RECENT DEVELOPMENTS IN CONTRACT LAW & PROPERTY LAW

By

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I. CONTRACT LAW DEVELOPMENTS


1. In 1958 Prairie entered into an “all requirements” wholesale electricity supply contract with Sunflower Electric Power Corporation that continues in effect until April 2021.

   a. The contract obligated Prairie to purchase all its electricity for its system from Sunflower to the extent Sunflower has the electricity available to sell.

   b. The contract obligation excepted Prairie’s pre-existing purchase commitments.

2. In 1977 Prairie entered into a second “all requirements” wholesale electricity contract with Kansas Electric Power Cooperative (KEPCo) that continues in effect until December 2020.

   a. Contains an exception for Prairie’s pre-existing purchase commitments.

   b. But, another section of the contract sought to limit the exception to “those areas of [Prairie’s] system presently served” with power procured from Sunflower.

      (1) This exception does not appear in the 1958 Prairie/Sunflower contract.

      (2) Sunflower is not a party to the Prairie/KEPCo contract.

3. Prairie has agreed to provide retail electrical service to Jayhawk Pipeline Service that will require a new delivery point which was not an area “presently served” with power procured from Sunflower. Prairie sought to purchase its wholesale electricity requirements to serve Jayhawk from Sunflower. KEPCo objected, arguing it was entitled to provide Prairie with wholesale electricity.
4. Not a breach of contract action (yet); declaratory judgment to ascertain the rights of the parties regarding service to Jayhawk.

a. Trial Court: Sunflower entitled to provide the service; its contract was first-in-time.

b. Court of Appeals: KEPCo entitled to provide the service; this clearly falls within the exception to the exception in the Prairie/KEPCo contract.

c. Supreme Court: Reverses Court of Appeals by interpreting “the KEPCo Contract in light of, and as limited by, Prairie Land’s pre-existing obligations under the Sunflower Contract.”

(1) Sunflower has the right to provide the electricity.

(2) The Prairie/KEPCo contract is interpreted so the exception to the exception does not apply to this situation.

(3) The exception to the exception language conflicts with the balance of the contract and therefore does not apply to the pre-existing Prairie/Sunflower contract.


1. A contracted with B to construct a motel. B subcontracted with C to have a sign installed. A indicated to B and C where the sign could be located. It later turned out A did not own the land where the site had been prepared for the sign. C had incurred $2,901.06 in expenses preparing the site. The sign was moved to another site and installed by C in accordance with its contract with B. C sought reimbursement for the $2,901.06 from A.

2. The trial court held that when A discussed placement of the sign with C it created an oral contract. The trial court held for C.

3. The major defense raised by A on appeal was that C’s only remedy was to file a mechanic’s lien and since C did not, C has no claim.
a. The motel owner (A) relied on *Holiday Development Co. v. Tobin Construction Co.*, 219 Kan. 701, 549 P.2d 1376 (1976), which noted: “Many courts have considered whether a subcontractor or materialman can obtain a personal judgment against an owner on the basis of quasi-contract or unjust enrichment, in the absence of privity of contract or a direct promise to pay. The overwhelming weight of authority is in the negative.”

(1) In most situations, there has been no direct contract between the owner (A) and the subcontractor/materialman. The practice is to rely upon the mechanic’s lien statute to protect the landowner after a stated period of time.

(2) Often there will be no unjust enrichment because the contractor (B) will have been paid in full by the owner (A).

(3) Note, however, the facts are different here.

4. Court of Appeals analysis:

a. “[T]he Supreme Court views a subcontractor’s failure to avail itself of an available mechanic’s lien as an absolute bar to a quasi-contract claim against a property owner or whether such failure is merely one factor to be considered in determining whether a subcontractor can bring a quasi-contract claim under the circumstances.”

b. However, in this case the court finds that C did not have a mechanic’s lien remedy alternative: “A mechanic’s lien was not an available remedy for Gleason (C) to recover expenses beyond the contract price, expenses that were incurred as a result of its reliance on Rattan’s (A) approval of the first sign location and authorization to relocate the sign once the mistake was discovered.”

c. “Rattan (A) was unjustly enriched to the extent that he received the full benefit of a properly-placed sign without paying for the additional expenses incurred as a result of his own mistake regarding the first location.”

5. Observations about quasi-contract:
a. Noting “the terms ‘quasi-contract,’ ‘unjust enrichment,’ and ‘quantum meruit’ are used interchangeably in Kansas and a claim based on any such theory is typically considered equitable in nature.”

b. Contract “implied in law, not a contract implied in fact.”

“A contract implied in fact is one ‘inferred from the facts and circumstances of the case’ but which is ‘not formally or explicitly stated in words.’ It is the product of agreement, although it is not expressed in words. A contract implied in law does not rest on actual agreement. It is a legal fiction created by the courts to ensure justice or to prevent unjust enrichment.”

(1) The contract referred to by the trial court, according to the court of appeals, was a contract implied in law, not fact.

(2) Therefore, arguments by A that many of the formalities of a contract cannot be established does not matter because it will be implied, if at all, to “ensure justice or to prevent unjust enrichment.” It is a remedy, not an agreement.

c. The basis for recovery is “the acceptance by the owner . . . of benefits rendered under such circumstances as reasonably notify the owner that the one performing such services expected to be compensated therefor by the owner.” There must be some act by the owner that reasonably results in the subcontractor acting to his detriment.

d. “There are many cases where the law enforces in a contractual action a duty to restore the plaintiff to former status – not merely to surrender the benefit which the defendant has received.”


1. A entered into a contingent fee agreement with attorney B that provided for a fee of 331/3% of any recovery before the final pretrial conference and 40% thereafter. While the action was pending, A fired B and hired C. C settled the case for $360,000. What should B’s fee be?
2. Trial court: awarded B a partial fee based on the contingency clause in the A/B contingent fee agreement.

3. Court of Appeals: "The district court erred. We remand for a redetermination of the fee due . . . [B] founded on a lodestar calculation consistent with the equitable principles of quantum meruit that govern in this circumstance."

4. Moral of the story:
   a. "Pistonik’s [B’s] right to compensation for his legal services derives from his contractual relationship with Consolver [A]. But the contract contained no terms dealing with payment should Consolver terminate Pistonik before the litigation ended. In the absence of such provisions, the court have generally held that a client must compensate the terminated lawyer based on equitable principles of quantum meruit or unjust enrichment."
   
   b. All contingent fee agreements should provide for compensation in the event of a discharge prior to completing the case. Failure to do so leaves the attorney with a quantum meruit remedy that in most cases will be much less favorable to the discharged attorney.

5. Principles:
   a. "Under a quantum meruit theory, a party conferring a benefit on another party is entitled to recover the value of the benefit conferred if the recipient knew of the benefit and retention of the benefit without compensation would be inequitable under the circumstances."
   
   b. "A quantum meruit payment is fundamentally incompatible with a contingency fee in a contract for legal services."
   
   c. "The lodestar method of calculating attorney fees provides a sounder foundation for a quantum meruit award. A court makes a lodestar fee calculation by determining a reasonable hourly rate for the legal services and multiplying that by the reasonable number of hours required to handle the litigation."
d. “The reasonable time to perform the work commonly will be derived from contemporaneous records showing specific tasks and the time taken to perform them.”

e. “The reviewing court may adjust the recorded time to eliminate duplicative work, excessive conferences, and other unwarranted inefficiencies.”

f. “In addition, the court should take into account the criteria outlined in KRPC 1.5(a) . . . for determining the reasonableness of a fee, excluding whether the fee is fixed or contingent.”

g. “[T]he lodestar method produces an award that roughly approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case.”

h. Failure to maintain contemporaneous records:

(1) “[R]esolve doubts about [reconstructed records] . . . against Pistotnik, since he chose not to keep a contemporaneous accounting.”

(2) Generic statements about a broad range regarding the value of services “is unacceptable for lodestar purposes.”

(3) “Although the courts understandably have a distinct preference for contemporaneous time records, they can and do consider ‘reconstructed’ records derived from a lawyer’s careful review of the file and his or her studied reflection.”


1. A (father) promised B (daughter) to leave B land worth $1 million, if B would leave her job and manage the ranch full time. B left her job and took over management of the ranch. A and B had a falling out. A subsequently sold the land to a third party. B seeks restitution equal to the money she lost by leaving a lucrative job to manage the ranch.
2. Trial court: granted summary judgment to A.

3. Court of Appeals: summary judgment improper; there are disputes issues of fact that, if resolved in B’s favor, would entitle B to a promissory estoppel remedy.

4. General principles of promissory estoppel:
   
a. “[A]n equitable doctrine designed to promote some measure of basic fairness when one party makes a representation or promise in a manner reasonably inducing another party to undertake some obligation or to incur some detriment as a result. The party assuming the obligation or detriment may bring an action for relief should the party making the representation or promise fail to follow through.”

b. Applicable when:
   
   (1) “a promisor reasonably expects a promisee to act in reliance on a promise;

   (2) the promisee, in turn, reasonably so acts; and

   (3) a court’s refusal to enforce the promise would countenance a substantial injustice.”

c. The Kansas Supreme Court has embraced Restatement (Second) of Contracts §90.

   (1) Often referred to as “promissory estoppel” and is conceptually designed to protect legitimate reliance interests.

   (2) “[A] party’s reasonable reliance on a promise prompting a reasonable change in position effectively replaces the bargained for consideration of a formal contract, thereby creating what amounts to a contractual relationship.”

   (3) “Courts treat the requirement of reasonable reliance under promissory estoppel as a question of fact.”
d. Statute of limitations not 2 years for misrepresentation but rather 3 years under K.S.A. 60-512(1) for “[a]ll actions upon, contracts, obligations or liabilities expressed or implied but not in writing . . . .”

(1) “Enforcement of an oral promise by estoppel yields an ‘obligation’ and, therefore, would come within the scope of K.S.A. 60-512(1).

(2) Therefore, the statute of limitations for a promissory estoppel claim is 3 years.

e. No statute of frauds issue.

(1) Not a transfer of land but rather compensation for failing to honor a promise.

(2) Note, however, that promissory estoppel can be used to overcome a number of traditional contract enforcement requirements.

(3) “The Restatement (Second) of Contracts §90 specifically states relief on a promissory estoppel claim should be tailored to effectuate fair or equitable results. Thus, ‘[t]he remedy granted for breach [of the promise] may be limited as justice requires.”

(4) “The statute of frauds would impose a legal impediment only to specific performance of the promise . . . .”

(5) “The Kansas statute of frauds does not impose an impenetrable legal barrier to that sort of restitutionary recover on an oral promise, even if the promise itself called for the transfer of land.”

5. Promissory estoppel vs. quantum meruit.

a. The measure of damages is not limited to the value of the services provided following the promise (quantum meruit).
b. The measure of damages sought is restitutuonary: to be placed in the position she would have been had the promise not been made and had she not left her employment to manage the ranch.

(1) The promise was made to induce her to leave her career to manage the ranch.

(2) The damages being sought are not for the value of her work at the ranch but rather the financial benefit she gave up to take over management of the ranch.

6. Restatement (Second) of Contracts §90:

Promise Reasonably Inducing Action or Forbearance

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

(2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.


1. This case has “bar examination question” written all over it.

2. A was seeking health insurance. B contacted A and then assisted A in preparing an application for insurance from company #1. A properly completed the application showing pre-existing conditions. Company #1 rejected coverage. B then asked A for permission to submit the application to C. A agreed. B submitted the application but omitted (asserted to be by accident) the pre-existing conditions information. A was not given the opportunity to review the second application. C insured A. C learned later of pre-existing conditions and refused coverage to A. A sought the assistance of the Kansas Insurance Commissioner. The Commissioner found that C engaged in improper practices and ordered C to cover A’s
expenses. District court affirmed. Court of appeals reversed. Kansas Supreme Court reverses court of appeals and affirms, in part, the Commissioner’s ruling.

3. The case turns on whether B was the agent of A, or the agent of C with actual or apparent agency authority to obtain and present A’s application.

4. The court of appeals’ rationale: “Because McClary [B] was viewed as an independent broker rather than Golden Rule’s [C’s] agent, the panel held that Golden Rule was not responsible for McClary’s omissions on Denny’s [A’s] application. The panel thus summarily rejected the Department’s argument that Golden Rule committed unfair claim settlement practices in its dealing with Denny [A]. . . .”

5. “In this opinion . . . we attempt to improve upon the clarity of Kansas agency law.”

6. The court looks to the Restatement (Third) of Agency.

a. Agency is “the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”

b. “A person manifests assent or intention through written or spoken words or other conduct.”

c. “The common law of agency recognizes three distinct bases on which the legal consequences of the agent’s action are attributable to the principal – actual authority, apparent authority, and respondeat superior.”

d. “An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal’s manifestations to the agent, that the principal wishes the agent so to act.”
(1) “An agent’s actual authority can either be express, i.e., ‘stated in very specific or detailed language,’ or implied . . . .”

(2) Implied authority is “actual authority either (1) to do what is necessary, usual, and proper to accomplish or perform an agent’s express responsibilities or (2) to act in a manner in which an agent believes the principal wishes the agent to act based on the agent’s reasonable interpretation of the principal’s manifestation in light of the principal’s objectives and other facts known to the agent.” Restatement (Third) of Agency § 2.01, comment b.

e. “Apparent authority is the power held by an agent or other actor to affect a principal’s legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations.” Restatement (Third) of Agency § 2.03.

(1) Apparent authority “does not presuppose the present or prior existence of an agency relationship.” Restatement (Third) of Agency § 2.03, comment a.

(2) “Thus, an actor who appears to be an agent but is not may nevertheless bind a principal in certain circumstances.”

(3) “Similarly, agents with actual authority may also bind a principal under the doctrine of apparent authority.”

(4) In any event, “a principal’s liability requires that the third party reasonably believe the agent to be authorized and that such belief be traceable to a manifestation of the principal.”

f. “Respondent superior assigns liability to an employer for the torts committed by its employees while acting within the scope of their employment.” Restatement (Third) of Agency § 2.04.

7. The analytical process:
a. Is there a principal/agent relationship? If so, what is the nature and scope of the agent’s authority? [actual authority to act]

b. If no principal/agent relationship, or if there is but the action taken by the agent is beyond the scope of its authority, did the actor or agent have apparent authority to act? [apparent authority to act]

8. Court’s observations (critique) of Kansas common law of agency:

a. Cases focus on types of “agencies” as opposed to types of “authority.”

b. “Express agency” and “implied agency.”

c. “Ostensible or apparent agency.”

9. Kansas common law agency principles and insurance cases.

a. “Insurance intermediaries” generally classified as either “agents” or “brokers.”

   (1) Traditionally an “agent” is the representative of the insurer.

   (2) And the “broker” is the representative of the insured; except the broker is the agent of the insurer for the limited purpose of receiving the first premium.

b. “But it is not these characterizations that are important to our inquiry; it is the intentions of the insurer and intermediary in creating an agency relationship and the authority the insurer vests with the intermediary that are critical.”

c. “Where the insurer’s actions create actual or apparent authority for a broker to act on its behalf, the broker becomes the agent of the insurer.”

d. “[T]he distinction between brokers and agents does not prevent a broker from acting as an agent, and a person may be both an insurance agent and an insurance broker, functioning at different times in different capacities.”
e. “The same actor may occupy different roles at successive points in an ongoing interaction among the same parties.”

10. Why agency status matters: “it can determine whether the intermediary’s knowledge and acts are imputable to the insured or the insurer.”

11. So, was McClary [B] the agent of Golden Rule [C] such that the actions of B are imputable to C?

a. C argued its express contract with B “clearly prohibits McClary [B] from acting as an agent of Golden [C] or in any capacity except as an independent broker on behalf of his own clients . . . .”

b. But the other terms of the B/C contract granted B the right to accept applications on C’s behalf.

c. B/C cannot in fact contractually create a “cat” and then declare it is a “dog” and not a “cat.”

d. “We conclude that substantial evidence support the existence of a principal-agent relationship [between B and C].”

e. “We must next decide whether evidence supported a finding that McClary [B] had actual authority to solicit and submit applications to Golden Rule or, if not, whether he had apparent authority to do so.”

(1) The B/C contract authorized B to “[o]btain and submit” applications for insurance for C. “This express declaration vested McClary [B] with actual authority to solicit and submit applications to Golden Rule.”

(2) “This is the type of relationship and the scope of authority commonly held by a soliciting agent, as that term has been defined in the case law.”

12. “McClary clearly was not a captive or exclusive agent, but his simultaneous appointment by other insurance companies did not make it impossible for him to qualify as a soliciting agent for Golden Rule.”
13. Although the issues can be resolved based upon actual authority: “We pause only to recognize again that actual authority does not preclude the existence of apparent authority, and certain of the facts in this case would support its existence as well.” *E.g.*, “Golden Rule made McClary its appointed agent under K.S.A. 2013 Supp. 40-4912 . . . .”

14. So why is the Insurance Commissioner involved?

   a. Golden Rule’s investigation focused solely on whether the insured had a pre-existing condition that was not disclosed in the application.

   b. Golden Rule did not investigate the relationship with McClary and his actions, even after it became clear that the insured did not prepare the submitted application.


1. Westar contracted with Wahlco to manufacture and deliver pollution control equipment for Westar’s coal-fired power plant composed of three generating units. The contract contained specific delivery dates for each unit and a liquidated damage clause in the event Wahlco failed to meet the delivery dates.

2. The liquidated damage clause contained the following provisions:

   a. Clause acknowledging timely delivery is “critical to this Contract and that [Westar] will suffer financial loss if such Work is not completed within the period of time specified.”

   b. If each unit is not delivered by the designated dates: “[Wahlco] shall pay [Westar] one and one half percent (1.5%) of the total Contract Price per week for every week beyond the latest allowable delivery date.” However, the total liquidated damages could not exceed 10% of the total contract price of $6,229,185.50.

   c. “[T]ime is of the essence” and that Westar “will sustain damage if [Wahlco] fails to . . . complete Equipment and Material deliveries within the dates specified.”
d. The liquidated damages are “not penalties” and “damages are difficult or impossible to determine, otherwise obtaining an adequate remedy is inconvenient and the liquidated damages constitute a reasonable approximation of the harm or loss to [Westar].”

3. Delivery delays for all the units totaled over 34 weeks triggering the 10% cap on liquidated damages ($622,918.55). The district court upheld the liquidated damages and ruled in favor of Westar. Wahlco appealed.

4. Wahlco’s claims:
   a. Westar had to prove its construction schedule was actually delayed by the late deliveries of the pollution control equipment.
   b. Under Kansas law Westar must establish that Wahlco’s breach caused the event for which liquidated damages were designed to compensate – i.e., delay to Westar’s project schedule.
   c. Westar must suffer actual damages from the delay or the clause is an unenforceable penalty.

5. Preliminary matters: the parties agreed that Kansas law applied and that the transaction was a sale of goods governed by Article 2 of the Uniform Commercial Code.

6. The Court held:
   a. Nothing in the contract suggests that Westar must establish actual delay in order to recover liquidated damages.
   b. “The contract language amounts to a concession that Wahlco’s breach (failure to deliver equipment on time) would cause damages (delay to the Project) and relieves Westar of the burden of proving this in court.”
   c. The liquidated damages clause is not a penalty clause and is therefore enforceable.
7. Penalty analysis: The burden of proving the clause is a penalty clause is on the challenging party. Apply K.S.A. 84-2-718(1) that requires a showing of three factors:

a. Whether the amount is reasonable in light of anticipated or actual harm;

b. difficulty of proving damages; and

c. difficulty of obtaining an otherwise adequate remedy.

8. Analysis: The court gives effect to the recitals contained in the liquidated damages clause. One recital that would have been helpful to add to the contract language:

"Testimony was presented in the district court that ‘[a]t the time of entering into the Contract, Westar anticipated that late delivery of the equipment by Wahlco would result in damages, including from potentially extended outages, which could result in damages of multiple hundreds of thousands of dollars per day.’"

a. The drafting goal is to ensure the liquidated damages clause contains the information necessary to establish its validity.

b. The sort of information obtained through “testimony” could have been included as a background recital of possible damages that gave rise to the fashioning of the liquidated damages remedy.


II. PROPERTY LAW DEVELOPMENTS


1. K.S.A. 59-617. Limitation on probate of written will. No will of a testator who died while a resident of this state shall be effectual to pass property unless a petition is filed for the probate of such will within six months after the death of the testator, except as hereinafter provided.
2. **K.S.A. 59-618. Liability and effect of withholding will.** Any person who has possession of the will of a testator dying a resident of this state, or has knowledge of such will and access to it for the purpose of probate, and *knowingly withholds it* from the district court having jurisdiction to probate it for more than six months after the death of the testator shall be liable for reasonable attorney fees, costs and all damages sustained by beneficiaries under the will who do not have possession of the will and are without knowledge of it and access to it. Such will may be admitted to probate as to any innocent beneficiary on petition for probate by any such beneficiary, if such petition is filed within 90 days after such beneficiary has knowledge of such will and access to it, except that the title of any purchaser in good faith, without knowledge of such will, to any property derived from the fiduciary, heirs, devisees or legatees of the decedent, shall not be defeated by the production of the will of such decedent and the petition for probate of the will after the expiration of six months from the death of the decedent.

The provisions of this section as amended by this act shall apply retroactively to the withholding of a will of a testator.

3. Betty Jo Stradler died on October 19, 2006 survived by five adult children. Betty executed a will in 1985. The will gave all the family oil and gas business and assets to the three sons, and divided the remaining property among the five children. After a diligent search, Betty’s will could not be found.

4. While intestate proceedings were in process, but not closed, the will was found in 2011 during “general housekeeping” at her former attorney’s office.

5. The sons sought to probate the will, one of the daughters objected.

   a. The district court admitted the will to probate relying upon a court of appeals decision allowing probate under 59-618 of a “lost” will.

   b. On appeal, the court of appeals affirmed, with one judge dissenting.

6. Kansas Supreme Court: reverses the lower courts.

   a. “K.S.A. 59-517 functions as a statute of limitations prohibiting the admission of a will to probate more than 6 months after a testator’s death.”

   b. The only savings provision is found at K.S.A. 59-618 which applies to a will that has been “knowingly withheld from probate for more than 6 months after the death of the testator by a person who has possession of the will or knowledge of and access to it.”

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c. “[A] will that simply has been lost or misplaced, is not admissible under K.S.A. 59-618 after the 6-month time limit in K.S.A. 59-617 has expired.”

7. The court also applies K.S.A. 59-1504 that requires the district court to award attorney fees and expenses to any person who successfully opposes the probate of a will.
   a. The award is compensatory, not penal, and is paid out of the estate.
   b. Must file the appropriate motion. Failed to do so in the court of appeals, so no fee there. Filed the proper motion at the Supreme Court, court awards $8,146.90 in fees for work at the supreme court level only. See Rule 7.07(b).


1. 1976 A, a railroad enters into a lease with B of land adjacent to railroad tracks. Rent was to be paid in advance. There was no termination date; either party could terminate by serving a 30-day written notice.

2. Default in payment, “Lessor may . . . declare this lease at an end . . .”

3. 1977 Delange acquired B’s interest in the lease. 1980 A and Delange [B] amended the lease to increase the rent. 1983 lease amended to add more land to it. 1987 successor to A, Union Pacific Railroad ceased running trains through the town (Hepler).

4. Dispute over description of the leased land raised by son of B. B stopped paying rent. No rent paid since January 1, 1993. Attempts at collection. No attempt to terminate the lease.

5. 1997 A inquired of B whether B might be interested in buying the leased land. Parties negotiated but could not agree on a price. B continued to occupy the land without paying rent.

6. 2012 UP sold the land and assigned its rights to MFA (new A). MFA gave notice it was terminating the lease for failure to pay rent. B asserted he owned the land by adverse possession.

7. Adverse possession?
a. Lease was not terminated by either party until MFA acted in 2012.

b. Even if the lease had terminated, B would be a holdover tenant.

c. Adverse possession is a question of fact that must be established by clear and convincing evidence; the burden of proof is on the party asserting adverse possession and there is a presumption in favor of the party holding legal title.

d. B was not a trespasser; his presence on the property, throughout the term of the lease, was permissive, not adverse.


1. O, owner of land in fee, enters into an oil and gas lease with X. Seven months later, while the lease is still in effect, O conveys to A an undivided one-half mineral interest in the land for the term of the lease. This is a defeasible term mineral interest.

   a. In the deed creating the interest it states: “Said land being now under an oil and gas lease executed in favor of, as appears of record, it is understood and agreed that this sale is made subject to the terms of said lease, but covers and includes one-half of all the oil royalty, and gas rental or royalty due and to be paid under the terms of said lease.”

   b. A producing gas well was completed on the land but was declared shut-in by the lessee with no gas being produced from June 1, 1985 to 2003. The primary term on A’s defeasible term mineral interest terminated on June 1, 1985.

2. Prior Kansas law provides that if the document that created the defeasible term mineral interest does not contain a shut-in royalty clause, and the only well capable of producing on the land is not being produced or otherwise developed or operated, the defeasible term mineral interest terminates. *Dewell v. Federal Land Bank*, 380 P.2d 379 (Kan. 1963).
a. However, in *Dewell* each mineral owner entered into a separate lease after the interest was granted; each lease contained a shut-in royalty clause. In *Netahla* the original grantor entered into the lease containing the shut-in royalty clause.

b. The court of appeals held including the “subject to” language in the subsequent mineral deed expressly incorporated the lease terms, including the shut-in royalty clause, into the mineral deed.

c. The supreme court rejected that argument and chose to follow two Texas Court of Appeals cases interpreting identical language under similar facts that held the “subject to” language was used only to alert the grantee that its interest was burdened by a prior lease.

3. The Kansas Supreme Court reaffirms the *Dewell* rule that “absent a provision in a mineral deed stating otherwise, the payment of shut-in royalties pursuant to a lease is not the equivalent of actual production or development.”

4. Although it is possible for a grantor to confer on a grantee the benefits of savings clauses in an existing or future lease, the court holds that common “subject to” language does not have that effect.


1. A has a water right that dates to 1950; B has water rights that date to 1964 and 1976. A established that B’s withdrawal of water is substantially impairing A’s ability to use its water right. A sues for a temporary injunction requiring B to shut-in its water wells.

2. Interlocutory appeal to review whether district court abused its discretion is issuing a temporary injunction to protect A during the pendency of the action. Court of appeals affirms the injunction.


a. Priority does not depend upon the nature of the use, only the date the right was established.
b. Curtailment does not depend upon the nature of the use, only the date the right was established.

4. The district court appointed the Kansas Department of Agriculture’s Division of Water Resources as the referee for fact investigation pursuant to K.S.A. 82a-725.

   a. The chief engineer of the Division of Water Resources filed interim and final reports that detailed the impairment of A’s water right.

   b. An issue on appeal was whether an evidentiary foundation must be laid before the report is admitted into evidence; presumably requiring that the author of the report be subject to cross-examination.

   c. Court holds K.S.A. 82a-725 authorizes, by express statutory language, the referee’s report without further action. “The report shall be evidence of the physical facts found therein, but the court shall hear such evidence as may be offered by any party to rebut the report or the evidence.”


1. Among the basic tasks a lawyer undertakes is determining the precise nature of a landowner’s “ownership.”

   a. The holder of an “easement” has the right to use the land for the purposes stated in the easement.

   b. Absent express language in the easement document, the owner of the land burdened by the easement retains the balance of rights, including all rights in the land once an easement terminates. See generally Great Northern Ry. Co. v. United States, 315 U.S. 262, 271–72 (1942) (under the General Railroad Right-of-Way Act of 1875, 43 U.S.C. §§ 934–939, railroad received an easement and the federal government retained the oil and gas, and all other rights). This issue was recently revisited by the U.S. Supreme Court in Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257, 1268 (2014) (reaffirming the Great Northern holding regarding rights-of-way issued under the 1875 Act).
2. The U.S. Court of Appeals for the Federal Circuit, purporting to apply Kansas law, examined a number of conveyances to a railroad and held that some conveyed a fee interest to the railroad and others conveyed merely an easement.

3. This Kansas real property issue arrived at the Federal Circuit after the landowners filed inverse condemnation actions against the federal government in the U.S. Court of Federal Claims under the Tucker Act.

a. The landowners objected to having the land, where the railroad’s abandoned tracks ran through their property, placed in the “Rails-to-Trails” program under the National Trails System Act. See 16 U.S.C. § 1247(d).

b. While the federal government can “take” the land for the program, the issue is whether a compensable taking has occurred. That issue must be decided under the Tucker Act in the Court of Federal Claims. See Preseault v. Interstate Commerce Comm’n, 494 U.S. 1, 11–12 (1990).

3. No conveyance in Biery involved a government grant or reservation; all were between private parties. Therefore, Kansas property law determines whether the landowners have an interest in the land taken that entitles them to compensation.

4. If the railroad received a fee interest, the landowners have no compensable interest. If the railroad received an easement, following its abandonment the landowners own the unencumbered fee and will be entitled to compensation. See Preseault v. United States, 100 F.3d 1525, 1552 (Fed. Cir. 1996) (under Vermont law, railroad received an easement and when it was abandoned, the placement of the land in the Rails-to-Trails program constituted a compensable taking by the federal government).

5. In Biery, the Federal Circuit’s task was to ascertain and apply Kansas law regarding conveyances to railroads.

a. The Court of Federal Claims focused on the conveyance documents, noted they purported to convey a fee, and held a fee was conveyed.
b. The Federal Circuit held that was not, in some cases, a proper analysis under Kansas law.

6. The Kansas Supreme Court has developed special rules that must be applied to conveyances to a railroad.

   a. In Kansas a conveyance that clearly states a fee interest is being conveyed to a railroad will nevertheless convey only an easement when the conveyance, either by express language or implied from the circumstances, indicates the land is being conveyed for right-of-way purposes.

   b. Kansas public policy in effect prohibits granting strips of land in fee to railroads for right-of-way purposes. This policy is reflected in the basic rule that “in Kansas, railroads take only an easement in strips taken for railroad right-of-ways regardless of whether taken by condemnation or deed.”

7. The Federal Circuit stated the Kansas rule that “when an unambiguous deed to a railroad contains no use restrictions, reversionary clause, or anything else indicating the land is for a right-of-way, the title to the land is granted in fee simple.”

   a. The court then proceeded to apply its rule to a conveyance, the “Julia Fair Deed,” that quitclaimed to the railroad “all the estate, title and interest” therein. The court then searched the deed for language indicating it was being conveyed for right-of-way purposes, and found none. Therefore, the deed conveyed a fee to the railroad, not an easement.

   b. What the court failed to focus on was express language in the deed that clearly implied it was going to be used for right-of-way purposes.

      (1) Under the rule stated by the court, this would be “anything else” in the deed “indicating the land is for a right-of-way.”

      (2) The deed stated that the land granted was “[a] strip of land [100] feet wide” across the length of the property. Railroad
rights-of-way were typically 50 feet either side of a line: a 100-foot strip.

c. The court ignored the foundational Kansas case that held the words "right-of-way" do not have to be in the document for it to indicate the land being conveyed is for right-of-way purposes. See Abercrombie v. Simmons, 81 P. 208, 211 (Kan. 1905) (look for language that right-of-way use was "within the contemplation of the parties").

(1) For example, in Abercrombie the deed conveyed "lands . . . lying within fifty feet of the center line of the main track of said railroad . . . ."

(2) In Harvest Queen Mill & Elevator Co. v. Sanders, 370 P.2d 419 (Kan. 1962), the right-of-way nature of the conveyance was established by the grant of a 100- to 150-foot strip of land "for the purpose of . . . building constructing or maintaining its roadbed or of maintaining its railroad."

(3) In Abercrombie and Harvest Queen the language in each deed showing a strip of land was being conveyed for the railroad route was sufficient to deduce it was for right-of-way purposes and therefore the railroad received an easement, not the fee.

8. The holding in Biery is significant because any takings claim related to the Rails-to-Trails program must pass through the Court of Federal Claims and ultimately the Federal Circuit. It appears the dynamics in those courts may be attuned to promoting the Rails-to-Trails program by seeking to interpret state law narrowly to avoid a compensable taking.

III. CONTRACT/PROPERTY NEXUS


1. This case demonstrates how the parties to a contract can alter their property rights in the event the parties divorce.
2. After the parties were married they entered into two agreements concerning the division of their assets upon divorce. The first was in the 1980s and the second in 2004. The terms of the first and second agreements were very similar.

3. The husband sought a divorce in 2007, triggering K.S.A. 23-201 “which gives each spouse a common interest in the marital property until the district court finalizes the property division under K.S.A. 60-1610.”

4. The district court held the agreement violated public policy by promoting divorce and was void.

   a. The agreement gave most of the assets (98.87%) to the wife.

   b. The agreement had been drafted by the husband, an attorney.

5. The court of appeals reversed finding that Kansas should recognize two types of postnuptial agreements.

   a. “Separation” agreements governed by K.S.A. 60-1610(b)(3) that are entered “only when the parties have an imminent intent to actually divorce or separate.” And;

   b. “Postmarital” agreements entered when divorce or separation are not imminent, to be governed by common law principles.

6. Kansas Supreme Court interprets K.S.A. 60-1610(b)(3) to apply to “all agreements entered into during marriage that provide for a spouse’s property rights in the event of divorce or separation . . . .”

   a. Any agreement entered into during the marriage will be a statutory “separation agreement” as the term is used in K.S.A. 60-1610(b)(3).

   b. As such, the inquiry is whether the agreement was “valid, just and equitable.” This is a two-step inquiry:

      (1) Was a valid contract created?

      (2) If so, was it “just and equitable”? 

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7. The trial court, purporting to apply the same two-step analysis, held the agreement was an invalid contract (against public policy) and not “just and equitable.” The basis for this conclusion was the court’s belief the agreement would encourage divorce.

8. The Kansas Supreme Court reverses the trial court’s holding stating: “We hold that the public policy inquiry into whether the property division in a separation agreement tends to ‘invite and encourage’ divorce was abrogated when the legislature enacted K.S.A. 60-1610(b)(3) and specified such agreements must be ‘just and equitable.’”

   a. “District courts tasked with reviewing separation agreements should examine property distribution under the legislature’s chosen ‘just and equitable’ standard, rather than trying to figure out whether that distribution is a springboard to divorce or separation.”

   b. Remand to have the district court apply the “just and equitable” standard in light of the supreme court’s analysis.

   (1) “A district court must consider more than the resulting property division at the time of divorce . . . .”

   (2) “The district court focused only on the present day property division and gave no stated consideration to the Trasters’ explicit reasons for that division, i.e. Debra’s parents being the source of the assets, Debra’s medical circumstances, and the financial impact on Debra if she and David divorced.”

   (3) “Put simply, more is required from the district court if it is to conclude under these particular circumstances that the Trasters’ agreement cannot be enforced in light of the parties’ freedom of contract and the general rule that such agreements should be honored.”

9. Dissenting Justices Rosen and Johnson: no need to remand; the record reveals that the agreement is just and equitable. The party challenging the fairness of the agreement is the “scrivener and legal expert in the formation of the agreement . . . he should not be able to repudiate his own contract when it suits him.”

1. A and B were married and later divorced. 14 years later A dies. A did not change the designated beneficiary on his retirement account. At his death the named beneficiary remained his ex-wife B. Held: B owns the retirement account funds.

2. The divorce decree did not provide for a change in beneficiary.

3. Under the divorce decree A received all his retirement benefits. A “was free to do whatever he wanted with the asset post-divorce.” “By leaving Glenda [B] as the named beneficiary on the account, this court can only conclude that Byron [A] must have intended such a result.”

4. “In 14 years, he [A] might have changed his mind. Byron [A] retained the power to do whatever he wanted with the asset.”

5. No “unjust enrichment” here.
"Are you an Ethical Attorney Negotiator? --
A Live Exercise based on the
"American Pickers" Show!"

This CLE session will blend an initial live negotiation exercise
with discussion and application of ethical issues and related
rules arising out of that exercise. The initial exercise is based on
the negotiation style and examples found on the "American
Pickers" show and seeks to get participants to evaluate their
personal negotiation style and how that affected the outcome of
the "negotiation" session as compared to other participants.
Participants will be paired off for the first half of the session to
negotiate and then a series of questions and related discussion
will take the participants through the applicable legal ethical
rules. Participants will be challenged to contemplate whether
they feel they complied ethically or may need to adjust their style
and negotiation tactics.

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Additional materials

The provided materials covering the ethical rules of negotiation are from a full hour long CLE entitled, "Attorney as Negotiator – The Ethical Rules as They Apply to Negotiation" and are intended as a long form review of the Kansas Ethical Rules as they apply to the attorney negotiator context. Following the initial negotiation exercise today we will apply some of these rules as they relate to the live experience, results, concepts and concerns that are raised in this negotiation exercise.

Initial Thoughts and Directions

As you approach the exercise try to adopt the role you are assigned and use the negotiation style or approach that you would routinely use in a legal negotiation. After the exercise, initial discussion will focus on whether you took a cooperative or competitive approach both in regards to style and content. We will also discuss whether being collaborative in working through the various options and solution scenarios affected the outcome of the negotiation. The common information is provided in these materials and the confidential information will be handed out at the session with partners randomly assigned.
Negotiation Skills and Assessment Problem
The Next “American Picker” Scenario
Common Information

This problem is based on the popular History Channel show “American Pickers”. If you are not familiar with the show, it involves two gentlemen who travel around the country looking to buy old items that may have actual value, or value when repurposed or used for renovations of some sort. They travel extensively and negotiate to purchase those items that the owners are willing to part with. The seller’s and buyer’s motivation, costs and ultimate decision to sell/buy or not sell/buy within the offered prices and terms vary with each item.

For this exercise, assume the two “Pickers”, Mike and Frank, are busy promoting their show, so one of you have been sent on the road to go on a pick that their store manager Danielle has arranged. The other person will play the role of the seller. The seller in this case has called Danielle to ask the “Pickers” to come lock through multiple buildings of stuff that his/her father who passed away recently (after a long battle with cancer) acquired and accumulated over his lifetime. Some items have sentimental value and others are just taking up space. The Pickers are working with a budget and particular goals based on what they can sell (or like to collect) and the seller is coming from the perspective of wanting to at least start parting with some of the stuff. Today’s exercise will involve 5 potential items and an evaluation process after the negotiation is complete.
The Items That Are Available

Item 1:
Rusty old motorcycle with a few missing parts that has been stored in the barn for years.

Item 2:
Coffee can shaped piece of metal with brass rings around it.

Item 3:
Oak mantel clock that is on the fireplace in the farmhouse.

Item 4:
Vintage radio in a wood cabinet that sits in the living room of the farmhouse.

Item 5:
A cast iron bell that is pretty rusty and is attached to a post just in front of the front porch.

Let the Games Begin!

The negotiation will last for approximately 15 to 20 minutes. Be prepared to briefly respond with your approach, style and your results from the negotiation.
Negotiation Wrap Up

What were your results?
Did you get what you needed for your client?
Did you give up more than you wanted to?
Did you competitive lawyer come out?
Did you work to collaborate and develop a win/win negotiation process and result?
Are there parallels to your legal negotiation?
Did you mislead or hold back information or facts to get a better outcome?

Which of the Kansas Rules of Professional Conduct actually apply to lawyers as they engage in negotiation?

There is no truly simple answer to this question. The Preamble to the Kansas Rules provides,

"PREAMBLE: A LAWYER'S RESPONSIBILITIES
[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.
[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an evaluator, a lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others." (Emphasis added.)
The Preamble to the Rules continues,

"[3] ... In addition, there are Rules that apply to lawyers who are not active in
the practice of law or to practicing lawyers even when they are acting in a
nonprofessional capacity. For example, a lawyer who commits fraud in
the conduct of business is subject to discipline for engaging in conduct
involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4."  
Emphasis added.

So even a lawyer engaged in a non-traditional practice of law in a business
setting may well have a heightened ethical obligation due to his or her status as
a licensed attorney in Kansas. In essence all lawyers at all times are governed
by an ethical duty to avoid, "... dishonesty, fraud, deceit or
misrepresentation."

This higher standard for attorneys makes an evaluation of ethical negotiation
especially important and bears close contemplation of the remaining issues
raised in this presentation and the broader materials provided.

What does the average Kansas lawyer understand to
be his or her duty to "ethically" negotiate on behalf of
his or her client?

When you ask most lawyers what their ethical duties are in general
practice they will immediately talk about the Kansas Rules of
Professional Conduct in general, most often raising the a duty to
"zealously" represent the client, the duty to communicate and to let the
client make appropriate decisions about the representation and the
general duty to be honest and forthright with the Court and others
involved in any particular representation.

When you ask about the ethical duties of a lawyer as they relate to
negotiation, however, they generally have to pause for a bit and think
about it. Not because they are by nature unethical when they serve in
a role as negotiator, but more often because they think about ethical
practice in the area of negotiation in the same way that past Courts had
defined concepts of obscenity or pornography in the past, in essence,
"Well, I know it when I see it!"
“Puffing and Bluffing”

As a general rule most lawyers understand the general ethical rule to be that you cannot lie in a negotiation and that it is permissible to “puff” or “bluff” or generally only say or respond to what you are directly asked by opposing counsel.

With law students, this same basic ethical knowledge can be found as well, but law students very quickly get flustered when you ask them about the competing issues of candor towards the court and the legal concepts in both civil and criminal law of “fraud” and “misrepresentation”.

The underlying conflict is that “advocacy” in the negotiation context would appear to be in conflict with the need to be honest and forthright in the exchange with the other party, whether through counsel or not, in the process of negotiating a settlement, plea or contract.

What rules apply to lawyers as they engage in the legal role of negotiator?

The central guideline or concept raised in this area is that you cannot engage in fraud. Under the Kansas Rules of Professional Conduct, Rule 1.0 Terminology, the definition of that “Fraud” standard that I have raised is found, the Rule provides,

“(e) “Fraud” or “Fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.”
What do we mean by fraud and misrepresentation in the context of legal negotiation then?

Isn't the very purpose and role of a negotiation to deceive at least to some degree?

Don't we try to closely guard just how much our client is willing to accept or what they might be willing to pay to settle the matter?

Don't we bluff a bit on what impact particular facts or issues really might have on subsequent litigation?

Don't we try to avoid answering fairly direct questions and instead shift the focus to issues or facts that are more advantageous to our client and his or her position?

At a basic level however, by plain language, fraud is both that intent to deceive as well as conduct that is fraudulent as defined by the substantive and procedural law of our jurisdiction. That said, the generally accepted "puffing" and "bluffing" concepts are carved out of those substantive and procedural fraud provisions as they apply to negotiation for lawyers.

In the case of TRANSACTIONS WITH PERSONS OTHER THAN CLIENT, we find the core direction of truthfulness as it applies to negotiation.

This is the central "false statement of a material fact" evaluation.

Rule 4.1 Truthfulness in Statements to Others, provides that, "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by or made discretionary under Rule 1.6."

Thus the issues of misrepresentation and fraud are clearly a concern as lawyers "puff" and "bluff" in a negotiation.
Is there any particular guidance in regard to what disclosure is actually ethically allowed in live negotiations?

Under K.R.P.C. Rule 226 1.6 Client-Lawyer Relationship: Confidentiality of Information, the general confidentiality provisions are found. Under the comments section and under the heading “Authorized Disclosure”, Comment 6 provides, "

Authorized Disclosure

[6] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

What if our client wants to move forward with something more than “puffing and bluffing”? 

Under Rule 1.16 Declining or Terminating Representation, we find a very important provision that requires withdrawal of representation if the lawyer finds that the client continues to move forward with behavior that is fraudulent.

It provides in pertinent part, “(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: ...

(4) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.” Emphasis added.

This gets at that initial basic concept that a lawyer may not engage in “fraud” either directly, or as an agent of the client, in the process of negotiation and representation. Those ideas of “puffing” and “bluffing” become much more concerning when you have to continually think about where the line might be in regards to a material (mis)representation especially if the client is at the negotiation and starts to provide any additional questionable information or representations in the process.
Duty to Report Fraud or Misrepresentation?

MAINTAINING THE INTEGRITY OF THE PROFESSION under Rule 8.3 Reporting Professional Misconduct, "(a) A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority." And also in Rule 8.4 Misconduct, "It is professional misconduct for a lawyer to: ... (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to administration of justice; (e) state or imply an ability to influence improperly a government agency or official; ... or (g) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law." Emphasis added.

Needless to say, all of those issues are raised when we come back to the question of at what point in negotiation " puffing " and " bluffing " move into misrepresentation and on to fraud of the contractual or criminal variety. The concepts and categories raised in the sections of Rule 8.4 could very easily be interpreted to cover what would otherwise be expected "zealous advocacy" by a lawyer in a negotiation.

So why do collaborative or cooperative negotiation approaches make more sense than adopting a competitive or contentious negotiation style?

A collaborative or cooperative approach to negotiation contemplates that the parties have a mutual interest in settling the matter and often involves the concept that, as opposed to win/lose results found in traditional competitive negotiation, there can be win/win scenarios. You may have heard of this approach in the civil arena of negotiations as "finding creative ways to increase the size of the pie".

While our clients may often be looking at the simple dollars and cents of the settlement check, whether it is to be written or received, bringing in the associated considerations of time, effort and stress of protracted litigation often will get both sides in a settlement mentality. Beyond that, especially in contractual matters, the parties will have to continue to work together in the relevant business relationship after the attorneys have moved on to other representations and clients.
Continued thoughts ...

Beyond those more concrete considerations, a collaborative mutually acceptable negotiated settlement of a matter, or plea in a criminal case, serves multiple baseline goals of the parties in having a simple and quicker resolution of the case, avoiding the protracted costs associated with moving forward to a trial, protecting the relationships of the parties as they move forward, and having a settled agreement that both parties are willing to actually sign off on and follow through on after the matter is done.

From a lawyer’s perspective, clients that come out of the collaborative negotiation process are comfortable with the result. They do not see clients returning to get an unbalanced deal either enforced or rescinded in some manner or form. They do not see clients that routinely blame the attorney for not getting an agreement that was reasonable and the parties could actually comply with. They understand that they were part of solving the issues and have a vested interest in making the solution work long term.

Final Thoughts/Questions?

Most importantly, they may be willing to not raise the question of whether any of the “puffing and bluffing” engaged in the settlement process rose to the level of the contemplated misrepresentation or fraud!

If the issue is not raised then the ethics complaint will not be made and you can avoid being the “seminal case” in regards to where the line in ethical negotiation in Kansas should be drawn.
Confidentiality Issues?

Under Rule 1.6 Confidentiality of Information, pertinent sections provide, "(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

... (2) to comply with requirements of law or orders of any tribunal; ..."

Are we always fully aware of how much our client is willing to share and how far they are willing to go in the dynamic negotiation process to get to a settlement?

Organization as Client?

Under Rule 1.13 Organization as Client, we find even more potential issues for a negotiator representing an organization, Rule 1.13 provides, "(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization.
Organization Client Continued

Such measures may include among others:
(1) asking for reconsideration of the matter;
(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer’s efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer shall follow Rule 1.16.

(d) In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.” Emphasis added.

Organizational Clients Concluded

In the realm of hotly contested negotiations, the lawyer may easily be tasked with making tactical decisions that the assigned representative of the organization may support as in their interests but that may be contrary to the best interests of the organization. The quintessential situation that comes to mind is any investigation or settlement of an employment law matter.

Often facts or allegations will come out in those initial conversations and negotiations that may well cause the lawyer to alter their perspective and cause them to desire to give new and better informed legal guidance to the organization, either through the assigned agent or up the described higher or highest authority within the organization.

What is the ethical obligation of the attorney at that point with an organizational client? Do you negotiate for the best result for the entity and then answer to the “human” who has retained you to represent the “corporate person/entity”?
Judicially Moderated Settlement Processes?

- As an advocate under Rule 3.3 Candor Toward the Tribunal, a lawyer who engages with a judge in a settlement conference process also may walk a narrow line. Rule 3.3 provides in pertinent part, "(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; ... or

- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Obligations to the Tribunal

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse." Emphasis added.
Talking With The Judge?

Thus, the lawyer must take care even in a mediated settlement negotiation process with another judge, to be careful in regards to responses to settlement authority and pertinent and relevant facts to the matter as the judge mediates or moves between the parties to encourage settlement. The exception to the fraud standard I have discussed, in regards to allow “puffing” and “bluffing” that is not active misrepresentation of fact, does not apply when a judge is involved in the negotiation process.

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Attorney as Negotiator –
The Ethical Rules as They Apply to Negotiation

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This presentation will cover the general concepts of “puffing and bluffing” that are generally allowed in the negotiation context and address how the ethical rules apply to the practice of negotiation by attorneys. We will talk about the rules in regards to difficult concepts such as making false or misleading statements to third parties, candor towards tribunals, and more. During the presentation we will walk through all of the Kansas ethical rules and explore their application in the negotiation context. Special focus will be given to collaborative or cooperative negotiation approaches as a tool to avoid the ethical issues raised in the presentation.
Lawyers in all practice areas are tasked with regularly negotiating on behalf of their clients. Many times the short term benefits of competitive negotiation style must be balanced against the long term benefits of cooperative and collaborative approaches to negotiation. From an ethical perspective this presentation will, at a base level, seek to discuss the balancing of the ethical duty to zealously represent a client against the benefits of cooperative problem negotiation with opposing counsel. The basic premise to be explored is whether it is possible to ethically negotiate with a cooperative or collaborative negotiation technique?

The larger conclusion reached is that a cooperative and collaborative approach to negotiation is not only likely to produce better long term results for the client, but to also allow the lawyer to engage in substantially less ethical risk taking in the process.

Beyond those more concrete considerations, a collaborative mutually acceptable negotiated settlement of a matter, or plea in a criminal case, serves multiple base line goals of the parties in having a simple and quicker resolution of the case, avoiding the protracted costs associated with moving forward to a trial, protecting the relationships of the parties as they move forward, and having a settled agreement that both parties are willing to actually sign off on and follow through on after the matter is done.

From a lawyer’s perspective, clients that come out of the collaborative negotiation process are comfortable with the result. They do not see clients returning to get an unbalanced deal either enforced or rescinded in some manner or form. They do not see clients that routinely blame the attorney for not getting an agreement that was reasonable and the parties could actually comply with. They understand that they were part of solving the issues and have a vested interest in making the solution work long term.
What is a Collaborative Negotiation style or approach?

It is not a collaborative law process but only the style in which the attorney chooses to complete a negotiation. The style is cooperative and looks to find mutually agreeable (rather than mutually disagreeable) solutions. At a simplistic level it is an attempt to get the parties to work together to search out creative solutions beyond the standard harm–responsibility–damages dynamic. It is an attempt to share information between the sides to problem solve, rather than weigh the scale between winner and loser in the matter.

Which of the Kansas Rules of Professional Conduct actually apply to lawyers as they engage in negotiation?

There is no truly simple answer to this question. The Preamble to the Rules provides,

"PREAMBLE: A LAWYER'S RESPONSIBILITIES
[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.
[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an evaluator, a lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others." (Emphasis added.)
The Preamble to the Rules continues,

"[3] ... in addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4." Emphasis added.

So even a lawyer engaged in a non-traditional practice of law in a business setting may well have a heightened ethical obligation due to his or her status as a licensed attorney in Kansas. In essence all lawyers at all times are governed by an ethical duty to avoid, " ... dishonesty, fraud, deceit or misrepresentation." This higher standard for attorneys makes an evaluation of ethical negotiation especially important and bears close contemplation of the remaining issues raised in this review.

What does the average Kansas lawyer understand to be his or her duty to "ethically" negotiate on behalf of his or her client?

When you ask most lawyers what their ethical duties are in general practice they will immediately talk about the Kansas Rules of Professional Conduct in general, most often raising the duty to zealously represent the client, the duty to communicate and let the client make appropriate decisions about the representation and the general duty to be honest and forthright with the Court and others involved in any particular representation.

When you ask about the ethical duties of a lawyer as they relate to negotiation, however, they generally have to pause for a bit and think about it. Not because they are by nature unethical when they serve in a role as negotiator, but more often because they think about ethical practice in the area of negotiation in the same way that past Courts had defined concepts of obscenity and pornography in the past, in essence, "Well, I know it when I see it!"
As a general rule most lawyers understand the general ethical rule to be that you cannot lie in a negotiation and that it is permissible to "puff" or "bluff" or generally only say or respond to what you are directly asked by opposing counsel. With law students, this same basic ethical knowledge can be found as well, but law students very quickly get flustered when you ask them about the competing issues of candor towards the court and the legal concepts in both civil and criminal law of "fraud" and "misrepresentation".

The underlying conflict is that "zealous advocacy" in the negotiation context would appear to be in conflict with the need to be honest and forthright in the exchange with the other party, whether through counsel or not, in the process of negotiating a settlement, plea or contract.

What rules apply to lawyers as they engage in the legal role of negotiator? The central guideline or concept raised in this area is that you cannot engage in fraud. Under the Kansas Rules of Professional Conduct, Rule 1.0 Terminology, the definition of that "Fraud" standard that I have raised is found, the Rule provides, "[e] "Fraud" or "Fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive."

Isn't the very purpose and role of a negotiation to deceive at least to some degree? Don't we try to closely guard just how much our client is willing to accept or what they might be willing to pay to settle the matter? Don't we bluff a bit on what impact particular facts or issues really might have on subsequent litigation? Don't we try to avoid answering fairly direct questions and instead shift the focus to issues or facts that are more advantageous to our client and his or her position? At a basic level however, by plain language, fraud is both that intent to deceive as well as conduct that is fraudulent as defined by the substantive and procedural law of our jurisdiction. The generally accepted "puffing" and "bluffing" concepts are carved out of those substantive and procedural fraud provisions as they apply to negotiation for lawyers.
What other rules complicate the representation in a negotiation?

Under Rule 1.1 Competence, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

As such a lawyer must reasonably be prepared for the negotiation with the requisite information, authority and planning to respond to issues, concerns and offers provided by the other party. How often do you feel like you have prepared for a particular negotiation but the facts and priorities change as additional information comes to light in the process and discussions? What level of skill, thoroughness and preparation is required by the ethical standard?

Under Rule 1.2 Scope of Representation, "(a) A lawyer shall abide by a client's decisions concerning the lawful objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means which the lawyer shall choose to pursue. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify. (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities. (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law. Emphasis added.
Under Rule 1.4 Communication, "(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Then what obligation does the lawyer have in the process of a negotiation when new information and priorities come to light that might radically alter the client's desired priorities in the negotiation? At what point must you stop the negotiation and consult with the client if they are not present? Can the standard, "Well I do not have authority to bind my client to X but I would be willing to take that back to him/her for consideration.\textquotedbl, comply?\textquotedbl

Under Rule 1.6 Confidentiality of Information, pertinent sections provide, "(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b). (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

\...
(2) to comply with requirements of law or orders of any tribunal;\textquotedbl ...

Are we always fully aware of how much our client is willing to share and how far they are willing to go in the dynamic negotiation process to get to a settlement?\textquotedbl
Rule 1.9 Duties to Former Clients, provides, "(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

... Unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client."

That said, may those lawyers who have developed a particular expertise in an area of law or industry ever negotiate on behalf of clients who are on the other side of matters that are new and novel? The intention appears to be yes, but at what point does knowledge of those internal policies and strategies affect that subsequent representation in a negotiation setting.

Under Rule 1.11 Successive Government and Private Employment, "(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation.

... (d) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public."
That said, may an attorney who represented the government in regards to any annual or regular regulatory, administrative or quasi-judicial process ever represent any of the regulated or applicant entities in negotiation of say a subsequent year’s ad valorem property valuation appeal, future licensure reviews, zoning or planning permitting appeals, or the myriad comparable matters that we can easily contemplate?

The simple answer is of course yes, but at what point are the concepts of what the past and present “matters” was/is at the very least difficult to define? Also, what kind of “confidential governmental information” are they talking about in the prohibition?

Doesn’t the government entity have an attorney client privilege in regards to most cases/properties/permitting processes/interim decisions the government lawyer is involved in? Aren’t many of those pieces of information not otherwise available to the public? Even the particular tactics or approaches to defense of a particular regulation or licensure process or decision are intertwined with trial and litigation strategy. At what point can the argument be made that those strategic decisions are public knowledge and free to the adept negotiator to bring up or utilize in a negotiation with that governmental entity?

Under Rule 1.13 Organization as Client, we find even more potential issues for a negotiator representing an organization. Rule 1.13 provides, “(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization.
Such measures may include among others:
(1) asking for reconsideration of the matter;
(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.
(c) if, despite the lawyer’s efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer shall follow Rule 1.16.
(d) In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.” Emphasis added.

In the realm of hotly contested negotiations, the lawyer may easily be tasked with making tactical decisions that the assigned representative of the organization may support as in their interests but that may be contrary to the best interests of the organization. The quintessential situation that comes to mind is any investigation or settlement of an employment law matter.

Often facts or allegations will come out in those initial conversations and negotiations that may well cause the lawyer to alter their perspective and cause them to desire to give new and better informed legal guidance to the organization, either through the assigned agent or up the described higher or highest authority within the organization.

What is the ethical obligation of the attorney at that point with an organizational client? Do you negotiate for the best result for the entity and then answer to the “human” who has retained you to represent the “corporate person/entity”?
Under Rule 1.14 Client with Diminished Capacity, we find that,

“(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.”

Rule 1.14 may well apply to those lawyers who regularly practice in the areas of family law or juvenile law and find themselves negotiating settlements, custody orders or pleas in juvenile offender or child in need of care situations.

In the midst of a settlement conference the lawyer who is negotiating must always be aware of the client’s ability to make carefully considered decisions in regards to the contested issues and potential resolution of the issues at hand even in preliminary matters.
Under Rule 1.16 Declining or Terminating Representation, we find a very important provision that requires withdrawal of representation if the lawyer finds that the client continues to move forward with behavior that is fraudulent.

It provides in pertinent part, "(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: ...
(4) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.". Emphasis added.

This gets at that initial basic concept that a lawyer may not engage in "fraud" either directly or as an agent of the client in the process of negotiation and representation. Those ideas of "puffing" and "bluffing" become much more concerning when you have to continually think about where the line might be in regards to a material (mis)representation especially if the client is at the negotiation and starts to provide any additional questionable information or representations in the process.

Do the roles that a lawyer is serving in at a particular point matter?

As was mentioned earlier, the lawyer serves a variety of roles in representing a given client whether actively engaged in a negotiation or not.

As a COUNSELOR under Rule 2.1 Advisor we find, "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation."
As an ADVOCATE under Rule 3.1 Meritorious Claims and Contentions, we find,

"A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established."

Further in Rule 3.2 Expediting Litigation, we find, "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."

In the process of negotiation then, as counselors, the lawyer has an obligation to be candid and to talk with the client about the benefits and strategy of a collaborative versus competitive strategy and the moral, economic, social and relationship impacting implications of those two approaches. The client should be apprised of the impact of those approaches on a continuing relationship with the opposing party in the matter.

In negotiation, as advocates, lawyers are bound to only pursue legitimate claims or causes of action on behalf of the client. Lawyers are further bound to take actions that expedite the legal process. A lawyer must stop and contemplate how many times in a heated negotiation or settlement he or she may well have said, "If you do X then we will be forced to amend and bring the following additional claims/charges/etc.". She or he may also have said, "Well we can drag this case out as long as we need to if your client refuses to be reasonable in regards to the settlement terms or amounts in this matter".

In both cases has the ethical line been crossed?
As an advocate under Rule 3.3 Candor Toward the Tribunal, a lawyer who engages with a judge in a settlement conference process also may walk a narrow line. Rule 3.3 provides in pertinent part, "(c) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; ... or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse." Emphasis added.
Thus, the lawyer must take care even in a mediated settlement negotiation process with another judge, to be careful in regards to responses to settlement authority and pertinent and relevant facts to the matter as the judge mediates or moves between the parties to encourage settlement. The exception to the fraud standard I have discussed, in regards to allow "puffing" and "bluffing" that is not active misrepresentation of fact, does not apply when a judge is involved in the negotiation process.

Some interesting issues are also raised by Rule 3.4 Fairness to Opposing Party and Counsel, which provides, "A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; ... (d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party; ... [f] request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information."
Again, the lawyer must ask herself or himself whether they have threatened to pepper the other side with additional or substantial discovery burdens in the process of negotiation. Does simply pointing out the expense and time that will be required to fully to respond to discovery as leverage implicate a contemplation of paragraph (d)? Does threatening that your client will simply drop off the 25 boxes of stuff to sort through in a conference room in response to a discovery request become non-responsive and an ethical issue under (a)? What about advising that, as the employer all of your staff, employees are being directed to not speak on the contested matter absent an order of the court that they be subpoenaed or deposed? Under (f) can that threat be made if it might be in the individual employee’s interest to be forthcoming in a given matter to avoid any personal liability?

All of these thoughts and many others must be contemplated throughout the process of negotiation as additional facts and information are shared between the parties.

In the case of TRANSACTIONS WITH PERSONS OTHER THAN CLIENT, we find the core direction of truthfulness as it applies to negotiation.

This is the central “false statement of a material fact” evaluation.

Rule 4.1 Truthfulness in Statements to Others, provides that, “In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by or made discretionary under Rule 1.6.”

Thus the issues of misrepresentation and fraud are clearly a concern as lawyers “puff” and “bluff” in a negotiation.
Rule 4.3 Dealing with Unrepresented Person, specifically provides that, "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

Personally, as an attorney who engages in the drafting of leases for rental properties my wife and I own, I even choose to take a clear step to advise potential renters when I offer a lease that I am an attorney and that they should take the lease to another party they trust for any advice or guidance they might need in the matter. Beyond that verbal admonition, I specifically reflect that they have been offered the chance to do so and have clearly waived it within the lease. Is that overkill? Do I really need to take those steps? Maybe so, but I would hate to run into a disciplinary complaint if I have to evict a problem tenant and get in front of a judge only to have the client claim what I "told them" in the process of the signing of an initial lease. To that end, I require that the tenant actually leave with the lease to have their signature notarized thus giving a requisite time for them to seek that outside counsel or guidance and also to authenticate who they are.

Rule 4.4 Respect for Rights of Third Persons also mentions that, "(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person. (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."

Under Rule 4.4 then a lawyer should not be threatening to bring others into a matter via subpoena or deposition regarding what they might know about the subject of the legal matter. How often as a lawyer have you threatened to bring in everyone that was witness to the event at issue to be deposed or testify if the opposing party forces the matter to go forward to trial or through the finish of discovery?
While there are certainly additional rules that I could relate to the negotiation process, I will end with the most important final admonitions found in MAINTAINING THE INTEGRITY OF THE PROFESSION under Rule 8.3 Reporting Professional Misconduct, "(a) A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority," and also in Rule 8.4 Misconduct, "It is professional misconduct for a lawyer to: ... (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice; (e) state or imply an ability to influence improperly a government agency or official; ... or (g) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law."

Needless to say, all of those issues are raised when we come back to the question of at what point in negotiation "puffing" and "bluffing" move into misrepresentation and on to fraud of the contractual or criminal variety. The concepts and categories raised in the sections of Rule 8.4 could very easily be interpreted to cover what would otherwise be expected "zealous advocacy" by a lawyer in a negotiation.

So why do collaborative or cooperative negotiation approaches make more sense than adopting a competitive or contentious negotiation style?

A collaborative or cooperative approach to negotiation contemplates that the parties have a mutual interest in settling the matter and often involves the concept that, as opposed to win/lose results found in traditional competitive negotiation, there can be win/win scenarios. You may have heard of this approach in the civil arena of negotiations as finding creative ways to increase the size of the pie.

While our clients may often be looking at the simple dollars and cents of the settlement check, whether it is to be written or received, bringing in the associated considerations of time, effort and stress of protracted litigation often will get both sides in a settlement mentality. Beyond that, especially in contractual matters, the parties will have to continue to work together in the relevant business relationship after the attorneys have moved on to other representations and clients.
Beyond those more concrete considerations, a collaborative mutually acceptable negotiated settlement of a matter, or plea in a criminal case, serves multiple broad goals of the parties in having a simple and quicker resolution of the case, avoiding the protracted costs associated with moving forward to a trial, protecting the relationships of the parties as they move forward, and having a settled agreement that both parties are willing to actually sign off on and follow through on after the matter is done.

From a lawyer’s perspective, clients that come out of the collaborative negotiation process are comfortable with the result. They do not see clients returning to get an unbalanced deal either enforced or rescinded in some manner or form. They do not see clients that routinely blame the attorney for not getting an agreement that was reasonable and the parties could actually comply with. They understand that they were part of solving the issues and have a vested interest in making the solution work long term.

Most importantly, they may be willing to not raise the question of whether any of the “putting and bluffing” engaged in the settlement process rose to the level of the contemplated misrepresentation or fraud. If the issues is not raised then the ethics complaint will not be made and you can avoid being the “seminal case” in regards to where the line in ethical negotiation in Kansas should be drawn.

Questions?
Selected Free Case Law Resources - Options for Kansas Attorneys

   b. Published opinions usually posted by 9:30 am on Fridays
   c. Browsable: by date of release, by docket number, by alphabetical listing of case name
   d. Key word searchable
   e. Opinions posted in PDF format beginning 2 Oct 2009
   f. Appellate case inquiry system

2. Washburn Law's Tenth Circuit Opinions  http://ca10.washburnlaw.edu
   a. Coverage begins 1 Oct 1997
   b. Browsable: by plaintiff/defendant case name, docket number, filing date, date added to site
   c. Key word searchable
   d. Links to 10th Circuit web site, Practitioner's guide, etc.

3. Casemaker  http://ksbar.org  (free to bar members in 23 states - KS)
   a. Available as a benefit to KBA members (students in KS may join for free)
   b. Accessible through Kansas Bar website - need password
   c. Kansas Library
   d. Federal Library
   e. KBA membership also provides CaseCheck, CiteCheck, CasemakerDigest

4. FastCase  http://www.fastcase.com  (free to bar members in 26 states - MO)
   a. Available for use at Washburn Law Library
   b. Partnership with Hein Online

5. Google Scholar Legal  http://scholar.google.com
   a. Default search covers all of Scholar's collection of federal and state cases and law review articles.
   b. Can search by citation but put cite in quotes (e.g., "385 F.2d 27").
   c. Subsequent citation history for a case, in context.
   d. Bloggers have reported that collection includes all US Supreme Court cases since 1 US,
      federal circuit opinions since 1 F.2d 1 (1924), and many federal district court opinions.
   e. Scholar has opinions from all 50 state supreme courts back to 1950.

6. Google Site Search  http://www.google.com  (e.g, site:www.kscourts.org "engagement ring")
7. LexisOne - no longer available

   a. 10th Circuit cases since Nov 1995
   b. Opinion summaries from Sep 2000
   c. Browse Cases and Codes (state and federal)

   a. Free version of VersusLaw
   b. U.S. Supreme Court opinions since 1886
   c. Federal Circuit opinions since 1930 (some exceptions)
   d. Federal District opinions (varies - Kansas 1938)
   e. State Supreme Court opinions (varies - Kansas 1950)

    a. Free version made available by FastCase
    b. Cases from all 50 states back to 1997
    c. All US Sup Ct, Fed Circ Cts from 1950
    d. All states – statutes, constitutions, court rules
    e. USC, CFR, federal court rules

    a. Goal to publish all state and federal case law in public domain.
    b. Essentially a data warehouse.
    c. May be searched using Google's site feature (site:bulk.resource.org query)

Selected Lower Cost Services that Include Cases, Statutes and Regulations

12. FastCase  http://www.fastcase.com


Selected Legal Research Portals for Accessing Web-based Research Resources

15. WashLaw  http://washlaw.edu
   a. Extensive links to state materials - down to county level
   b. State agencies listed A-Z
   c. Links to primary law sources in each state
   d. Links by subject
   e. Foreign law sources on the Web by country (organized by region)
   a. Affiliated with ThomsonWest

17. Cornell's Legal Information Institute  http://www.law.cornell.edu

18. LLRX - Legal and Technology Articles and Resources for Librarian, Lawyers and Law Firms
   http://www.llrx.com
   a. Court rules, forms, dockets (as of 2011)
   b. Extensive collection of research guides (e.g., How to Conduct Free Legal Research Using
      Google Scholar in 2015)

19. KU Law Library – Research & Study Guides http://law.ku.edu/research-study-guides by Topic

Selected (Paid Subscription) Resources Available for Free to On-site Users at Washburn Law Library

20. Electronic Resources (Databases) at Washburn Law Library
    http://washburnlaw.edu/library/research/databases/index.html
    a. General
    b. Government
       General
       Legislative
       Administrative
       Judicial
    c. Periodicals and Indexes
    d. Monographs and Treatises
    e. Foreign and International
    f. Topical

20a. Of particular note:

Hein Online

LLMC Digital Collection

Proquest Congressional - very extensive digital collection of Congressional materials

Proquest Legislative Insight - 18,000 legislative histories
Legal Trac
U.S. Supreme Court Records and Briefs (1832-1978)

Making of Modern Law – Legal Treatises

IndexMaster (Tables of Content and Indexes from legal publications – pdf)

Foreign Law Guide

Treaty collections

Selected Library Catalogs Available on the Web

21. ATLAS  http://topekalibraries.info

   a. Includes Washburn Law, Kansas Supreme Court, KS Historical Society
   b. Encore (google-like search interface)
   c. Advanced search provides traditional catalog search

22. KU Libraries Catalog  http://catalog.lib.ku.edu

   a. Includes KU Law Library

23. WorldCat  http://worldcat.org

   a. Suggest use via http://washburnlaw.edu/library/research/databases

Selected General Web Sites Helpful to Attorneys

24. Hotsheet  http://www.hotsheet.com

25. ABA TechShow - 60 Sites in 60 Minutes
   Google: ABA TechShow 60 sites in 60 minutes

   Selected from 2015 list:

   6. iPhoneJD – best resource for lawyers using an iPhone or iPad

12. Hotel Wi-Fi Test – don’t stay in a hotel with crappy wi-fi

37. justdelete.me - directory of links to delete your account from web services

38. ABA Legal Technology Resource Center
   http://www.americanbar.org/groups/departments_offices/legal_technology_resources.html
40. The Droid Lawyer – for those who use Android phones and tablets


Selected U.S. Supreme Court Sources


29. SCOTUS Blog http://www.scotusblog.com

30. ABA Preview (U.S. Supreme Court Briefs)
   http://www.abanet.org/publiced/preview/briefs/home.html
   a. Current term (Oct 2014)
   b. Archive of briefs on site (since 2003)
   c. Archive of “Preview” (Oct 2007 – Oct 2010 terms)

31. Oyez Multimedia Archive http://www.oyez.org

32. Cornell's LII Supreme Court Collection http://supct.law.cornell.edu/supct
   a. Opinions since 1990
   b. E-mail alert - synopses of decisions available

33. Willamette Law Online - same-day summaries of cert granted, oral arguments, and decisions e-mailed
   http://willamettelawonline.com

34. Records and Briefs - Available at Washburn Law Library
   Digital format (electronic resources) - Making of Modern Law (1832-1978)
   Microfiche format - since 1974 term

Selected Presidential and Federal Agency Sources

35. Compilation of Presidential Documents
   a. Issued daily since 2009 (was a weekly compilation since 1965)

http://www.gpo.gov/fdsys/search/home.action

a. Page contains list of collections currently available on FDsys with links, including
   Federal Register
   Code of Federal Regulations
   Compilation of Presidential Documents
   Congressional Bills, Calendars, Committee Prints, Documents, Hearings, Reports
   Congressional Record
   Public and Private Laws
   United States Code
   United States Courts Opinions

b. Collections Available in FDsys (currently available)
   http://www.gpo.gov/help/index.html#about_government_publications.htm

37. Electronic Code of Federal Regulations
   http://www.ecfr.gov
   a. e-CFR is a currently updated version of the CFR.
   b. NOT an official legal edition.

Selected Congressional Resources

38. Years and Session Dates of the U.S. Congress   http://www.gpoaccess.gov/help/congress_table.html

39. GPO's Federal Digital System (FDsys) - same as no. 36 above

40. Proquest Congressional - digital collection available by subscription
   a. Available for on-site users at Washburn Law Library (may be at other academic libraries).
   b. Extensive collection of historical and current Congressional materials.

41. THOMAS   has been replaced by Congress.gov   http://congress.gov

Selected State Legislative Resources

42. Kansas Legislature   http://www.kslegislature.org

43. Hawver's Capitol Report Online
   a. Paid subscription current awareness service with usually weekly but frequently additional
      news flashes delivered via e-mail during session.

44. WashLaw   http://washlaw.edu
   a. From the menu on the left, click on the state of interest, then click on the statutory code or
      other legislation-related link of interest
45. Uniform Law Commission (National Conference of Commissioners on Uniform State Laws)  
http://www.uniformlaws.org

Selected State Administrative Agency Sources

46. Administrative Codes and Registers Section of the National Association of Secretaries of State  
http://www.administrativerules.org/index.php, click on "Codes & Registers" link  
a. Home page  
b. Register  
c. Code  
d. Manual

47. Washlaw  http://washlaw.edu  
a. For each state there is a listing of each administrative agency by name with link

a. State phone directory  
b. Stage agency listing with links to websites

49. Free Full-Text Online Law Review/Journal Search (ABA)  
http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/free_journal_search.html

50. Check out other libraries in your geographic area (and beyond) for free research resources
   A. Topeka and Shawnee County Public Library  http://tsepl.org  
   B. State Library of Kansas  http://kslib.info  
   C. McAfee Library at Washburn  http://topekalibraries.info  
   D. Other Law School Libraries – see Washlaw Web

Additional Resource:

51. Washburn U. School of Law Online Alumni Directory (for paid members of alumni association)  
http://givetonewashburn.org/lawalumnidirectory

Potential Resource:

52. Hein Online Alumni Access program (FastCase Basic plus Hein Online Law Journal Library)
TILA-RESPA Integrated Disclosure rule

Small entity compliance guide
Version Log

The Bureau updates this guide on a periodic basis to reflect finalized clarifications to the rule which impacts guide content, as well as administrative updates. Below is a version log noting the history of this document and its updates:

<table>
<thead>
<tr>
<th>Date</th>
<th>Version</th>
<th>Rule Changes</th>
</tr>
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</table>
| March 2015  | 2.0     | ▪ Extends the timing requirement for revised disclosure when consumers lock a rate or extend a rate lock after the Loan Estimate is provided (Section 8.7)  
 ▪ Permits certain language related to construction loans for transactions involving new construction on the Loan Estimate (Section 5.6) |
| September 2014 | 1.1    | ▪ Updates to information on where to find additional resources on the rule (Section 1.3)  
 ▪ Additional clarification on questions relating to the Loan Estimate and the 7 day waiting period (Section 6.1 and 6.2)  
 ▪ Additional clarification on questions relating to Timing for Revisions to Loan Estimate (Section 9) |
| April 2014  | 1.0     | Original Document                                                            |
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1. Introduction

For more than 30 years, Federal law has required lenders to provide two different disclosure forms to consumers applying for a mortgage. The law also generally has required two different forms at or shortly before closing on the loan. Two different Federal agencies developed these forms separately, under two Federal statutes: the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act of 1974 (RESPA). The information on these forms is overlapping and the language is inconsistent. Consumers often find the forms confusing, and lenders and settlement agents find the forms burdensome to provide and explain.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) directs the Consumer Financial Protection Bureau (Bureau) to integrate the mortgage loan disclosures under TILA and RESPA Sections 4 and 5. Section 1032(f) of the Dodd-Frank Act mandated that the Bureau propose for public comment rules and model disclosures that integrate the TILA and RESPA disclosures by July 21, 2012. The Bureau satisfied this statutory mandate and issued proposed rules and forms on July 9, 2012. To accomplish this, the Bureau engaged in extensive consumer and industry research, analysis of public comment, and public outreach for more than a year. After issuing the proposal, the Bureau conducted a large-scale quantitative study of its proposed integrated disclosures with approximately 850 consumers, which concluded that the Bureau’s integrated disclosures had on average statistically significant better performance than the current disclosures under TILA and RESPA. The Bureau has now finalized a rule with new, integrated disclosures - Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z) (78 FR 7973, Dec. 31, 2013) (TILA-RESPA rule). The TILA-RESPA rule also provides a detailed explanation of how the forms should be filled out and used.

First, the Good Faith Estimate (GFE) and the initial Truth-in-Lending disclosure (initial TIL) have been combined into a new form, the Loan Estimate. Similar to those forms, the new Loan Estimate form is designed to provide disclosures that will be helpful to consumers in understanding the key features, costs, and risks of the mortgage loan for which they are
applying, and must be provided to consumers no later than the third *business day* after they submit a loan *application*. Second, the HUD-1 and final Truth-in-Lending disclosure (final TIL and, together with the initial TIL, the Truth-in-Lending forms) have been combined into another new form, the *Closing Disclosure*, which is designed to provide disclosures that will be helpful to consumers in understanding all of the costs of the transaction. This form must be provided to consumers at least three *business days* before *consummation* of the loan.

The forms use clear language and design to make it easier for consumers to locate key information, such as interest rate, monthly payments, and costs to close the loan. The forms also provide more information to help consumers decide whether they can afford the loan and to facilitate comparison of the cost of different loan offers, including the cost of the loans over time.

The final rule applies to most closed-end consumer mortgages. It does not apply to home equity lines of credit (HELOCs), reverse mortgages, or mortgages secured by a mobile home or by a dwelling that is not attached to real property (*i.e.*, land). The final rule also does not apply to loans made by persons who are not considered “creditors,” because they make five or fewer mortgages in a year.

The TILA-RESPA rule is effective August 1, 2015.

### 1.1 What is the purpose of this guide?

The purpose of this guide is to provide an easy-to-use summary of the TILA-RESPA rule. This guide also highlights issues that small creditors, and those that work with them, might find helpful to consider when implementing the rule.

This guide also meets the requirements of Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996, which requires the Bureau to issue a small-entity compliance guide to help small entities comply with these new regulations.

You may want to review your processes, software, contracts with service providers, or other aspects of your business operations in order to identify any changes needed to comply with this rule. Changes related to this rule may take careful planning, time, or resources to implement. This guide will help you identify and plan for any necessary changes.

To support rule implementation and ensure that industry is ready for the new consumer protections, the Bureau will coordinate with other agencies, publish plain-language guides,
publish updates to the Official Interpretations, if needed, and publish revised examination procedures and readiness guides.

This guide summarizes the TILA-RESPA rule, but it is not a substitute for the rule. Only the rule and its Official Interpretations (also known as commentary) can provide complete and definitive information regarding its requirements. The discussions below provide citations to the sections of the rule on the subject being discussed. Keep in mind that the Official Interpretations, which provide detailed explanations of many of the rule’s requirements, are found after the text of the rule and its appendices. The interpretations are arranged by rule section and paragraph for ease of use. The complete rule and the Official Interpretations are available at http://www.consumerfinance.gov/regulations/integrated-mortgage-disclosures-under-the-real-estate-settlement-procedures-act-regulation-x-and-the-truth-in-lending-act-regulation-z/.

The focus of this guide is the TILA-RESPA rule. This guide does not discuss other federal or state laws that may apply to the origination of closed-end credit.

At the end of this guide, there is more information about the TILA-RESPA rule and related implementation support from the Bureau.

1.2 Who should read this guide?

If your organization originates closed-end residential mortgage loans, you may find this guide helpful. This guide will help you determine your compliance obligations for the mortgage loans you originate.

This guide may also be helpful to settlement service providers, secondary market participants, software providers, and other companies that serve as business partners to creditors.

1.3 Where can I find additional resources that will help me understand the TILA-RESPA rule?

Resources to help you understand and comply with the Dodd-Frank Act mortgage reforms and our regulations, including downloadable compliance guides, are available through the CFPB’s
website at www.consumerfinance.gov/regulatory-implementation. If after reviewing these materials you have a specific TILA-RESPA regulatory interpretation question, submit a detailed message, including your name, contact information, details about your regulatory question, and the specific title, section, or subject matter of the regulation you are inquiring about, to CFPB_RegInquiries@cfpb.gov. If you do not have access to the internet, you may leave this information in a voicemail at 202-435-7700. Please note that Bureau staff provide only an informal oral response to regulatory inquiries and that the response does not constitute an official interpretation or legal advice. Generally we are not able to respond to specific inquiries the same business day. Actual response times will vary depending on the number of questions we are handling and the amount of research needed to respond to your question.

Email comments about the guide to CFPB_MortgageRulesImplementation@cfpb.gov. Your feedback is crucial to making this guide as helpful as possible. The Bureau welcomes your suggestions for improvements and your thoughts on its usefulness and readability.

The Bureau is particularly interested in feedback relating to:

- How useful you found this guide for understanding the rule
- How useful you found this guide for implementing the rule at your business
- Suggestions you have for improving the guide, such as additional implementation tips
2. Overview of the TILA-RESPA rule

2.1 What is the TILA-RESPA rule about?

The TILA-RESPA rule consolidates four existing disclosures required under TILA and RESPA for closed-end credit transactions secured by real property into two forms: a Loan Estimate that must be delivered or placed in the mail no later than the third business day after receiving the consumer’s application, and a Closing Disclosure that must be provided to the consumer at least three business days prior to consummation.

2.2 What transactions does the rule cover? (§ 1026.19(e) and (f))

The TILA-RESPA rule applies to most closed-end consumer credit transactions secured by real property. Credit extended to certain trusts for tax or estate planning purposes is not exempt from the TILA-RESPA rule. (Comment 3(a)-10). However, some specific categories of loans are excluded from the rule. Specifically, the TILA-RESPA rule does not apply to HELOCs, reverse mortgages or mortgages secured by a mobile home or by a dwelling that is not attached to real property (i.e., land). (§ 1026.19(e) and (f))
2.3 What are the record retention requirements for the TILA-RESPA rule? (§ 1026.25)

The creditor must retain copies of the Closing Disclosure (and all documents related to the Closing Disclosure) for five years after consummation.

The creditor, or servicer if applicable, must retain the Post-Consummation Escrow Cancellation Notice (Escrow Closing Notice) and the Post-Consummation Partial Payment Policy disclosure for two years. For additional information, see section 15 below.

For all other evidence of compliance with the Integrated Disclosure provisions of Regulation Z (including the Loan Estimate) creditors must maintain records for three years after consummation of the transaction.

2.4 What are the record retention requirements if the creditor transfers or sells the loan? (§ 1026.25)

If a creditor sells, transfers, or otherwise disposes of its interest in a mortgage and does not service the mortgage, the creditor shall provide a copy of the Closing Disclosure to the new owner or servicer of the mortgage as a part of the transfer of the loan file.

Both the creditor and such owner or servicer shall retain the Closing Disclosure for the remainder of the five-year period.

2.5 Is there a requirement on how the records are retained?

Regulations X and Z permit, but do not require electronic recordkeeping. Records can be maintained by any method that reproduces disclosures and other records accurately, including computer programs. (Comment 25(a)-2)
3. Effective Date

3.1 When do I have to start following the TILA-RESPA rule and using the new Integrated Disclosures?

The new Integrated Disclosures must be provided by a creditor or mortgage broker that receives an application from a consumer for a closed-end credit transaction secured by real property on or after August 1, 2015.

Creditors will still be required to use the GFE, HUD-1, and Truth-in-Lending forms for applications received prior to August 1, 2015. As the applications received prior to August 1, 2015 are consummated, withdrawn, or cancelled, the use of the GFE, HUD-1, and Truth-in-Lending forms will no longer be used for most mortgage loans.

3.2 Are there any requirements that take effect on August 1, 2015 regardless of whether an application has been received on or after that date?

Yes. As discussed in section13, below, the TILA-RESPA rule includes some new restrictions on certain activity prior to a consumer’s receipt of the Loan Estimate. These restrictions take effect on the calendar date August 1, 2015, regardless of whether an application has been received on that date. These activities include:
• Imposing fees on a consumer before the consumer has received the **Loan Estimate** and indicated an intent to proceed with the transaction (§ 1026.19(e)(2)(i));

• Providing written estimates of terms or costs specific to consumers before they receive the **Loan Estimate** without a written statement informing the consumer that the terms and costs may change (§ 1026.19(e)(2)(ii)); and

• Requiring the submission of documents verifying information related to the consumer’s application before providing the **Loan Estimate** (§ 1026.19(e)(2)(iii)).

### 3.3 Can a creditor use the new Integrated Disclosures for applications received before August 1, 2015?

No. For transactions where the **application** is received prior to August 1, 2015, creditors will still need to follow the current disclosure requirements under Regulations X and Z, and use the existing forms (Truth-in-Lending disclosures, GFE, HUD-1).
4. Coverage

4.1 What transactions are covered by the TILA-RESPA rule? (§§ 1024.5, 1026.3, and 1026.19)

The TILA-RESPA rule applies to most closed-end consumer credit transactions secured by real property, but does not apply to:

- HELOCs;
- Reverse mortgages; or
- Chattel-dwelling loans, such as loans secured by a mobile home or by a dwelling that is not attached to real property (i.e., land).

Consistent with the current rules under TILA, the rule also does not apply to loans made by a person or entity that makes five or fewer mortgages in a calendar year and thus is not a creditor. (§ 1026.2(a)(17))

There is also a partial exemption for certain transactions associated with housing assistance loan programs for low- and moderate-income consumers. (§ 1026.3(h))

However, certain types of loans that are currently subject to TILA but not RESPA are subject to the TILA-RESPA rule’s integrated disclosure requirements, including:

- Construction-only loans
- Loans secured by vacant land or by 25 or more acres
Credit extended to certain trusts for tax or estate planning purposes also are covered by the TILA-RESPA rule. (Comment 3(a)-10)

4.2 What are the disclosure obligations for transactions not covered by the TILA-RESPA rule, like HELOCs and reverse mortgages?

The new Integrated Disclosures will not be used to disclose information about reverse mortgages, HELOCs, chattel-dwelling loans, or other transactions not covered by the TILA-RESPA rule. Creditors originating these types of mortgages must continue to use, as applicable, the GFE, HUD-1, and Truth-in-Lending disclosures required under current law.

For these transactions associated with the partial exemption for housing assistance loan programs for low- and moderate-income consumers. (§ 1026.3(h)):

- Creditors are exempt from the requirement to provide the RESPA settlement cost booklet, RESPA GFE, RESPA settlement statement, and application servicing disclosure statement requirements. (See §§ 1024.6, 1024.7, 1024.8, 1024.10, and 1024.33)

- Creditors are exempt from the requirements to provide a Loan Estimate, Closing Disclosure, and Special Information Booklet for these loans. (§ 1026.3(h))

4.3 Does a creditor have an option to use the new Integrated Disclosure forms for a transaction not covered by the TILA-RESPA rule?

Creditors are not prohibited from using the Integrated Disclosure forms on loans that are not covered by TILA or RESPA (e.g., mortgages associated with housing assistance loan programs for low- and moderate-income consumers). (See §§ 1026.3(h) and 1024.5(d)(2)). However, a creditor cannot use the new Integrated Disclosure forms instead of the GFE, HUD-1, and Truth-
in-Lending forms for transactions that are covered by TILA or RESPA that require those disclosures (e.g., reverse mortgages).
5. The Loan Estimate Disclosure

5.1 What are the general requirements for the Loan Estimate disclosure? (§§ 1026.19(e) and 1026.37)

For closed-end credit transactions secured by real property (other than reverse mortgages), the creditor is required to provide the consumer with good-faith estimates of credit costs and transaction terms on a new form called the Loan Estimate. This form integrates and replaces the existing RESPA GFE and the initial TIL for these transactions. The creditor is generally required to provide the Loan Estimate within three-business days of the receipt of the consumer’s loan application (see section 6.1 below on the timing requirements of the Loan Estimate). (§ 1026.19(e)(1))

- **Loan Estimate must contain a good faith estimate of credit costs and transaction terms.** If any information necessary for an accurate disclosure is unknown, the creditor must make the disclosure based on the best information reasonably available at the time the disclosure is provided to the consumer, and use due diligence in obtaining the information. (§ 1026.19(e)(1)(i); Comment 19(e)(1)(i)-1)

- **Loan Estimate must be in writing and contain the information prescribed in § 1026.37.** The creditor must disclose only the specific information set forth in § 1026.37(a) through (n), as shown in the Bureau’s form in appendix H-24. (§ 1026.37(o))
- **Delivery must satisfy the timing and method of delivery requirements.** The creditor is responsible for delivering the Loan Estimate or placing it in the mail no later than the third business day after receiving the application. (§ 1026.19(e)(1)(iii))

- **Creditors may only use revised or corrected Loan Estimates when specific requirements are met.** Creditors generally may not issue revisions to Loan Estimates because they later discover technical errors, miscalculations, or underestimations of charges. Creditors are permitted to issue revised Loan Estimates only in certain situations such as when changed circumstances result in increased charges. (§ 1026.19(e)(3)(iv))

- **In certain situations, mortgage brokers may provide a Loan Estimate.** As discussed in more detail in section 6.3 below, if a mortgage broker receives a consumer’s application, either the creditor or the mortgage broker may provide the Loan Estimate. (§ 1026.19(e)(1)(ii))

### 5.2 Does a creditor have to use the Bureau’s Loan Estimate form? (§ 1026.37(o))

Generally, yes. For any loans subject to the TILA-RESPA rule that are **federally related mortgage loans** subject to RESPA (which will include most mortgages), form H-24 is a **standard form**, meaning creditors **must** use form H-24. (§ 1026.37(o)(3)(i) (See also § 1024.2(b) for definition of **federally related mortgage loan**)

For other loans subject to the TILA-RESPA rule that are **not federally related mortgage loans**, form H-24 is a **model form**, meaning creditors are not strictly required to use form H-24, but the disclosures must contain the exact same information and be made with headings, content, and format substantially similar to form H-24. (§ 1026.37(o)(3)(ii))
5.3 What information goes on the Loan Estimate form?

The following is a brief, page-by-page overview of the Loan Estimate, generally describing the information creditors are required to disclose. For detailed instructions on the individual fields and calculations for the Loan Estimate, see the Bureau’s companion guide, TILA-RESPA Guide to Forms.
Page 1 of the **Loan Estimate** includes general information, a **Loan Terms** table with descriptions of applicable information about the loan, a **Projected Payments** table, a **Costs at Closing** table, and a link for consumers to obtain more information about loans secured by real property at a website maintained by the Bureau.

Page 1 of the **Loan Estimate** includes the title “Loan Estimate” and a statement of “Save this Loan Estimate to compare with your **Closing Disclosure**.” (§ 1026.37(a)(1), (2)). The top of
page 1 also includes the name and address of the creditor. (§ 1026.37(a)(3)). A logo or slogan can be used along with the creditor’s name and address, so long as the logo or slogan does not exceed the space provided for that information. (§ 1026.37(o)(5)(iii))

If there are multiple creditors, use only the name of the creditor completing the Loan Estimate. (Comment 37(a)(3)-1). If a mortgage broker is completing the Loan Estimate, use the name of the creditor if known. If not yet known, leave this space blank. (Comment 37(a)(3)-2)

### 5.5 Page 2: Closing cost details

<table>
<thead>
<tr>
<th>Closing Cost Details</th>
<th>Other Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Loan Costs</strong></td>
<td></td>
</tr>
<tr>
<td>A. Origination Charges</td>
<td>F. Taxes and Other Government Fees</td>
</tr>
<tr>
<td>% of Loan Amount (Points)</td>
<td>Recording Fees and Other Taxes</td>
</tr>
<tr>
<td></td>
<td>Transfer Fees</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>B. Services You Cannot Shop For</td>
<td>F. Prepaids</td>
</tr>
<tr>
<td></td>
<td>Homeowner’s Insurance Premium (per month)</td>
</tr>
<tr>
<td></td>
<td>Mortgage Insurance Premium (per month)</td>
</tr>
<tr>
<td></td>
<td>Prepaid Interest (per day for days @)</td>
</tr>
<tr>
<td></td>
<td>Property Taxes (per month)</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>C. Services You Can Shop For</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>D. TOTAL COSTS (A + B + C)</td>
<td></td>
</tr>
</tbody>
</table>

#### Calculating Cash to Close

- **Total Closing Costs (D)**
- Closing Costs Financed (Paid from your Loan Amount)
- Down Payment/Funds from Borrower
- Escrow
- Funds for Borrower
- Seller Credit
- Adjustments and Other Credits

**Estimated Cash to Close**

<table>
<thead>
<tr>
<th>Adjustable Payment (AP) Table</th>
<th>Adjustable Interest Rate (AIR) Table</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interest Only Payments?</td>
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</tr>
<tr>
<td>Optional Payments?</td>
<td></td>
</tr>
<tr>
<td>Seasonal Payments?</td>
<td></td>
</tr>
<tr>
<td>Monthly Principal and Interest Payments</td>
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</tr>
<tr>
<td>First Change/Adjustment</td>
<td></td>
</tr>
<tr>
<td>Subsequent Changes</td>
<td></td>
</tr>
<tr>
<td>Maximum Payment</td>
<td></td>
</tr>
</tbody>
</table>

**LOAN ESTIMATE**
Four main categories of charges are disclosed on page 2 of the Loan Estimate:

- A good-faith itemization of the Loan Costs and Other Costs associated with the loan. (§ 1026.37(f) and (g))

- A Calculating Cash to Close table to show the consumer how the amount of cash needed at closing is calculated. (§ 1026.37(h))

- For transactions with adjustable monthly payments, an Adjustable Payment (AP) Table with relevant information about how the monthly payments will change. (§ 1026.37(i))

- For transactions with adjustable interest rates, an Adjustable Interest Rate (AIR) Table with relevant information about how the interest rate will change. (§ 1026.37(j))

The items associated with the mortgage are broken down into two general types, Loan Costs and Other Costs. Generally, Loan Costs are those costs paid by the consumer to the creditor and third-party providers of services the creditor requires to be obtained by the consumer during the origination of the loan. (§ 1026.37(f)). Other Costs include taxes, governmental recording fees, and certain other payments involved in the real estate closing process. (§ 1026.37(g))

These two tables are further broken down, as discussed below.

Items that are a component of title insurance must include the introductory description of Title. (§ 1026.37(f)(2)(i) and (g)(4)(i))

If State law requires additional disclosures, those additional disclosures may be made on a document whose pages are separate from, and not presented as part of, the Loan Estimate. (Comments 37(f)(6)-1 and 37(g)(8)-1)

5.6 Page 3: Additional information about the loan

Page 3 of the Loan Estimate contains Contact information, a Comparisons table, an Other Considerations table, and, if desired, a Signature Statement for the consumer to sign to acknowledge receipt. (See § 1026.37(k), (l), (m), and (n))
In transactions involving new construction, this page may include a clear and conspicuous statement that the creditor may issue a revised disclosure any time prior to 60 days before consummation, pursuant to § 1026.19(e)(3)(iv)(F) if the creditor reasonably expects that settlement will occur more than 60 days after the provision of the initial Loan Estimate.
6. Delivery of the Loan Estimate

6.1 What are the general timing and delivery requirements for the Loan Estimate disclosure?

Generally, the creditor is responsible for ensuring that it delivers or places in the mail the Loan Estimate form no later than the third business day after receiving the consumer’s application (although see section 6.3 below regarding delivery of the Loan Estimate by a mortgage broker).

The Loan Estimate must also be delivered or placed in the mail no later than the seventh business day before consummation of the transaction. (See § 1026.19(e)(1)(iii)(B))

The creditor also is responsible for ensuring that the Loan Estimate and its delivery meet the content, delivery, and timing requirements discussed in sections 5, 6, 7, 8, and 9 of this guide. (See §§ 1026.19(e) and 1026.37)

6.2 May a consumer waive the seven-business-day waiting period? (§ 1026.19(e)(1)(v))

The consumer may modify or waive the seven-business-day waiting period after receiving the Loan Estimate if the consumer has a bona-fide personal financial emergency that necessitates consummating the credit transaction before the end of the waiting period.
Whether a consumer has a **bona fide personal financial emergency** is determined by the facts surrounding the consumer's individual situation. (See § 1026.19(e)(1)(v); Comment 19(e)(1)(v)-1). An example of a **bona fide personal financial emergency** is the imminent sale of the consumer’s home at foreclosure, where the foreclosure sale will proceed unless loan proceeds are made available to the consumer during the waiting period.

To modify or waive the waiting period, the consumer must give the creditor a dated written statement that describes the emergency, specifically modifies or waives the waiting period, and is signed by all consumers primarily liable on the legal obligation. (§ 1026.19(e)(1)(v)). The creditor may not provide the consumer with a pre-printed waiver form. (§ 1026.19(e)(1)(v)).

### 6.3 Can a mortgage broker provide a Loan Estimate on the creditor’s behalf?

Yes. If a mortgage broker receives a consumer’s **application**, the mortgage broker may provide the **Loan Estimate** to the consumer on the creditor’s behalf. (§ 1026.19(e)(1)(ii))

The provision of a **Loan Estimate** by a mortgage broker satisfies the creditor’s obligation to provide a **Loan Estimate**. However, any such creditor is expected to maintain communication with mortgage brokers to ensure that the **Loan Estimate** and its delivery satisfy the requirements described above, and the creditor is legally responsible for any errors or defects. (§ 1026.19(e)(1)(ii); Comment 19(e)(1)(ii) -1 and -2)

If a mortgage broker provides the **Loan Estimate** to a consumer, the mortgage broker must comply with the three year record retention requirement discussed in section 2.3 above. (Comment 19(e)(1)(ii)-1)

### 6.4 When does the creditor have to provide the Loan Estimate to the consumer?

The **Loan Estimate** must be delivered or placed in the mail to the consumer no later than the third **business day** after the creditor receives the consumer’s **application** for a mortgage loan. (§ 1026.19(e)(1)(iii)(A)). (See definitions of **application** and **business day** below at sections 6.5 and 6.9). If the **Loan Estimate** is not provided to the consumer in person, the
consumer is considered to have received the Loan Estimate three business days after it is delivered or placed in the mail. (§ 1026.19(e)(1)(iv))

6.5 What is an “application” that triggers an obligation to provide a Loan Estimate? (§ 1026.2(a)(3))

An application means the submission of a consumer’s financial information for purposes of obtaining an extension of credit. For transactions subject to § 1026.19(e), (f), or (g), an application consists of the submission of the following six pieces of information:

- The consumer’s name;
- The consumer’s income;
- The consumer’s social security number to obtain a credit report;
- The property address;
- An estimate of the value of the property; and
- The mortgage loan amount sought.

An application may be submitted in written or electronic format, and includes a written record of an oral application. (Comment 2(a)(3)-1)

6.6 What if a creditor receives these six pieces of information, but needs to collect additional information to proceed
with an extension of credit? (Comment 2(a)(3)-1)

This definition of application does not prevent a creditor from collecting whatever additional information it deems necessary in connection with the request for the extension of credit. However, once a creditor has received the six pieces of information discussed above, it has an application for purposes of the requirement for delivery of the Loan Estimate to the consumer, including the three-business-day timing requirement. (Comment 2(a)(3)-1)

6.7 What if the consumer withdraws the application or the creditor determines it cannot approve it? (Comment 19(e)(1)(iii)-3)

If the creditor determines within the three-business-day period that the consumer’s application will not or cannot be approved on the terms requested by the consumer, or if the consumer withdraws the application within that period, the creditor does not have to provide the Loan Estimate. (Comment 19(e)(1)(iii)-3). However, if the creditor does not provide the Loan Estimate, it will not have complied with the Loan Estimate requirements under Regulation Z if it later consummates the transaction on the terms originally applied for by the consumer. (Comment 19(e)(1)(iii)-3)

6.8 What if the consumer amends the application and the creditor can now proceed? (Comment 19(e)(1)(iii)-3)

If a consumer amends an application and a creditor determines the amended application may proceed, then the creditor is required to comply with the Loan Estimate requirements, including delivering or mailing a Loan Estimate within three business days of receiving the amended or resubmitted application. (Comment 19(e)(1)(iii)-3)
6.9 What is considered a “business day” under the requirements for provision of the Loan Estimate? (Comment 19(e)(1)(iii)-1, § 1026.2(a)(6))

For purposes of providing the Loan Estimate, a business day is a day on which the creditor’s offices are open to the public for carrying out substantially all of its business functions. (Comment 19(e)(1)(iii)-1, § 1026.2(a)(6))

Note that the term business day is defined differently for other purposes; including counting days to ensure the consumer receives the Closing Disclosure on time. (See §§ 1026.2(a)(6), 1026.19(f)(1)(ii)(A) and (f)(1)(iii)). For these other purposes, business day means all calendar days except Sundays and the legal public holidays specified in 5 U.S.C. 6103(a), such as New Year’s Day, the Birthday of Martin Luther King, Jr., Washington’s Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day. (See § 1026.2(a)(6); Comment 2(a)(6)-2; Comment 19(f)(1)(ii)-1)

6.10 What if the creditor does not have exact information to calculate various costs at the time the Loan Estimate is delivered? (Comments 17(c)(2)(i)-1 and -2)

Creditors are required to act in good faith and exercise due diligence in obtaining information necessary to complete the Loan Estimate. (Comment 17(c)(2)(i)-1). Normally creditors may rely on the representations of other parties in obtaining information. (§ 1026.17(c)(2)(i))

However, there may be some information that is unknown (i.e., not reasonably available to the creditor at the time the Loan Estimate is made). In these instances, the creditor may use estimates even though it knows that more precise information will be available by the point of consummation. However, new disclosures may be required under § 1026.17(c) or § 1026.19. (Comment 17(c)(2)(i)-1)
When estimated figures are used, they must be designated as such on the Loan Estimate.
(Comment 17(c)(2)(i)-2)
7. Good faith requirement and tolerances

7.1 What is the general accuracy requirement for the Loan Estimate disclosures? (§ 1026.19(e)(3)(iii))

Creditors are responsible for ensuring that the figures stated in the Loan Estimate are made in good faith and consistent with the best information reasonably available to the creditor at the time they are disclosed. (§ 1026.19(e)(3); Comment 19(e)(3)(iii)-1 through -3)

Whether or not a Loan Estimate was made in good faith is determined by calculating the difference between the estimated charges originally provided in the Loan Estimate and the actual charges paid by or imposed on the consumer in the Closing Disclosure. (§ 1026.19(e)(3)(i) and (ii))

Generally, if the charge paid by or imposed on the consumer exceeds the amount originally disclosed on the Loan Estimate it is not in good faith, regardless of whether the creditor later discovers a technical error, miscalculation, or underestimation of a charge.

However, a Loan Estimate is considered to be in good faith if the creditor charges the consumer less than the amount disclosed on the Loan Estimate, without regard to any tolerance limitations.
7.2 Are there circumstances where creditors are allowed to charge more than disclosed on the Loan Estimate?

Yes. A creditor may charge the consumer more than the amount disclosed in the Loan Estimate in specific circumstances, described below:

- Certain variations between the amount disclosed and the amount charged are expressly permitted by the TILA-RESPA rule (See section 7.3 below for additional information on which variations are possible) (§ 1026.19(e)(3)(iii));

- The amount charged falls within explicit tolerance thresholds (and the estimate is not for a zero tolerance charge where variations are never permitted) (§ 1026.19(e)(3)(ii)) (See sections 7.5 and 7.10 below); or

- Changed circumstances permit a revised Loan Estimate or a Closing Disclosure that permits the charge to be changed. (§ 1026.19(e)(3)(iv)) (See section 8.2 below)

7.3 What charges may change without regard to a tolerance limitation? (§ 1026.19(e)(3)(iii))

For certain costs or terms, creditors are permitted to charge consumers more than the amount disclosed on the Loan Estimate without any tolerance limitation.

These charges are:

- Prepaid interest; property insurance premiums; amounts placed into an escrow, impound, reserve or similar account. (§ 1026.19(e)(3)(iii)(A)-(C))

- For services required by the creditor permits the consumer to shop and the consumer selects a third-party service provider not on the creditor’s written list of service providers. (§ 1026.19(e)(3)(iii)(D))
- Charges paid to third-party service providers for services not required by the creditor (may be paid to affiliates of the creditor). (§ 1026.19(e)(3)(iii)(E))

However, creditors may only charge consumers more than the amount disclosed when the original estimated charge, or lack of an estimated charge for a particular service, was based on the best information reasonably available to the creditor at the time the disclosure was provided. (§ 1026.19(e)(3)(iii))

### 7.4 When is a consumer permitted to shop for a service? (§ 1026.19(e)(1)(vi)(C))

In addition to the Loan Estimate, if the consumer is permitted to shop for a settlement service, the creditor must provide the consumer with a written list of services for which the consumer can shop. This written list of providers is separate from the Loan Estimate, but must be provided within the same time frame—that is, it must be provided to the consumer no later than three business days after the creditor receives the consumer’s application—and the list must:

- Identify at least one available settlement service provider for each service; and
- State that the consumer may choose a different provider of that service. (§ 1026.19(e)(3)(ii)(C) and (e)(1)(vi)(C))

The settlement service providers identified on the written list must correspond to the settlement services for which the consumer can shop as disclosed on the Loan Estimate. See form H-27(A) of appendix H to Regulation Z for a model list. (Comment 19(e)(1)(vi)-3)

The creditor may also identify on the written list of providers those services for which the consumer is not permitted to shop, as long as those services are clearly and conspicuously distinguished from those services for which the consumer is permitted to shop. (Comment 19(e)(1)(vi)-6). See form H-27(C) of appendix H to Regulation Z for a sample of the inclusion of this information.
7.5 What charges are subject to a 10% cumulative tolerance? (§ 1026.19(e)(3)(ii))

Charges for third-party services and recording fees paid by or imposed on the consumer are grouped together and subject to a 10% cumulative tolerance. This means the creditor may charge the consumer more than the amount disclosed on the Loan Estimate for any of these charges so long as the total sum of the charges added together does not exceed the sum of all such charges disclosed on the Loan Estimate by more than 10%. (§ 1026.19(e)(3)(ii))

These charges are:

- Recording fees (Comment 19(e)(3)(ii)-4);
- Charges for third-party services where:
  - The charge is not paid to the creditor or the creditor’s affiliate (§ 1026.19(e)(3)(ii)(B)); and
  - The consumer is permitted by the creditor to shop for the third-party service, and the consumer selects a third-party service provider on the creditor’s written list of service providers. (§ 1026.19(e)(3)(ii)(C); § 1026.19(e)(1)(vi); Comment 19(e)(1)(vi)-1 through 7)).

7.6 What happens to the sum of estimated charges if the consumer is permitted to shop and chooses his or her own service provider? (§ 1026.19(e)(3)(iii) and Comment 19(e)(3)(ii) -3)

Where a consumer chooses a provider that is not on the creditor’s written list of providers, then the creditor is not limited in the amount that may be charged for the service. (§ 1026.19(e)(3)(iii)) (See section 7.3 above, describing charges subject to no tolerance.)
limitation). When this occurs for a service that otherwise would be included in the **10% cumulative tolerance** category, the charge is removed from consideration for purposes of determining the **10% tolerance** level. (Comment 19(e)(3)(ii)-5)

Remember, if the creditor permits the consumer to **shop** for a required settlement service but the consumer either does not select a settlement service provider or chooses a settlement service provider identified by the creditor on the **written list of providers**, then the amount charged **is included** in the sum of all such third-party charges paid by the consumer, and also is subject to the **10% cumulative tolerance**. (Comment 19(e)(3)(ii)-3)

### 7.7 What if the creditor estimates a charge for a service that is not actually performed? (Comment 19(e)(3)(ii)-5)

The creditor should compare the sum of the charges actually paid by or imposed on the consumer with the sum of the estimated charges on the **Loan Estimate** that are actually performed. If a service is not performed, the estimate for that charge should be removed from the total amount of estimated charges. (Comment 19(e)(3)(ii)-5).

### 7.8 What if a consumer pays more for a particular charge for a third-party service or recording fee than estimated, but the total charges paid are still within 10% of the estimate? (Comment 19(e)(3)(ii)-2)

Whether an individual estimated charge subject to § 1026.19(e)(3)(ii) is in **good faith** depends on whether the sum of all charges subject to that section increases by more than 10 percent, even if a particular charge does not increase by 10 percent. A creditor may charge more than 10% in excess of an individual estimated charge in this category, so long as the sum of all charges is still within the **10% cumulative tolerance**. (Comment 19(e)(3)(ii)-2)
7.9 What if the creditor does not provide an estimate of a particular charge that is later charged?  (Comment 19(e)(3)(ii)-2)

Creditors also are provided flexibility in disclosing individual fees by the focus on the aggregate amount of all charges. A creditor may charge a consumer for a fee that would fall under the 10% cumulative tolerance but was not included on the Loan Estimate so long as the sum of all charges in this category paid does not exceed the sum of all estimated charges by more than 10%.  (Comment 19(e)(3)(ii)-2)

7.10 What charges are subject to zero tolerance?  (§ 1026.19(e)(3)(ii))

For all other charges, creditors are not permitted to charge consumers more than the amount disclosed on the Loan Estimate under any circumstances other than changed circumstances that permit a revised Loan Estimate, as discussed below in section 8.1.

These zero tolerance charges are:

- Fees paid to the creditor, mortgage broker, or an affiliate of either (§ 1026.19(e)(3)(ii)(B));

- Fees paid to an unaffiliated third party if the creditor did not permit the consumer to shop for a third party service provider for a settlement service (§ 1026.19(e)(3)(ii)(C)); or

- Transfer taxes.  (Comments 19(e)(3)(i)-1 and -4)
7.11 When is a charge paid to a creditor, mortgage broker, or an affiliate of either?

A charge is paid to the creditor, mortgage broker, or an affiliate of either if it is retained by that person or entity. A charge is not paid to one of these entities when it receives money but passes it on to an unaffiliated third party. (Comment 19(e)(3)(i)-3)

The term affiliate is given the same meaning it has for purposes of determining Ability-to-Repay and HOEPA coverage: any company that controls, is controlled by, or is under common control with another company, as set forth in the Bank Holding Company Act of 1956. (12 U.S.C. 1841 et seq.) (§ 1026.32(b)(5))

7.12 What must creditors do when the amounts paid exceed the amounts disclosed on the Loan Estimate beyond the applicable tolerance thresholds? (§ 1026.19(f)(2)(v))

If the amounts paid by the consumer at closing exceed the amounts disclosed on the Loan Estimate beyond the applicable tolerance threshold, the creditor must refund the excess to the consumer no later than 60 calendar days after consummation.

- For charges subject to zero tolerance, any amount charged beyond the amount disclosed on the Loan Estimate must be refunded to the consumer. (§ 1026.19(e)(3)(i))

- For charges subject to a 10% cumulative tolerance, to the extent the total sum of the charges added together exceeds the sum of all such charges disclosed on the Loan Estimate by more than 10%, the difference must be refunded to the consumer. (§ 1026.19(e)(3)(ii))
8. Revisions and Corrections to Loan Estimates

8.1 When are revisions or corrections permitted for Loan Estimates?

Creditors generally are bound by the Loan Estimate provided within three business days of the application, and may not issue revisions to Loan Estimates because they later discover technical errors, miscalculations, or underestimations of charges. Creditors are permitted to provide to the consumer revised Loan Estimates (and use them to compare estimated amounts to amounts actually charged for purposes of determining good faith) only in certain specific circumstances:

- **Changed circumstances** that occur after the Loan Estimate is provided to the consumer cause estimated settlement charges to increase more than is permitted under the TILA-RESPA rule (§ 1026.19(e)(3)(iv)(A));

- **Changed circumstances** that occur after the Loan Estimate is provided to the consumer affect the consumer’s eligibility for the terms for which the consumer applied or the value of the security for the loan (§ 1026.19(e)(3)(iv)(B));

- Revisions to the credit terms or the settlement are requested by the

☐ When creditors revise Loan Estimates for these reasons, the revised Loan Estimate may reflect increased charges only to the extent actually justified by the reason for the revision. (Comment 19(e)(3)(iv)-2)

Creditors must also retain records demonstrating compliance with the requirements of § 1026.19(e), in order to comply with the record retention requirements of the TILA-RESPA rule. (Comment 19(e)(3)(iv)-3)
consumer (§ 1026.19(e)(3)(iv)(C));

- The interest rate was not locked when the Loan Estimate was provided, and locking the rate causes the points or lender credits disclosed on the Loan Estimate to change (§ 1026.19(e)(3)(iv)(D));

- The consumer indicates an intent to proceed with the transaction more than 10 business days after the Loan Estimate was originally provided (§ 1026.19(e)(3)(iv)(E)); or

- The loan is a new construction loan, and settlement is delayed by more than 60 calendar days, if the original Loan Estimate states clearly and conspicuously that at any time prior to 60 calendar days before consummation, the creditor may issue revised disclosures. (§ 1026.19(e)(3)(iv)(F)).

### 8.2 What is a “changed circumstance”? (§ 1026.19(e)(3)(iv)(A))

A changed circumstance for purposes of a revised Loan Estimate is:

- An extraordinary event beyond the control of any interested party or other unexpected event specific to the consumer or transaction (§ 1026.19(e)(3)(iv)(A)(1));

- Information specific to the consumer or transaction that the creditor relied upon when providing the Loan Estimate and that was inaccurate or changed after the disclosures were provided (§ 1026.19(e)(3)(iv)(A)(2)); or

- New information specific to the consumer or transaction that the creditor did not rely on when providing the Loan Estimate. (§ 1026.19(e)(3)(iv)(A)(3))

### 8.3 What are changed circumstances that affect settlement charges?

A creditor may provide and use a revised Loan Estimate redisclosing a settlement charge if changed circumstances cause the estimated charge to increase or, in the case of charges
subject to the **10% cumulative tolerance**, cause the sum of those charges to increase by more than the 10% tolerance. (§ 1026.19(e)(3)(iv)(A); Comment 19(e)(3)(iv)(A)-1)

Examples of **changed circumstances** affecting settlement costs include (Comment 19(e)(3)(iv)(A)-2):

- A natural disaster, such as a hurricane or earthquake, damages the property or otherwise results in additional closing costs;
- The creditor provided an estimate of title insurance on the **Loan Estimate**, but the title insurer goes out of business during underwriting;
- New information not relied upon when providing the **Loan Estimate** is discovered, such as a neighbor of the seller filing a claim contesting the boundary of the property to be sold.

**NOTE:** Creditors are not required to collect all six pieces of information constituting the consumer’s **application**—i.e., the consumer’s name, monthly income, social security number to obtain a credit report, the property address, an estimate of the value of the property, or the mortgage loan amount sought—prior to issuing the **Loan Estimate**. However, creditors are presumed to have collected this information prior to providing the **Loan Estimate** and may not later collect it and claim a changed circumstance. For example, if a creditor provides a **Loan Estimate** prior to receiving the property address from the consumer, the creditor cannot subsequently claim that the receipt of the property address is a **changed circumstance**. (Comment 19(e)(3)(iv)(A)-3)

## 8.4 What if the changed circumstance causes third party charges subject to a cumulative 10% tolerance to increase?

It is possible that one of the events described above may cause one or more third-party charges subject to a **10% cumulative tolerance** to increase. Creditors are permitted to provide and rely upon a revised **Loan Estimate** only when the cumulative effect of the **changed**
circumstance results in an increase to the sum of all costs subject to the tolerance by more than 10%. (Comment 19(e)(3)(iv)(A)-1.ii)

8.5 What are changed circumstances that affect eligibility? (§ 1026.19(e)(3)(iv)(B))

A creditor also may provide and use a revised Loan Estimate if a changed circumstance affected the consumer's creditworthiness or the value of the security for the loan, and resulted in the consumer being ineligible for an estimated loan term previously disclosed. (§ 1026.19(e)(3)(iv)(B) and Comment 19(e)(3)(iv)(B)-1)

This may occur when a changed circumstance causes a change in the consumer's eligibility for specific loan terms disclosed on the Loan Estimate, which in turn results in increased cost for a settlement service beyond the applicable tolerance threshold. (Comment 19(e)(3)(iv)(A)-2).

For example:

- The creditor relied on the consumer's representation to the creditor of a $90,000 annual income, but underwriting determines that the consumer's annual income is only $80,000.

- There are two co-applicants applying for a mortgage loan and the creditor relied on a combined income when providing the Loan Estimate, but one applicant subsequently becomes unemployed.
8.6 May a creditor use a revised Loan Estimate if the consumer requests revisions to the terms or charges? (§ 1026.19(e)(3)(iv)(C))

Yes. A creditor may use a revised estimate of a charge if the consumer requests revisions to the credit terms or settlement that affect items disclosed on the Loan Estimate and cause an estimated charge to increase. (§ 1026.19(e)(3)(iv)(C); Comment 19(e)(3)(iv)(C)-1)

Remember, providing a revised Loan Estimate allows creditors to compare the updated figures for charges that have increased due to an event that allows for redisclosure to the amount actually charged for those services. If amounts decrease or increase only to an extent that does not exceed the applicable tolerance, the original Loan Estimate is still deemed to be in good faith and redisclosure is not permitted. (§ 1026.19(e)(4)(i))

8.7 May a creditor use a revised Loan Estimate if the rate is locked after the initial Loan Estimate is provided? (§ 1026.19(e)(3)(iv)(D))

Yes. If the interest rate for the loan was not locked when the Loan Estimate was provided and, upon being locked at some later time, the interest rate as well as points or lender credits for the mortgage loan may change. The creditor is required to provide a revised Loan Estimate no later than three business days after the date the interest rate is locked, and may use the revised Loan Estimate to compare to points and lender credits charged.

The revised Loan Estimate must reflect the revised interest rate as well as any revisions to the points disclosed on the Loan Estimate pursuant to § 1026.37(f)(1), lender credits, and any other interest rate dependent charges and terms that have changed due to the new interest rate. (§ 1026.19(e)(3)(iv)(D); Comment 19(e)(3)(iv)(D)-1)
8.8 May a creditor use a revised Loan Estimate if the initial Loan Estimate expires? (§ 1026.19(e)(3)(iv)(E))

Yes. If the consumer indicates an **intent to proceed** with the transaction more than 10 business days after the Loan Estimate was delivered or placed in the mail to the consumer, a creditor may use a revised Loan Estimate. (§ 1026.19(e)(3)(iv)(E); Comment 19(e)(3)(iv)(E)-1). No justification is required for the change to the original estimate of a charge other than the lapse of 10 business days.

Creditors should count the number of business days from the date the Loan Estimate was delivered or placed in the mail to the consumer, and use the definition of business day that applies for purposes of providing the Loan Estimate. (§ 1026.19(e)(1)(iii) and Comment 19(e)(1)(iii)-1; § 1026.2(a)(6))

8.9 Are there any other circumstances where creditors may use revised Loan Estimates?

Yes. In addition to the circumstances described above, creditors also may use a revised Loan Estimate where the transaction involves financing of new construction and the creditor reasonably expects that settlement will occur more than 60 calendar days after the original Loan Estimate has been provided. (§ 1026.19(e)(3)(iv)(F))

Creditors may use revised Loan Estimates in this circumstance only when the original Loan Estimate clearly and conspicuously stated that at any time prior to 60 days before consummation the creditor may issue revised disclosures. (Comment 19(e)(3)(iv)(F)-1)

A new construction loan is a loan for the purchase of a home that is not yet constructed or the purchase of a new home where construction is currently underway, not a loan for financing home improvement, remodeling, or adding to an existing structure. Nor is it a loan on a home for which a use and occupancy permit has been issued prior to the issuance of a Loan Estimate.
9. Timing for Revisions to Loan Estimate

9.1 What is the general timing requirement for providing a revised Loan Estimate? (§ 1026.19(e)(4)(i))

The general rule is that the creditor must deliver or place in the mail the revised Loan Estimate to the consumer no later than three business days after receiving the information sufficient to establish that one of the reasons for the revision described in section 8.1 above has occurred. (§ 1026.19(e)(4)(i); Comment 19(e)(4)(i)-1)

9.2 Are there any restrictions on how many days before consummation a revised Loan Estimate may be provided? (§ 1026.19(e)(4))

Yes.

- The creditor may not provide a revised Loan Estimate on or after the date it provides the Closing Disclosure.
- The creditor must ensure that the consumer receives the revised Loan Estimate no later than four business days prior to consummation. If the creditor is mailing the revised Loan Estimate and relying upon the 3 business day mailbox rule, the creditor would need
to place in the mail the **Loan Estimate** no later than **seven business days** before **consummation** of the transaction to allow 3 business days for receipt. (§ 1026.19(e)(4); Comment 19(e)(4)(i)-2)

- As discussed in section 11.2 below regarding the **Closing Disclosure**, when a revised Loan Estimate is provided in person, it is considered received by the consumer on the day it is provided. If it is mailed or delivered electronically, the consumer is considered to have received it three **business days** after it is delivered or placed in the mail. (§ 1026.19(e)(1)(iv) and commentary).

- However, if the creditor has evidence that the consumer received the revised **Loan Estimate** earlier than three **business days** after it is mailed or delivered, it may rely on that evidence and consider it to be received on that date. (Comments 19(e)(1)(iv)-1 and -2) (See also discussion above in section 11.3 of this guide on similar receipt rule under § 1026.19(e)(1)(iv) and commentary regarding the **Closing Disclosure**.)

### 9.3 What definition of “business day” applies to redisclosure rules?

For purposes of providing a revised Loan Estimate within three **business days** of receiving information sufficient to establish that an event permitting redisclosure has occurred, the standard definition of business day applies (see section 6.9 above).

However, for purposes of the **four-business-day** period prior to consummation, “business day” means all calendar days except Sundays and legal public holidays specified in 5 U.S.C. 6103(a) such as New Year’s Day, the Birthday of Martin Luther King, Jr., Washington’s Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day. (§ 1026.2(a)(6); Comment 2(a)(6)-2)
9.4 May a creditor revise a Loan Estimate after a Closing Disclosure already has been provided? (§ 1026.19(e)(4)(ii))

No. The creditor may not provide a revised Loan Estimate on or after the date the creditor provides the consumer with the Closing Disclosure. (§ 1026.19(e)(4)(ii); Comment 19(e)(4)(ii)-1.ii) (See also section 11.1 below, discussing timing requirements for the Closing Disclosure). Because the Closing Disclosure must be provided to the consumer no later than three business days before consummation (see section 10.2 below), this means the consumer must receive a revised Loan Estimate no later than four business days prior to consummation. (§ 1026.19(e)(4)(ii); Comment 19(e)(4)(ii)-1.ii)

9.5 What if a changed circumstance occurs too close to consummation for the creditor to provide a revised Loan Estimate? (Comment 19(e)(4)(ii)-1)

If there are less than four business days in between the time a the revised Loan Estimate would have been required to be provided to the consumer and consummation, creditors may provide consumers with a Closing Disclosure reflecting any revised charges resulting from the changed circumstance and rely on those figures (rather than the amounts disclosed on the Loan Estimate) for purposes of determining good faith and the applicable tolerance. (Comment 19(e)(4)(ii)-1)

- If the changed circumstance or other triggering event occurs between the fourth and third business days from consummation, the creditor may reflect the revised charges on the Closing Disclosure provided to the consumer three business days before consummation.

- If the event occurs after the first Closing Disclosure has been provided to the consumer (i.e., within the three-business-day waiting period before consummation), the creditor may use revised charges on the Closing Disclosure provided to the consumer at consummation, and compare those amounts to the
amounts charged for purposes of determining good faith and tolerance. (Comment 19(e)(4)(ii)-1)
10. Closing Disclosures

10.1 What are the general requirements for the Closing Disclosure? (§§ 1026.19(f) and 1026.38)

For loans that require a Loan Estimate and that proceed to closing, creditors must provide a new final disclosure reflecting the actual terms of the transaction called the Closing Disclosure. The form integrates and replaces the existing HUD-1 and the final TIL disclosure for these transactions. The creditor is generally required to ensure that the consumer receives the Closing Disclosure no later than three business days before consummation of the loan. (§ 1026.19(f)(1)(ii))

- **The Closing Disclosure generally must contain the actual terms and costs of the transaction.** (§ 1026.19(f)(1)(i)). Creditors may estimate disclosures using the best information reasonably available when the actual term or cost is not reasonably available to the creditor at the time the disclosure is made. However, creditors must act in good faith and use due diligence in obtaining the information. The creditor normally may rely on the representations of other parties in obtaining the information, including, for example, the settlement agent. The creditor is required to provide corrected disclosures containing the actual terms of the transaction at or before consummation. (Comments 19(f)(1)(i)-2, -2.i, and -2.ii)

- **The Closing Disclosure must be in writing and contain the information prescribed in § 1026.38.** The creditor must disclose only the specific information set forth in § 1026.38(a) through (s), as shown in the Bureau’s form in appendix H-25. (§ 1026.38(t))
If the actual terms or costs of the transaction change prior to **consummation**, the creditor must provide a corrected disclosure that contains the actual terms of the transaction and complies with the other requirements of §1026.19(f), including the timing requirements, and requirements for providing corrected disclosures due to subsequent changes. (Comment 19(f)(1)(i)-1)

**New three-day waiting period.** If the creditor provides a corrected disclosure, it may also be required to provide the consumer with an additional **three-business-day waiting period** prior to consummation. (§ 1026.19(f)(2)) (See section12 below for a discussion of the redisclosure requirements for the Closing Disclosure)

### 10.2 The rule requires creditors to provide the Closing Disclosure three business days before consummation. Is “consummation” the same thing as closing or settlement? (§ 1026.2(a)(13))

No, **consummation** may commonly occur at the same time as closing or settlement, but it is a legally distinct event. **Consummation** occurs when the consumer becomes contractually obligated to the creditor on the loan, not, for example, when the consumer becomes contractually obligated to a seller on a real estate transaction.

The point in time when a consumer becomes contractually obligated to the creditor on the loan depends on applicable State law. (§ 1026.2(a)(13) and Comment 2(a)(13)-1). Creditors and settlement agents should verify the applicable State laws to determine when **consummation** will occur, and make sure delivery of the **Closing Disclosure** occurs at least three business days before this event.
10.3 Does a creditor have to use the Bureau’s Closing Disclosure form?  
(§ 1026.38(t))

Generally, yes. For any loans subject to the TILA-RESPA rule that are **federally related mortgage loans** subject to RESPA (which will include most mortgages), form H-25 is a **standard form**, meaning creditors must use the form H-25. (§ 1026.38(t)(3)(i)) (See also § 1024.2(b) for definition of **federally related mortgage loan**)

For other transactions subject to the TILA-RESPA rule that are **not federally related mortgage loans**, form H-25 is a **model form**, meaning creditors are not strictly required to use form H-25, but the disclosures must contain the exact same information and be made with headings, content, and format substantially similar to form H-25. (§ 1026.38(t)(3)(ii))

10.4 What information goes on the Closing Disclosure form?

The following is a brief, page-by-page overview of the **Closing Disclosure** form, generally describing the information creditors are required to disclose. For detailed instructions on how to determine the contents of each of these fields, see the **TILA-RESPA Guide to Forms**.
General information, the **Loan Terms** table, the **Projected Payments** table, and the **Costs at Closing** table are disclosed on the first page of the **Closing Disclosure**. (§ 1026.38(a), (b), (c), and (d))
### 10.6 Page 2: Loan costs and other costs

The **Loan Costs** and **Other Costs** tables are disclosed under the heading Closing Cost Details on page 2 of the Closing Disclosure. (§ 1026.38(f), (g), and (h)). The number of items in the **Loan Costs** and **Other Costs** tables can be expanded and deleted to accommodate the disclosure of additional line items and keep the **Loan Costs** and **Other Costs** tables on page 2 of the Closing Disclosure. (§ 1026.38(t)(5)(iv)(A); Comment 38(t)(5)(iv)-2)
However, items that are required to be disclosed even if they are not charged to the consumer (such as Points in the Origination Charges subheading) cannot be deleted. (Comment 38(t)(5)(iv)-1)

The Loan Costs and Other Costs tables can be disclosed on two separate pages of the Closing Disclosure, but only if the page cannot accommodate all of the costs required to be disclosed on one page. (§ 1026.38(t)(5)(iv)(B); Comment 38(t)(5)(iv)-2)

When used, these pages are numbered page 2a and 2b. (Comment 38(t)(5)(iv)-2). For an example of this permissible change to the Closing Disclosure, see form H-25(H) of appendix H to Regulation Z.
### Calculating Cash to Close

<table>
<thead>
<tr>
<th>Loan Estimate</th>
<th>Final</th>
<th>Did this change?</th>
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<tbody>
<tr>
<td>Total Closing Costs (A)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Closing Costs Paid Before Closing</td>
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<td></td>
</tr>
<tr>
<td>Closing Costs Paid at Closing</td>
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<td></td>
</tr>
<tr>
<td>Earnest Money/Money</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Earnest Payment/Repayment</td>
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<td></td>
</tr>
<tr>
<td>Assumptions</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Purchase</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Seller Credit</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Adjustments and Other Credits</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cash to Close</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Summaries of Transactions

#### BORROWER'S TRANSACTION

<table>
<thead>
<tr>
<th>Item</th>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Due from Borrower at Closing</td>
<td></td>
</tr>
<tr>
<td>2.</td>
<td>Sales Price of Property</td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td>Less: Amounts Included in Sale</td>
<td></td>
</tr>
<tr>
<td>4.</td>
<td>Adjustments</td>
<td></td>
</tr>
<tr>
<td>5.</td>
<td>Total Due from Borrower at Closing</td>
<td></td>
</tr>
</tbody>
</table>

#### SELLER'S TRANSACTION

<table>
<thead>
<tr>
<th>Item</th>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Due to Seller at Closing</td>
<td></td>
</tr>
<tr>
<td>2.</td>
<td>Sales Price of Property</td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td>Less: Amounts Included in Sale</td>
<td></td>
</tr>
<tr>
<td>4.</td>
<td>Adjustments</td>
<td></td>
</tr>
<tr>
<td>5.</td>
<td>Total Due to Seller at Closing</td>
<td></td>
</tr>
</tbody>
</table>

### Notes

On page 3 of the Closing Disclosure, the Calculating Cash to Close table and Summaries of Transactions tables are disclosed. (§ 1026.38(i), (j), and (k)). For
transactions without a seller, a Payoffs and Payments table may be substituted for the Summaries of Transactions table and placed before the alternative Calculating Cash to Close table. (§ 1026.38(e) and (t)(5)(vii)(B)). For example, see page 3 of form H-25(J) of appendix H to Regulation Z.
On page 4 of the Closing Disclosure, Loan Disclosures, Adjustable Payment, and Adjustable Interest Rate (AIR) tables are shown with the heading Additional Information About This Loan. (§ 1026.38(l), (m), and (n))
### Loan Calculations

- **Total of Payments:** Total you will have paid after you make all payments of principal, interest, mortgage insurance, and loan costs, as scheduled.
- **Finance Charge:** The dollar amount the loan will cost you.
- **Amount Financed:** The loan amount available after paying your upfront finance charge.
- **Annual Percentage Rate (APR):** Your costs over the loan term expressed as a rate. This is not your interest rate.
- **Total Amount Finance (TIP):** The total amount of interest that you will pay over the loan term expressed as a percentage of your loan amount.

### Other Disclosures

- **Appraisal:** If the property was appraised for your loan, your lender is required to give you a copy at no additional cost at least 3 days before closing.
- **Contract Details:** See your note and security instrument for information about:
  - what happens if you fail to make your payments,
  - what is a default on the loan,
  - situations in which your lender can require early repayment of the loan, and
  - the rules for making payments before they are due.
- **Liability after Foreclosure:**
  - If your lender forecloses on this property and the foreclosure does not cover the amount of unpaid balance on this loan, the state law may protect you from liability for the unpaid balance. If you reference or take any additional costs on this property, you may have to pay any debt remaining even after foreclosure. You may want to consult a lawyer for more information.
  - State law does not protect you from liability for the unpaid balance.

### Questions?

If you have questions about the loan terms or costs on the form, use the contact information below to get more information or make a complaint. Contact the Consumer Financial Protection Bureau at www.consumerfinance.gov/mortgage-disclosures

### Contact Information

<table>
<thead>
<tr>
<th>Name</th>
<th>Lender</th>
<th>Mortgage Broker</th>
<th>Real Estate Broker (B)</th>
<th>Real Estate Broker (S)</th>
<th>Settlement Agent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Address</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NMLS ID</td>
<td>License ID</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Contact</td>
<td>Contact NMLS ID</td>
<td>License ID</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Email</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Phone</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Confirm Receipt

By signing, you are only confirming that you have received this form. You do not have to accept this loan because you have signed or received this form.

<table>
<thead>
<tr>
<th>Applicant Signature</th>
<th>Date</th>
<th>Co-Applicant Signature</th>
<th>Date</th>
</tr>
</thead>
</table>

Disclose **Loan Calculations**, **Other Disclosures**, **Questions Notice**, **Contact Information**, and, if desired by the creditor, **Confirm Receipt** tables on page 5 of the **Closing Disclosure**. (§ 1026.38(o), (p), (q), and (r))
For a description and instructions for calculations of amounts for the information and amounts required on the Closing Disclosure, please see the Closing Disclosure section of the TILA-RESPA Guide to Forms.
11. Delivery of Closing Disclosure

11.1 What are the general timing and delivery requirements for the Closing Disclosure? (§ 1026.19(f))

Generally, the creditor is responsible for ensuring that the consumer receives the Closing Disclosure form no later than three business days before consummation. (§ 1026.19(f)(1)(ii)(A); Comment 19(f)(1)(v)-3) (Although see section 11.4 below regarding delivery of the Closing Disclosure by a settlement agent)

The creditor also is responsible for ensuring that the Closing Disclosure meets the content, delivery, and timing requirements discussed in sections 10, 11, and 12 of this guide. (§§ 1026.19(f) and 1026.38)

11.2 How must the Closing Disclosure be delivered? (§ 1026.19(f)(1)(ii))

To ensure the consumer receives the Closing Disclosure on time, creditors must arrange for delivery as follows:

- By providing it to the consumer in person.
- By mailing, or by other delivery methods, including email. Creditors may use electronic delivery methods subject to compliance with the consumer consent and other applicable

- Creditors must ensure that the consumer receives the Closing Disclosure at least three business days prior to consummation. (§ 1026.19(f)(1)(ii)(A))

11.3 When is the Closing Disclosure considered to be received if it is delivered in person or if it is mailed? (§ 1026.19(f)(1)(iii))

If the Closing Disclosure is provided in person, it is considered received by the consumer on the day it is provided. If it is mailed or delivered electronically, the consumer is considered to have received the Closing Disclosure three business days after it is delivered or placed in the mail. (§ 1026.19(f)(1)(iii); Comment 19(f)(1)(ii)-2)

However, if the creditor has evidence that the consumer received the Closing Disclosure earlier than three business days after it is mailed or delivered, it may rely on that evidence and consider it to be received on that date. (Comments 19(f)(1)(iii)-1 and -2) (See also discussion above in section 6.4 of this guide on similar receipt rule under § 1026.19(e)(1)(iv) and commentary regarding the Loan Estimate.)

11.4 Can a settlement agent provide the Closing Disclosure on the creditor’s behalf? (§ 1026.19(f)(1)(v))

Yes. Creditors may contract with settlement agents to have the settlement agent provide the Closing Disclosure to consumers on the creditor’s behalf. (§ 1026.19(f)(1)(v)). Creditors and settlement agents also may agree to divide responsibility with regard to completing the Closing Disclosure, with the settlement agent assuming responsibility to complete some or all the Closing Disclosure. (Comment 19(f)(1)(v)-4)
Any such creditor must maintain communication with the settlement agent to ensure that the Closing Disclosure and its delivery satisfy the requirements described above, and the creditor is legally responsible for any errors or defects. (§ 1026.19(f)(1)(v) and Comment 19(f)(1)(v)-3)

11.5 Who is responsible for providing the Closing Disclosure to a seller in a purchase transaction? (§ 1026.19(f)(4)(i))

The settlement agent is required to provide the seller with the Closing Disclosure reflecting the actual terms of the seller’s transaction. (§ 1026.19(f)(4)(i))

The settlement agent may comply with this requirement by providing the seller with a copy of the Closing Disclosure provided to the consumer (buyer) if it also contains information relating to the seller’s transaction. (Comment 19(f)(4)(i)-1)

The settlement agent may also provide the seller with a separate disclosure, including only the information applicable to the seller’s transaction from the Closing Disclosure (§ 1026.38(t)(5)(v) or (vi), as applicable). (See form H-25(I) of appendix H to Regulation Z for a model form). However, if the seller’s disclosure is provided in a separate document, the settlement agent has to provide the creditor with a copy of the disclosure provided to the seller. (§ 1026.19(f)(4)(iv))
11.6 What if there is more than one consumer involved in a transaction? (§ 1026.17(d))

In rescindable transactions, the Closing Disclosure must be given separately to each consumer who has the right to rescind under TILA (see § 1026.23), although the disclosures required for adjustable rate mortgages need only be provided to the consumer who expresses an interest in a variable-rate loan program. (§ 1026.19(b)). In transactions that are not rescindable, the Closing Disclosure may be provided to any consumer with primary liability on the obligation.

☐ Implementation tip: Some creditors may desire that each obligor to a transaction subject to § 1026.19(f) receive a Closing Disclosure to obtain a signature of customary recitals or certifications that are appended to the disclosure pursuant to § 1026.38(1)(5).

11.7 When does the creditor have to provide the Closing Disclosure to the consumer? (§ 1026.19(f)(1)(ii))

Creditors must ensure that consumers receive the Closing Disclosure no later than three business days before consummation. (§ 1026.19(f)(1)(ii)(A))

- Consummation is the time that a consumer becomes contractually obligated on the credit transaction, and may not necessarily coincide with the settlement or closing of the entire real estate transaction. (§ 1026.2(a)(13))

- For timeshare transactions, the creditor must ensure that the consumer receives the Closing Disclosure no later than consummation. (§ 1026.19(f)(1)(ii)(B))

Remember that business day is given a different meaning for purposes of providing the Closing Disclosure than it is for purposes of providing the Loan Estimate after receiving a consumer’s application. (See section 6.9 above describing definition of business day). For purposes of providing the Closing Disclosure, the term business day means all calendar days except Sundays and the legal public holidays specified in 5 U.S.C. 6103(a), such as New

This requirement imposes a **three-business-day waiting period**, meaning that the loan may not be consummated less than three **business days** after the **Closing Disclosure** is received by the consumer. If a settlement is scheduled during the waiting period, the creditor generally must postpone settlement, unless a settlement within the waiting period is necessary to meet a **bona fide personal financial emergency**. (§ 1026.19(f)(1)(iv))

### 11.8 May a consumer waive the three-business-day waiting period? (§ 1026.19(f)(1)(iv))

Yes. Like the **seven-business-day waiting period** after receiving the **Loan Estimate** (see section 9.6 above), consumers may waive or modify the **three-business-day waiting period** when:

- The extension of credit is needed to meet a **bona fide personal financial emergency**. (§ 1026.19(f)(1)(iv));
- The consumer has received the **Closing Disclosure**; and
- The consumer gives the creditor a dated written statement that describes the emergency, specifically modifies or waives the waiting period, and bears the signature of all consumers who are primarily liable on the legal obligation. (§ 1026.19(f)(1)(iv))

☐ For example, the imminent sale of the consumer’s home at foreclosure, where the foreclosure sale will proceed unless loan proceeds are made available to the consumer during the waiting period, may be considered a **bona fide personal financial emergency**. (Comment 19(f)(1)(iv)-1)

The creditor is prohibited from providing the consumer with a pre-printed waiver form. (§ 1026.19(f)(1)(iv))
11.9 Does the three-business-day waiting period apply when corrected Closing Disclosures must be issued to the consumer? (§ 1026.19(f)(2)(i) and (ii))

Yes, in some circumstances. The three-business-day waiting period requirement applies to a corrected Closing Disclosure that is provided when there are:

- Changes to the loan’s APR;
- Changes to the loan product; or
- The addition of a prepayment penalty.

If other types of changes occur, creditors must ensure that the consumer receives a corrected Closing Disclosure at or before consummation. (§ 1026.19(f)(2)(i) and (ii))

11.10 When must the settlement agent provide the Closing Disclosure to the seller? (§ 1026.19(f)(4)(ii))

The settlement agent must provide the seller its copy of the Closing Disclosure no later than the day of consummation. (§ 1026.19(f)(4)(ii))

11.11 Are creditors ever allowed to impose average charges on consumers instead of the actual amount received? (§ 1026.19(f)(3)(i)-(ii))

In general, the amount imposed on the consumer for any settlement service must not exceed the amount the settlement service provider actually received for that service. However, an average charge may be imposed instead of the actual amount received for a particular service, as long
as the **average charge** satisfies certain conditions. (§ 1026.19(f)(3)(i)-(ii); Comment 19(f)(3)(i)-1)

An **average charge** may be used if the following conditions are satisfied (§ 1026.19(f)(3)(ii)):

- The **average charge** is no more than the average amount paid for that service by or on behalf of all consumers and sellers for a class of transactions;
- The creditor or settlement service provider defines the class of transactions based on an appropriate period of time, geographic area, and type of loan;
- The creditor or settlement service provider uses the same **average charge** for every transaction within the defined class; and
- The creditor or settlement service provider does not use an **average charge**:
  - For any type of insurance;
  - For any charge based on the loan amount or property value; or
  - If doing so is otherwise prohibited by law.

If the creditor develops representative samples of specific settlement costs for a particular class of transactions, the creditor may charge the average cost for that settlement service instead of the actual cost for such transactions. An **average-charge** program may not be used in a way that inflates the cost for settlement services overall. (Comment 19(f)(3)(ii)-1)

Creditors should consult the commentary to § 1026.19(f)(3)(ii) for additional guidance on using **average-charge** pricing. (See Comments 19(f)(3)(ii)-1 through -9)
12. Revisions and Corrections to Closing Disclosures

12.1 When are creditors required to correct or revise Closing Disclosures?
(§ 1026.19(f)(2))

Creditors must redisclose terms or costs on the Closing Disclosure if certain changes occur to the transaction after the Closing Disclosure was first provided that cause the disclosures to become inaccurate. There are three categories of changes that require a corrected Closing Disclosure containing all changed terms. (§ 1026.19(f)(2))

- Changes that occur before consummation that require a new three-business-day waiting period. (§ 1026.19(f)(2)(ii))
- Changes that occur before consummation and do not require a new three-business-day waiting period. (§ 1026.19(f)(2)(i))
- Changes that occur after consummation. (§ 1026.19(f)(2)(iii))

12.2 What changes before consummation require a new waiting period?
(§ 1026.19(f)(2)(ii))

If one of the following occurs after delivery of the Closing Disclosure and before consummation, the creditor must provide a corrected Closing Disclosure containing all
changed terms and ensure that the consumer receives it no later than three **business days** before **consummation**.  (§ 1026.19(f)(2)(ii); Comment 19(f)(2)(ii)-1)

- **The disclosed APR becomes inaccurate.** If the annual percentage rate (APR) previously disclosed becomes inaccurate, the creditor must provide a corrected **Closing Disclosure** with the corrected APR disclosure and all other terms that have changed. The APR’s accuracy is determined according to § 1026.22.  (§ 1026.19(f)(2)(ii)(A))

- **The loan product changes.** If the loan product previously disclosed becomes inaccurate, the creditor must provide a corrected **Closing Disclosure** with the corrected loan product and all other terms that have changed.  (§ 1026.19(f)(2)(ii)(B))  


- **A prepayment penalty is added.** If a prepayment penalty is added to the transaction, the creditor must provide a corrected **Closing Disclosure** with the prepayment penalty provision disclosed and all other terms that have changed.  (§ 1026.19(f)(2)(ii)(C))


12.3 **What changes do not require a new three-day waiting period?**  
 (§ 1026.19(f)(2)(i))

For any other changes before **consummation** that do not fall under the three categories above (i.e., related to the APR, loan product, or the addition of a prepayment penalty), the creditor still must provide a corrected **Closing Disclosure** with any terms or costs that have changed and ensure that the consumer receives it.

For these changes, there is no additional **three-business-day waiting period** required. The creditor must ensure only that the consumer receives the revised **Closing Disclosure at or before consummation**.  (§ 1026.19(f)(2)(i); Comment 19(f)(2)(i)-1 through -2)
12.4 What if a consumer asks for the revised Closing Disclosure before consummation? (§ 1026.19(f)(2)(i))

For changes other than to the APR, loan product, or the addition of a prepayment penalty, the creditor is not required to provide the consumer with the revised Closing Disclosure until the day of consummation. However, a consumer has the right to inspect the Closing Disclosure during the business day before consummation. (§ 1026.19(f)(2)(i))

If a consumer asks to inspect the Closing Disclosure the business day before consummation, the Closing Disclosure presented to the consumer must reflect any adjustments to the costs or terms that are known to the creditor at the time the consumer inspects it. (§ 1026.19(f)(2)(i))

Creditors may arrange for settlement agents to permit consumers to inspect the Closing Disclosure. (§ 1026.19(f)(1)(v) and Comment 19(f)(2)(i)-2)

An example of a post-consummation event that would require a new Closing Disclosure is a discovery that a recording fee paid by the consumer is different from the amount that was disclosed on the Closing Disclosure. (Comment 19(f)(2)(iii)-1.i). However, other post-consummation events that are not related to settlement, such as tax increases, do not require a revised Closing Disclosure. (Comment 19(f)(2)(iii)-1.iii). For guidance on when a creditor receives information sufficient to establish that an event has occurred after consummation, see Comment 19(e)(4)(i)-1.

12.5 Are creditors required to provide corrected Closing Disclosures if terms or costs change after consummation? (§ 1026.19(f)(2)(iii))

Yes, in some circumstances. Creditors must provide a corrected Closing Disclosure if an event in connection with the settlement occurs during the 30-calendar-day period after consummation that causes the Closing Disclosure to become inaccurate and results in a
change to an amount paid by the consumer from what was previously disclosed. (§ 1026.19(f)(2)(iii); Comment 19(f)(2)(iii)-1)

When a post-consummation event requires a corrected Closing Disclosure, the creditor must deliver or place in the mail a corrected Closing Disclosure not later than 30 calendar days after receiving information sufficient to establish that such an event has occurred. (§ 1026.19(f)(2)(iii); Comment 19(f)(2)(iii)-1)

12.6 Is a corrected Closing Disclosure required if a post-consummation event affects an amount paid by the seller? (§ 1026.19(f)(4)(ii))

Yes, in some circumstances. Settlement agents must provide a revised Closing Disclosure if an event related to the settlement occurs during the 30-day period after consummation that causes the Closing Disclosure to become inaccurate and results in a change to an amount actually paid by the seller from what was previously disclosed.

The settlement agent must deliver or place in the mail a corrected Closing Disclosure not later than 30 calendar days after receiving information sufficient to establish that such an event has occurred. (§ 1026.19(f)(4)(ii))

12.7 Are clerical errors discovered after consummation subject to the redisclosure obligation? (§ 1026.19(f)(2)(iv); Comment 19(f)(2)(iv)-1)

Yes. Creditors also must provide a revised Closing Disclosure to correct non-numerical clerical errors and document refunds for tolerance violations no later than 60 calendar days after consummation. (§ 1026.19(f)(2)(iv)-(v))
An error is **clerical** if it does not affect a numerical disclosure and does not affect the timing, delivery, or other requirements imposed by § 1026.19(e) or (f). (Comment 19(f)(2)(iv)-1)

For example:

- If the **Closing Disclosure** identifies the incorrect settlement service provider as the recipient of a payment, the error would be considered clerical because it is non-numerical and does not affect any of the delivery requirements set forth in § 1026.19(e) or (f).

- However, if the **Closing Disclosure** lists the wrong property address, which affects the delivery requirement imposed by § 1026.19(e) or (f), the error would not be considered clerical.

### 12.8 Do creditors need to provide corrected Closing Disclosures when they refund money to cure tolerance violations? (§ 1026.19(f)(2)(v))

Yes. If the creditor cures a tolerance violation by providing a refund to the consumer, the creditor must deliver or place in the mail a corrected **Closing Disclosure** that reflects the refund no later than **60 calendar days after consummation.** (§ 1026.19(f)(2)(v)) (See additional discussion above in section 12.7 of this guide)
13. Additional requirements and prohibitions

13.1 Are there exceptions to the disclosure requirements for loans secured by a timeshare interest?  
(§ 1026.19(e)(1)(iii)(C)) and (f)(1)(ii)(B))

Yes. Loans secured by interests in timeshare plans are still subject to the TILA-RESPA rule, but the Bureau recognizes that these loans may commonly be consummated within a few days of the consumer’s **application**. The Bureau thus adopted abbreviated timing, delivery, and disclosure obligations for these loans when **consummation** occurs **within three business days of the application**. For these loans, creditors may forego a **Loan Estimate** and provide only the **Closing Disclosure**. (§ 1026.19(e)(1)(iii)(C)) and (f)(1)(ii)(B); Comment 19(e)(1)(iii)-4 and Comment 19(f)(1)(ii)-3)

In addition, the waiting periods and timing requirements applicable to most loans subject to the TILA-RESPA Rule are inapplicable to loans secured by timeshare interests. Rather, creditors are required to ensure only that the consumer receives the **Closing Disclosure no later than consummation.** (§ 1026.19(f)(1)(ii)(B)) For details relating to the timing requirements for the **Closing Disclosure** in timeshare transactions, see Comment 19(f)(1)(iii)-3.
13.2 Are there any limits on fees that may be charged prior to disclosure or application?

Yes. A creditor or other person may not impose any fee on a consumer in connection with the consumer’s application for a mortgage transaction until the consumer has received the Loan Estimate and has indicated intent to proceed with the transaction. (§ 1026.19(e)(2)(i)(A))

This restriction includes limits on imposing:

- Application fees;
- Appraisal fees;
- Underwriting fees; and
- Other fees imposed on the consumer.

The only exception to this exclusion is for a bona fide and reasonable fee for obtaining a consumer’s credit report. (§ 1026.19(e)(2)(i)(B); Comment 19(e)(2)(i)(A)-1 through -5 and Comment 19(e)(2)(i)(B)-1)

13.3 How does a consumer indicate an intent to proceed with a transaction? (§ 1026.19(e)(2)(i)(A))

A consumer indicates intent to proceed with the transaction when the consumer communicates, in any manner, that the consumer chooses to proceed after the Loan Estimate has been delivered, unless a particular manner of communication is required by the creditor. (§ 1026.19(e)(2)(i)(A))

This may include:

- Oral communication in person immediately upon delivery of the Loan Estimate;
- Oral communication over the phone, written communication via email, or signing a pre-printed form after receipt of the **Loan Estimate**.

A consumer’s silence is not indicative of **intent to proceed**. (Comment 19(e)(2)(i)(A)-2)

The creditor must document this communication to satisfy the record retention requirements of § 1026.25.

### 13.4 What does it mean to impose a fee? (Comment 19(e)(2)(i)(A)-5)

A fee is **imposed** by a person if the person requires a consumer to provide a method for payment, even if the payment is not made at that time. (Comment 19(e)(2)(i)(A)-5)

This would include, for example:

- A creditor or mortgage broker requiring the consumer to provide a check to pay for a processing fee before the consumer receives the **Loan Estimate**, even if the check is not to be cashed until after the **Loan Estimate** is received and the consumer has indicated an **intent to proceed**.

- A creditor or mortgage broker requiring the consumer to provide a credit card number for a processing fee before the consumer receives the **Loan Estimate**, even if the credit card will not be charged until after the **Loan Estimate** is received and the consumer has indicated an **intent to proceed**.

☐ As discussed above, a creditor or other person may impose a bona fide and reasonable fee before the consumer receives the **Loan Estimate**, if the fee is for purchasing a credit report on the consumer.
Can creditors provide estimates of costs and terms to consumers before the Loan Estimate is provided? (§ 1026.19(e)(2)(ii))

The TILA-RESPA rule does not prohibit a creditor or other person from providing a consumer with estimated terms or costs prior to the consumer receiving the Loan Estimate.

However, if a person (such as a creditor or broker) provides a consumer with a written estimate of terms or costs specific to that consumer before the consumer receives the Loan Estimate, it must clearly and conspicuously state at the top of the front of the first page of the written estimate “Your actual rate, payment, and costs could be higher. Get an official Loan Estimate before choosing the loan.” (§ 1026.19(e)(2)(ii); Comment 19(e)(2)(ii)-1)

There are other restrictions on the form of this statement to assure it is not confused with the Loan Estimate:

- Must be in font size no smaller than 12-point font.
- May not have headings, content, and format substantially similar to the Loan Estimate or the Closing Disclosure. (§ 1026.19(e)(2)(ii); Comment 19(e)(2)(ii)-1)

The Bureau has provided a model of the required statement in form H-26 of appendix H to Regulation Z.
13.6 Are creditors allowed to require additional verifying information other than the six pieces of information that form an application from consumers before providing a Loan Estimate? (§ 1026.19(e)(2)(iii))

No. A creditor or other person may not condition providing the Loan Estimate on a consumer submitting documents verifying information related to the consumer’s mortgage loan application before providing the Loan Estimate. (§ 1026.19(e)(2)(iii); Comment 19(e)(2)(iii)-1)

For example:

- A creditor may ask for the sale price and address of the property, but may not require the consumer to provide a purchase and sale agreement to support the information the consumer provides orally before the creditor provides the Loan Estimate.

- A mortgage broker may ask for the names, account numbers, and balances of the consumer’s checking and savings accounts, but the mortgage broker may not require the consumer to provide bank statements or similar documentation to support the information orally provided by the consumer before the creditor provides the Loan Estimate.
14. Special Information Booklet (RESPA Settlement Costs Booklet)

14.1 When must creditors deliver the special information booklet? (§ 1026.19(g))

Creditors must provide a copy of the special information booklet to consumers who apply for a consumer credit transaction secured by real property, except in certain circumstances (see below). The special information booklet is required pursuant to Section 5 of RESPA (12 U.S.C. 2604) and is published by the Bureau to help consumers applying for federally related mortgage loans understand real estate transactions. (§ 1026.19(g)(1))

- If the consumer is applying for a HELOC subject to § 1026.40, the creditor (or mortgage broker) can provide a copy of the brochure entitled “When Your Home is On the Line: What You Should Know About Home Equity Lines of Credit” instead of the special information booklet. (§ 1026.19(g)(1)(ii))

- The creditor need not provide the special information booklet if the consumer is applying for a real property-secured consumer credit transaction that does not have the purpose of purchasing a one-to-four family residential property, such as a refinancing, a closed-end loan secured by a subordinate lien, or a reverse mortgage. (§ 1026.19(g)(1)(iii))

Creditors must deliver or place in the mail the special information booklet not later than three business days after receiving the consumer’s loan application. (§ 1026.19(g)(1)(i))
14.2 What happens if the consumer withdraws the application or the creditor determines it cannot approve it? (§ 1026.19(g)(1)(i))

If the creditor denies the consumer’s application or if the consumer withdraws the application before the end of the three-business-day period, the creditor need not provide the special information booklet. (§ 1026.19(g)(1)(i); Comment 19(g)(1)(i)-3)

14.3 What if there are multiple applicants?

When two or more persons apply together for a loan, the creditor may provide a copy of the special information booklet to just one of them. (Comment 19(g)(1)-2)

14.4 If the consumer is using a mortgage broker to apply for the loan, can the broker provide the booklet?

If the consumer uses a mortgage broker, the mortgage broker must provide the special information booklet and the creditor need not do so. (§ 1026.19(g)(1)(i))

14.5 Are creditors allowed to change or tailor the booklets to their own preferences and business needs?

Creditors generally are required to use the booklets designed by the Bureau and may make only limited changes to the special information booklet. (§ 1026.19(g)(2)). The Bureau may issue revised or alternative versions of the special information booklet from time to time in
the future. Creditors should monitor the Federal Register for notice of updates. (Comment 19(g)(1)-1)
15. Other disclosures

15.1 Does TILA-RESPA require any other new disclosures besides the Loan Estimate and Closing Disclosure?

Yes. In addition to the Integrated Disclosures discussed above, the TILA-RESPA rule also changes some other post-consummation disclosures provided to consumers by creditors and servicers: the Escrow Closing Notice (§ 1026.20(e)) and mortgage servicing transfer and partial payment notices (§ 1026.39(a) and (d)).

15.2 When must the Escrow Closing Notice be provided? (§ 1026.20(e))

For loans subject to the Escrow Closing Notice requirement, the creditor or servicer must provide consumers with a notice no later than three business days before the consumer’s escrow account is canceled. (§ 1026.20(e)(5))

15.3 What transactions are subject to the Escrow Closing Notice requirement?

The Escrow Closing Notice must be provided prior to cancelling an escrow account to any consumers for whom an escrow account was established in connection with a closed-end consumer credit transaction secured by a first lien on real property or a dwelling, except for reverse mortgages. (§ 1026.20(e)(1))
There are two exceptions to the requirement to provide the notice:

- Creditors and servicers are not required to provide the notice if the escrow account that is being cancelled was established solely in connection with the consumer’s delinquency or default on the underlying debt obligation. (Comment 20(e)(1)-2)

- Creditors and servicers are not required to provide the notice when the underlying debt obligation for which an escrow account was established is terminated, including by repayment, refinancing, rescission, and foreclosure. (Comment 20(e)(1)-3)

For purposes of this requirement, the term escrow account has the same meaning given to it as under Regulation X, 12 CFR § 1024.17(b), and the term servicer has the same meaning given to it as under Regulation X, 12 CFR § 1024.2(b).

15.4 What information must be on the Escrow Closing Notice?  
(§ 1026.20(e)(1))

Creditors and servicers must disclose certain information on the Escrow Closing Notice and may optionally disclose certain additional information. (§ 1026.20(e)(1))

The creditor or servicer must disclose (§ 1026.20(e)(2)):

- The date on which the account will be closed;

- That an escrow account may also be called an impound or trust account;

- The reason why the escrow account will be closed;

- That without an escrow account, the consumer must pay all property costs, such as taxes and homeowner’s insurance, directly, possibly in one or two large payments a year;

- A table, titled “Cost to you,” that contains an itemization of the amount of any fee the creditor or servicer imposes on the consumer in connection with the closure of the consumer’s escrow account, labeled “Escrow Closing Fee,” and a statement that the fee is for closing the escrow account;

- Under the reference “In the future”: 
The consequences if the consumer fails to pay property costs, including the actions that a State or local government may take if property taxes are not paid and the actions the creditor or servicer may take if the consumer does not pay some or all property costs;

- A telephone number that the consumer can use to request additional information about the cancellation of the escrow account;

- Whether the creditor or servicer offers the option of keeping the escrow account open and, as applicable, a telephone number the consumer can use to request that the account be kept open; and

- Whether there is a cut-off date by which the consumer can request that the account be kept open.

The creditor or servicer may also, at its option, disclose (§ 1026.20(e)(3)):

- The creditor or servicer’s name or logo;

- The consumer’s name, phone number, mailing address and property address;

- The issue date of the notice; or

- The loan number, or the consumer’s account number.

In addition, the disclosures must:

- Contain a required heading that is more conspicuous than and precedes the required disclosures discussed above. (§ 1026.20(e)(4))

- Be clear and conspicuous. This standard generally requires that the disclosures in the Escrow Closing Notice be in a reasonably understandable form and readily noticeable to the consumer. (Comment 20(e)(2)-1)

- Be written in 10-point font, at a minimum. (§ 1026.20(e)(4))

- Be grouped together on the front side of a one-page document. The disclosures must be separate from all other materials, with the headings, content, order and format substantially similar to model form H-29 in appendix H to Regulation Z. (§ 1026.20(e)(4))
15.5 When must the creditor send the Escrow Closing Notice before the escrow account is closed?

When the consumer requests cancellation. The creditor or servicer must ensure that the consumer receives the Escrow Closing Notice no later than three business days before the consumer’s escrow account is closed. (§ 1026.20(e)(5)(i))

Cancellation for any other reason. The creditor or servicer must ensure that the consumer receives the Escrow Closing Notice no later than 30 business days before the consumer’s escrow account is closed. (§ 1026.20(e)(5)(ii))

Mailbox rule applies. If the notice is not provided to the consumer in person, the consumer is considered to have received the disclosures three business days after they are delivered or placed in the mail. (§ 1026.20(e)(5)(iii))

15.6 What does the rule on disclosing partial payment policies in mortgage transfer notices require? (§ 1026.39(a) and (d))

If you are required by existing Regulation Z to provide mortgage transfer notices when the ownership of a mortgage loan is being transferred, you must include in the notice information related to the partial payment policy that will apply to the mortgage loan.

This post-consummation partial payment disclosure is required for a closed-end consumer credit transaction secured by a dwelling or real property, other than a reverse mortgage.
15.7 What information must be included in the partial payment disclosure and what must the disclosure look like? (§ 1026.39(d)(5))

The partial payment disclosure must include:

- The heading “Partial Payment” over all of the following, additional information:
  - If periodic payments that are less than the full amount due are accepted, a statement that the covered person, using the term “lender,” may accept partial payments and apply such payments to the consumer’s loan;
  - If periodic payments that are less than the full amount due are accepted but not applied to a consumer’s loan until the consumer pays the remainder of the full amount due, a statement that the covered person, using the term “lender,” may hold partial payments in a separate account until the consumer pays the remainder of the payment and then apply the full periodic payment to the consumer’s loan;
  - If periodic payments that are less than the full amount due are not accepted, a statement that the covered person, using the term “lender,” does not accept any partial payments; and
  - A statement that, if the loan is sold, the new covered person, using the term “lender,” may have a different policy.

You may use the format of the partial payment disclosure illustrated by form H-25 of appendix H to Regulation Z. The text illustrating the disclosure in form H-25 may be modified by you to suit the format of the mortgage transfer notice. (See Comment 39(d)(5)-1)
16. Practical implementation and compliance issues

You should consult with legal counsel or your compliance officer to understand your obligations under the TILA-RESPA rule and to devise the policies and procedures you will need to have in place to comply with the TILA-RESPA rule’s requirements.

When mapping out your compliance plan, in addition to understanding your obligations under the TILA-RESPA rule, you should consider practical implementation issues. Your implementation and compliance plan may include the following elements as described below in sections 16.1 through 16.4.

16.1 Identifying affected products, departments, and staff

How you comply with the TILA-RESPA rule may depend on your business model. To begin planning for compliance with the rule, you may find it useful to identify all affected products, departments, and staff.

Origination, processing, closing and post-closing departmental staff and processes are likely to be most broadly impacted by these rule changes. However, certain groups within servicing operations may be implicated by the two new disclosures related to escrow account cancellation and partial payment application policies during servicing transfers.

Also, you may originate certain products for which the existing disclosure regime will persist following the TILA-RESPA rule’s effective date. Be certain to closely consider the coverage of the rule to different types of mortgage products.
16.2 Identifying the business-process, operational, and technology changes that will be necessary for compliance

Fully understanding the changes required may involve a review of your existing business processes, as well as the hardware and software that you, your agents, settlement services providers, or other business partners use. Gap analyses may be a helpful output of such a review and can help to inform a robust implementation plan. You should review your technology platforms and determine which version of MISMO is currently supported. The data standards to support the new Loan Estimate and Closing Disclosure forms will exist in MISMO version 3.3 and later. Also, it is recommended that you evaluate the current integrations between your technology platforms and those of your relevant third party service providers, such as document generators and settlement service providers, to determine required updates, as needed.

16.3 Identifying impacts on key service providers or business partners

Third-party updates may be necessary to: update transaction coverage and calculations; obtain required information or verifications; incorporate new disclosures; and to make sure your software, compliance, quality-control, and recordkeeping protocols comply with this rule.

Software providers, or other vendors and business partners, may offer compliance solutions that can assist with any necessary changes. These key partners may depend on your business model. For example, smaller banks and credit unions may find it helpful to talk to their correspondent banks, secondary market partners, and technology vendors. All creditors will likely need to carefully coordinate readiness and compliance with the network of settlement services providers on whom they rely for closing services. In some cases, you may want to negotiate revised or new contracts with these parties, or seek a different set of services. In addition, creditors should be in close touch with all key business partners and vendors to ensure that their process and technology changes will meet your business and compliance needs and are scheduled to occur on a timeline that supports collaborative readiness. Make sure you understand the extent of the assistance that vendors, settlement services providers and other business partners provide. For example, if vendors provide software that calculates tolerances to determine which cost changes
at settlement require re-disclosure to the consumer, do they guarantee the accuracy of their conclusions?

The CFPB expects supervised banks and nonbanks to have an effective process for managing the risks of service provider relationships. For more information on this, view CFPB Bulletin 2012-03 - Service Providers.

### 16.4 Identifying training needs

Consider the training that will be necessary for your loan officer, processor, closing, compliance, and quality-control staff, as well as anyone else who accepts applications, processes loans, or monitors transaction compliance. Training may also be required for other individuals that you, your agents, or your business partners employ.
17. Where can I find a copy of the TILA-RESPA rule and get more information about it?

You will find the TILA-RESPA rule on the Bureau’s website at http://www.consumerfinance.gov/regulatory-implementation/tila-respa/

In addition to a complete copy of the TILA-RESPA rule, that web page also contains:

- The preamble, which explains why the Bureau issued the rule, the legal authority and reasoning behind the rule, responses to comments, and analysis of the benefits, costs, and impacts of the rule;
- Official Interpretations of the rule;
- The TILA-RESPA Guide to Forms; and
- Other implementation support materials (including proposed rule amendments, if applicable).

Useful resources related to mortgage rule implementation are also available at http://www.consumerfinance.gov/regulatory-implementation/.

For email updates about when additional TILA-RESPA rule or other mortgage rule implementation resources become available, please submit your email address within the “Email updates about mortgage rule implementation” box here.
TILA RESPA Integrated Disclosure

H-24(B) Mortgage Loan Transaction Loan Estimate – Fixed Rate Loan Sample

This is a sample of a completed Loan Estimate for a fixed rate loan. This loan is for the purchase of property at a sale price of $180,000 and has a loan amount of $162,000, a 30-year loan term, a fixed interest rate of 3.875 percent, and a prepayment penalty equal to 2.00 percent of the outstanding principal balance of the loan for the first two years after consummation of the transaction. The consumer has elected to lock the interest rate. The creditor requires an escrow account and that the consumer pay for private mortgage insurance.
# Loan Estimate

### Date Issued
2/15/2013

### Applicants
Michael Jones and Mary Stone
123 Anywhere Street
Anytown, ST 12345

### Property
456 Somewhere Avenue
Anytown, ST 12345

### Sale Price
$180,000

## Loan Terms

<table>
<thead>
<tr>
<th>Loan Amount</th>
<th>$162,000</th>
<th>NO</th>
</tr>
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<tbody>
<tr>
<td>Interest Rate</td>
<td>3.875%</td>
<td>NO</td>
</tr>
</tbody>
</table>

### Monthly Principal & Interest

- See Projected Payments below for your Estimated Total Monthly Payment
- **$761.78**
- NO

### Prepayment Penalty
- YES • As high as $3,240 if you pay off the loan during the first 2 years

### Balloon Payment
- NO

## Projected Payments

<table>
<thead>
<tr>
<th>Payment Calculation</th>
<th>Years 1-7</th>
<th>Years 8-30</th>
</tr>
</thead>
<tbody>
<tr>
<td>Principal &amp; Interest</td>
<td>$761.78</td>
<td>$761.78</td>
</tr>
<tr>
<td>Mortgage Insurance</td>
<td>+ 82</td>
<td>+ —</td>
</tr>
<tr>
<td>Estimated Escrow</td>
<td>+ 206</td>
<td>+ 206</td>
</tr>
</tbody>
</table>

### Estimated Total Monthly Payment

- **$1,050**
- **$968**

### Estimated Taxes, Insurance & Assessments

- **$206** a month

### Costs at Closing

- **Estimated Closing Costs**: $8,054
  - Includes $5,672 in Loan Costs + $2,382 in Other Costs – $0 in Lender Credits. See page 2 for details.

- **Estimated Cash to Close**: $16,054
  - Includes Closing Costs. See Calculating Cash to Close on page 2 for details.

---

Visit [www.consumerfinance.gov/mortgage-estimate](http://www.consumerfinance.gov/mortgage-estimate) for general information and tools.
# Closing Cost Details

## Loan Costs

<table>
<thead>
<tr>
<th>A. Origination Charges</th>
<th>$1,802</th>
</tr>
</thead>
<tbody>
<tr>
<td>.25 % of Loan Amount (Points)</td>
<td>$405</td>
</tr>
<tr>
<td>Application Fee</td>
<td>$300</td>
</tr>
<tr>
<td>Underwriting Fee</td>
<td>$1,097</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>B. Services You Cannot Shop For</th>
<th>$672</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appraisal Fee</td>
<td>$405</td>
</tr>
<tr>
<td>Credit Report Fee</td>
<td>$30</td>
</tr>
<tr>
<td>Flood Determination Fee</td>
<td>$20</td>
</tr>
<tr>
<td>Flood Monitoring Fee</td>
<td>$32</td>
</tr>
<tr>
<td>Tax Monitoring Fee</td>
<td>$75</td>
</tr>
<tr>
<td>Tax Status Research Fee</td>
<td>$110</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>C. Services You Can Shop For</th>
<th>$3,198</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pest Inspection Fee</td>
<td>$135</td>
</tr>
<tr>
<td>Survey Fee</td>
<td>$65</td>
</tr>
<tr>
<td>Title – Insurance Binder</td>
<td>$700</td>
</tr>
<tr>
<td>Title – Lender’s Title Policy</td>
<td>$535</td>
</tr>
<tr>
<td>Title – Settlement Agent Fee</td>
<td>$502</td>
</tr>
<tr>
<td>Title – Title Search</td>
<td>$1,261</td>
</tr>
</tbody>
</table>

## Other Costs

<table>
<thead>
<tr>
<th>E. Taxes and Other Government Fees</th>
<th>$85</th>
</tr>
</thead>
<tbody>
<tr>
<td>Recording Fees and Other Taxes</td>
<td>$85</td>
</tr>
<tr>
<td>Transfer Taxes</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>F. Prepays</th>
<th>$867</th>
</tr>
</thead>
<tbody>
<tr>
<td>Homeowner’s Insurance Premium (6 months)</td>
<td>$605</td>
</tr>
<tr>
<td>Mortgage Insurance Premium (months)</td>
<td></td>
</tr>
<tr>
<td>Prepaid Interest ($17.44 per day for 15 days @ 3.875%)</td>
<td>$262</td>
</tr>
<tr>
<td>Property Taxes (months)</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>G. Initial Escrow Payment at Closing</th>
<th>$413</th>
</tr>
</thead>
<tbody>
<tr>
<td>Homeowner’s Insurance</td>
<td>$202</td>
</tr>
<tr>
<td>Mortgage Insurance</td>
<td></td>
</tr>
<tr>
<td>Property Taxes</td>
<td>$211</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>H. Other</th>
<th>$1,017</th>
</tr>
</thead>
<tbody>
<tr>
<td>Title – Owner’s Title Policy (optional)</td>
<td>$1,017</td>
</tr>
</tbody>
</table>

| I. TOTAL OTHER COSTS (E + F + G + H) | $2,382|

## J. TOTAL CLOSING COSTS

<table>
<thead>
<tr>
<th>$8,054</th>
</tr>
</thead>
<tbody>
<tr>
<td>D + I</td>
</tr>
<tr>
<td>Lender Credits</td>
</tr>
</tbody>
</table>

## Calculating Cash to Close

<table>
<thead>
<tr>
<th>$8,054</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Closing Costs (J)</td>
</tr>
<tr>
<td>Closing Costs Financed (Paid from your Loan Amount)</td>
</tr>
<tr>
<td>Down Payment/Funds from Borrower</td>
</tr>
<tr>
<td>Deposit</td>
</tr>
<tr>
<td>Funds for Borrower</td>
</tr>
<tr>
<td>Seller Credits</td>
</tr>
<tr>
<td>Adjustments and Other Credits</td>
</tr>
</tbody>
</table>

## Estimated Cash to Close

<table>
<thead>
<tr>
<th>$16,054</th>
</tr>
</thead>
<tbody>
<tr>
<td>Estimated Cash to Close</td>
</tr>
</tbody>
</table>
### Additional Information About This Loan

**LENDER**
Ficus Bank

**NMLS/___ LICENSE ID**

**LOAN OFFICER**
Joe Smith

**NMLS/___ LICENSE ID**
12345

**EMAIL**
joesmith@ficusbank.com

**PHONE**
123-456-7890

---

**Comparisons**

<table>
<thead>
<tr>
<th><strong>In 5 Years</strong></th>
<th><strong>Total you will have paid in principal, interest, mortgage insurance, and loan costs.</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>$56,582</td>
<td>$15,773 Principal you will have paid off.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Annual Percentage Rate (APR)</strong></th>
<th><strong>Your costs over the loan term expressed as a rate. This is not your interest rate.</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>4.274%</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Total Interest Percentage (TIP)</strong></th>
<th><strong>The total amount of interest that you will pay over the loan term as a percentage of your loan amount.</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>69.45%</td>
<td></td>
</tr>
</tbody>
</table>

---

### Other Considerations

**Appraisal**
We may order an appraisal to determine the property's value and charge you for this appraisal. We will promptly give you a copy of any appraisal, even if your loan does not close. You can pay for an additional appraisal for your own use at your own cost.

**Assumption**
If you sell or transfer this property to another person, we
☐ will allow, under certain conditions, this person to assume this loan on the original terms.
☒ will not allow assumption of this loan on the original terms.

**Homeowner's Insurance**
This loan requires homeowner's insurance on the property, which you may obtain from a company of your choice that we find acceptable.

**Late Payment**
If your payment is more than 15 days late, we will charge a late fee of 5% of the monthly principal and interest payment.

**Refinance**
Refinancing this loan will depend on your future financial situation, the property value, and market conditions. You may not be able to refinance this loan.

**Servicing**
We intend
☐ to service your loan. If so, you will make your payments to us.
☒ to transfer servicing of your loan.

---

### Confirm Receipt

By signing, you are only confirming that you have received this form. You do not have to accept this loan because you have signed or received this form.

---

**Applicant Signature**

**Co-Applicant Signature**

**Date**

**Date**

---

LOAN ESTIMATE
Ag Tax Basics

Prof. Lori McMillan

Tax Base

- What is the tax base, and why is it important?
- Tax Base $\times$ Tax Rate = Taxes Paid/Collected
- Income taxes have a progressive rate structure (rate gets higher as income increases)
“Income”

- Gross income = all income, whatever source derived.

- *Glenshaw Glass*: accession to wealth, clearly realized, over which the taxpayer has dominion and control

- Comprehensive definition of income

Accounting Methods and Timing

- Cash vs. accrual (plus special and hybrid)
- Farm inventory
- Farm-price method
- Unit-livestock-price method
Common Income in the Ag Context

- Sales of farm products
- Rents (including crop shares)
- Agricultural Program Payments
- Income from Cooperatives
- Cancellation of debt
- Patronage dividends
- Barter income
- Production used to secure a Commodity Credit Corporation (CCC) loan
- Feed assistance payments
- State of KS exemption from income tax for certain businesses

Common Deductions in the Ag Context

- Current costs of operating the farm
  - Ordinary and necessary costs of running a farm business for profit (compare a hobby farm to this)
    - “ordinary” = what most farmers do
    - “necessary” = useful and helpful in farming
- Insurance
- Rent and leasing costs
- Dues to cooperatives
- Consultant fees
- Business travel and (partial) meals
- Crop scouting expenses
- Insect sprays and dusts
- Livestock fees
- Prorated loan expenses
“Capital” Gains and Expenditures

- Ordinary income vs. capital gains
- Current expenditures vs. capital expenditures

- Matching principle

Capital Gains

- Sale or exchange of a ‘capital asset’
  - Capital asset is broadly defined, but specifically excludes inventory and stock in trade
  - Capital gains and losses are generally isolated from ordinary business income, because capital gains are taxed at a preferential rate. For that reason, generally capital losses can only be offset against capital gains, and to the extent the losses exceed the gain in a year they can be carried over.
  - Taxed at a rate of 0/15/20%
  - Gain = Amount received – Adjusted basis
    - Basis is cost
    - Amount received is cash plus fmv of other property received in the exchange
Capital Expenditures

- Costs that are incurred, the benefit for which are expected to last more than one year.
- Instead of being expenses in the year the costs are incurred, the costs are added to the basis of the assets acquired/improved/restored, etc.

Common Capital Expenditures

- Equipment and machinery
- Fences
- Draft, breeding, sport and dairy livestock
- Repairs to machinery, equipment, trucks, etc. that prolong their useful life, increase value, or adapt them to different use
- Water wells, including drilling and equipping costs
- Leveling and conditioning land
- Installing drain tile
Nondeductible Expenses

- Personal, living and family expenses.
- Principal on loans repaid
- Losses from sales/exchanges of property between related persons.
- Gifts

Farm Losses

- Not all farm losses can be deducted. Must take into account
  - At-risk limits
  - Passive activity limits

- Hobby farms are limited in the losses they can take
Special Treatment

- Soil and water conservation expenses
- Installment sales
- Fuel tax issues
- Depreciation/depletion/amortization
- Self-employment and employment taxes

More information

- IRS Publication 225

- Forms to assist farmers:
AgTax Presentation Worksheet

Income:

Deductions:

Capital Gains:

   Basis:

   Capitalization rules:

   Adjusted basis:

Depreciation:

Foreclosure or Repossession: