

## Question 14 - APS review

### Part 1 – Initial Review Matters

When you receive an agreement of purchase and sale (APS) do you review the following?

1. As a regular matter in a residential real estate transaction, do you request a copy of the survey or MLS or search Google Maps for the property?

#### Results:

	Survey	Copy of MLS	Google Maps
Generally, if acting for the purchaser	46%	19%	35%
Generally, if acting for the seller	48%	24%	29%
Never	17%	83%	0%
Yes, if an older home is involved	42%	25%	33%
Yes, if a rural property is involved	42%	25%	33%
Yes, if property is being purchased for redevelopment	44%	22%	33%
Only if there is an issue or suspect one	33%	33%	33%

#### Working Group (WG) Comments:

Due diligence is at the heart of the lawyer's role in the real estate transaction. The survey remains a critical document and the only way anyone can verify the boundaries of a property. In order for clients to be properly protected in a transaction, the lawyer must have all the facts to be able to identify issues that need to be addressed or to properly advise the client of their interests, obligations and risks. The WG is pleased to see that the majority of the respondents seek information other than what can be revealed by a search of title. Clients can be protected, forewarned of issues and advised of a situation and that aspect of the lawyer's role cannot and should not be replaced.

2. When do you discuss:

	At the earliest opportunity (call, email or meeting)	In the retainer /introduction letter/email	In a specific communication with/sent to the client	At the signing/closing meeting
title insurance with the purchaser?		16%	16%	21%
financing with the purchaser?	18%	18%	8%	3%
the delivery of keys?				33%
home insurance with the client?	10%	18%	13%	9%
an estimate/ commitment of LTT and fees?	18%	11%	11%	6%
mortgage discharge details with the vendor?	14%	7%	13%	9%
the client's availability to sign the closing documents?	10%	7%	24%	
if the client is a non-resident?	22%	18%	8%	6%

**WG Comment:**

Clients are bombarded with information and new processes when they buy or sell. The WG considers that the earliest clients are informed of the matters noted above, the more they are comforted that their lawyer is looking out for their interests and their confidence in their lawyer grows. Many issues in a real estate transaction are fixable but time consuming and the more time available to work on the issue, the greater chance of a successful resolution and of happy clients at the scheduled closing.

3. How do you regularly meet your clients when you get an agreement of purchase and sale (pre-COVID-19)?

**Results:**

- a. Via phone – 53%
- b. In person – 24%

- c. Exchange emails – 12%
- d. Video conference 12%
- e. Other - 0%

**WG Comment:**

There is no wrong way to communicate with clients but it is extremely important to ensure early communication to confirm the retainer, manage expectations, get the information required and advise the clients of matters they need to attend to including the work the lawyer will or will not be doing. COVID has dramatically changed our practices and no one knows what the new normal will be, but it is important to ensure good communication with clients and to document all discussions.

4. When quoting or discussing fees/disbursements, do you use the Working Group's Fee Calculator ([www.lawyersworkinggroup.com](http://www.lawyersworkinggroup.com)):

**Results:**      Yes – 19%                      No – 81%

**WG Comment:**

The WG is disappointed that not many lawyers use the fee calculator. This calculator was conceived as a marketing tool for lawyers to demonstrate their value to the client. It compares the lawyer's fees to that of the recommended fee schedule. Although few lawyers follow the pricing proposed by the fee schedule, it provides clients with an appreciation of the value they are receiving. It also compares the lawyer's fees to the HST paid on the real estate's agent's commission, which is generally higher. Again, a matter clients should ponder when they look at the work provided by a lawyer compared to a real estate agent. Also, it is an easy way to provide the clients with an indication of the disbursements. Many clients do not appreciate the distinction between fees and disbursements and believe the lawyer pockets all the money required to close. This calculator sets out the disbursements and shows that those funds go to third parties. A better informed client is always more appreciative of the lawyer's work.

5. When acting for the vendor, what information do you ask about mortgages?

**Results:**

- a. approximate outstanding balance of mortgage – 22%
- b. copy of their last mortgage/line of credit statement – 20%
- c. if lender is a private lender or financial institution – 20%
- d. if they have a line of credit, which might be secured by the property – 14%

- e. the date of last payment and regular payments – 6%
- f. if mortgage is open or closed – 4%
- g. if there are any prepayment options – 2%
- h. the amount of any prepayment penalties – 2%
- i. their payment method (i.e. pre-authorized payment) – 2%

**WG Comment:**

There is much information that could be helpful to have when dealing with a vendor selling their property. The WG believes that the most efficient way to obtain the information and ensure its accuracy is to request that the client provide the lawyer with a copy of their latest mortgage statement. Lawyers would be well served to request this from their clients in the first communication. In discussions with financial institutions, they recommend that lawyers get the statement(s) in order that they have the full and correct information to send in their request for a discharge statement.

6. What do you discuss about home insurance?

**Results:**

- a. Lender's need for confirmation (binder)
  - i. With purchaser – 93%
  - ii. With vendor – 7%
- b. Possible problems to insure so need to set up as early as possible
  - i. With purchaser – 85%
  - ii. With vendor – 15%
- c. Vendor keep coverage in case of delayed closing
  - i. With purchaser – 31%
  - ii. With vendor – 69%

**WG Comments:**

The WG is pleased to see that these issues (binder; getting insurance; timing of cancellation) are reviewed with clients. Insurance has become much more of a concern than in the past and should be addressed with the clients as soon as possible to ensure a stress-free closing. Purchasers should secure insurance as soon as they have signed the APS, in case there are issues or requests by the insurer that need to be satisfied to obtain coverage. Vendors should ensure their property remains protected by insurance in the event that the closing is not completed on the contemplated date, and especially if there is a weekend/holiday before registrations can be submitted.

7. What do you discuss with a first-time home buyer?

**Results:**

- a. Qualifications of a first-time home buyer – 35% of respondents
- b. HST, process for payment and rebates – 18% of respondents
- c. LTT/MLTT and possible rebates – 12% of respondents
- d. Delayed closing rules/issues – 6% of respondents
- e. Realty taxes, adjustments & budgeting - 0% of respondents

**WG Comment:**

There are many issues to review with clients in a real estate transaction, but the WG was interested to see if these topics were regularly raised. First-time homebuyers typically know very little about the process and their obligations and the WG expected a higher percentage of respondents discussing these matters with clients as they relate to financial commitments clients are required to make and can be significant. Early discussions can help prepare clients for eventualities as they typically have little extra funds at the time of closing. Delayed closings are a major disruptive situation for clients and the WG expected more discussion to forewarn clients of the possibility and resulting consequences.

8. Do you have a specific fee for the review of the resale APS?

**Results:** Yes – 0% No – 29%

- a. Part of the total fee of acting on the transaction – 35%
- b. Only if the client does not retain me for the transaction – 18%
- c. I charge an additional fee to review builder agreements – 6%
- d. Only if the transaction does not proceed – 0%

**WG Comment:**

Fees are generally a delicate topic and one that is hard to get a good grasp of. Real estate lawyers generally do not charge the full value for their services. It is a very competitive market segment and one which is being commoditized at every turn. There are many pitfalls in a real estate transaction and often issues that are difficult for clients to grasp the full significance of. When lawyers are asked to review an agreement, which can be many pages long, and generally involves significant financial commitments, they should ensure they bring the proper attention to their task and provide the clients with a clear understanding of the depth of their review and any limitation to it. Fees are never considered when reviewing a claim or complaint to determine if a lawyer met their standard of practice and so be wary that charging no or low fees will not justify a lower standard.

9. What do you think would be a fair fee for the review of the resale APS?

**Results:**

	One billable hour	Time spent	Fixed fee
For resale APS	56%	44%	80%
For builder's APS	44%	56%	20%

**WG Comment:**

The WG concludes from the responses that lawyers believe there is value to the review of the APS for which the lawyer should be compensated. WG encourages all lawyers to consider their situation, the time they invest in reviews, the expertise they bring to the matter and the peace of mind they provide clients.

Part 2 – Follow up Transactional Review Matters

1. Do you regularly do a Teraview subsearch of the title to the property if acting for the seller?

**Results:**

- a. 63% of respondents indicated they did.
- b. 22% of respondents indicated, only if the buyer's lawyer does not send them a letter of requisition or a PIN printout with their letter of requisition.
- c. 9% indicated they never do a subsearch of seller's property.
- d. Some indicated doing so when the description looks odd or they are unfamiliar with the seller's property.

**WG Comment:**

The WG is encouraged that the majority of lawyers are confirming the status of their seller client's property. The WG encourages all lawyers to send a copy of the PIN printout to the other side. It costs nothing, is of great assistance to purchaser's lawyers, saves purchasers some expense and is a great way to maintain the collegiality of the real estate bar.

2. Do you regularly do a writ search on your seller client?

**Results:**

- a. 57% of respondents indicated they did.
- b. 25% of respondents indicated they did not.
- c. 16% of respondents indicated, only if the buyer's lawyer does not send them a letter of requisition.
- d. Some undertake the search if the seller has a common name.

**WG Comment:**

It is proactive to undertake the search to avoid problems for your own client come the closing date. The WG encourages all lawyers to send the writ search to the other side. Another pair of eyes could avoid the potential oversight of having searched the wrong name or of a misspelled name. It costs nothing, is of great assistance to seller's lawyers, saves sellers some expense and is a great way to maintain the collegiality of the real estate bar.

3. Do you, for every purchase transaction, discuss the client's plans for the property?

**Results:**

- a. 51% of respondents indicate they always do.
- b. 33% of respondents indicate they do if the client mentions something or the property/circumstances invite it.
- c. 12% of respondents do if drafting the APS.
- d. 4% of respondents never do.

**WG Comment:**

It is crucial to understand the client's plans for the property after closing. Their intentions may impact on searches that could be required or in cautioning them on possible issues. Additionally, title insurance typically only covers for the then existing use and sometimes only the use noted in the APS, which might be simply residential and not more specifically as a duplex, triplex or other, unless disclosed to the title insurer. Client often assume future uses are permitted and will later look to the lawyer for an explanation of why they were not warned of concerns at the time of the closing. Lawyers should inquire of the client's intended use of the property and make a note of it in their files.

4. When do you discuss the following issues with the purchaser?

**Results:**

Respondents indicated doing so:	At the earliest opportunity	At the signing/closing meeting	In the retainer/intro letter/email	In the client information questionnaire
Plans for the property	34%	24%	22%	20%
Title insurance	16%	22%	58%	4%
Home insurance	36%	2%	48%	14%
Confirm type of property	42%	4%	28%	26%

**WG Comment:**

The WG encourages timely and early communication with clients on all appropriate aspects of the transaction. It is comforting that most respondents do not wait until the signing/closing meeting to raise or discuss these issues. They can have an impact on the due diligence and work required of the lawyer and so should be addressed ASAP.

5. How do you review the dimensions of the property as set out in the APS?

**Results:**

- a. 57% of respondents match to dimensions on title (transfer, plan or other documents)
- b. 30% of respondents review and discuss with clients
- c. 30% of respondents review against the title searcher/conveyancer's notes
- d. 18% of respondents confirm with survey of the property
- e. 18% of respondents indicate that their title searcher has standing instructions to confirm the dimensions
- f. 16% of respondents indicated they do not review dimensions of the property
- g. 12% of respondents indicated doing so only if the client requests

**WG Comment:**

Purchasers are or will be concerned of the property dimensions at some time if not on closing. The WG believes it would be in the lawyer's interest to discuss boundaries/dimensions and inform the client that without an up-to-date survey, these cannot be confirmed. The discussion should be documented and preferably set out in the reporting letter, together with the information available on boundaries/dimensions (plans, survey, registered documents, etc.).

6. What do you discuss with the client regarding the chattels and fixtures when reviewing an agreement during a conditional period or drafting the APS?

**Results:**

- a. 81% of respondents discussed whether they are listed in APS
- b. 69% of respondents raised the issue of ownership or leasehold (contract terms)
- c. 48% of respondents suggest clients examine them on taking possession to ensure the same as seen before closing
- d. 48% of respondents discuss the status/condition of chattels/fixtures
- e. 40% of respondents discuss warranties on the chattels/fixtures

**WG Comment:**

Chattels and fixtures can be frustrating to deal with. They are usually of little value compared to the purchase price but will frustrate clients if they do not get what



they expected. The WG would like to see all items of concern to the clients clearly set out in the APS, as a chattel or fixtures, to avoid the client's disappointment and anguish later and the lawyer having to take on a battle for no or little financial compensation or having to advise the client that the lawyer cannot assist them. Unfortunately, once the APS is signed, which is usually when the lawyer gets to see it for the first time, it is too late to assist.

7. If the seller has a secured line of credit, do you instruct the client to no longer draw on it?

**Results:**

- a. 61% of respondents do
- b. 26% of respondents do not
- c. Some will do so once they have requested the discharge statement.

**WG Comment:**

Lawyers are well advised to discuss this matter with sellers. Clients will often not understand or remember that their line of credit is secured and will affect the discharge statement and payment from the closing proceeds. Financial institutions advise us that they will not close or restrict a line of credit upon the request by a lawyer even if as part of obtaining a discharge statement. It might be a good suggestion to have this as a standard caution to sellers in your information package.

8. Do you discuss home insurance with the client?

**Results:**

	Lender's need for confirmation (binder)	Possible problems to insure so set up early	Seller keeps coverage in case of delayed closing	Full replacement cost	Knob and tube wiring	Occupied or vacant for a time period
Acting for seller	13%	9%	94%	9%	4%	24%
Acting for purchaser	100%	51%	14%	77%	12%	18%

**WG Comment:**

Home insurance has become a greater concern for all and should be discussed with clients. Its availability, coverage and cost make it that it needs to be attended too

early to ensure it is in place for closing. As expected, the most crucial element for sellers is to ensure their insurance does not lapse prior to the closing. Sellers are well advised to only cancel a day or two after the closing date in anticipation of possible delayed closings. Purchasers are well advised to seek to place insurance on their new property ASAP after signing the APS. There are a variety of issues (e.g., knob and tube wiring; insulation; use; former use) which could delay or prevent the obtaining of insurance.

9. Do you regularly discuss the set up or close out of utilities personally by the client?

**Results:**

- a. 51% of respondents have it in the initial letter/client intake form/other.
- b. 41% of respondents indicated they always do.
- c. 8% of respondents indicated they do not.

**WG Comment:**

Utilities can be problematic for lawyers to deal with and it is best to advise the clients to deal with themselves. For privacy reasons, utility companies will be wary of dealing with lawyers, and as they often have payment or services options which the clients should choosing. Whatever avenue the lawyer chooses, they should raise the matter with their clients early to ensure everyone is aware of who is responsible for what.

10. Do you regularly ask if the client has any specific concerns/issues about the property/transaction?

**Results:**

- a. 76% of respondents indicated they did
- b. 20% of respondents indicated they did not

**WG Comment:**

The WG notes that the second most common reason LAWPRO sees claims from lawyers is for insufficient information. This is caused by the lawyer not asking sufficient questions of the clients to fully understand the transactions and how to best serve and protect the client or not undertaking necessary due diligence due to the lack of information about the transaction. To best serve the clients and to reduce the risk of claims, lawyers are well advised to canvass with clients the details of the transaction and the client's intentions for the property. The lack of searches undertaken because of the availability of title insurance may lead to claims if the client would have liked to have

the information that a search would have revealed. Of course, clients do not know what searches are available and so a prudent lawyer could discuss the possible searches not being conducted, what they could reveal and document the client's acknowledgment and any instructions.

11. Do you look for or ask if the property has a pool and satisfies fencing requirements?

**Results:**

- a. 67% of respondents indicated they do not
- b. 25% of respondents indicated they do
- c. Some of the respondents indicated they do if mentioned in the listing, APS or by the client or there is some other information which discloses a pool.

**WG Comment:**

Pools have special regulations which may require some due diligence or at least making the client aware of the possible issues that they should be mindful of, especially if they have never owned a pool before.

12. Do you regularly confirm the type of property being dealt with (e.g. single family, duplex, rental, mixed use, etc.)?

**Results:**

- a. 92% of respondents indicated that they do
- b. 8% of respondents indicated that they do not

**WG Comment:**

The type of property will determine the due diligence required for the transaction. It is critical that the lawyer be aware of the type of property being dealt with and undertake the relevant due diligence to best serve and protect the client.

13. If the property contains rental units:

**Results:**

- a. 77% of respondents indicated that they specifically confirm they are not providing any opinion or verification about the legality of the rents unless the client specifically retains them for such
- b. 21% of respondents raise the issues but do not provide an opinion
- c. None of the respondents provide any opinion that the rents are legal

**WG Comment:**

Compliance with rental regulation is a complex matter and not one that lawyers should undertake in a matter-of-fact way. It requires a good knowledge of the property, its past use and practices and a review of leases, notices and past conduct of the landlord. The WG recommends lawyers have a specific exclusion in their documentation about rental matters.

14. Do you review with clients:

**Results:**

	Always	Never	Sometimes
The timing and purpose of the requisition period	18%	18%	65%
Any issues that are subject of a requisition before making any requisition	14%	16%	71%
Deadline to comply with any conditions	57%	4%	39%
Notification of obligation to comply with any condition	53%	4%	43%
Who must do what to comply with any condition	53%	6%	41%
Other obligations or deliveries the client has undertaken	53%	4%	43%

**WG Comment:**

The WG is pleased to see that a number of lawyers consult with or advise clients about these critical matters. Clients are often not aware of the required next step or of the consequences of missing a deadline. It is important to keep clients informed and involved in the transaction. Clients will have a better understanding of the role of the lawyer, the value a lawyer brings to the transaction – this helps increase their trust in the lawyer and their expertise.

15. When do you most typically get to review the APS?

**Results:**

- a. Respondents indicated they do when the APS is sent in, already signed between 50-98% of the time
- b. Respondents indicated they do prior to it being signed under 10% of the time
- c. Respondents indicated they do during the conditional period for the lawyer's review under 10% of the time
- d. Respondents indicate they do during any conditional period less than 10% of the time

**WG Comment:**

The WG recognizes that most lawyers see the APS for the first time after it has been fully negotiated and signed by the clients without their involvement. Lawyers can then only advise clients and complete the transaction based on the terms of the APS. Seeing the APS during the conditional period offers a better chance to actively protect the client, but only to the extent of the provisions of the conditions. If conditional for only financing, a lawyer cannot offer much advise to modify any other terms. The lawyer is in the best position to offer their expertise when clients consult them before signing.

16. If the clients will not be present to sign the closing documents, what due diligence do you undertake?

**Results:**

- a. 43% of respondents require, before the meeting, front and back copies of any identification document being advanced
- b. 24% of respondents require showing the identification documentation on screen during the video meeting
- c. 10% of respondents keep detailed notes of the video meeting in the file
- d. 4% of respondents take further steps to satisfy themselves if anything raises concerns
- e. None of the respondents check with the Ministry the validity of an Ontario driver's license

**WG Comment:**

The Law Society of Ontario has provided guidance on how to do remote signatures and client identification and verification. It is crucial to follow those recommendations and to keep good notes of all matters during the course of the transaction. Lawyers will see hundreds of clients throughout their career and be involved in thousands of files and transactions, and unless they have notes to assist their memory of what took place, they may have difficulty remembering the details of the transactions or be unable to defend themselves against any allegations.