Archive of Questions

Mentoring Initiative

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The questions are posted by the Working Group on Lawyers and Real Estate for the practicing Bar to respond to. It is hoped that the survey results will assist lawyers appreciate trends and be a mentoring tool for fellow practitioners. The Working Group (WG) then provides a comment on the responses to elaborate on the responses received or to raise other aspects.

Question 1 – Tax Certificate

Do you obtain a tax certificate for every residential purchase resale transaction? (Yes / No)

- if yes, why? _____
- If not, why not?
    a) Too costly
    b) not required by title insurance
    c) municipality does not provide timely certificates
    d) municipality does not provide a convenient method to order the certificate
    e) I obtain verbal tax information from the municipality
    f) The vendor's lawyer provides a copy of the most recent tax bill for the property
    g) Other: _____

Results:

56% of respondents obtain a tax certificate for every residential purchase resale transactions.

- Many respondents noted the high cost and disruption in post-closing adjustments when the wrong information is obtained to close the deal and prefer to get it right the first time, even if title insurance could provide a reimbursement.
- Most respondents who do not order a certificate do so because their title insurer does not require it.

Working Group (WG) comment:

Obtaining the tax certificate, in addition to other benefits, eliminates the reputational risk to the lawyer's practice as the client perceives or is told by others that the lawyer did something wrong when the adjustments are not accurate.

Question 2 – Abutting Land Search

Do you obtain an abutting land search for every parcel where you act for the purchaser?

a) Yes, to confirm compliance with the Planning Act (Note: unless the property is a full lot on a registered plan of subdivision or another Planning Act exemption applies);
b) Yes, in all case to confirm there is no boundary dispute/discrepancy (if not a lot on a plan of subdivision or a part/block on a reference plan)?
c) Yes, in all cases where there is a right of way or easement to confirm it is registered on both the dominant and the servient tenement?

Results:

65% of the respondents conduct an abutting land search for every parcel where they act for the purchaser. They indicated they do so in order to confirm compliance with the Planning Act, confirm there is no boundary dispute/discrepancy and confirm any easements are registered on both the servient and dominant parcels.

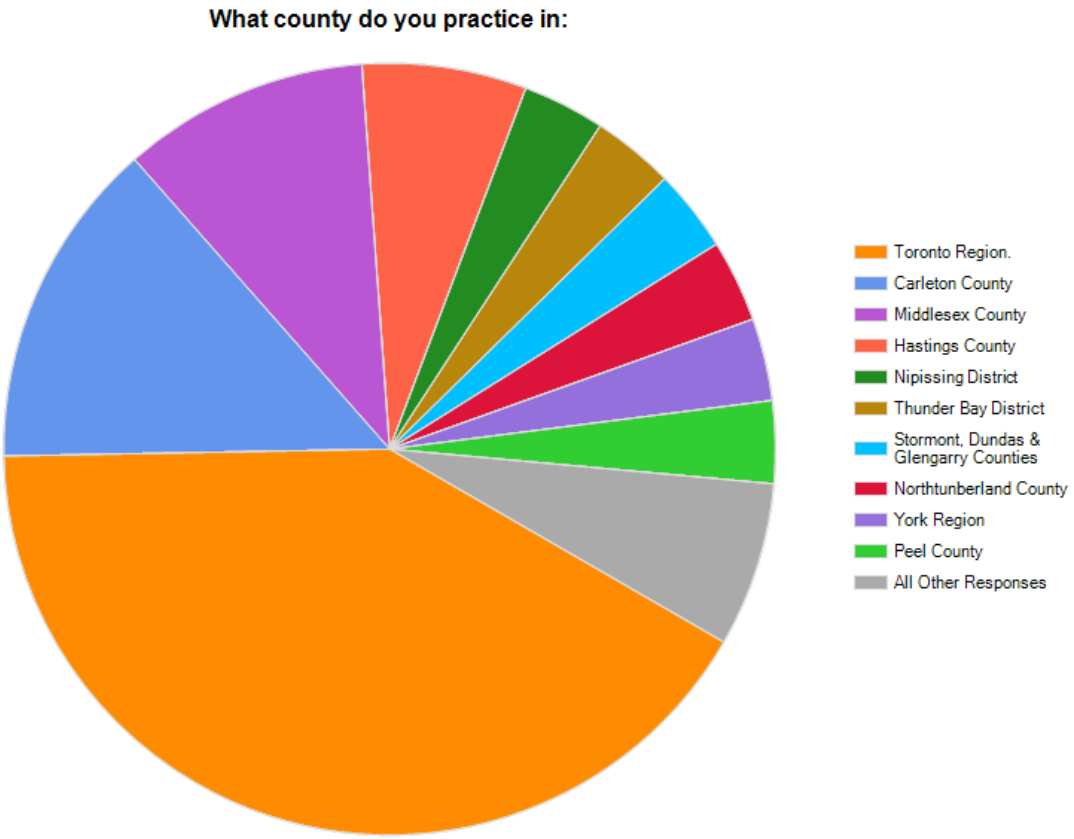
Question 3 – Planning Act Statements

Do you always sign the Planning Act Statements? Yes or No?

Results:
65% of respondents indicated that they always sign the Planning Act Statements.

WG comment:
Lawyers should remember that:
- the standard OREA Agreement of Purchase and Sale provides in paragraph 16: "If required by the Buyer, Seller covenants that the Transfer/Deed of Land to be delivered on completion shall contain the statements contemplated by Section 50(22) of the Planning Act, R.S.O. 1990."[1] - Where a deed or transfer contains (the statements) any contravention of (section 50) of The Planning Act does not and shall be deemed never to have had the effect of preventing the conveyance of any interest in the land.[2]
The Committee recommends that all lawyers add a request in their standard letter of requisition and sign the Planning Act Statements when the opportunity is presented.

For Q1, Q2 & Q3 respondents practiced in :



[1] OREA Form 100, Revised 2013.
[2] Planning Act, R.S.O. 1990, c. P.13, s. 50 (22).

Question 4 – Building Compliance Issues

Participants were asked about their building compliance issues (BCI) searching habits and responded as follows:

a. Do you verify the status of:
   i. Outstanding work orders - 59.3% sometimes & 22.2% always
   ii. Open building permits - 44.4% sometimes & 29.6% always
   iii. Lack of building permits - 60.0% sometimes & 32.0% never
b. If no BCI searches, did they have clients sign a waiver - 73.9% did not
c. 54.5% indicated they had a standard waiver for clients to sign, which was prepared by:
   i. Them - 50.0%
   ii. The Conveyancer - 35.7%
   iii. TitlePLUS - 28.6%
   iv. Stewart Title - 28.6%
   v. Realtiweb - 7.1%
   vi. Chicago Title - 7.1%
d. Those who did not have a waiver signed, indicated they discussed with the client, title insurance coverage, the lack of any search for BCI or the possible risks if there are any outstanding BCI.
e. Most participants indicated discussing BCI with the clients at the signing meeting or on their initial contact.
f. Most participants had no mention of BCI in their retainer letter or reporting letter.
g. Most participants had BCI on their file checklist with a good number of those who indicated no, that it was a good idea and they would add it.
h. Most participants obtained their BCI information from a report from the municipality with the cost of the reports ranging from $50-$150 and as high as $600.

WG comment:
Building Compliance Issues (BCI) are significant issues for the clients to have to deal with if there are problems discovered after closing. Clients will certainly be told that their lawyer should have discovered these or warned them of these. This is especially problematic if they could have been discovered by doing the searches. Therefore, the Committee emphasises the need to have a full discussion of BCI with clients and to document those discussions, especially if clients are not asked to sign a waiver. The discussion should preferably occur in the retainer letter or initial contact or as soon as practical in the transaction. Clients can be advised of title insurance coverage but as any insurance is not always the best or a full answer, clients should be aware of the risks and provided the option of having the searches completed to obtain any information which might be available before closing.

Question 5 – Title Insurance Opinion

When you obtain title insurance, do you

a) also give the purchaser a title opinion in your reporting letter - over 90% did not
b) amend the lender's standard report to remove the title opinion option - all did or selected the title insurance paragraph provided.

WG comment:
The Committee is pleased to see that the vast majority of participants do not provide a title opinion in addition to the title insurance policy. Title insurance is a substitute for the opinion and providing the opinion without undertaking all the due diligence which would otherwise be done if title insurance was not used, exposes the lawyer to a claim for coverage which a standard title opinion would provide.

Question 6 - Requisition Letter

1. Do you regularly send out a requisition letter?
   Yes / No / If not, why not?

   Results
   97% of respondents indicated that they regularly send a requisition letter.

   WG comment:
   It is good practice to send a requisition letter. Requisitions are not merely a means of communication between two parties but a process by which matters requiring attention, such as defects in title, are investigated and properly dealt with in a timely fashion in order to fulfil the requirements of a purchase contract to the parties' satisfaction. The letter is simply the ultimate act of the requisition process.

2. Do you send out a requisition letter on a builder deal? (Yes/No)

   Results
   62% of respondents indicated they sent a requisition letter on builder deals.

   WG comment:
   This is again a good practice to send a requisition letter. In the situation where the builder has provided a "Title Memorandum or Title Advice Statement" which fully addresses all of the issues which would have been addressed in a requisition letter, then the need is greatly reduced and perhaps negated.

3. Which describes the most common amount of time between the requisition date (R/D) and you receiving the agreement of purchase and sale ("APS")?
   a) APS received more than 2 weeks before R/D
   b) APS received 1-2 weeks prior to R/D
   c) APS received less than a week prior to R/D, or
   d) APS received after R/D

   Results
   48% indicated having 2 or more weeks, however, 52% indicated having less than 2 weeks and none after the requisition date.

   WG comment:
   The due diligence process is crucial in all transactions in order to permit the lawyer to undertake all inquiries to best protect the client. The committee suggests advising the client in writing of the possible lack of time to properly conduct any necessary due diligence in the event that the requisition date is looming. Real estate agents should be alerted to the pressure and risk involved in not providing the lawyer with sufficient time to undertake the necessary due diligence.

4. Do you provide a copy of the parcel PIN with your requisition letter? (Yes/No)

   Results
   59% of respondents indicated that it was their practice to provide a copy of the PIN with the requisition letter.

   WG comment:
   This is simply a wonderful courtesy extended to the other side and saves time and expense which is beneficial to all. Real estate lawyers typically are a congenial and helpful bar, and this is one of those practices which cement goodwill.

5. Do you requisition the deletion of expired covenants on title? (Yes/No)

   Results
   87% of respondents indicate that they did requisition the deletion.

   WG comment:
   This is good practice which will save you time and enhance your reputation. When the property is resold, the next purchaser's lawyer may likely requisition the deletion and you will be required to spend time to debate the issue or satisfy the requisition. If another lawyer is then acting for the vendor, you will likely be blamed for sloppy practice or negligence.

6. Do you requisition a declaration of possession for a residential resale property (non-condo)? Yes / No - rely on title insurance / No - other

   Results
   84% of respondents indicated that they did request a declaration of possession.

   WG comment:
   Declarations of possession are only of value in the Registry system and where there is a problem with the boundaries of the property. There is no adverse possession for condominiums or in the Land Title system, unless acquired before conversion. Most Ontario properties are now in the Land Titles system.

7. If acting for the vendor, do you:
   a) sub-search the parcel PIN to identify any issues, or
   b) wait for the requisition letter?

   Results
   57% of respondents indicated they waited to receive the requisition letter.

WG comment:
This practice underlines the importance of delivering a requisition letter and in a timely fashion. Vendor's lawyers should monitor for a time if by which they have not received the letter, they proactively do a sub-search to confirm there are no issues. The practice of including a copy of the PIN is that much more valuable in this situation.
If you do not conduct a subsearch, you might consider asking the vendor if they have or had a mortgage/charge, if they have ever been sued or if they had any disputes over their property.

8. If acting for the vendor, do you:
    a) sub-search executions against the vendor, or
    b) wait for the requisition letter?

Results
63% of respondents indicated they waited to receive the requisition letter.

WG comment:
Depending on when and if the requisition letter is received, it is a good preventative practice to undertake a search to ensure your client's transaction is not delayed because of a similar name or other execution unknown to your client or the other side's tardy delivery of a requisition letter.

9. Do you use a computer program to generate your requisition letter? (Yes/No)
    a) If yes, which one?

Results
69% of the respondents indicated using a computer program to generate their requisition letter. Those who indicated a program, referred to Conveyancer or LDD's Realtiweb.

10. Do you prepare a tailored requisition letter which only requisitions the specific issues of the transaction and the property, or, do you use a generic requisition letter with all possible issues noted?

Results
66% of respondents tailor their requisition letter to the actual issues to be addressed.

WG comment:
The popular view is that a requisition must identify a specific non-permitted title defect to be valid. The case of Stykolt v. Maynard [1942] 3 D.L.R. 654 is often cited for this proposition. The letter may be short if there are few items to address. A laundry-list of possible/speculative concerns is of little value and typically will only lead to a "Satisfy yourself" response.

11. Do you typically review the survey for a residential resale property (non-condo) and make requisitions as applicable? (Yes/No)
    a) If this is not your regular practice, when do you review a survey?

Results

59% of respondents indicated they did review a survey and requisition appropriately. Many who responded that they did not review a survey indicated it was because surveys are seldom available.

WG comment:

Lawyers' searches only address the quality of title (interests), while the survey addresses the quantity of what a client is purchasing (boundaries). It is good practice to review a survey with clients. If there is no survey, clients should be advised of the information they are not getting and how it limits their and your due diligence efforts. Title insurance does provide some relief for clients in the event of an issue, but it is not a substitute for an up-to-date survey.

12. In which County or district do you practice in (optional)?

Results

Responses were received form the following jurisdictions: Algoma, Brant, Carleton, Durham, Elgin, Hastings, Kent, Middlesex, Thunder Bay, Toronto and York – 11 of the 47 possible jurisdictions.

Question 7 – Document Registration Agreement (DRA)

1. Is the DRA: (select one of the 5 options)
    a. ___ signed by the lawyer;
    b. ___ signed by the clerk; or
    c. ___ entered into via exchange of letter of requisition
    d. ___ entered into via protocol (exchange of specific letters)
    e. ___ never use it.

    Results: 65% of respondents indicated that the lawyer signed the DRA and another 35% indicated they confirmed the use of the DRA via an exchange in the letter of requisition.

    Working Group (WG) comment: This is excellent and the desired approach. The DRA is an undertaking by the lawyer and as such should be signed personally by the lawyer or dealt with in a letter signed by the lawyer (letter of requisition).

2. Do you ever change the terms of the DRA?
    a. ___ Yes
    b. ___ No
    c. How? _____

    Results: 63% of the respondents confirmed that they make changes to the DRA.

    WG comment: The WG agrees that the DRA is a standard precedent to be used as a basis for every transaction and that it needs to be tailored as required. Some commented they change the release time, note additional documents to be registered and add parties. Also see question No 4.

3. Do you make the DRA control (subject to) the registration of the:
    a. Transfer – Yes or No
    b. Mortgage – Yes or No
    c. Other, and if so, what? _____

    Results: Respondents indicated that their DRA is controlled by the registration of the Transfer (72%), the charge (50%) and other documents (61%). Other documents included discharges, powers of attorney and priority agreements.

    WG comment: The DRA is usually subject to the registration of the transfer. There is debate as to whether the DRA should be subject to the registration of the charge. Some argue this is only a purchaser's responsibility. Others argue that realistically

without the registration of the charge, the purchaser has no money to complete the transaction. This debate fuels the argument as to whether the vendor should agree to this requirement. The WG does not take a position on this debate. However, there may be documents which the parties agree are required to be registered before or to which the transaction is subject (see some noted above) and it is proper for the parties to agree that the registration should proceed listing the priority of the documents to be registered.

4. Are you aware of the multi-party DRA approved by the LSO?
    a. ___ Yes
    b. ___ No - See https://www.lsuc.on.ca/uploadedFiles/.../eRegistration/DRA%20Three-Way_2017.pdf

    Results: 79% of respondents were aware of the multi-party DRA.

    WG comment: This is a recent development and the WG is pleased to see this level of awareness. Anyone who has not become familiar with this new document is invited to visit the above link.

5. If you received keys in advance, do you release them to your client before the registration under any situation?
    a. ___Yes
    b. ___ No
    c. If yes, give an example: _____
    d. If the keys are released to your client before the registration under any situation, is it done with the consent of the Vendor's solicitor:
        i. ____ Always;
        ii. ___ Sometimes;
        iii. ___ Never

    Results: 60% of respondents indicated they would never release keys to a client prior to registration contrary to the DRA. Of the 40% who indicated they would, 93% indicated it was only on consent of the other side.

    WG comment: The DRA sets out in writing the terms of the escrow agreement between the parties, one based on trust and an undertaking by the respective lawyers. It is essential to preserve this trust amongst the Bar if we are to have a convenient and efficient protocol to close transactions. In addition, the Rules provide that a lawyer must respect his/her undertaking. One should always follow the wording and spirit of the DRA. If there is a need to divert, the lawyer would be wise to consult with the other side and to document it.

6. If you receive a DRA to sign, do you verify that it is in the LSO standard form?
    a. ___Yes
    b. ___ No
    c. ___ Assume it is a replica of the LSO template

    Results: 58% of respondents verify that the DRA they receive is in the form approved by the LSO. 42% assume it is a replica of the LSO template.

    WG comment: These results reinforce the importance of the trust that lawyers place on the lawyer on the other side not to make changes to an approved document without noting or pointing out the change.

7. Would you expect to see on the DRA a statement that it is the version adopted by the LSO and posted on its website?
    a. ___Yes
    b. ___ No

    Results: 84% of respondents expected to see on the DRA they receive a statement that it is in the version adopted by the LSO.

    WG comment: The document on the website already has this statement and it would be important not to remove it when it is being prepared for a transaction.

8. If you receive a DRA with an ineligible signature, would you investigate further?
    a. ___ Yes
    b. ___ No
    c. ___ Assume it is the signature of the lawyer whose name is on the document
    d. ___ recognize the lawyer's signature from previous dealings

    Results: 55% of respondents assume the signature is that of the lawyer whose name is on the DRA. 20% would investigate further, while the other 25% do not if they recognized the lawyer`s signature.

    WG comment: Again this reinforces the level of trust lawyers have and expect of the other side in a real estate transaction. The trust and respect for each other is a hallmark of our profession and with the ever growing degree of incivility, the real estate Bar should cherish and enhance this spirit of cooperation. Deals are much more efficient when there is a trusting relationship on which it can proceed.

9. Do you normally insert a time to create an alternate Release Deadline (paragraph 4(b) of the DRA) or simply rely on the 6:00 pm time reference in, for example, the OREA APS?
    a. ___ Yes

b. ___ No
c. If yes, what time to you normally insert: _____

Results: The respondents were evenly divided on this question.

WG comment: OREA has commented that the reason for the 6:00 pm Release Deadline is to permit time for the parties to decide what happens in the event that registration could not be completed by the closing of the registry office. It permits the party who could not register in time to reach the other side before the Deliveries are released. There is no right or wrong time as long as everyone knows and agrees to the rules they are playing by.

Question 8 – Undertakings

1. Do you diarize all undertakings in a real estate transaction?

   Results:
   - 50% of respondents diarized the undertakings they gave.
   - 58% of respondents diarized the undertakings they received.

   Working Group (WG) comment:
   Undertakings are a crucial part of all real estate transactions and enable efficiency in the closing process notwithstanding outstanding matters which are deemed sufficient to be completed after closing. Under the Rules of Professional Conduct, Rule 7.2-11 states that "a lawyer shall not give an undertaking that cannot be fulfilled and shall fulfill every undertaking given and honour every trust condition once accepted". To ensure compliance, diarizing the undertaking is a good practice.

2. Do you have a paper or a digital tickler system to diarize fulfillment of outstanding undertakings?

   Results:
   - 25% of respondents indicated they have a paper tickler system.
   - Almost 42% indicated having a digital tickler system.
   - However, a third of lawyers indicated they have no tickler system.

   WG comment:
   The Law Society of Ontario in its Practice Management Guidelines states that lawyers should implement and maintain reminder systems. Like checklists, a tickler system is a desirable practice tool, if not essential in a busy legal practice. With more software becoming available to assist lawyers in their practices, digital tickler systems often come incorporated in software and simpler to operate. The WG would advocate for all lawyers to maintain a robust tickler system, in whatever format, to ensure all undertakings are satisfied, whether given or received.

3. Do you have an automated reminder system for the fulfillment of outstanding undertakings?

   Results:
   One third of lawyers indicated that they have an automated reminder system.

   WG comment:
   Lawyers, especially busy ones, know the value of a good reminder system. It does not matter if it's automated or not, it is important to have one and use it.

4. Who is responsible to follow up on outstanding undertakings?

Results:

- Almost 60% of respondents delegated the responsibility to follow up on undertakings to a responsible assistant.
- 17% to a pending matters clerk.
- 25% to the responsible lawyer.
- No one indicated that they outsource this function.

WG comment:
Unless clearly qualified, a lawyer's undertaking is a personal promise and responsibility (see Commentary to Rule 5.1-6).The Law Society of Ontario permits lawyers to delegate tasks to responsible staff members but reminds all lawyers that the ultimate responsibility for meeting deadlines and limitation periods rests with lawyers (see Rule 7.2-11 above).

5. How often do you revisit the outstanding items in your tickler system?

Results:

- 58% of respondents indicated they review their outstanding undertakings as necessary.
- 17% on a weekly basis.
- The other respondents were evenly divided between bi-weekly, monthly and quarterly reviews.

WG comment:
There is no specified time for a review as long as you are aware that they are outstanding and follow up or take some action to ensure the undertakings are satisfied. It is often easier to attend to a matter when it is fresh but the volume of the practice and whether there is a person dedicated to this task, will influence the frequency of the reviews.

The Law Society indicates that discharges of mortgages should be registered within 60 days of closing (see "Due Diligence in Mortgage or Loan Transactions" found here).

The Canadian Bankers Association publishes a contact list for mortgage discharge requests and for escalations if discharges are not received in a timely manner. This list is updated from time to time – the current version is dated July 24, 2018 and can be found here.

6. What is your principal method to follow up with the other lawyer for outstanding undertakings?

Results:

- 83% of respondents sent letter reminders to the other side.
- 17% sent an email.

WG comment:
There is no ideal way to remind the other side of their outstanding undertaking. With the growing adoption and efficiency of emails, the WG presumes we will see this method of sending reminders escalate. The important issue is to ensure that all undertakings are satisfied in a timely fashion.

7. What is your oldest outstanding undertaking (given or received)?

Results:

- 50% of respondents indicated that their oldest outstanding undertaking (given or received) was under 3 months.
- 8% indicated their oldest was less than 6 months old.
- 17% of respondents qualified their oldest undertaking as less than one year.
- 17% as more than one year.
- 8% indicated they did not know.

WG comment:
Almost 60% of undertakings being less than 6 months outstanding points to great practice management by the majority of lawyers and cooperation by the Bar.

8. How do you deal with files with outstanding undertakings?
Results:

- 35% of respondents indicated that they have a special “pending” cabinet to store files closed with outstanding undertakings.
- 35% mark the cover of the file with a list of the undertakings which remain to be fulfilled after closing.
- 14% maintain a register for undertakings.
- Others responded using BFs or a notation on their file list.

WG comment:
The method of following up on outstanding undertakings is not as important as having a system that is used, is efficient and ensures that all undertakings are fulfilled in a timely fashion.

9. When a discharge undertaking has been fulfilled do you include a copy of the discharge instrument along with your letter to the other side/client?

Result:
100% of respondents indicated that they send a copy of the discharge instrument along with notification of the satisfaction of the undertaking.

WG comment:
The WG is pleased to see this unanimous process which enhances credibility and extends a great courtesy to the other side to allow them to confirm the fulfillment of the undertaking in an efficient manner without the need to undertake any additional steps.

10. How many times would you write/contact another lawyer regarding an outstanding undertaking before you would consider reporting the lawyer to the Law Society of Ontario for breach of undertaking?

Result:

- 58% of respondents gave the other side 4 or more notices of outstanding matters
- 42% gave 3 notices.

WG comment:
The WG concludes this demonstrates the highest degree of courtesy to the Bar. This extends the most opportunities to the other lawyer to attend to the matter they had undertaken. Everyone goes through busy periods or some disruption in their practice which might negatively impact their ability or desire to attend to outstanding undertakings. The high number of reminders demonstrates a high level of cooperation and understanding amongst the Bar. This should not be abused.

11. Would you give the delinquent lawyer one final written notice to comply with the outstanding undertaking, stating that you will report the lawyer if he or she does not comply, before actually reporting the lawyer?

Result:
100% of respondents would provide the other side with a FINAL notice before reporting the lawyer for the delinquent work.

WG comment:
The WG commends the Bar on this high level of cooperation. This courtesy should not be abused to ensure the Bar continues to enjoy an efficient closing process and maintains trust in this valued practice of accepting undertakings.

12. Do you believe that you have a duty to report a lawyer to the Law Society of Ontario for breach of undertaking, or rather, that your duty is to the client and you otherwise obtain satisfaction of the undertaking?

Result:

- 50% of respondents saw it as their duty to satisfy the outstanding matter on behalf of their client.
- 42% agreed although they would do so in combination with a report to the Law Society of Ontario.

WG comment:

The WG commends the Bar on this high degree of professionalism which aims to assist the other side to comply with its undertakings, but in the event of a lapse, ensure that their clients are well served. The reluctance of reporting lawyers is understandable but should never be taken for granted. Great cooperation facilitates all of our work to efficiently close transactions on behalf of clients. It is a show of respect for our fellow lawyer and the system we operate in to satisfy all undertakings in the most expeditious manner possible.

Question 9 – Reporting Letter

1. Do you always send a reporting letter to all clients?

Working Group (WG) comment:
All respondents indicated that they send a reporting letter to all clients, whether they are a purchaser, a vendor or a lender. This is great to see. The reporting letter is an important step in the transaction. It provides the lawyer with one last opportunity to review the file and ensure that all that was to be done was completed properly and in accordance to the client's instructions. If a deficiency is found, it is easier to rectify when the details of the transaction are still fresh to everyone. The reporting letter provides a record of what was completed, the decisions made and issues raised with the clients and their direction or acknowledgment.
The reporting letter is also a marketing opportunity for you – you can advise the clients as to other types of services you offer, and encourage clients to update wills, etc.. It also provides a resource to be consulted by the client, which hopefully reduces the number of calls to the lawyer's office for additional copies or information.
The Rules of Professional Conduct (Rule 3.2-9.8) requires lawyers provide a final report on a mortgage transaction, together with the duplicate registered mortgage, to the lender within 60 days of the registration of the mortgage, or within such other time period as instructed by the lender. Although there is no such Rule for other clients, the Law Society of Ontario Residential Real Estate Transactions Practice Guidelines state: "The lawyer shall report in a prompt and clear manner to the client, as reasonably required throughout the transaction on an interim basis and in all cases at the end of a transaction". It is seen as part of a lawyer's retainer and therefore the file is not complete until a report is rendered.

2. On average, when do you deliver/send out your reporting letter?

WG comment:
Some lawyers provide their report to the client on the closing day, with just over 40% of respondents indicated that they provide their report within 1 month of the closing. Another almost 40% indicated reporting within 3 months of the closing. The closer one can report to the client after the closing, the better for the reasons stated above. Also, since the invoice is usually sent with the report, it is a business principle that clients have a better view of the cost incurred the closer the receipt of the invoice is to the closing, especially if there is a positive outcome. Clients are happiest when they receive their report earlier. Late reports reflect poorly on you,

as clients can view this as you being unorganised or that they are not important to you.

3. Do you use the reporting letter in your file management software or have your own letter?

WG comment:
Over 55% of respondents indicated that they generate their reporting letters from the file management software they use, but with changes. As we must always be wary of the use of precedents, standard letters should be vetted to be tailored to the client's experience and transactions. This clearly demonstrates a good use of technology. Clients should understand, even if they did not see the work done for them, the issues resolved on their behalf and get confirmation of any discussions during the process.

4. Do you add specific content to address issues that arose during the transaction?

WG comment:
Over 80% of respondents indicated that they tailor their reporting letter to include file/client/transaction specific matters. As the reporting letter is often the only evidence that the client sees of what transpired in the transaction, it is important to ensure that it properly and fully reflects the lived experience. The standard precedent may note nothing or that a certain element progressed in the usual fashion, contrary to the actual experience (i.e. there were no survey issues, when in fact, there was full discussion about an encroachment).

5. How do you send your reporting letters to the purchaser/vendor?

WG comment:
Over 50% of respondents indicated they provide their reports in the traditional paper format by mail, but there is a strong contingent who hand the client their report when the client visits their offices, or who only provide reports via email. There is no required format for reporting letters, but with the increasing use and efficiency of electronic devices, we can assume that more and more clients might be preferring and demanding their reports electronically.

6. How do you send your reporting letters to the lender?

WG comment:
Interestingly, one third of respondents provided their reports in paper format via mail, one third in an electronic format only and one third provided both. We recognize that lender's, especially the big financial institutions, will increasingly require reports in electronic format.

7. Who signs the reporting letter?

WG comment:
Importantly all respondents indicated that a lawyer signed the reporting letter, whether the partner responsible for the file or the associate working on the file. Because of the opinions that the letter often contains or the nature of the information, only lawyers should sign reporting letters.

8. When do you bill for the work done on the transaction/file?

WG comment:
Over 40% of respondents indicated that they bill their real estate file on the day of closing. One quarter indicated that they bill when the reporting letter is sent. As the reporting letter is part of the file review exercise, it is a good practice discipline to bill at the same time the report is completed, after ensuring that all work is completed as required or promised. It is a great incentive to report early when all is fresh, with the carrot of issuing the bill and transferring the funds to pay it. Again, it is good business practice to bill as close to the event, as clients better appreciate and perceive the cost. The Law Society of Ontario's By-Law No. 9 dictates when a lawyer may withdraw funds from trust. Although it is silent on when to render a bill, it clearly stipulates that one cannot withdraw funds prior to incurring any disbursement or rendering an invoice.

9. What documents do you include in your report?

WG comment:
Most respondents include the vast majority of closing documents with the report. It is best to have a complete report, including a copy of all pertinent closing documents. The file that is retained can be less bulky and easier to eventually destroy if there are no originals that should be returned to the client. The complete report can also reduce the number of calls to your office by clients looking for

information or copies of documents, and eliminate the need to retrieve the file from storage in the future should questions arise.

10. How do you present your reporting letter to your client?

WG comment:
Over 50% of respondents indicated that their report was a letter with attachments. Nearly 20% provided only an electronic copy. Over 10% provided the reporting letter in a bound report. No format is required. A bound report will be easier to consult, less likely to be picked apart with parts being misplaced or lost and a convenient resource when next dealing with the property with all the necessary information at hand.

11. Where do you keep your copy of the reporting letter?

WG comment:
Slightly more than half of respondents indicated they store a paper format copy in the client's closed file, however almost 50% indicated they only retain an electronic copy. Again, there are no specific requirements, however, electronic copies are usually cheaper to store and easier to consult when needed.

Question 10 – Survey

1. Do you discuss with your client the need to obtain a survey, whether or not one is stated to be available in the Agreement of Purchase and Sale ("APS")?

Results:

- 40% of respondents indicated they discuss the need to obtain a survey in a transaction where the title search indicates a description discrepancy or other concern
- 37% of respondents indicated they discuss the need to obtain a survey in every transaction
- 36% of respondents indicated they discuss the "benefits of" and not the "need" of a survey or set it out in their retainer letter

Working Group (WG) comment:

These results are very encouraging as everyone indicated addressing the survey question with their clients. The survey, even if many believe it has been surpassed by title insurance, remains a critical part of the due diligence of any real estate transaction. Clients should be aware of the benefits of having a survey (new or older) and the risks of completing the transaction without one. Title insurance is a great tool and may be the only practical solution where there is a limited time to close a deal, but it is not a perfect replacement for a survey.

2. What factors influence your decision to recommend that the client get a survey?

Results:

The most popular responses were:

- 98% - title search indicates a description discrepancy or other concern
- 78% - client concerns / notation in APS
- 48% - age of the property – older more likely to recommend a new survey
- 48% - survey is old or illegible
- 43% - recent construction on property or neighbouring property
- 35% - if there was a building addition in the past
- 35% - if a well and septic were on the property
- 30% - if there was an existing pool

WG comment:

In addition, a few respondents raised the issue of the future use of the property as a factor. All of the above factors are good reasons to recommend getting a new survey or at the very least having a specific discussion with the client about it. We

recommend you make a notation of this discussion in your file. You will not necessarily remember the discussion or what was discussed, but having a note in your file will protect you if the client's memory fails and he/she later points to you for not raising the matter. It is also recommended that you communicate the discussion to the client in the reporting letter or other written communication.

3. If you receive a survey, do you review the survey with the client purchaser/borrower?

WG comment:

All respondents indicated that they do review the survey with their client. Some lawyers have a practice of having the client initial the survey or the lot/condo unit being purchased or mortgaged, as additional confirmation of the review. This is an easy way to document the discussion for your file and to protect yourself. Consider doing the same for parking and storage units.

4. Do you document all survey-related discussions with the client?

Results:

- 61% - Always
- 39% - Sometimes

WG comment:

Lawyers have many clients over the years and it is impossible to remember everyone, much less the specifics of any discussion with them on a particular file. Although it might be your standard practice to discuss a certain matter, it is invaluable to have a written indication of this discussion in the file, if asked to confirm this years later. A checklist is a simple way to accomplish this, with a notation for matters that were emphasized during the meeting. Also, documenting this discussion to the client in writing is a great way to avoid future questions on the matter.

5. If you do document your discussion, how and where is it documented?

Results:

- 61% made a note to the file (paper file or digital file/program)
- 57% sent an email or letter to the client
- 57% added a notation in the reporting letter to the client
- 48% got the client to sign an acknowledgment and retained in the file

WG comment:

The important factor is to document and retain a record of the discussion. Where a lawyer can demonstrate that they did have the discussion and it was brought to the client's attention at the time of the transaction, it will be helpful if the matter is ever litigated. The best practice is to document the discussion and provide this to the client contemporaneously as it is always easier to address any client concerns, differences of opinion or additional requirements prior to the completion of the closing.

6. What elements of the survey do you review with clients?

Results:

Respondents indicated discussing the following:

- Registered easements and/or unregistered easements (65%)
- Access to the property (65%)
- Location of structures/improvements (61%)
- Encroachments/overhang (61%)
- Driveway – private/mutual (61%)
- Placement of fence/retaining walls (57%)
- Dimensions of boundaries (53%)
- Setbacks of structures (48%)

WG comment:

Respondents also added: (1) pointing out if something is missing from an old survey and (2) inquiring if any construction or other changes had occurred from what the survey shows.

7. Which of the following would you accept as a survey for a purchase or mortgage transaction?

Results:

86% indicated a Building Location Survey

WG comment:

This is the only acceptable response for residential transactions. None of the following have all of the technical attributes of a building location survey: Plan of subdivision (M-Plan); R-Plan; R-Plan showing the house; sketch of survey; Registrar's Compiled Plan or Town Plan; architect or engineer rendering for building permit application or Site Plan or elevation plan.

8. How do you verify if the survey you received is up-to-date?

Results:

- 60% of respondents indicated that they ask/review the plan with the client
- 57% indicated relying on the date of the plan
- 43% do a Google Maps search and comparison
- 39% compare it to other plans
- 22% indicated relying on a statutory declaration from the vendor

WG comment:

Surveyors will advise you that a survey once signed and delivered is out-of-date, because they do not know what changes have been made to the property or adjacent lands since the date the survey was completed. From a practical standpoint, the real relevance of the date of the survey is that the older the survey, the greater the likelihood that something has changed. In addition, the requirements of what a survey denotes may have changed since the survey was produced. The best practice is to review the survey with the client and have them compare it with what they know of the physical state of the property. While a statutory declaration of possession from the vendor would be helpful, bear in mind that the standard OREA APS contains no obligation for the vendor to provide such a declaration.

9. How can a survey be updated?

Results:

- 83% of respondents said hire a surveyor to provide a new survey
- 74% of respondents said hire the original surveyor to do a field survey update and
- 65% of respondents request the vendor to sign a statutory declaration confirming accuracy of existing survey or declaration of possession

WG comment:

All three avenues are possibilities, but with varying degrees of reliability. The options involving a surveyor are more time consuming, costly and offer the best information. The vendor's statutory declaration although the least costly route carries a higher degree of risk, as vendors may be wrong in their statements.

10. Are you aware that copies of existing surveys may be available (for a fee)?

Results:

Many respondents indicated being aware that existing surveys may be obtained via the following:

- www.landsurveyrecords.com (70%)
- www.onland.ca (45%)
- www.protectyourboundaries.ca (38%)
- Municipal building department (32%)

WG comment:

Although reliance on an old survey has its challenges, in the absence of any survey, it is a good starting point to get a copy of any existing survey of the property or adjoining properties. These surveys may provide comfort, further information, or indicate a need for further investigation or obtaining a new survey.

11. Are you aware that a survey is an opinion reflecting the state of the property at a point in time only?

Results:

95% of respondents confirmed that a survey only reflects the state of the property at a point in time.

WG comment:

A survey reflects existing conditions at the time it was created, the purpose for which it was created and is subject to the regulations governing the content of a survey. Over the years, the survey preparation requirements imposed on surveyors under the *Surveyors Act (Ontario)* have been increased. It is crucial, if not getting a new survey or having it updated by a surveyor, to inquire of the client if they are aware of any changes to the property or abutting properties, such as additions, new structures, etc., and to advise clients that reliance on an existing survey is subject to any changes since it was prepared. In addition, a survey produced as a foundation survey, where only foundations are noted or with the notation DUC (dwelling under construction), is not the same as an as-built survey which is more extensive, showing easements, encroachments, overhanging eves, rights of way, etc.

12. Are you aware that your client can only sue the original surveyor if he/she was the party who actually contracted for the survey work or later received a supplementary letter of reliance?

Results:

96% of responded understood that only the parties to the original survey may rely upon it with the ability to pursue any recourse against the surveyor in the case of any discrepancy or error.

WG comment:

A third party can be put in a similar position of privity of contract provided they obtained a letter of reliance from the surveyor who authored the survey. This is not a common process in residential transactions but might be desirable and affordable in larger commercial transactions. There is typically a cost for obtaining this letter of reliance. Any such letter of reliance only allows the third party to rely on the accuracy of the survey as of the date it was produced and it is not an update.

13. In a condominium transaction, what do you review with the client?

Results:

- 61% of respondents reviewed the location of the unit on the plan
- 26% of respondents reviewed the horizontal survey plans
- 22% of respondents reviewed both horizontal and elevation survey plans
- 9% of respondents reviewed the elevation survey plans
- 43% of respondents indicated all of the above responses

WG comment:

The review of a plan in a condominium transaction is as important as in a fee simple transaction, but offers some unique challenges. Firstly, the lawyer should have the client verify the location of the unit on the applicable strata level. Initialling the unit on a production of the appropriate level floor plan is a good practice. Secondly, if dealing with a **multi-level unit**, the plans should be reviewed to ensure that the levels being acquired are all identified as part of the unit on the plans and that no part of the unit forms part of the common elements. The case of *Orr v. Metropolitan Toronto Condominium Corp. No. 1056* (also known as Rainville), is said to be authority for the proposition that a solicitor must present and review with the purchaser client all of the available plans affecting the unit.

14. When there is a survey available, what do you compare it to, if anything?

Results:

Respondents indicated comparing the survey to the following:

- Legal description in the title documents (100%)
- Legal description in the Agreement of Purchase and Sale (96%)
- M-Plan (74%)
- R-Plans, if available (74%)
- Other plans on title (61%)
- Google maps (43%)

WG comment:

It is important to ensure that the property is consistently described throughout the various documents of the transaction, such as, the legal description, the APS, survey, plans on title, etc. A purchaser or lender should be getting the property they contracted for. Discrepancies should be addressed with the client and further action undertaken, as necessary, including identifying the issue to the title insurer.

15. If there is no survey, do you get clients to acknowledge reliance on title insurance?

Results:

- 83% of respondents agreed they always
- 17% said they sometimes

get clients to acknowledge their reliance on title insurance if no survey is available and the clients do not want to incur the expense or there is no time to request a survey.

WG comment:

Title insurance is a great tool for lawyers to complete transactions but it is not a perfect replacement for a survey or does not always offer the remedy most desirable for clients. For this reason, it is always beneficial to review with the client the role of the survey and title insurance, their benefits and shortfalls.

16. Which form of client acknowledgment of their reliance on title insurance do you have clients sign?

Results:

52% of respondents indicated that they use their own form of acknowledgment. Some used a form found in their document preparation software or a title insurer's suggested form.

WG comment:

It is always best to document this acknowledgment. One responded that it is done verbally with the client but then confirmed in the reporting letter. There is no required form of the acknowledgment. Documenting the matter is good practice.

17. What is currently required for a document to qualify as a building location survey?

Results:

All of theses elements were identified as being an important part of a survey and required for a valid building location survey:

- Surveyor's certificate
- Dimensions of boundaries
- Monumentation of corners
- Dimensions of structures
- Location of structures
- Setback of structures
- Legible date and signature of surveyor
- Surveyor's Part 2 Written Report
- Legal description of property
- Indication of scale
- Legend of markings
- Indication of compass north direction

WG comment:

In order for a survey to be valid under today's requirements, all of the above information must be available. Older surveys may be valid if they were prepared under the then existing regulations. A "sketch of survey" is a survey, which even by older standards did not have all of the legal attributes of a survey. As well, surveys contain two parts, with the survey and the certificate forming one part (Part 1) and the surveyor's comments forming a second part (Part 2). Parts 1 and 2 may be shown together on the survey document or they may be presented as two separate

documents. If the surveyor's comments are not shown on the survey (Part 2), then something is missing and there is another related document which you will need to review. Be cautious of what is provided as a survey.

18. If the offer calls for a survey to be provided, and you receive a copy which is illegible, missing the date and/or the surveyor's signature, do you requisition a new survey?

Results:

- 43% of the respondents indicated they would requisition a new survey
- 57% said they would only request a legible, signed and dated survey if a new or up-to-date survey is required in the APS

WG comment:

A seller is only required to provide what has been agreed to in the APS. The standard OREA APS only requires that the seller provide any survey in their possession. Only if the APS specifically requires a new or up-to-date survey would the seller be obligated to provide a new survey.

Question 11 – Non-Resident Seller (s.116 Certificate)

1. When is a certificate under s.116 of the Income Tax Act required in a real estate transaction?

Results:

- 100% of respondents indicated correctly that a certificate is required when the seller is a non-resident of Canada.

Working Group (WG) comment:

This was the only correct response. Citizenship is not the test and landed resident status in Canada has no bearing on the requirement. The determination of residency of the seller is critical to how a transaction is to be handled and it is always the first fact that you need to determine. It is not always patently obvious from the circumstances of your client or the other side's client and you should always dig further if you get the sense that something is not right. If you encounter a situation where there is any question, go to Canada Revenue Agency's website at: www.cra-arc.gc.ca/tax/nonresidents/common/residency-e.html,and to the CRA circular IT-221R3. Residency is usually confirmed by way of statutory declaration: "The seller states that he/she/they is/are not now and will not be at the time of closing of this transaction a non-resident of Canada within the meaning of s.116 of the Income Tax Act (Canada)." The Residency paragraph of the OREA Agreement of Purchase and Sale provides that "Buyer shall not claim such credit if Seller delivers on completion the prescribed certificate". Case law (see Kau v. The Queen, 2018 TCC 156) has found that the receipt of a certificate remains subject to reasonable inquiry not revealing any indicators to the contrary.

2. Is the need to obtain a certificate under s.116 of the Income Tax Act tied to the type of property (i.e. residential, commercial, recreational)?

Results:

- 94% of respondents indicated that the type of property does not go into the consideration of whether a s.116 certificate is required from a non-resident seller.

WG comment:

The only test to determine if a s.116 certificate is required is residency. It does not matter if a non-resident is selling a residential, commercial, recreational, industrial or other type of property. (See Question 1 for more information)

3. When is the s.116 certificate required to be delivered?

Results:

- 68% of respondents indicated that a certificate is required to be delivered at the time of closing.

WG comment:

If the certificate is not available on closing, the buyer must retain a holdback from the closing proceeds pending receipt of a certificate or payment to CRA. Confirmation of the seller's residency status should be requisitioned early and if the seller is not going to provide the regular statutory declaration of residency (see Question 1) the lawyers should keep each other informed of the status of the availability of the s.116 certificate as closing approaches.

4. What is the correct amount of the holdback to be retained if a s.116 certificate is required but not available?

Results:

- 97% of respondents indicated that the amount of holdback if no s.116 certificate is available on closing is 25%.
- 45% of respondents indicated that the amount of holdback if no s.116 certificate is available on closing is 50%.

WG comment:

This was a multiple-choice question and the correct answer may be either 25% or 50%. The amount depends on the type of property – see question 5 for more information.

5. What is the criterion to determine the holdback requirement (% of purchase price) in lieu of the certificate?

Results:

- Only 36% of respondents indicated that the use of the property from a tax perspective was the criterion to determine if the holdback should be 25% or 50%.

WG comment:

The location, the sale price or the anticipated capital gains from the sale of the property are not material to determine if the holdback should be 25% or 50%. This is

however not necessarily a simple determination. The legislation requires a 50% holdback for property referred to in subsection 116(5.2). Many default to 25% as that is typically used for residential properties. The legislation does not use labels such as residential and commercial but rather raises issues of how the property was used or treated for tax purposes. How does one qualify a residential property from which the seller runs their business or operates an Airbnb? See https://www.practicepro.ca/practice-aids/checklists/non-resident-sale-holdback-flowchart/ for a flow chart and other resources to assist you if you have any questions or retain an accountant or tax lawyer to determine the issue.

6. Concerning the funds withheld in lieu of a certificate, who has the obligation to withhold the funds, according to the ITA?

Results:

- 48% of respondents indicated correctly that the buyer had the obligation to withhold funds from the proceeds of sale if no s.116 certificate was available on closing.
- 19% of respondents indicated that the buyer's lawyer was obligated.
- 19% of respondents indicated wrongly that the seller's lawyer was obligated.
- 13% of respondents indicated wrongly that the seller was obligated.

WG comment:

The CRA rules obligate the seller to deliver a certificate on closing. If no certificate is provided, the buyer is then obligated to keep a holdback out of the closing proceeds. The buyer is provided with a right to withhold. Although the buyer is the specified person, typically their lawyer would undertake this responsibility. Seller's are comforted by the fact that the holdback is held in trust by a lawyer. In view of the payment obligations, either on receipt of a certificate after closing or otherwise (see question 8), it is prudent that a lawyer hold the funds (see question No. 7). It would not be prudent to have the seller hold the holdback.

7. Concerning the funds withheld in lieu of a certificate, who typically withholds the funds according your practice?

Results:

- 74% of respondents indicated that the seller's lawyer retains the holdback.
- 22% of respondents indicated that the buyer's lawyer retains the holdback.

WG comment:

The CRA rules obligate the seller to deliver a certificate on closing. If no certificate is provided, the buyer is then obligated to keep a holdback out of the closing proceeds

and provided with the right to do so. As the consequences of closing without a certificate all fall upon the buyer, it would seems logical that the buyer, via their lawyer, would be in control of the holdback to ensure compliance and avoid any penalties and interest. The precedent undertaking posted by the Working Group (https://www.lawyersworkinggroup.com/ontario-standard-closing-document) does provide that the buyer's lawyer is the holder of the holdback. However, there is no problem if the seller's lawyer holds the funds, provided they follow the CRA requirements, which have been incorporated in the Working Group's undertaking. Provided the correct amount of the holdback is held and paid in accordance with the CRA rules (see Question No 8), either lawyer may hold the funds.

8. There is an obligation to remit the funds withheld from the purchase price to CRA after closing even if you have not received the certificate. When are the funds required to be remitted to CRA?

Results:

- 55% of respondents indicated that the holdback needs to be paid to CRA within 30 days of closing.
- 38% of respondents indicated that the holdback needs to be paid to CRA within 30 days of the end of the month within which the closing occurred.

WG comment:

CRA requires payment of the holdback within 30 days of the end of the month within which the closing occurred. For example, if a transaction closes on the 12th of March, payment would be required on or before the 30th day of April. The seller's or buyer's year-end are of no consideration in the payment deadline. Payment within 30 days of closing would be within the time required and a good practice to follow to ensure payment is delivered on time without any risk of incurring any penalties or interest charges against the buyer.

9. Did you know that the Working Group on Lawyers and Real Estate has posted a precedent undertaking for when a s.116 ITA certificate is not available?

Results:

- 64% of respondents indicated they did not know of the Working Group's precedent non-resident undertaking.
- 36% of respondents indicated that they were aware of the undertaking.

WG comment:

Please go to (https://www.lawyersworkinggroup.com/ontario-standard-closing-document) to see the Non-Resident Undertaking. This is a suggested format and

lawyers are free to modify it to fit the terms of their particular transaction, while being mindful of the traps in dealing with holdbacks – the amount and the timing of the payment to CRA.

10. Did you know that LAWPRO's practicePRO has a s.116 ITA Flowchart for when a non-resident sells?

Results:

- 70% of respondents indicated they did not know of the flowchart available on practicePRO.ca.
- 30% of respondents indicated that they were aware of the flowchart.

WG comment:

The flowchart sets out the questions to be determined and course of action to follow. In addition, it does provide information and other resources for any lawyer who wishes to learn more or confirm any detail. (see https://www.practicepro.ca/practice-aids/checklists/non-resident-sale-holdback-flowchart/)

11. Which undertaking do you use if you require one?

Results:

- 60% of respondents indicated that they have their own undertaking.
- 16% of respondents indicated that the undertaking is typically negotiated by the two lawyers.
- 10% indicated they have used the Working Group's undertaking.
- 7% of respondents indicated they have used the undertaking provided by their real estate software.
- 7% of respondents indicated they have used the undertaking provided by the other side.

WG comment:

There is no required undertaking that must be used. It is a good idea that the undertaking used provide for all the necessary requirements. Particularly, it should confirm the amount of the holdback, who retains it and when it will be paid out. The Working Group recommends that each lawyer compare the undertaking they typically use or the last one they used to the Working Group's undertaking to ensure all requirements and eventualities have been provided for. The Working Group welcomes any feedback you might have on its precedent undertaking.

12. If you are the payer of the funds to CRA, do you provide the other side with a copy of proof of payment?

Results:

- 84% of respondents indicated that they provide the other lawyer with a copy of the proof of payment to CRA.
- 16% of respondents indicated that they do not.

WG comment:

Although there is no requirement to provide the other side with proof of payment, the Working Group finds it a good practice to do so. It is a more friendly way to practice and can be helpful for the seller to have the information in order to claim back any amount if they in fact owed less. The initial payment triggered by filing of the Form T2062 is merely a withholding tax, which is held by CRA as security against non-resident vendors who may have been tempted to leave the country after closing and never pay their tax. The income tax return that they file by April 30th the next year is what actually counts to calculate the amount of the capital gains tax payable, if any. Note that it will very often be in the client's best interests to file this tax return in Canada since certain expenses that were not applicable in calculating the withholding tax, such as legal fees, real estate commissions and appraisal costs etc. will be deductible as against the capital gains tax. They will most likely get a refund.

13. When is the latest a party can apply for the s.116 certificate?

Results:

- 53% of respondents indicated that a seller must apply no later than 10 days after the closing date for a s.116 certificate.
- 20% of respondents indicated that a seller must apply no later than 30 days after the closing date for a s.116 certificate.
- 10% of respondents indicated either within 10 or 30 days prior to the closing date.
- 7% of respondents indicated one may file up to the closing date.

WG comment:

CRA permits a seller to file up to 10 days after the closing date. The penalty, under subsection 162(7), for failing to file or submit a notice on time is $25 a day. There is a minimum penalty of $100 and a maximum penalty of $2,500.

14. Who should apply for the s.116 certificate?

Results:

- 35% of respondents indicated that the seller should apply for the s.116 certificate.

- 32% of respondents indicated that the accountant should apply.
- 26% of respondents indicated that the lawyer should apply.
- 6% of respondents indicated that the buyer should apply.
- None of the respondents thought the real estate agent should apply.

WG comment:

The seller is definitely the party who is responsible to apply as they are the ones that get the most benefit for doing so. Typically, the seller would require assistance to do so. Although lawyers can do so, they may not have the information or resources available to the accountant. Notwithstanding who applies, the important consideration is to apply early enough to have the certificate from CRA in time to deliver to the buyer on closing. The Working Group understands that this is becoming more and more rare and therefore recommends that lawyers faced with a closing without a certificate, ensure that they have a solid undertaking to ensure compliance with CRA rules and avoid any liability to the buyer.

Question 12 - Meeting with Clients

Note: this survey was done prior to the COVID-19 pandemic.

1. How long is a meeting with the client (which is typically the sign-up meeting)?

Results:

- Respondents indicated spending this amount of time with clients:
    - up to 15 minutes – 3%;
    - 15 – 30 minutes – 23%;
    - 30 – 60 minutes – 51%;
    - one hour – 17%; and
    - more than one hour – 6% .

Working Group (WG) comment:

This is an important meeting and often the only in-person meeting with the client. Too often we hear of clients say that they never met with the lawyer, which in the WG's opinion, is simply inadequate. In addition to being a very informative and beneficial meeting for clients, this is the perfect marketing occasion when the lawyer can establish, cultivate and solidify client loyalty for repeat retainers and referrals to the client's family, friends and acquaintances. The purpose of the meeting is to ensure that the client understands the real estate closing process, the documentation being signed, the obligations the clients are taking on and answer any questions and concerns clients might have. An appropriate amount of time should be allocated to this meeting.

2. What factors would extend the time of your typical meeting?

Results:

- Respondents indicated the following factors would extend the time of their typical client meeting:
    - 88% - demanding lenders;
    - 82% - multiple mortgages;
    - 71% - new construction;
    - 65% - rural property/cottage;
    - 44% - condominiums; and
    - 21% - other matters, including, client questions; first-time buyers; title or property issues; off-title issues; extra bank documents; demanding clients.

WG comment:

These are all matters which would demand more of the lawyer's attention, ensuring the client gets all the necessary information and providing comfort to clients

who may be anxious about the process. Lawyers should remember that they provide a professional service and by being more personal and available to clients, they can distinguish themselves from their competition.

3. Do you typically have more than one meeting with the clients?

Results:

- Respondents indicated having these meetings with clients:
    - 94% - only had a sign-up meeting;
    - 55% - had a number of meetings by phone;
    - 43% - had a number of in-person meetings;
    - 12% - had an initial retainer meeting; and
    - 9% - if an issue arises.
- Many indicated having more communication with clients via phone and email, some even via video conferencing.

WG comment:

It is not the number of meetings but the substance of them and the access to a lawyer which is of greater importance. Clients should feel that they have the lawyer's attention and can get the information they need and comfort they require. This can be a very unnerving experience for clients, especially first-time buyers and they need guidance, information and reassurance while they go through the process. The personal attention to clients is one of the significant ways that lawyers can distinguish themselves from their competition.

4. Is the real estate agent typically present for the sign up meeting?

Results:

- 100% of respondents indicated that the agent does not attend.

WG comment:

This is to be expected but is one of the differences between the Canadian and American closing process. Unless there is a problem that could benefit from the agent being involved to resolve, agents should not be at this meeting due to privacy, solicitor-client privilege and other considerations.

5. How do you proceed if the client does not speak your language?

Results:

- Respondents indicated they:
    - 51% - get the assistance of client's family member;

- 25% - end the retainer;
- 6% - get an independent translator;
- 16% - had not had the issue arise.

WG comment:

It is essential for the lawyer and clients to be able to communicate and properly understand each other. Although recruiting a client's family member to act as a translator between the lawyer and the clients is a practical and inexpensive option, the WG cautions that this could raise issues and special attention must be exercised. If the lawyer does not speak or understand the language, there could be a possibility that the family member does not properly translate the lawyer's or client's communication, or that they may be exercising undue influence. It would be additionally important to make and retain good notes of the meetings, discussions, questions and participants if future consultation is required.

6. How do you get documents signed if the clients do not make themselves available (i.e. on vacation)?

Results:

- Respondents indicated they:
  - 71% - send documents to a solicitor near where the clients are;
  - 9% - use remote signature capabilities;
  - 6% - proceed with a power of attorney; and
  - 14% - other, including, getting signatures before they leave or a combination of the above.

WG comment:

It is always important to verify with the client, early in the process, their schedule at closing and to reinforce the need for them to be accessible to you for signing and to deal with any issues if and when they arise. Clients are much more mobile than before and so it is incumbent upon the lawyer to ensure their clients are available at critical times during the transaction (such as for signing documents, getting instructions, or ensuring that the clients undertake the necessary tasks they have to complete, for e.g. financing). Many lawyers deal with these issues in their retainer, initial correspondence with the client or in the intake questionnaire (for e.g. see WG's Client Information Form for condos at www.lawyersworkinggroup.com in the condominium documents tab).

7. What do you review with the clients during your meeting (or have reviewed since retained)?

Results:

- Respondents indicated reviewing the following with clients:
  - 100%
    - Particulars of mortgage(s)
    - Manner of taking title (joint tenants, tenants in common and percentage interest)
  - 97%
    - Client names, DOB and address for service on documents to be registered
    - Statement of adjustments
    - Arrangements for keys
    - E-Reg Acknowledgment and Direction
  - 94%
    - Statement of funds and funds to close
    - Land Transfer Tax Affidavit
    - Unique property issues (e.g. cottage, rural, etc.)
  - 92% - Original client ID (likely done earlier) and keep copy in file
  - 89%
    - Standard charge terms as a separate document from the mortgage
    - Title insurance policy
  - 83% - Tax certificate or arrangement for upcoming tax payments
  - 77% - Search of title
  - 74%
    - Results of off-title searches or fact not proceeding with search(es)
    - Status certificate
  - 66% - Pre-closing inspection, if new construction
  - 60% - Discuss when they will get their report
  - 49% - Survey
  - 40% - Home/fire insurance
  - 34% - Discuss why they need a will/Powers of Attorney
  - 14% - Other, including, search of title, if interested; block map or other plan if no survey; HST and the complete file.

WG comment:

In view of the above answer of the time spent with clients at the signing meeting and the number of documents reviewed, it seems that the time noted in Question 1 above was under estimated. These matters deserve the necessary attention.

8. Do you have client initial lot(s) or dwelling unit(s), parking and/or storage units on a survey/plan?

Results:

- The majority of respondents indicated that they do not have clients initial the document for the location of the property, but many did note having the discussion with the client.

WG comment:

There is no requirement to get anything initialed by the clients, however, the WG notes that in the event of a dispute as to the location or the discussion of the location of the property at a later date, having a copy of a plan, with the property highlighted, initialed by the client would prove very useful to determine the matter. It is an easy and effective way to confirm and document the conversation about reviewing the property location with the client and avoid any future questions.

9. Do you have a checklist of documents to be signed and matters to be reviewed?

Results:

- 51% of respondents indicated they had a checklist to assist at the closing meeting.
- Most indicated having a standard checklist that they customise to the needs of the transaction/clients.

WG comment:

With the number of matters to be reviewed, documents to be signed and the number of transactions and clients lawyers have, the WG suggests it is a best practice to have a checklist for the closing of the transaction that is started at the beginning of the transaction and evolves during the entire process to ensure that all matters of importance are dealt with prior to the closing, and to ensure any post closing matters are also addressed (such as reporting letters, etc.).

10. Do you make any notes of your meeting with the client, their concerns, matters discussed or reviewed to be kept in the file?

Results:

- 77% of respondents indicated they make notes of their discussion with the clients during the signing/closing meeting.

WG comment:

The best defence a lawyer can have when a matter is later questioned is to have evidence of the matters discussed with clients. Clients can have a different perception

or recollection of the discussion and if lawyers have no notes to refresh their memories from the multitude of similar meetings and number of clients they have had through the years, courts tend to then side with the client if they are an otherwise credible witness. Of course, any matters of concern should have been dealt with previously and noted in correspondence. A checklist and an initialed plan showing the location of the property are simple ways to document the conversation/transaction. A comprehensive report can provide some support. It is good practice to record discussions with clients in case the lawyer needs to refresh their memory, often years later.

11. What do you give the client at the end of the meeting?

Results:

- Respondents indicated they give clients the following:
    - 48% - Copy or info on next payments (e.g. taxes, first mortgage payment);
    - 48% - Status certificate/condominium documents package (original);
    - 32% - Original documents;
    - 6% - Report;
    - 45% - Other, for example, statement of adjustments; statement of funds; all documents signed at meeting; mortgage documentation; survey; title insurance policy; relevant title information; retainer and invoice.
- No respondent indicated that they presented a gift to the clients.

WG comment:

The practice of document delivery varies from lawyer to lawyer. There is no requirement except the need to provide clients with the information and documentation of their transaction as soon as possible after the closing. The practice of piling closed files to be reported on later and accumulating large stacks of files that are reported on months after closing is problematic. It is difficult to ensure that all matters and issues dealt with in the transaction are incorporated in the report when done a long time after the transaction has closed. Clients draw negative conclusions about their lawyers when they receive a report long after closing. A final report produced closer to the date of closing will better serve to protect the lawyer in the event a question arises later. Luckily, with the advent of technology and the document preparation programs, reports are easier to prepare and critical matters and issues dealt with can be added contemporaneously to the event to ensure they are properly reflected in the report.

12. Who meets with the client for the sign-up meeting?

Results:

- 97% of respondents indicated that lawyers met with the clients.
- 9% had both the lawyer and clerk/assistant meet with clients.
- 6% indicated only the clerk/assistant met with clients, but generally only when the lawyer was not otherwise available.

WG Comments:

The WG is pleased to see that the vast majority of lawyers meet with the clients. The Law Society prohibits a non-lawyer to deal with many issues that arise in the meeting, such as insurance considerations, matters of opinion, etc. Again, this meeting is an excellent marketing opportunity for lawyers to create or reinforce the relationship with the clients. It is also a great opportunity to learn of the client's further legal needs. Often, a real estate transaction will lead to a request for a will and powers of attorney and those can solidify the loyalty of the client for future work.

13. Do you do remote sign-up meetings?

Results:

60% of respondents indicated that they do not do remote sign-ups. This survey was largely open prior to the COVID-19 pandemic.

WG Comments:

Today, during COVID-19, we know that most lawyers are meeting clients via video conferencing capabilities. It will be interesting to see whether this practice continues after the COVID-19 emergency measures are over. Of course, some legal requirements will revert to how things were before the pandemic and we will have to see if temporary changes become permanent.

14. Which documents do you send to clients before your meeting?

Results:

Respondents indicated providing clients with the following documents prior to the closing meeting:

- 83% - Statement of Funds;
- 66% - Statement of Adjustments;
- 29% - Survey;
- 9% - Charge(s);
- 14%
    - Standard Charge Terms
    - Mortgage commitment/instructions;
- 9% - Acknowledgment & Direction (For Transfer / Mortgage / other documents);

- 9% - Standard Closing Documents (such as Direction re Funds; Vendor's Closing Certificate; Direction re Title; etc.);
- 14% - Other, for example, status certificate, rules and regulations for condos, restrictive covenants and anything requested by the client (usually adjustments, and trust statement and account); title insurance documents; complex or unusual title matters (e.g. major easements, restrictions); and
- 14% - do not send any documents to the clients before the meeting.

WG Comments:

The closing meeting can be an intimidating experience for clients and often may be difficult for clients to fully assess and absorb the amount of information dealt with. Sending material documents, and in particular transaction accounting, ahead of the meeting gives clients the ability to review them beforehand and have a better understanding. This practice could in fact shorten the meeting as clients can make themselves comfortable with the documents and their content prior to the meeting.

15. When and how do you collect the balance due on closing?

Results:

The responses received indicated closing funds are:

- 97% - received at the sign-up meeting;
- 69% - by certified cheque or bank draft made payable to your firm in trust;
- 29% - delivered by clients at another time;
- 29% - wired funds into the trust account;
- 23% - direct deposit to the firm trust account;
- 6% - collected by sending a courier;
- Other: some will only allow institutional lenders to wire or direct deposit funds to the trust account; some will only accept an email transfer.

WG Comments:

The process of receiving closing funds remains a challenging issue for real estate closings. The prevalence of fraud and the uncertainty by our banking system as to the status of funds received, make this an issue lawyers must specifically turn their minds to. Good old common sense should be the first test applied to any funds received to assess the risk the firm is undertaking.

The Law Society of Ontario sets out (under its practice management topics on managing money), that if you permit funds to be deposited directly to your trust account: "To fulfill your financial record keeping obligations, you should obtain from the third party payor a copy of the confirmation documents generated when the funds are transmitted. The confirmation should document the financial institution and account from which the

funds were sent, the financial institution and account in which the funds were deposited (i.e. your trust account), the amount deposited, and the date and time of the transmission of funds. Prior to accepting a third party deposit to your trust account you should confirm in advance and in writing that you are permitting the deposit of funds for that particular instance, and that the third party agrees to provide you with a copy of their transmission confirmation as described above."

See: https://lso.ca/lawyers/practice-supports-and-resources/topics/managing-money