PRACTICE GUIDELINE 1

MAINTAINING INTEGRITY OF ACCESS AND ACCOUNTS

Responsibilities Regarding Accounts

Teranet Account

Every person who wishes to use e-reg™ must become a subscriber with Teranet Land Information Services Inc. ("Teranet"). In the context of lawyers, each subscribing lawyer or law firm will need to establish an account with Teranet. It is from this account that user fees (access charges and on line charges) will be debited. Registration fees and Land Transfer Tax can be paid from lawyers' special trust accounts or general accounts.

The Personal Security Package

Each user under a Teranet account (i.e. each person in a law firm that will be accessing the e-reg™ system) needs to obtain a personalized, specially encrypted floppy diskette and a corresponding pass phrase. Both must be used in conjunction to access the system. Integrity and security of the electronic registration system is achieved by Teranet establishing and maintaining an audit trail of all transactions and the party (identified by the pass phrase used) who performed them.

Rule 5.01 of *The Rules of Professional Conduct* provides that a lawyer shall not share his or her Personal Security Package.

Compliance With Law Statements

While non-lawyers may obtain access to the e-reg™ system, by regulation under the *Land Registration Reform Act*, only lawyers entitled to practice may make statements professing compliance with law without registration of supporting evidence. Consequently, Teranet maintains a current list of lawyers entitled to practice which is updated to reflect lawyers whose rights and privileges have been affected by, for example, retirement, suspension, disbarment or resignation.

Responsibilities Regarding Access For Users

Individual users within a law firm will be allowed access through that firm's account with Teranet. Given the importance to the security and integrity of the e-reg™ system and since the knowledge of, and control over, movements of members of law firms (employees, associates or partners) rests with the firm, law firms must be vigilant to ensure appropriate safeguards are implemented in relation to individual encrypted diskettes and pass phrases.

At a minimum, firms should ensure that:

a. the need to maintain the confidentiality of pass phrases and the need to safeguard encrypted diskettes are emphasized to all users granted access pursuant to their accounts. Firms should take appropriate steps to discourage and prevent sharing of pass phrases;

b. appropriate guidelines are established in formulating pass phrases to take full advantage of the security afforded by the system;

c. appropriate steps are taken to destroy/disable and/or replace pass phrases and diskettes when such confidentiality is breached;

d. appropriate monitoring procedures are implemented to safeguard against unauthorized access to the e-reg™ system under their accounts. This should include careful recording and reconciliation of any and all charges incurred with Teranet which may disclose unauthorized access; and,

e. procedures are implemented which includes the immediate notification of Teranet when the law firm has changes in its membership (whether employees, associates or partners) affecting who the authorized users are under the firm's account. In particular, where an authorized user leaves the firm, the firm should ensure that all copies of the user's encrypted diskette are returned and that Teranet is immediately notified of the termination of access of the specific user.

Account Responsibility - "Law Firms"

When establishing accounts with Teranet, lawyers must carefully consider which lawyers may operate under the same account. Lawyers who are partners or who are employers/employees will normally access the e-reg™ system under the same account.

However, care must be exercised where lawyers are practising in "association". Where there is no intended joint and several liability, it is ill advised to subscribe to the e-reg™ system under the same account.

Additionally, it will be permissible to pay registration fees and land transfer tax out of a special trust account. Since it is inappropriate for associated lawyers who are not "practising in the manner of employed solicitors" to share the use of a common trust account, pragmatically, it is improper for such associated lawyers to operate under the same Teranet account.

Effect of Suspensions and Other Changes to Law Society Status

As only lawyers entitled to practice law are able to approve electronic documents containing compliance with law statements, lawyers need to be extremely sensitive to the effects of changes in their status on their ability to complete real estate transactions. E-reg™ will automatically verify statuses of lawyers and will not allow lawyers who are not entitled to practice to approve

documents containing compliance of law statements. The Law Society will be providing timely updates to Teranet as to changes in members' statuses.

Lawyers voluntarily leaving their practices through retirement or resignation need to ensure that all real estate closings are either completed or reassigned (both paper files and access to electronic documents in the e-reg™ system) to other counsel, before the effective date of their status changes.

Lawyers who are suspended and/or disbarred will likewise be precluded from approving these types of documents. This will be particularly germane for lawyers who are "administratively" suspended (i.e suspended for non-payment of Law Society fees/Lawyers' Professional Indemnity Company levies or non-filing of required Law Society/Lawyers' Professional Indemnity Company forms). As the Law Society will be providing electronic updates regarding member statuses to Teranet, this will likely result in a much faster effect to changes than in the past. It is conceivable that the change to Teranet access may take effect before members receive written confirmation of status change by registered mail. Consequently, lawyers will need to exercise additional care to ensure that their fees and levies are paid on time or they may risk being precluded from completing certain real estate transactions.

PRACTICE GUIDELINE 2

OBLIGATIONS REGARDING DOCUMENT PREPARATION

Computerization

Accessing e-reg™ will involve learning how to use the hardware and software for preparation and registration of documents. Currently, lawyers are required to draft certain documents for registration to complete real estate transactions. For example, the lawyer for the transferor is responsible for preparation of the transfer. In the e-reg™ system, this is now an electronic document which is prepared at a computer terminal and, at the appropriate time, released for electronic registration and will require input from the lawyer for both the transferor and transferee in a timely manner.

Although access to e-reg™ will continue to be available through computer terminals at Land Registry Offices (LROs), current staff and service levels there are not likely to be maintained once e-reg™ is introduced to an LRO. Lawyers cannot rely on attending at the LRO to prepare and register documents in electronic format. This is not a viable alternative to properly outfitting the lawyer's office with the required computer equipment to gain remote access to e-reg™.

Accordingly, lawyers practising real estate should equip themselves with the required technological tools to properly service their clients. In particular, the necessary computer equipment should be acquired to function as real estate practitioners in the e-reg ™ system. Teranet has published hardware specifications with recommended requirements and also a set of

minimum requirements. It should be noted that with upgrades imminent, it will be necessary to have equipment which meets current requirements.

Consequences of the Failure to Computerize

A lawyer who is not prepared to meet the minimum technical investment required is incapable of producing any registerable documentation under e-reg™. Apart from the obvious concerns about the lawyer's failure to fulfill his or her duty to the client and the potential effect on the client's contractual rights and obligations, this will cause inconvenience for the lawyer's colleague(s) acting for other parties to the transaction, who is computer-equipped for e-reg™.

In these situations, the lawyer should be prepared to make suitable arrangements to meet his or her obligations. Arrangements may include retaining an agent, or making arrangements with a lawyer for another party to the transaction. In either case, the lawyer should be prepared to compensate the agent or other party's lawyer (as the case may be) for the costs associated with assisting the lawyer in completing his or her obligations. Compensation to the other party's lawyer for expenses and additional time caused may take the form of financial compensation to the other parties' lawyer for the costs of using e-reg™ in preparing the documentation on the lawyer's behalf, and may also include an amount for the time spent by him or her in assisting the lawyer.

If assistance is required, this should be identified and addressed early in the transaction and confirmed in writing with the lawyer acting for other parties, to avoid last minute delays, inconvenience to the other lawyer as well as potential prejudice to the lawyer's clients.

PRACTICE GUIDELINE 3

THE ACKNOWLEDGMENT AND DIRECTION

The e-reg™ system has been designed to produce five different standard forms of Acknowledgment and Direction corresponding to each of the electronic registration formats, which can be amended to suit the particular needs of any transaction:

- Transfer (Transferors)
- Transfer (Transferee)
- Charge (Chargor)
- Discharge of Mortgage/Charge (Chargee)
- Document General.

The Law Society recommends that the appropriate form of Acknowledgment and Direction for each electronic document to be registered under e-reg™ be printed from the e-reg™ system for signature by the lawyer's client(s) before each electronic document is released for registration. Alternatively, one may draft his or her own form of Acknowledgment and Direction containing the pertinent information. However, if one drafts his or her own form of Acknowledgment and

Direction, it is still recommended that the e-reg™ document registration report be attached to the form. Where an electronic document to be registered relates to a transaction where it is also appropriate for the lawyer to enter into a Document Registration Agreement (DRA), such as where the lawyer represents the vendor or the purchaser of property under an agreement of purchase and sale, a statement authorizing the lawyer to enter into a DRA should be included in the Acknowledgment and Direction. A true copy of the DRA should be appended as a schedule and also be signed by the client(s).

The description of the electronic document contained in an Acknowledgment and Direction should correspond exactly to the electronic document which is ultimately registered electronically.

Amendments to the Acknowledgment and Direction

In a situation where an amendment, which is not merely clerical in nature, is required to be made to an existing Acknowledgment and Direction, such as a change in the rate of interest provided in an Acknowledgment and Direction for a Charge (Chargor)or where contrary instructions are received from the client, an amended Acknowledgment and Direction that includes any necessary changes should be prepared and signed by the lawyer's client(s) to confirm the changes.

The Acknowledgment and Direction only confirms client instructions for registration of an electronic document and, additionally, a related DRA in some instances. Lawyers are cautioned to obtain written confirmation of client instructions appropriate to the circumstances of the individual transaction. For example, the lawyer may represent the party or parties to an agreement of purchase and sale for property as purchasers and she or he may be instructed by the client(s) to electronically register a Transfer in favour of one or more but not all of those parties or in favour of a third party as transferee(s). In addition to obtaining an Acknowledgment and Direction for a Transfer (Transferees) from the party or parties to be named as transferee(s) in the Transfer document, written instructions should be obtained from all parties who are purchasers under the Agreement of Purchase and Sale. Those instructions should set out the party or parties to be named as transferee(s) and therefore the registered owner(s) of the property described. Lawyers should continue to obtain written confirmation of client instructions for issues not directly related to the registration of an electronic document itself and in particular for those transactions where the lawyer will be providing a qualified opinion on title.

The Signing of the Acknowledgment and Direction

An Acknowledgment and Direction and any other appropriate form of written client instructions should be reviewed, where possible and/or practicable with the client(s) in a personal interview with the lawyer before an electronic document is released for registration. The review should include a detailed explanation of the contents of the Acknowledgment and Direction and other client instructions before signature. Signed copies of the Acknowledgment and Direction should be retained in the lawyer's file as the written verification of client instructions and authority for electronic document registration.

Reliance on Documents other than the Acknowledgment and Direction
During the transition period in which e-reg™ is being introduced in a region, lawyers may find it appropriate to rely on documents other than the Acknowledgment and Direction to confirm client instructions. This is particularly the case when such alternate written documents already exist and the Acknowledgment and Direction merely serves as a duplication. For example, documents prepared in Polaris format and signed by clients can serve as instructions to counsel if this is fully explained to the clients.

PRACTICE GUIDELINE 4

ELECTRONIC CLOSINGS AND THE DOCUMENT REGISTRATION AGREEMENT ("DRA")

Closings in the e-reg™ system will require a procedure to be established whereby documents, funds, keys etc. are exchanged between the lawyers prior to closing and held under very strict escrow terms until the computerized title documents have been electronically registered.

The terms of escrow should be clearly set out in an agreement executed prior to closing. A standardized form of agreement (the DRA) can be used for this purpose. Alternatively, the DRA can form the basis for a closing protocol which the parties would expressly agree to adhere to. Items that require completion in the DRA would be set out in a letter confirming adherence to the DRA closing protocol.

Additions or Modifications to the DRA
Additions or modifications to the DRA may be required to meet the circumstances of individual transactions.

The DRA establishes strict escrow terms relating only to the closing procedure. It does not, for example:

- provide for giving or acceptance of possession of the real property in advance of registration of title documents, or

- address any of the issues relating to interim possession, readjustments, amendment or preservation of contractual rights/obligations or other matters normally associated with an "escrow closing" as that term is commonly used in relation to a transaction which cannot be completed on the scheduled closing date.

Those issues, in addition to the specific escrow provisions of the DRA itself, will have to be reviewed and addressed by lawyers for the parties to a transaction.

Authorization to enter into a DRA
As each lawyer entering into a DRA will be undertaking professional obligations with respect to the handling and disposition of a client's documents and funds, specific written authority should be obtained from the client authorizing the lawyer to make that commitment.

A lawyer who becomes a party to the recommended form of DRA contracts as agent for his or her client with the intention that the client shall have both the benefits and burdens of the covenants in the agreement.

Provision for the written acknowledgment and consent of the client required to enable a lawyer to enter into a DRA in these terms is included in the forms of Acknowledgment and Direction referred to earlier in these Practice Guidelines.

It should also be noted that the DRA neither precludes nor prevents a lawyer from retaining conveyancers to assist in the closing of the transaction.

Professional Obligations of Lawyer
A lawyer who becomes a party to the prescribed form of DRA incurs professional obligations. A lawyer must fulfill all obligations that the lawyer has undertaken pursuant to the DRA. It is important to remember that a lawyer who enters into a DRA is giving undertakings pursuant to that agreement and accordingly the lawyer must comply with subrule 6.03(8) of the Rules of Professional Conduct which provides that a lawyer shall not give an undertaking that cannot be fulfilled and shall fulfill every undertaking given.

PRACTICE GUIDELINE 5

ELECTRONIC CLOSINGS AND MORTGAGE TRANSACTIONS

Parties to the DRA
Although the recommended form of DRA refers to "Purchaser's solicitor" and "Vendor's solicitor", it is not intended that the agreement would be limited to purchase and sale transactions. Lawyers representing mortgagees, guarantors or others involved in a real estate transaction may be necessary parties to such agreements with respect to funds and documents (whether in electronic or paper form) held for disbursement, registration or release subject to escrow terms. Appropriate additions or amendments to the recommended form may be made to accommodate those additional parties and the further obligations involved.

Delivery of Paper Copy of Mortgage
Lawyers acting for mortgagees are reminded that Section 4 of the *Mortgages Act* (R.S.O. 1990. Chap. M.40, as amended) requires the mortgagee to deliver a true copy of the mortgage or charge to the mortgagor within thirty days "after receipt by the mortgagee of a mortgage executed by the mortgagor". Section 4 of the *Mortgages Act* has been amended to provide that for the purposes

of this section “a true copy” includes a facsimile as defined in section 1 of the *Land Titles Act* R.S.O. 1990 Chap. L.5 as amended. A “facsimile” is defined in the *Land Titles Act* as an accurate reproduction of a book, document or record and includes a print from microfilm and a printed copy generated by or produced from a computer record. The mortgagee’s lawyer should, therefore, print out a paper copy of the electronic charge as registered and deliver it to the mortgagor (or the mortgagor’s solicitor) together with a paper copy of the Standard Charge Terms within thirty days of registration. Lawyers for mortgagees should also obtain from the mortgagor a signed paper copy of the acknowledgment of receipt of the Standard Charge Terms before the electronic charge is registered.

Guarantees

Although a guarantor may be identified in the electronic form of charge, it would appear necessary for the guarantor to sign a separate (paper) form of guarantee to bind the guarantor to the covenant. Lawyers should ensure that the terms of the paper document signed by the guarantor are consistent with the provisions (if any) regarding the guarantee in the charge and the Standard Charge Terms.

Discharge of Mortgages

The forms of Agreement of Purchase and Sale of real property now in common use make provision for the payment and subsequent discharge of institutional mortgages (mortgages held by banks, trust companies, insurance companies, credit unions, or finance companies) held by certain financial institutions so that these mortgages may be paid from the proceeds of the sale. Yet undefined procedures as to who is to prepare and electronically register discharges (lawyers or financial institutions) require lawyers to be careful in clarifying who is to assume these tasks, who is to pay for associated costs and the scope of the lawyer’s undertaking. The procedure set out in the Agreement of Purchase and Sale requires that the vendor's lawyer give his/her personal undertaking to obtain and register a discharge of the mortgage after closing. The recommended forms of Acknowledgment and Direction previously referred to include a form by which the mortgagee could authorize the vendor’s lawyer to create and register the required discharge of mortgage. If financial institutions will give that authority, the vendor’s lawyer should be able to give the undertaking in accordance with the terms of the Agreement of Purchase and Sale.

However, it is anticipated that some financial institutions may establish a practice of creating and registering an electronic discharge of a mortgage without the assistance of the vendor’s lawyer after discharge funds have been received. When requesting a discharge statement from the financial institution, lawyers retained to act for vendors under an Agreement of Purchase and Sale requiring the lawyer to give a personal undertaking respecting the discharge of an institutional mortgage, should also seek clarification on whether the lawyer or the financial institution itself will prepare and register the electronic discharge of mortgage. If the financial institution insists upon dealing with this matter "in-house", the lawyer should obtain written confirmation to that effect. In these circumstances, and subject to any contrary provision in the Agreement of Purchase and Sale , the lawyer may be more comfortable changing the wording of

the undertaking to provide that the vendor's lawyer "will cause a discharge of the mortgage to be registered".

It will still be the responsibility of the vendor's lawyer to ensure that the necessary funds (including any additional interest accrual and the discharge registration fee) are forwarded to the financial institution, that the electronic discharge is prepared and registered by the financial institution in a timely manner (in default of which an application may have to be brought to the court for an order discharging the mortgage) and that registration particulars of the discharge are obtained and forwarded to the purchaser's solicitor to confirm compliance with the undertaking.

In the case of "private mortgages" (mortgages held by persons other than financial institutions), and in the absence of any express provision to the contrary in the Agreement of Purchase and Sale, lawyers should not give or accept personal undertakings respecting discharge after closing. Unless the private mortgage is paid out and discharged prior to closing, it may be necessary for the vendor's solicitor or the mortgagee's solicitor to seek written authority from the lender in the recommended form of Acknowledgment and Direction to create the required electronic form of discharge and arrange for it to be registered on closing.

In the case of a private mortgage, it would be acceptable for a lawyer to transfer amounts required to pay out the mortgage directly to the vendor's solicitor's trust account where the mortgage discharge itself comprises one of the documents to be registered under the DRA.

Acting on proper written authority, the vendor's solicitor could include a Discharge of Mortgage in the DRA as one of the documents to be registered on closing, subject to compliance with the escrow terms of that agreement. The vendor's solicitor would confirm to the lender that a DRA was being utilized as part of the closing procedure and that the discharge of mortgage would be shown as a document for registration under that agreement, subject to the terms of the escrow.

Electronic Payment of Closing Proceeds and Discharge Funds

Where the electronic real time cleared funds transfer capability is utilized, it would be acceptable for the purchaser's solicitor to transfer the amount required to payout an institutional mortgage directly to the vendor's solicitor's trust account. In this context, the purchaser's solicitor would rely on the vendor's solicitor's personal undertaking to deliver discharge funds to the mortgagee and procure a discharge of the mortgage.

PRACTICE GUIDELINE 6

USE OF COMPLIANCE WITH LAW STATEMENTS

Electronic registration moves away from the practice of placing large volumes of supporting material in the public records. The new practice involves a legally trained professional determining whether a document is suitable for registration and in compliance with applicable

legislation. Each electronically registered document must contain prescribed information. Among the types of information which may be included or used are statements which call for an application of legal expertise based on legal judgments, which must be made by a lawyer. These statements are called the "Compliance with Law Statements", and will be used in the place of filing hard/paper copy of the evidence upon which the statements is based.

Supporting Evidence

Lawyers should obtain and retain in their files the evidence upon which compliance with law statements are based, or alternatively, ensure that publicly available information to fully support the statements is and remains available. This is important in the Teraview Electronic Registration System ("TERS") as copies of the supporting evidence will not be available from the Land Registry Office when a document has been registered in reliance on one or more compliance with law statements. The copies retained in the lawyer's file may be the only source of such supporting evidence. This may be particularly important where a claim is made against the lawyer in consequence of any such statements.

Lawyers should also be aware of the effect that this may have on the period that files must be retained. In considering whether real estate files can be safely destroyed, members should take additional care in ensuring that they are not destroying what may be the only source of evidence in support of an electronic document registration and that alternate, public supporting information is available.

Going Behind Compliance with Law Statements

Lawyers need not look to nor request nor require evidence behind registered compliance with law statements, but rather should rely upon the provisions of the *Land Titles Act* as to the sufficiency of title once certified. The entire TERS and Land Titles system is premised on the sufficiency of the register to establish title to real property.