



By Lisa A. Tyler
National Escrow Administrator

An accounting clerk saved Lawyers Title Company in San Diego, a \$339,049.44 loss! The transaction was a sale involving the payoff of an existing loan. The escrow closing was being conducted by an independent escrow company. Read "UPDATED payoff statement" for all the facts surrounding the heroic loss prevention.

Notaries are very important to a successful real estate closing. Title insurance companies count on them to properly identify the signer and ensure the documents are executed and notarized properly. Generally speaking, notaries identify signers in one of three ways:

1. By personal knowledge, meaning the notary personally knows the signer, 2. By the presentation of a government issued identification or, 3. By the oath of a credible witness or witnesses. The last option was cause for concern in this story from California. Read "IN-credible witnesses" for the details.

In last month's edition we revealed an alternative way for principals to have their signatures notarized on closing documents when they are abroad, not a member of the military and cannot visit a U.S. Embassy or Consulate office. The article last month addressed a transaction where the principal was located in a country that was a member of the Hague Convention Treaty and subscribed to the convention of 5 October 1961. This month's edition explains the signing and notarization procedure when the principal is located in a country that is **not** a member of the Hague Convention treaty or has **not** subscribed to the convention of 5 October 1961. Read "SIGNING in a non-Hague Convention treaty member country" to discover the solution to this conundrum.

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UPDATED *payoff statement*

In Southern California, 70% of all transactions are closed by independent escrow companies. Institutional lenders involved in the transactions end up wiring the loan proceeds to the title insurance company, rather than the independent escrow company.

The title insurance company pays the existing encumbrances, taxes and the title invoice, for premium, recording fees and transfer tax. The balance of the funds is then sent to the independent escrow company to complete the disbursement of commissions, proceeds and to pay invoices submitted into escrow. Internally, we refer to these orders as "title only" orders.

Tina Zeferjohn, Accounting Clerk for Lawyers Title Company in San Diego, was working on a title only order. She received a payoff statement from the independent escrow company to pay the existing loan on July 5, 2018.

The transaction did not end up closing until August. On August 6, 2018, the independent escrow company sent over a second, updated payoff statement. The transaction was set to record and disburse on August 10, 2018. On the morning of the 10th, Tina picked up the phone to verify the payoff amounts with the payoff lender. The payoff lender was a mortgage company she had paid hundreds of times.

Tina reviewed the second statement noticing the telephone number for the payoff lender was not printed in the normal spot. She searched all over the payoff statement for a telephone number, but it was not there. She pulled the previous

payoff statement she received in July, located the telephone number and started to call the lender to verify figures, when she noticed something else.

The second payoff statement did not have any contact information for the payoff lender and the address to send payoff checks via overnight delivery had been removed. According to the statement, the lender only accepted wire transfers.

Tina reviewed the bank wire information and discovered the information had been completely altered in an attempt to divert the payoff funds to an entirely different bank. The original payoff statement indicated the funds should be wire transferred to KeyBank® in Cleveland. The second payoff statement directed the loan payoff funds to BMO Harris Bank in Janesville, Wisconsin.

Tina immediately took both payoff statements to her manager. Together, they contacted the independent escrow company to let them know they could not use the payoff statement they provided, as it had been altered.

The independent escrow company was able to order a new unaltered statement and send it to Tina to pay off the existing loan. They were thankful Tina had caught the altered statement and so are we!

As a result of her detection of the altered payoff, the Company has rewarded Tina \$1,500 along with a letter of recognition.



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IN-credible witnesses

Lynn Dimas, Vice President of Chicago Title in Oakland, California, was handling a file for one of her colleagues. Her colleague was out on a much deserved vacation and Lynn was helping by covering her desk. The transaction was a sale, with a sales price of \$1.1 million dollars. The buyer was obtaining a purchase money loan from a hard money lender, Rushmyfile, Inc.

From the start of the transaction Lynn had an uneasy feeling. The listing agent directed the transaction to the Company and told everyone the seller would not sign any of his closing documents until the buyer had performed. The seller previously had a deal with this same buyer — which fell apart. Both the seller and his real estate agent called and emailed several times each day for updates.

The lender emailed the loan documents to escrow. The note and deed of trust referenced four exhibits: A, B, C and D. The exhibits, however, were not attached to either document. One of the exhibits was supposed to disclose to Lynn the beneficiary of the note and deed of trust.

Getting in touch with the lender was very frustrating since they would only provide an 888-phone number and a generic email address. Lynn was never given a contact name, direct phone, direct email or even mailing address but she called anyway and asked for the exhibits. The lender refused to provide them.

Lynn explained to the lender the exhibits have to be attached to the documents when the borrower signs them. The lender said they would attach them later and told her she was being difficult as they do this all the time.

Although the loan officer and the buyer's real estate agent, Bill Foldes, kept indicating this was a rush closing, the lender did not send the exhibits until a week later. Here is where the plot thickens.

Then Foldes notified Lynn that the buyer, Doug Hole, had lost his driver's license. Lynn asked if Mr. Hole had a passport. She also noticed the lender required two forms of identification in order to comply with Federal Regulations and reminded the real estate agent of that requirement.

Mr. Hole assured Foldes he had a passport and the signing appointment was set with a mobile signing company. Everything was arranged through Foldes. Lynn did not have any direct communication with Mr. Hole. She did not even have his phone number.

The notary went to meet Mr. Hole and Foldes, but after waiting for a half an hour she called Lynn to tell her they did not show up. Lynn called Foldes and asked him for his client's phone number. Foldes said the buyer was on his way but eventually gave her Mr. Hole's cell phone number. She called Mr. Hole who said he was just pulling into the parking lot to meet the notary.

A little while later the mobile signing agent called Lynn back to tell her she was cancelling the signing, stating Mr. Hole brought an expired Peruvian Passport as his identification. Lynn apologized to the notary for wasting her time and they hung up the phone. Lynn immediately notified all parties to the transaction by email the signing appointment was cancelled and why.



The next day Lynn went to work and found the fully executed escrow instructions and loan documents on her desk. She immediately called the notary to find out what happened.

The notary told Lynn that right after they talked two gentlemen who worked for Mr. Hole arrived to act as credible witnesses. Foldes told the notary he had already called Lynn to tell her what was going on and that Lynn approved it. Foldes never called Lynn.

The notary contacted the National Notary Association for guidance. They pointed her to the California Notary Handbook which says:

The identity of the signer can be established by the oaths of two credible witnesses whom the notary public does not personally know...The notary public first must establish the identities of the two credible witnesses by the presentation of paper identification documents...such as...a valid consular identification document issued by a consulate from the applicant's country of citizenship, or a valid passport from the applicant's country of citizenship.

...Under oath, the credible witnesses must swear or affirm under penalty of perjury...that each of the following is true:

- 1. The individual appearing before the notary public as the signer of the document is the person named in the document;*
- 2. The credible witness personally knows the signer;*
- 3. The credible witness reasonably believes that the circumstances of the signer are such that it would be very difficult or impossible for the signer to obtain another form of identification;*
- 4. The signer does not possess any of the identification documents authorized by law to establish the signer's identity; and*
- 5. The credible witness does not have a financial interest and is not named in the document signed.*

The credible witnesses must sign the notary public's journal and the notary public must indicate in his or her journal the type of identifying documents.

[IN-credible witnesses- continued]

Each of the credible witnesses presented the notary with consular identification cards issued by the Mexican consulate. The notary did not identify them by any other means. It was all too convenient for Lynn's comfort, so she took the package to her title officer to review. Although the notary, technically did nothing wrong, she expressed to Lynn she was completely uncomfortable with the signing. At one point, she even asked Lynn to shred the documents she notarized rather than use them. In the end Lynn and her title officer agreed there were too many red flags to proceed and resigned from the transaction.

Afterwards, Lynn found out this was the second time a title company resigned from this transaction. A competitor had also resigned but for a different reason — the buyer's wife was nowhere to be found.

Wife? What wife? The loan documents said Mr. Hole was a single man. Looks like the decision to resign was the right one. Hooray for Lynn who has been rewarded \$1,500 for her role in protecting the Company from so many potential risks.

A Word of Caution!

Settlement agents should always obtain underwriting approval before closing a transaction where a credible witness or witnesses were used to identify the signer. Keep in mind, underwriting approval should not be confused with a notary's obligation to know and understand their duties as a commissioned notary public to

identify the credible witness before accepting their assertion the signer is who they say they are.

For example, in the State of Texas, the notary must personally know the credible witness. In other states, the credible witness must have a current driver's license or state issued I.D. card and there must be at least two credible witnesses.

In the end, it is the notary who has to be completely comfortable with the circumstances surrounding the need to rely on a credible witness. A notary should be sure he or she knows and understands the state specific regulations. A notary also always has the right to ask the signer for additional, out of pocket identification, such as a bank card or club membership card which would have a name and picture on it.

An imposter would rarely, if ever, have other forms of identification on them in the same name as a fake I.D. Keep in mind, it is the notary's commission and therefore his or her personal liability.

This article was provided by contributing author, Diana Hoffman, Corporate Escrow Administrator Fidelity National Title Group National Escrow Administration

SIGNING *in a Hague Convention treaty member country*

If the country where the principal is located is not a member of the Hague Convention or has not subscribed to the convention of 5 October 1961, the principals may go to a duly appointed notary public in that country.

The notary will attach a Certificate of Acknowledgment which must be authenticated by a judge of a court of the country in which the acknowledgment was taken or a member, consul, vice-consular agent of the United States. The certification is most often referred to as a Certification of Authentication.

The certification must contain certain information and must be of a certain format, in order for the document to be accepted for recording and insuring purposes. The certificate is not a form a settlement agent would prepare or provide. If the foreign acknowledgment is not provided in English, a translation of the document will be required.

If the principal does not read and understand English, and the documents must be translated to them, then an Affidavit of Translator will be required to be signed by the interpreter and notarized by the duly appointed notary.

