

## **The Law Society of Upper Canada *Residential Real Estate Transactions Practice Guidelines*: A systemized approach to residential real estate<sup>1</sup>**

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### **Introduction**

It has been nine years since the Law Society of Upper Canada published its *Residential Real Estate Transactions Practice Guidelines* (the “Guidelines”).<sup>2</sup> The Guidelines were initially drafted by the Working Group on Lawyers and Real Estate,<sup>3</sup> and then adopted by the Law Society.

The real estate bar’s approach to the Guidelines has ranged from strict adherence to blessed ignorance, in our opinion. The diversity of response is reflected in LAWPRO’s E&O claims experience.

In the nine years since the Guidelines were published, there have been approximately 5600 claims in the real estate area of practice reported to LAWPRO. Time after time LAWPRO sees claims that could have been avoided if lawyers had incorporated in their practices the measures described in the Guidelines. These are often simple things, like:

- Finding out how many units are in the property (e.g., parking and locker units for a condominium or a basement apartment in a house), whether it is on the waterfront or what the client intends to do with it after closing;
- Asking whether the client has adverse knowledge about the property that needs to be disclosed to the title insurer;
- Advising the client about documents on title like easements, restrictive covenants and subdivision agreements; or
- Watching values on title for past transactions, to catch a potential value fraud.

So, why don’t more lawyers follow the practices set out in the Guidelines? Were the Guidelines dreamed up by the proverbial “Counsel of Perfection” who couldn’t possibly understand or appreciate the everyday reality of

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<sup>1</sup> This paper was originally published by the Ontario Bar Association as part of its February 4, 2016 Institute program, [Quirky Conveyancing – Tools for the Modern Real Estate Lawyer](#).

<sup>2</sup> The Guidelines are available at: <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147491216>

<sup>3</sup> At the time the Working Group was comprised of representatives from the County and District Law Presidents Association, the Ontario Bar Association and the Ontario Real Estate Lawyers Association. Visit the Working Group’s website at: <http://www.lawyersworkinggroup.com/>

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life in the trenches? The answer to these questions lies not so much within the wording and requirements of the Guidelines, but within the system or process used in the delivery of the lawyer's service.

### **Achieving both client satisfaction and a sustainable income**

From a long term perspective, in order to run any successful service business there must be a high level of customer satisfaction. This translates into repeat business and a steady stream of new clients from referrals. In the practice of residential real estate, there clearly appears to be an inverse relationship between the level of client satisfaction and the number of complaints and claims put forward by clients. Simply put, as you increase client satisfaction you lower the incidence of claims and complaints.

At the same time that the business is generating a high level of client satisfaction, it must also generate a return on the time and capital invested. On the surface, there also (unfortunately) appears to be an inverse relationship between client satisfaction and profitability, especially if the only means available for maintaining or increasing client satisfaction is increasing the time required to be spent on each file. This service/profitability paradox is further strained by the argument that the demand for a lawyer's real estate services has a high degree of price elasticity (i.e., demand is very price sensitive).

How do we manage the paradox, develop a large clientele, run a profitable business and stay within the boundaries of the Guidelines? The simple answer is to develop a highly systemized approach to the delivery of the service: an approach which leverages many technology tools, including those designed to enhance the client relationship. The trick to this solution is that effort, thought and resources will be required to design, build and implement a systemized approach. You cannot successfully build a practice on the basis of multiple clerk/legal assistant-based systems. (In other words, for a firm real estate practice to thrive you can't have each firm member – lawyer or clerk - adopting an independent approach to handling transactions.) Moreover as with any business, the performance of your process needs to be closely monitored, updated and adjusted on a regular and frequent basis.

### **Where to start**

The initial part of this process is to identify the basic "DNA" building blocks of your system. We believe the following items are essential components of any systemized approach:

1. determine the scope of your service by identifying real estate transactions that you are not capable of or interested in handling, given the limitations of your proposed system;
2. identify transactional (i.e. resale single unit freehold vs. resale condominium) streams based on deal types and tweak your process to accommodate each transactional stream;
3. identify and implement software productivity/connectivity/client management tools that are flexible and adaptable to meet your system design;
4. identify and adopt ways of importing, exporting and storing as much deal-related information in a digital fashion as possible, for reasons of efficiency, security and good risk management;
5. identify and move forward with one or more title insurance provider(s) that is/are willing and capable of being an integral part of your systemized approach;

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6. identify client demographics and expectations and ensure that your systemized approach meets these expectations;
7. develop an easy to understand pricing matrix for fees and disbursements, with transparency as a key value;
8. ensure that your systematized approach implements appropriate measures for information security, covering both cyber threats and traditional risks affecting office premises and paper files (if you have any paper files in the new, system-oriented practice).

Once your building blocks are in place it is also essential to set out basic operational rules that combine and promote efficiency, proper practice and your overall business philosophy. Consider the following:

- a) “No clerk or paralegal is an island”--The process is a firm-wide process to be adhered to by all personnel. Remember that failure to supervise staff is a significant cause of real estate claims. Isn't supervision easier if all staff (including associate lawyers) must be on the same system, using the same document precedents, and you have an electronic view of all the work and the progress measured by consistent milestones?
- b) “The Guidelines are our friend”: You should consider the Guidelines as a roadmap to increased client satisfaction created for lawyers by a knowledgeable and experienced “focus group” of your peers. Design your systemized approach in a manner that incorporates the components identified in the Guidelines.
- c) “Smash the service/profitability wheel” by utilizing technology to enhance the client experience.
- d) “Don't get caught up in a race to the bottom” when it comes to pricing your services. The truth is that there is no absolute price elasticity of demand for legal services. Your flexible, attractive pricing matrix should reflect transactional streams and client expectations. Brand yourself and your practice on value, quality and predictability, not low pricing.
- e) Continually adapt and improve your service offerings to meet changing client expectations. In other words, embrace the wheel of continuous quality improvement.

As we all know, in every major undertaking, the devil is always in the details. Let's examine some of the details that need to be addressed in implementing a systematized approach. We can start with some of the tools available that we know the best and that have been specifically designed to meet the objectives described above:

1. LAWPRO's TitlePLUS<sup>®</sup> title insurance program; and
2. LawyerDoneDeal's RealtiWeb<sup>®</sup> system.

There are also other tools in the marketplace that may assist in developing your system; pick what works best for you.

### **Guidelines as “friend”**

We can focus on some of the Guideline's titles or headings for our discussion because they also identify the key components underlying what's involved in handling a real estate deal, namely:

Client/Lawyer Relationship  
Due Diligence  
Proper Filing & Record-keeping  
Document Preparation & Registration  
Financial Issues, and  
Extraordinary Matters.

#### ***(a) Client/Lawyer Relationship***

One of the fundamental objectives in any successful service business is developing and implementing a framework for a successful client/provider (i.e., lawyer) relationship. This framework is mandatory in order to escape the service/profitability paradox and must be comprehensive, managing the relationship from retainer to reporting letter.

The first component of the framework is a well-crafted retainer letter that can dynamically adjust between transaction streams. The letter should be accompanied with supporting material such as a sample TitlePLUS policy and the “Working with a Lawyer when you buy a home” booklet.<sup>4</sup> These materials will establish the scope of the retainer, set out the details on how the relationship will work, shape the client's expectations and market your abilities as a premier service provider.

Do not assume that the transactions details, circumstances and requirements are static: these will all evolve as you proceed through the deal and your systemized approach must include a simple process for ongoing communications with the client to adjust your retainer and keep them informed. As part of this approach, examine options for creating client connectivity through electronic means such as email or through client information/service pages on your own website. (As an aside, the better documented or “captured” your client communications are, the more you are practising in a defensive, risk-sensitive manner.)

When meeting with your client, utilize the tools provided and/or made available to you in RealtiWeb or through the TitlePLUS process. For instance, in a purchase transaction, review the TitlePLUS Acknowledgment and Direction with your clients in a measured fashion. This document will help ensure that your client understands the exceptions and other special aspects of the policy coverage, as well as confirming other key instructions, such as how title is to be held. (It even confirms that the client received a sample TitlePLUS policy and the “Working With a Lawyer” booklet, as described above).

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<sup>4</sup> The booklet is a joint publication of the Law Society of Upper Canada and the Ontario Bar Association. It is available at: [http://www.oba.org/CBAMediaLibrary/cba\\_on/pdf/workingWithLawyerBrochure.pdf](http://www.oba.org/CBAMediaLibrary/cba_on/pdf/workingWithLawyerBrochure.pdf)

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Consider what role, if any, that electronic signatures will have in the execution of closing documentation by your clients. In many instances, the use of electronic signatures may enhance the client experience and improve overall reliability and non-repudiation of the signature process.

Complete the client/lawyer relationship framework with a comprehensive and meaningful report to the client. There must be continuity between retainer and final report. Specifically, the report should continue with and effectively wrap up some of the concepts initially discussed/raised in the retainer letter and should also reflect any adjustments and qualifications that arose throughout the process of handling the transaction. A “one size fits all” report will not achieve your system objectives, so it is important to utilize RealtiWeb system functionality to dynamically shape the reporting letter contents.

### ***(b) Due Diligence***

Thoroughly understand the due diligence required for each transaction stream to ensure that the TitlePLUS requirements and any unusual client needs (identified during the intake process) will be fulfilled, but that overall no unnecessary due diligence is carried out.

Utilize programming logic within RealtiWeb that provides direct connectivity to the title search data provided through Teraview<sup>®</sup>. This will allow you to, in turn, create properly crafted requisitions, customize reporting letters and maintain a high level of understanding and control over title policy exceptions without getting bogged down in the deal.

Once the title search data is automatically imported into the RealtiWeb system, you can address issues from every angle by simply indicating the type(s) of actions you wish to undertake. This way you can, by mouse click, requisition, adjust, undertake and report on any particular issue encountered in the deal. This reduces the risk that you will have to move outside the “system” very often. The system is flexible enough to manage any problem.

Moreover, by clicking on any specific item or matter you also have access to the TitlePLUS underwriting requirements related to that item. This ensures that you do not undertake unnecessary work in connection with any particular title or off-title matter. In addition, for purchases, you can follow the TitlePLUS requirements set out in its “Ordering a TitlePLUS Residential Purchase Policy – Ontario” instruction sheet for the necessary steps to take in the deal. Remember, the TitlePLUS policy, with its legal service coverage, stands behind all your work on the deal;

You will know what your client’s policy will look like before they attend to sign documents because you will have requested pre-approval for TitlePLUS coverage. Having a title insurance policy pre-approved (or coverage “bound”) before closing is a key risk management step for lawyers.

The proprietary fraud prevention checks embedded in the TitlePLUS automated underwriting system will also help ensure that you and your clients steer clear of any problematic situations. The TitlePLUS system also screens as best we can for former grow house properties by maintaining our own interactive database, assembled from public sources. If a manual review is triggered (as opposed to automated underwriting approval being granted), an experienced underwriter will walk you through any challenging issues and give you instructions.

### ***(c) Document Preparation & Registration***

Set the groundwork appropriately with the lawyer on the other side by using the RealtiWeb form of opening letter, so necessary electronic registration issues are addressed at the outset.

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As part of enhancing the client experience it is also important to look at ways you can provide clients with advance access to the documentation they will be signing when they meet with you prior to closing. Although you can't guarantee that all clients will review this documentation, it can't hurt to give them the opportunity to do so and it certainly helps to block any later arguments that the client was forced to sign documents without a true opportunity for review.

Close the purchase deal and issue your TitlePLUS policy. The Policy Issuance Checklist once again ensures that you don't miss any necessary steps.

How many times have you read a LAWPRO communication that analyses the root cause of a real estate claim (or even some other type of claim) and concludes that one or more of the following were key failures giving rise to the claim:

- The lawyer did not send a retainer letter (or it did not cover the relevant topic);
- The lawyer did not get signed instructions from the client, or otherwise document critical advice at closing; or
- The lawyer did not confirm relevant information in a reporting letter?

These may appear to be time-consuming steps in a transaction, but if you can create the relevant documentation at the push of a button, completely customized for your client and the type of deal and property, we are back to the point we made at the outset: namely, the need for a systemized approach.

## **Conclusion**

Perhaps you react as follows: "legal practice isn't all about claims risk; client satisfaction should be top of mind". But doesn't good communication play a huge role in the client experience (as well as avoiding claims, given that poor communication is the number one cause of loss in the LAWPRO E&O claims portfolio)? Pretend for a moment that you are the client. A lawyer who:

- ✓ sends you relevant materials,
- ✓ provides clear and comprehensive correspondence before and after your deal, and
- ✓ takes the time to sit down with you to go through an information piece like the TitlePLUS Acknowledgment and Direction,

is a poster child for great communication and client satisfaction.

So, (a) take some time to read the Guidelines, (b) contact the TitlePLUS Customer Service Centre at LAWPRO to complete a Subscription Agreement or arrange updated training for ordering TitlePLUS insurance,<sup>5</sup> and (c) meet with LawyerDoneDeal Corp. for a RealtiWeb demo.<sup>6</sup> In the alternative, source your own suppliers to support you in development of your preferred systematized approach. With any luck you'll start to see how to achieve an optimal (and claims-resistant) standard of residential real estate practice, that also creates engaged and satisfied clients.

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<sup>5</sup> Visit [http://www.titleplus.ca/general\\_information\\_for\\_lawyers.html](http://www.titleplus.ca/general_information_for_lawyers.html) for information on becoming a TitlePLUS subscriber or arranging a visit from a TitlePLUS Consultant. You may also wish to visit: <https://titleplus.lawyerdonedeal.com/info.html>

<sup>6</sup> Visit <http://www.lawyerdonedeal.com/legalprofessionals.asp> for information on RealtiWeb.

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