

**Working Group on Lawyers & Real Estate**  
**Real Estate Practice Principles**

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**Introduction:** The following represents six broad-based principles that properly underlie the standards to which real estate lawyers should adhere. Due to the complexity of real estate practice and its ever evolving nature, it would be difficult, if not impossible, to develop and maintain detailed, checklist-like standards that would be easy to follow and remain relevant for reasonable periods of time. Accordingly, we believe it is more appropriate to enunciate client-centered, professional principles. To assist with understanding these principles, we have also developed Commentary with examples of how these principles should be implemented in a working context. These Standards are intended to supplement the *Rules of Professional Conduct* and other regulatory requirements, in a manner that emphasizes the relationship with, and provision of service to, the client.

## **1. Client/Lawyer Relationship**

### (a) Communication

The lawyer must (i) ascertain necessary and relevant information regarding the client, the property and the transaction, and (ii) clarify and confirm the client's expectations about the lawyer's role and responsibilities in the transaction.

### (b) Responsibility

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

### (c) Accessibility

The lawyer will make him/herself accessible to discuss matters involved in the transaction that should properly be dealt with by a lawyer.

### (d) Reporting

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

## **2. Due Diligence**

The lawyer must employ a well-reasoned approach in determining the level and scope of due diligence involved in any particular transaction, having due regard to the time and cost of conducting title and off-title searches and the availability/utility of title insurance.

### **3. Proper File & Record-keeping**

The lawyer must keep a file with respect to 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

### **4. Document Preparation & Registration**

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

### **5. Financial Issues**

The lawyer must 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.

### **6. Extraordinary Matters**

Where the lawyer undertakes matters on behalf of the client that are beyond the normal or traditional scope of activity in a transaction, the lawyer must define his/her role with precision and not undertake tasks that are beyond the scope of competence and/or give rise to a contravention of the *Rules of Professional Conduct*.

## **Commentary:**

### Section 1(a)

Communicate with the purchaser-client at the outset of the retainer to establish (i) the true nature of the property (e.g. how many residential units? How is the property serviced – public or private? Is the property tenanted? Is it on a ravine, waterfront or highway, adjacent to significant physical features, subject to or near hydro installations that may impact on choice of searches?); (ii) the client's intentions for the property (future use issues); (iii) how title will be assured.

In discussing fees and disbursements with clients, the lawyer must provide a reasonable estimate of the total cost, as opposed to an unreasonable estimate designed solely to garner the client's business.

Based on initial information from the client, make an early determination as to whether to advise that the client order a survey (for instance, based upon the client's statement of anticipated use for the property).

An initial letter to the purchaser should include the following topics:

- To whom the file is assigned
- Who is supervising & availability to discuss issues
- Estimate of fees & disbursements
- Calculation of Land Transfer Tax
- Explanation of nature of closing adjustments & that they will be reviewed in detail before closing
- Explanation of joint retainer issues where lawyer will be acting for purchaser and lender, including the inability of the lawyer to keep information confidential as between the two clients
- Request for instructions re: title, including explanation of difference between joint tenancy & tenants in common
- Request for information re: type of property (number of units & approximate age), type of heating, mortgage and fire insurance policy
- Request for any available survey and for information on any changes to the property not reflected on the survey, plus an explanation of the importance of a survey
- If condominium, confirmation of extent of review of Status Certificate & attachments
- Instructions re: arranging utility & other service accounts
- If new home property, instructions re: Tarion inspection; GST and the New Home Rebate; additional types of adjustments that can be expected
- Instructions re: form of funds that will be required shortly before closing (certified cheque or bank draft)
- How and when keys will be available

An initial letter to the vendor should include the following topics:

- To whom the file is assigned
- Who is supervising & availability to discuss issues
- Estimate of fees & disbursements
- Request for existing transfer, mortgage details (including most recent statement), realty tax bill, contact address for after closing
- Request for any available survey and for information on any changes to the property not reflected on the survey
- Instructions re: arranging final meter readings
- Explanation of GST

#### Section 1(b)

In particular, attention must be paid to the requirements of Rule 5.01 of the *Rules of Professional Conduct* regarding supervision.

#### Section 1(c)

Accessibility extends to being reasonably available to speak to lawyers on the other side of the transaction at their request.

#### Section 1(d)

Prior to closing, the lawyer should review with the client (and receive written confirmation from the client regarding):

- How title is being assured. Where title insurance is not being used, the post-policy date coverages which the client is effectively waiving (e.g. regarding post-closing encroachments onto the property and fraud) should be acknowledged by the client;
- The state of title, including the coverage that will be available under the client's title insurance policy, if applicable. The review should include 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" pre-closing;
- How the client is taking title and the implications of joint tenancy v. tenancy in common;
- 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.

In a purchase 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.

## Section 2

- Title Searches

The purchaser's lawyer must implement guidelines outlining what is to be reviewed as part of the title search process, given that in most cases it will not be sufficient to review only the parcel register. These guidelines are essential to be able to advise the client as to the state of title and the use of the property after closing, including the existence and location of easements and the possible impact of restrictive covenants or other similar restrictions.

Due to the increasing risk of fraud in real estate transactions, the lawyer should review (i) the pattern of inactive or deleted instruments on the parcel register and inquire about any suspicious patterns of transfers or discharges; and (ii) values revealed by arm's-length transfers in the recent past, to determine if there have been any suspicious changes in value which should be reported to the purchaser, borrower and/or title insurer (if applicable).

- Off-Title Searches

Where title insurance is being used, the lawyer must be cognizant of:

- what off-title issues relevant to the transaction (if any) 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: whether 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; 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.

- Verification of 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. In addition, the lawyer will be sensitive to, and comply with, all identification-related requirements being imposed by lenders and/or insurers in connection with the transaction.

- Title Insurance/Opinions

Where title insurance is being relied upon to close a transaction without registration being effected, 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).

The lawyer must 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 easements or rights-of-way located on other properties, but benefiting the subject property, will be covered by the insurance. Similarly, depending on the narrowness of the property defined, encroachments from the subject property onto other lands may not be covered.
- Are there other title issues, not apparent from the insurance commitment, regarding which the client should be warned? 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. This also minimizes the risk of 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.

### Section 3

Lawyers must maintain a system to follow up on mortgage discharges and/or other undertakings given 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).

### Section 4

Where the electronic registration system is being used, the initial letter to the other lawyer should specify: (i) who is preparing the electronic transfer; (ii) 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); (iii) to whom messages should be sent through the system.

### Section 5

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.

### Section 6

One of the elements of competence, for determining whether a retainer should be accepted or a lawyer should practice in a given area, is the lawyer's ability to maintain up-to-date knowledge in that area of law and practice.