

# New practice guidelines

## guide practitioners in title insurance era

*Changes in real estate practice over the past decade have been many: The introduction and now widespread use of title insurance, advent of electronic registration and related Land Titles system changes – all pointed to a need to update practice standards for residential real estate practice.*

The CDLPA-OBA-ORELA group known as the Working Group on Lawyers and Real Estate first tackled this issue more than two years ago. The Working Group created a set of principles and discussion papers that focused on the value-added that a lawyer who is engaged with the clients and their transactions brings to the table.

These principles became a starting point for the subsequent Law Society Working Group on Real Estate issues: In January 2007 the Law Society adopted a new set of *Residential Real Estate Transactions Practice Guidelines*.

The new Guidelines are not only the first comprehensive updating of practice standards in a decade, but also are a tool in sync with the times, says Ray Leclair, co-chair of the CDLPA-OBA-ORELA Working Group and a member of the Law Society Working Group.

“For a lawyer committed to using title insurance in his or her practice in a positive, client-centred way, these Guidelines are an indispensable tool,” he says.

“For the real estate bar, this is an issue of our long-term survival. To avoid being shuffled aside by non-legal competitors who want the public to believe they can close a transaction without the benefit of a lawyer, we need consumers to recognize how important the lawyer is. This means we in turn need to do a much better job of projecting our value to our clients – to demonstrate the protections and services that a lawyer as quarterback brings to the table. These guidelines – which require us to interact and engage with the client in many ways – do just that.

“For example, they guide us on how to do intake of our client’s needs and plans for the property; they guide us in how to advise the client in the sign-up meeting before closing; and they guide us in the use of title insurance in the transaction,” says Leclair.

Among the principal ways in which the Practice Guidelines provide guidance in the conduct of a title-insured transaction are the following:

- The lawyer is encouraged to obtain necessary and relevant information from the client at the outset of the transaction. This information helps the lawyer meet the due diligence requirements of title insurers and ensures that appropriate endorsements are obtained, if needed. For example, special searches may be required by the title insurer if the property has private services and a rural property endorsement may then be available from the title insurer.
- The lawyer is encouraged to communicate with the client at the outset of the transaction about the future use of the property. This allows the lawyer to determine if a special endorsement should be obtained for a proposed future use involving a change of the property. It also allows the lawyer to consider whether to recommend title insurance at all, or to advise the client to obtain an up-to-date survey and fuller inspections/searches to determine more conclusively if the proposed use can be implemented.
- The lawyer is reminded to review with the client what searches or inquiries the lawyer will not be undertaking (if any) due to the choice of title insurance and the possible impact of those searches.

For example, in many cases a building department search will not be undertaken if title insurance is being purchased. If the property includes a basement apartment, some clients may be more interested in knowing that the apartment is definitely legal and can be rented out rather than knowing that they are entitled to make a claim under an insurance policy for a loss of property value if the apartment must be removed. Also,

there are possible adverse consequences for the client if the lawyer allows a requisition date to pass without making a given search, a problem comes to light before closing that would have been revealed by the relevant search and the title insurer will not insure over the problem. The lawyer needs to bear that issue in mind, along with any published policies of title insurers on the issue, when deciding not to make a given search.

- The impact of the knowledge exclusion in a title insurance policy is highlighted, so that the lawyer remembers to determine if the client has any adverse knowledge that must be disclosed to the title insurer.
- The lawyer is reminded to review with the client the coverage that will be available under the client's title insurance policy before closing, the lawyer having him/herself reviewed the exclusions and exemptions in the draft title insurance policy.

The Guidelines provide an overall list of items for the lawyer to consider when reviewing the draft policy or binder/commitment.

- The lawyer is reminded to issue the policy as soon as possible after closing, in case the client needs to put in a claim in the early days of owning the property, and to compare the issued policy to the draft.

Most title insurance policies generally available in Ontario do not include legal service coverage (although the TitlePLUS® policy for purchases and/or mortgages does). All of the above are possible areas of liability related to the use of title insurance for the unthinking lawyer. The Practice Guidelines are a resource and a safety net for lawyers wanting to maximize their clients' protection through title insurance while managing their own risk exposure along the way.

# Residential Real Estate Practice Guidelines in action

The *Residential Real Estate Transactions Practice Guidelines* were adopted by the Law Society in January of this year after a province-wide consultation with the profession. They were developed with the assistance of the real estate bar.

The guidelines have a dual purpose: They clarify for lawyers the steps that they should or must take in the usual circumstances when handling residential real estate transactions; and they assist in educating the public on the role and value of a lawyer in a residential real estate transaction.

## WHAT IS THE EFFECT OF THE *GUIDELINES*?

Different terminology is used in the *Guidelines* to explain different concepts. While some provisions are mandatory, others are not.

### MANDATORY PROVISIONS

Some of the *Guidelines* are expressed using the word "shall." These provisions incorporate obligations contained in the Law Society *By-Laws* or *Rules of Professional Conduct* and are mandatory. If a lawyer breaches one of these provisions, the lawyer could be disciplined.

### RECOMMENDED PRACTICES AND PROCEDURES

Some of the *Guidelines* are expressed using the words "should" or "should consider." These provisions contain recommended

practices and procedures that lawyers should follow in the usual circumstances. It is recognized that in some situations, the lawyer might have to deviate because of the circumstances of the individual transaction. If a lawyer fails to follow one of these recommended practices or procedures in a situation where he or she should have done so, the Law Society may take this into account when performing its regulatory function. For example, the Law Society might take this into account if determining whether a lawyer had failed to serve a client competently and breached the rule on competency – Rule 2 of the *Rules of Professional Conduct*.

### OPTIONAL PROVISIONS

Finally some of the *Guidelines* are expressed using the words "may" or "may consider." These provisions are discretionary on the part of the lawyer. The lawyer may or may not follow them depending upon the circumstances of the transaction.

To access the new *Practice Guidelines*, go to <http://mrc.lsuc.on.ca/jsp/residentialRealEstate>.

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*Caterina Galati is senior competence counsel with the Law Society.*