



RESIDENTIAL REAL ESTATE TRANSACTIONS

PRACTICE GUIDELINES

EXECUTIVE SUMMARY

Purpose

The *Residential Real Estate Transaction Practice Guidelines* contain recommended guidelines or procedures that lawyers should follow when acting for clients in residential real estate transactions. The guidelines focus on six client-centered professional principles: Client/Lawyer Relationship, Due Diligence, Proper Filing and Record-keeping, Document Preparation and Registration, Financial Issues and Extraordinary Matters.

The *Guidelines* are not intended to replace a lawyer's professional judgment or to establish a rigid approach to the practice of law or the conduct of a real estate transaction. Subject to those provisions of the *Guidelines* that incorporate legal, by-law or *Rules of Professional Conduct* requirements, a lawyer should consider the circumstances of the individual transaction and choose and recommend to the client the practice and procedure that best suits the individual transaction. In appropriate circumstances the lawyer may deviate from the *Guidelines*. Whether a lawyer has provided quality service will depend upon the circumstances of each individual transaction.

Terminology

Certain aspects of the Guidelines are mandatory and others are not.

The term "shall" is used in those instances where compliance is mandated by either the *By-laws* made pursuant to the *Law Society Act* or the *Rules of Professional Conduct*.

The term "should" or the phrase "should consider" connotes a recommendation. The terms refer to those practices or policies that are considered to be a reasonable goal for maintaining or enhancing client service.

The term "may" or the phrase "may consider" convey discretion. Lawyers may or may not pursue these suggested policies or practices depending upon the particular circumstances of the transaction.

Living Document

By their very nature the *Guidelines* are not static: professional requirements, standards, techniques and practices change. The Guidelines will be reviewed regularly and revised where necessary to reflect the evolving practice of law.

INTRODUCTION

A lawyer who undertakes to perform legal services on behalf of a client must perform such services to the standard of a competent lawyer. Rule 2.01 provides a definition of the term “competent lawyer”. A competent lawyer includes a lawyer who ascertains client objectives, develops and advises the client on appropriate courses of action, communicates with the client at all stages of a matter in a timely and effective manner and complies in letter and in spirit with the *Rules of Professional Conduct*.

A lawyer who undertakes professional services on behalf of a client in a residential real estate transaction should be guided by the following principles.

GUIDELINE 1 CLIENT/LAWYER RELATIONSHIP

Communication

At the commencement of the lawyer-client relationship, the lawyer should ascertain all necessary and relevant information regarding the client, the property and the transaction and clarify and confirm the client’s expectations about the lawyer’s role and responsibilities in the transaction.

- The lawyer should obtain from the client at the outset of the retainer information about the property. This information might include but is not limited to information regarding:
 - the number of residential units in the property;
 - the manner in which the property is serviced – public or private;
 - whether the property is tenanted;
 - whether the property is located on a ravine, waterfront or highway or adjacent to any significant physical features;
 - whether the property is subject to or near hydro installations; and
 - any other matter that may impact on the choice of searches.
- The lawyer should communicate with the client at the outset of the retainer to obtain information about the client’s intentions regarding the future use of the property.
- The lawyer should advise the client of the options available to assure title in order to protect the client’s interests and minimize the client’s risk. In this regard, the lawyer shall comply with his or her obligations regarding title insurance and real estate conveyancing pursuant to subrules 2.02(10) – 2.02(13) of the *Rules*. If the client selects title insurance, the lawyer should advise the client about the searches that the lawyer will not be performing and the type of information that

these searches would reveal about the property such as zoning, encroachments or survey issues. Where title insurance is not being used, the lawyer should advise the client about the post closing protections provided by title insurance which the client is not receiving (e.g. regarding post-closing encroachments onto the property and fraud).

- Where title insurance is being used, the lawyer should communicate with the client to determine whether the client has any adverse knowledge about the property that could give rise to the insurer relying on the “knowledge” exclusion if the matter is not disclosed and “insured over” pre-closing.
- When requested, the lawyer should provide the client or potential client with a timely estimate of the fees and disbursements involved so that the client or potential client is able to make an informed decision on retaining the lawyer. In discussing fees and disbursements with clients, the lawyer:
 - should provide a reasonable estimate of the total cost and not an unreasonable estimate designed to garner the client’s business;
 - should not manipulate fees and disbursements in a manner as to provide a lower fee estimate.
- The lawyer should make an early determination whether to advise the client to obtain a survey of the property (for instance, based upon the client’s statement of intended use for the property) and should advise the client accordingly.
- The lawyer should consider forwarding an initial letter to the client at the commencement of the lawyer-client relationship.

The lawyer may consider including the following topics in the initial letter to the purchaser:

- the name of the lawyer primarily responsible for the matter;
- the name of any person in the firm who will be working on the file and the functions that the person will be performing;
- confirmation that the lawyer will be supervising all non-lawyers who are working on the file and that the lawyer is available to discuss issues with the client;
- information about the various methods of assuring title and the method selected by the client;
- an estimate of fees and disbursements;
- the amount of land transfer tax payable on registration;
- an explanation of the nature of closing adjustments and confirmation that adjustments will be reviewed in detail before closing;

- an explanation of joint retainer issues if the lawyer is acting for more than one client in the transaction (e.g. purchaser and lender), including the inability of the lawyer to keep information confidential as between the two clients;
- a request for instructions regarding title and an explanation of the difference between a joint tenancy and a tenancy in common;
- a request for information regarding the type of property and other relevant information about the property (number of units and approximate age of the property), the type of heating, mortgage and fire insurance policy;
- a request for any available survey and for information on any changes to the property not reflected on the survey, and an explanation of the importance of a survey;
- if the property is a condominium, confirmation of the extent of review of the Status Certificate and attachments;
- instructions regarding arranging utility and other service accounts;
- if the property is a new home, instructions regarding the Tarion inspection, HST and the New Home Rebate and additional types of adjustments that can be expected;
- a request for information regarding the client's proposed mortgage financing;
- instructions regarding the form of funds that will be required shortly before closing (certified cheque or bank draft);
- information regarding the need to produce identification;
- an explanation regarding the requirement for property insurance;
- information regarding how and when keys will be available; and
- any other matter upon which the client has instructed the lawyer or upon which the lawyer must provide information or instruction in order for the lawyer to proceed with the handling of the transaction.

A lawyer may consider including the following topics in the initial letter to the vendor:

- the name of the lawyer primarily responsible for the matter;
- the name of any person in the firm who will be working on the file and the functions that the person will be performing;

- confirmation that the lawyer will be supervising all non-lawyers who are working on the file and that the lawyer is available to discuss any issues with the client;
- an estimate of fees and disbursements;
- a request for the existing transfer, mortgage details (including most recent statement), realty tax bill, most recent utility bills and contact address for after closing;
- a request for any available survey and for information on any changes to the property not reflected on the survey;
- a request for information regarding the manner in which the house is heated;
- if applicable, information regarding the real estate commission payable and prepayment penalties for the discharges of mortgages;
- a request for the name and phone number of the condominium manager if applicable;
- a request for information regarding the client's marital status and residency;
- information regarding the need to produce identification;
- instructions regarding arranging final meter readings;
- an explanation of the statement of adjustments;
- an explanation of HST; and
- any other matter upon which the client has instructed the lawyer or upon which the lawyer must provide information or instruction in order for the lawyer to proceed with the handling of the transaction.

Responsibility

The lawyer is responsible for carriage of the transaction or client's legal matter and shall have knowledge of legal issues affecting the matter that require a lawyer's expertise to address.

- The lawyer shall comply with the requirements of Rule 5.01 of the *Rules of Professional Conduct* regarding supervision.
- While a lawyer may permit a non-lawyer to attend to all matters of routine administration, assist in more complex transactions, draft statements of account and routine documents and correspondence and attend to registrations, the lawyer shall not delegate to a non-lawyer the ultimate responsibility for:

- review of a title search report or of documents before signing;
 - review and signing of a letter of requisition;
 - review and signing of a title opinion; and
 - review and signing of a reporting letter to the client.
- A lawyer shall not permit a non-lawyer to:
- provide advice to the client concerning insurance, including title insurance without supervision;
 - present insurance options or information regarding premiums to the client without supervision;
 - recommend one insurance product over another without supervision;
 - provide a legal opinion including without limitation a legal opinion regarding the title insurance coverage obtained.
- In transactions using the system for the electronic registration of title documents, only a lawyer can sign for completeness any document requiring compliance with law statements.
- If the lawyer has a personalized specially encrypted diskette to access the system for the electronic registration of title documents, the lawyer shall not permit others including a non-lawyer employee or agents to use the lawyer's diskette and shall not disclose his or her personalized e-reg™ pass phrase to others.

Accessibility

The lawyer shall answer with reasonable promptness all communications from other lawyers that require an answer, shall be punctual in fulfilling all commitments and should be reasonably available to speak to clients as well as the lawyer on the other side of the transaction at their request.

Communication Prior to Closing and Reporting

The lawyer shall report in a prompt and clear manner to the client, as reasonably required throughout the transaction on an interim basis and in all cases at the end of a transaction.

- Prior to closing, the lawyer should meet with the client where possible and should in any event review with the client and receive written confirmation from the client regarding:
- the manner in which title is being assured;
 - the state of title, including the coverage that will be available under the client's title insurance policy, if applicable. The review should include but is

not limited to matters such as subdivision/development agreements, easements and restrictive covenants, even if the client is obliged to accept title subject to them;

- where title insurance is being used, whether the client has any adverse knowledge about the property, that could give rise to the insurer relying on the “knowledge” exclusion if the matter is not disclosed and “insured over” before closing;
 - the manner in which the client is taking title and the implications of joint tenancy or tenancy in common;
 - any limitations on the lawyer’s retainer, if applicable, regarding private services, condominium documentation, rental property or multi-unit issues;
 - any necessary disclosure pursuant to the *Rules of Professional Conduct* regarding payments that the lawyer is receiving from other sources and how that relates, if applicable, to the client’s disbursements.
- Depending on the nature and type of transaction, it may be appropriate for the lawyer to include the following topics in a reporting letter to a purchaser or mortgagee client:
- details of any waivers given by the client (e.g. instructions on not obtaining an up to date survey of the property or any other material instructions);
 - full particulars of any mortgages (e.g. payments, payment dates and privileges);
 - information on how title was taken;
 - a short description of the closing documentation;
 - information regarding the statement of adjustments;
 - particulars of property insurance arrangements;
 - reference to Tarion, if applicable;
 - a description of the various taxes involved such as realty taxes, HST and land transfer tax.
 - information on any unusual aspects of the transaction;
 - if the property is a condominium, highlights or a reference to the Declaration, By-Laws and status certificate;
 - any other information that provides the client with a record of the practical aspects of the property;

- the lawyer’s legal opinion on title and the exceptions to which the opinion is subject if title insurance is not being used;
 - if title insurance is not being used, advice on the search inquiries conducted and responses received including the status of zoning and building searches, tax account and utility status and other off-title title search inquiries;
 - if title insurance is being used, information regarding the title insurance coverage obtained and in a transaction where title insurance has been used to assure title, the reporting letter to the client should not opine on title but should include the title insurance policy issued in favour of the client.
- Depending on the nature and type of transaction, it would be appropriate for a lawyer to cover the following topics in a reporting letter to a vendor:
- information regarding the adjustments made on closing;
 - particulars of the receipt and disbursement of funds;
 - information concerning mortgages or other encumbrances that have been discharged;
 - details of real estate commission;
 - if the vendor has taken back a mortgage, the details of such mortgage;
 - details of any waivers obtained from the client;
 - confirmation of payment of realty taxes and other payments;
 - a short description of the closing documentation;
 - particulars of any undertaking given or received on closing;
 - information on any unusual aspect of the transaction; and
 - any other information that provides the client with a record of the practical aspects of the property.

GUIDELINE 2 DUE DILIGENCE

The lawyer should employ a well-reasoned approach in determining the level and scope of due diligence involved in any particular transaction and in advising the client regarding due diligence and should conduct title and off-title searches having due regard for the terms of the client’s contractual rights and obligations, the time and cost of conducting title and off-title searches and the availability/utility of title insurance.

Title Searches

- ❑ Performing a proper search requires that the lawyer review all documents on title affecting the client's interest in the property and retain notes on the search of title with respect to every real estate file.
- ❑ The lawyer should advise a purchaser, borrower or lender client as to the state of title, the location of easements, the impact of restrictive covenants, subdivision and other agreements affecting title.
- ❑ Due to the increasing risk of fraud in real estate transactions, the lawyer should review:
 - the pattern of inactive or deleted instruments on the parcel register and inquire about any suspicious patterns of transfers or discharges;
 - the values revealed by arm's-length transfers in the recent past, to determine if there have been any suspicious changes in value.
 - The lawyer should report the results of the title search and due diligence process and in particular any suspicious patterns of transfers or discharges and/or any suspicious changes in values revealed by the due diligence process to:
 - the purchaser/borrower if the lawyer is acting for the purchaser/borrower;
 - the lender if the lawyer is acting for the lender; and
 - the title insurer (if applicable).

Off-Title Searches

- ❑ The lawyer should discuss with the client and obtain instructions from the client regarding the off title searches that may be appropriate or advisable in view of the nature of the property, the circumstances of the transaction, the terms of the agreement of purchase and sale and the consequences of not conducting those searches.
- ❑ Where title insurance is being used, the lawyer should be cognizant of:
 - what off-title searches relevant to the client or transaction are not covered by title insurance and make appropriate searches or obtain waivers from the client; and
 - the inter-related nature of the following issues: deciding not to make certain off-title searches; allowing the requisition date to pass without the results of those searches being available; the timing of receiving a title insurance binder or commitment (usually after the requisition date has passed); and the policy of the selected title insurer regarding "insure over" requests for adverse

circumstances which emerge before closing notwithstanding the lack of a search.

Review of Title and Off-Title Searches

- A lawyer is responsible for reviewing personally all title search reports, off title search reports and the draft title insurance policy exclusions and exemptions.

Client/Party Identification

- Although the lawyer may not be able to guarantee the identity of the client or a party to a document in many circumstances (absent personal, long-term knowledge), the lawyer shall undertake steps to verify that the person retaining the lawyer and/or signing documents under the lawyer's supervision has reasonable identification to substantiate that he/she is the named client/party and should retain details or information about the identification obtained.

Title Insurance

- Where title insurance is being relied upon to close a transaction where registration is delayed, there should be an express obligation on the part of the title insurer as part of the binder/commitment pre-closing, addressed to the insured-client(s), to provide coverage to the client for any adverse registrations which occur between releasing the closing proceeds and registration of the title document(s). This obligation may be satisfied by obtaining a draft policy from the title insurer in the name of the insured clients including an endorsement or policy terms providing the coverage described.
- The lawyer should review the draft title insurance policy or binder/commitment, to ensure the following:
 - Is the insured named correctly?
 - Is the legal description correct? Since only the lands described are insured, there may be off-site lands that should be included in the description, so that easements or rights-of-way located on other properties, but benefiting the subject property, and encroachments from the subject property onto other lands, will be covered by the insurance.
 - Are there other title issues, not apparent from the insurance commitment, of which the client should be warned? For example, problems may have been found when the search was conducted but the title insurer has not entered them on the Schedule to the policy because those problems are removed from coverage by the standard, pre-printed exceptions.
 - In the alternative, have problems emerged with respect to the title that it would be preferable for the owner to have resolved under the terms of the agreement of purchase and sale?
 - What coverage is excluded from the commitment/policy?

- The lawyer should issue the title insurance policy as soon as possible after closing, to insure that an issued policy exists should the insured-client(s) need to make a claim, and to minimize the risk of the client's being obliged to disclose adverse information obtained between closing and the issuance of the policy.
- The issued policy should be compared carefully to the draft policy or binder/commitment received before closing to ensure that there are no discrepancies in coverage.

GUIDELINE 3 PROPER FILING AND RECORD-KEEPING

The lawyer should keep a separate file for each transaction that is consistent with proper management of a transaction including appropriate management of deadlines and the facilitation of information storage and retrieval, while also fulfilling all record-keeping requirements of the *Rules of Professional Conduct* and other regulatory requirements

- Lawyers should maintain a system to follow up on undertakings regarding mortgage discharges and/or other undertakings given or received in the course of the transaction.
- Lawyers should approach a post-closing claim relating to an undertaking to re-adjust in good faith, advising clients of their rights and obligations and attempting to resolve the situation (subject to reporting the claim to the purchaser's title insurer, if any, and following the instructions of the insurer).

GUIDELINE 4 DOCUMENT PREPARATION AND REGISTRATION

The lawyer shall utilize appropriate means to ensure the reliable, consistent and legally sound preparation and registration of documents in accordance with evolving professional tools and practices.

Electronic Registration

- Where the electronic registration system is being used, the initial letter to the other lawyer should specify:
 - who is preparing the electronic transfer;
 - whether the Document Registration Agreement ("DRA") is intended to be used and if so, whether it will be signed as a separate document or subscribed to as a protocol (if the latter, additional relevant information and/or changes thereto need to be provided as per the current form of DRA);
 - to whom messages should be sent through the system.

- ❑ Prior to registering electronic documents, lawyers should obtain and retain in their files the client's written authorization.
- ❑ 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.

Review of Documents

- ❑ A lawyer is responsible for the ultimate review of documents before signing.

GUIDELINE 5 FINANCIAL ISSUES

The lawyer shall maintain appropriate financial records, controls and systems to ensure proper record-keeping and accountability, while also fulfilling all financial requirements of the *Rules of Professional Conduct* and other regulatory requirements.

Transfer of Funds

- ❑ Due regard should be had to the method of funds transfer. Absent agreement between the law firms and accompanying instructions from the clients, funds should be exchanged in the form provided for in the agreement of purchase and sale.

GUIDELINE 6 EXTRAORDINARY MATTERS

A lawyer should not undertake a matter without honestly feeling competent to handle it or being able to become competent without undue delay, risk or expense to the client.

- ❑ A lawyer must be alert to recognize any lack of competence for a particular task and the disservice that would be done to the client by undertaking that task. If consulted in such circumstances, the lawyer should either decline the retainer to act or obtain the client's instructions to retain, consult, or collaborate with a lawyer who is competent for that task.
- ❑ When handling a task on behalf of a client, the lawyer is responsible for keeping up to date with changes in the law and adapting to changing professional requirements, standards, techniques and practices.
- ❑ When acting for a client in the provision of legal services, the lawyer may be asked for or be expected to give advice on non-legal matters such as business or policy implications involved in the question or the course that the client should choose. If the lawyer expresses views on such matters, the lawyer should where and to the extent necessary point out any lack of experience or qualification in the particular field and should clearly distinguish legal advice from other advice.