

# Steer clear of real estate claims by asking these five questions on every deal



The real estate lawyer's job is more than just conveying title, and not every matter will be straightforward. Communication errors and inadequate investigation are the biggest causes of real estate claims at LAWPRO, respectively 41 per cent and 26 per cent of claims reported between 2001 and 2011. Busy, high-volume practices often lead to situations where the lawyer is not taking the time to communicate with the clients properly. Lawyers need to take the time to speak to clients to ensure they've gathered all the relevant information.

Here are five questions lawyers should be asking their clients or themselves on a real estate matter:



Is there a spousal interest in the property?

Although only one person may be registered on title, there could be a spousal interest in a matrimonial home. LAWPRO has seen a number of claims where the lawyer did not get the consent of the spouse to change the

ownership status or encumber the property with a mortgage. Take the time to discuss the client's marital status to determine whether the consent of a spouse – or any other person with an unregistered interest

in the property – needs to be obtained, or whether the spouse needs to be sent for independent legal advice (depending on the nature of the transaction).



Even with title insurance, are there more inquiries I should be making?

Even if a title insurer waives certain searches or a survey requirement, lawyers still need to ask clients if they want the searches or survey done, and explain what the consequences could be of not doing so. The title insurance policy may rectify a problem to some extent or indemnify the client, but going through the process of dealing with the problem may still

not be a situation the client welcomes. Think of a boundary dispute which leads to a hostile relationship with the neighbours, a deck needing to be torn down without the possibility of replacement or grow-op damage that could be harmful to the family's health: All things that searches might have uncovered depending on the circumstances.

The lawyer should also look beyond the searches that are required by the title insurer and apply his or her own knowledge of the particulars of the transaction to determine which searches ought to be considered. For example, is it a property on a ravine that may be under the jurisdiction of a Conservation Authority?



What is the future use of the property?

Often the lawyer fails to ask clients about possible future uses of the property that the client might have in mind, and as a result fails to get a title insurance endorsement that would protect the clients (e.g., they planned

to build a pool, but later discovered an easement prevents it). In the alternative, the lawyer must personally investigate the feasibility of the plans (and presumably bill accordingly) or document with the clients

that they did not wish to undertake the expense of investigating their options at this time and therefore no assurances are being provided beyond the existing legal state of the property.



Is the person obtaining the mortgage actually the person who will be living in the house?

Shelter fraud, unlike other mortgage fraud, involves real people who want real places to live. In this scenario, people who don't qualify for a mortgage enlist the help of a "friend" or family member. For a payment, the "friend" becomes the borrower and takes title to the property and presents himself to the lawyer as the purchaser of the home. In effect he's selling his good credit. Of course he has no intention of living there, and the person(s) who hired him will move in and promise to make the mortgage payments.

If the person(s) behind the scheme default on the mortgage, the "friend" is on the hook, pursued by the bank and facing financial ruin. The friend may sue the lawyer claiming that he was not aware of what he was getting himself into, and that the lawyer knew (or should have known) that he was buying on behalf of others and should have made him aware of the consequences of defaulting on the mortgage.

While there is only so much lawyers can do to ensure the borrower is in fact the person planning to live in the house, a good intake process can ensure that the client's answers to relevant questions are documented. After all, most real estate lawyers will also wish to know if there will be a tenant in the house instead of the owner, as residential rental investment properties bring many other legal issues of their own.



What information should I pass on to the lender?

Lawyers need to remember that lending institutions are also their clients in many real estate transactions. We've seen claims in which lawyers have failed to communicate material information to the lender client so the lender can make an informed decision on whether to advance mortgage funds.

Throughout the course of the transaction, lawyers should always consider whether

information received from any party, a title search, or other due diligence may be considered information material to the lender's decision to advance funds under the mortgage or is expressly requested in the lender's instructions. This includes, for example, information that may suggest that the property is being purchased at an inflated price. As well, information that suggests that the purchaser is misrepresenting the true

circumstances of the purchase (as in the shelter fraud described above) should be reported to the lender before the lawyer proceeds to close the transaction and advance funds under the mortgage. In such circumstances lawyers must be careful to fulfill their duties to each client, as required by the *Rules of Professional Conduct*, and in particular Rules 2.02(5) and 2.04(6.1). ■

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