in the courts of this or any other state or of the United States in the
174 enforcement or collection by law of any claim, debt, or demand of any such person
175 against another or is suggesting or urging the bringing of the action; or
- 176 (4) Is engaged in the practice of seeking out and proposing to other persons that they
177 present and urge through any attorney at law the collection of any claim, debt, or demand
178 of such person against another.
- 179 (b) The venue of any action authorized by this Code section shall be determined by the
180 constitutional and statutory provisions relating to cases in equity.
- 181 (c) The hearing, interlocutory or final, and the trial of actions authorized by this Code
182 section shall be governed by the laws of this state relating to injunctions, as shall appeals
183 from orders or judgments therein.
- 184 (d) In any action brought under this Code section, the final judgment, if in favor of the
185 plaintiff, shall perpetually enjoin the defendant or defendants from the commission or
186 continuance of the act or acts complained of. Restraining orders or temporary injunctions
187 may be granted as in other cases in which injunctive relief is sought. Any person who
188 willfully or knowingly violates the terms of an injunction, judgment, or consent order
189 entered under the provisions of this Code section shall forfeit and pay to the state a civil
190 penalty of at least \$40,000.00 per violation of such injunction, judgment, or consent order,
191 and investigative costs, reasonable expenses, and attorney and witness fees.

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

196 **SECTION 1-6.**

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

199 "15-19-60.

200 (a) Any consumer who is a party to a ~~one-to-four family residential~~ real estate transaction
 201 closing, as such term is defined in Code Section 15-19-50.1, or a consumer debtor or a
 202 trustee of a consumer debtor in a bankruptcy case that involves a ~~one-to-four family~~
 203 ~~residential real property~~ real estate closing who is damaged by a violation of this article or
 204 a violation of the Supreme Court's rules or opinions governing the unlicensed practice of
 205 law shall be entitled to maintain a civil action to recover damages, treble damages,
 206 reasonable ~~attorney's~~ attorney and witness fees, and expenses of litigation. A claim for a
 207 violation of this Code section shall be asserted in an individual action only and shall not
 208 be the subject of a class action under Code Section 9-11-23. This Code section shall not
 209 prevent the activities authorized by Code Section 15-19-52, 15-19-53, 15-19-54, 15-19-59
 210 or 43-40-25.1.

211 (b) Any buyer, seller, or borrower that is or was a party to a real estate closing in which
 212 any person involved in such closing engaged in conduct constituting the unauthorized or
 213 unlawful practice of law shall be entitled to maintain a civil action to recover damages.
 214 Such damages shall include, but not be limited to:

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

218 (2) Any expenses paid by the plaintiff for the services of any person or entity that
219 violated the provisions of this article; and

220 (3) De minimis or nominal damages incurred by the plaintiff as a result of a violation of
221 the provisions of this article.

222 (c) In addition to any other penalties provided for by law, if the court finds that the
223 defendant willfully or knowingly violated the provisions of this article in connection with
224 a real estate closing, the court may, in its discretion, increase the award to an amount equal
225 to not more than ten times the amount available under paragraph (1) of subsection (b) of
226 this Code section. The court shall consider the frequency and persistence of
227 noncompliance by the defendant, the nature of such noncompliance, the extent to which
228 such noncompliance was intentional, the number of persons or sales impacted by the
229 violation, the impact of the judgment, and the resources of the defendant.

230 (d) Any person, including, but not limited to, a notary public, a technology provider, a
231 mortgage lender or its affiliates, employees, agents, and attorneys, or an attorney or the
232 attorney's employee or agent, that, while participating in a real estate closing, engages in
233 conduct that constitutes the unauthorized or unlawful practice of law, willfully or
234 knowingly aids and abets another person in committing such conduct, or otherwise violates
235 the provisions of this article regulating real estate closings shall be liable for damages
236 resulting from such conduct.

237 (e) When the loan agreement utilized in a real estate closing contains an arbitration clause
238 and the mortgage lender or such lender's agent engages in conduct that constitutes the
239 unauthorized or unlawful practice of law or an unlawful notarial act, the arbitration clause
240 shall not be enforceable to the extent it restricts or excludes damages or remedies that
241 would be available to the plaintiff in court.

242 (f) The court may provide such equitable relief it deems necessary or proper, including
243 enjoining the defendants from further violations of the provisions of this article.

244 (g) In a successful action to enforce the provisions of this Code section, a court shall award
245 the plaintiff costs, including reasonable attorney and witness fees.

246 (h) A person shall not be held liable for damages in any action brought under this article
247 if the person shows by a preponderance of the evidence that the violation was not willful
248 or knowing or resulted from a bona fide error notwithstanding the maintenance of
249 procedures implemented to avoid such error.

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

254

PART II

255

Notarization using electronic means

256

SECTION 2-1.

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

260 "45-17-9.

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

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

- 269 (c) Any notarial act to be performed remotely shall meet the following requirements:
270 (1) The notary public shall use real-time two-way audio-video communication
271 technology that allows the parties to see, hear, and communicate with each other and is
272 sufficiently secure to prevent interference with the authenticity, integrity, and security of
273 the transaction, corruption or loss of the recording of the transaction, and unauthorized
274 use of or tampering with the recording, record, and backup record;
275 (2) The signatory shall be physically located in the United States or one of its territories
276 or military bases or at a United States embassy, consulate, or diplomatic mission location
277 and present evidence of his or her identity and location;
278 (3) The notary public shall witness the signature;
279 (4) The notary public shall document evidence of the acts provided for in paragraphs (1)
280 through (3) of this subsection; and
281 (5) The notarial act shall not be performed to:
282 (A) Create or execute a will, codicil, or testamentary trust; or
283 (B) Notarize the signature on any security instrument, deed, or other real estate
284 document executed for the conveyance of real property located in this state in
285 connection with a real estate closing, as such term is defined in Code
286 Section 15-19-50.1, whether or not such security instrument, deed, or other real estate
287 document is recorded, except as provided for in Code Section 15-19-50.2.
288 Notwithstanding this subparagraph, a notarial act as well as an attestation by an
289 unofficial witness may be performed remotely in connection with a commercial real
290 estate transaction, but not for a real estate closing.
291 (d) A notary public may use an electronic signature and electronic seal of office to perform
292 a notarial act as provided for in subsection (c) of this Code section or to perform an
293 in-person electronic notarization in a real estate closing using electronic means as provided
294 for in Code Section 15-19-50.2. Such electronic seal of office shall comply with the

295 provisions of Code Section 45-17-6, and such document and signature shall be valid as
296 provided in Code Section 44-2-37.

297 (e) Nothing in this Code section shall invalidate an in-person notarial act performed in the
298 physical presence of the notary public that occurs in another state that complies with such
299 state's regulations for an in-person notarial act performed in the physical presence of the
300 notary public or a notarial act that occurs outside the limits of the United States that
301 complies with the provisions of Article 2 of this chapter."

302 **SECTION 2-2.**

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

305 "45-17-20.

306 (a) Any person who violates subsection (d) of Code Section 45-17-8 ~~shall be guilty of a~~
307 misdemeanor or performs any notarial act without complying with the provisions of this
308 article shall, upon a first or second conviction, be guilty of a misdemeanor; provided,
309 however, that, upon a third or subsequent conviction, such person shall be guilty of a
310 felony, punishable by imprisonment of not less than one year nor more than five years, a
311 fine of at least \$20,000.00, or both.

312 (b) Any person who ~~performs any notarial service without complying with the provisions~~
313 ~~of this article shall, upon the, including, but not limited to, a notary public, a technology~~
314 provider, a mortgage lender or its affiliates, employees, agents, and attorneys, or an
315 attorney or the attorney's employee or agent, that willfully and knowingly aids or abets
316 another person in violating the provisions of this article, including, but not limited to,
317 directing the performance of an unauthorized notarial act, shall, upon a first or second
318 conviction, be guilty of a misdemeanor and; provided, however, that, upon a third or
319 subsequent conviction, such person shall be guilty of a felony, punishable by imprisonment

320 of not less than one year nor more than five years, a fine of ~~up to \$5,000.00~~ at least
321 \$20,000.00, or both."

322 **SECTION 2-3.**

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

324 "45-17-21.

325 (a) Any person, including, but not limited to, a notary public, a technology provider, a
326 mortgage lender or its affiliates, employees, agents, and attorneys, or an attorney or the
327 attorney's employee or agent, that, while participating in a real estate closing involving
328 property located in this state, engages in conduct that constitutes an unlawful notarial act,
329 knowingly aids and abets another person in committing an unlawful notarial act, or
330 otherwise violates the provisions of this article regulating real estate closings shall be liable
331 for damages resulting from such illegal conduct.

332 (b) Any buyer, seller, or borrower that is or was party to a real estate closing, as such term
333 is defined in Code Section 15-19-50.1, involving property located in this state in which any
334 person engaged in an unlawful notarial act or other violation of the provisions of this article
335 shall be entitled to maintain a civil action to recover damages. Such damages shall include,
336 but not be limited to:

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

340 (2) Any expenses paid by the plaintiff for the services of any person or entity that
341 violated the provisions of this article; and

342 (3) De minimis or nominal damages incurred by the plaintiff as a result of a violation of
343 the provisions of this article.

344 (c) In addition to penalties provided for in this article, if the court finds that the defendant
345 willfully or knowingly violated the provisions of this article, the court may, in its

346 discretion, increase the award to any amount equal to not more than ten times the amount
347 available under paragraph (1) of subsection (b) of this Code section.

348 (d) When the loan agreement utilized in a real estate closing contains an arbitration clause
349 and the mortgage lender or such lender's agent engages in conduct that constitutes an
350 unlawful notarial act, the arbitration clause shall not be enforceable to the extent it restricts
351 or excludes damages or remedies that would be available to the plaintiff in court.

352 (e) The court may provide such equitable relief it deems necessary or proper, including
353 enjoining the defendants from further violations of the provisions of this article.

354 (f) In a successful action to enforce the provisions of this Code section, a court shall award
355 the plaintiff costs, including reasonable attorney and witness fees.

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

360

PART III

361

Effective date and repealer

362

SECTION 3-1.

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

365

SECTION 3-2.

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