

Electronic Registration Rules of Professional Conduct and Practice Guidelines

On June 28, 2002 Convocation, on the recommendation of the Joint LSUC/OBA Committee on Electronic Registration of Title Documents, approved a number of additions to the Rules of Professional Conduct and six practice guidelines. These additions and guidelines aim to assist lawyers to adapt their practices to electronic registration. They promote risk management and they encourage lawyers across the province to develop consistent practices when completing transactions that require the electronic registration of title documents.

Rules of Professional Conduct

The Rules of Professional Conduct (*Rules*) are expressed in the form of rules followed by commentaries. The rules contain the duties that a lawyer must fulfill and are expressed in mandatory language. The commentaries explain the rules and are usually expressed using the subjunctive “should”. Two new subrules and four commentaries have been added to the *Rules* to deal specifically with electronic registration.

Use of the Personal Security Package (PSP)

Subrules 5.01(7) and (8), have been added to the rule dealing with the supervision of non-lawyers by lawyers. These subrules impose obligations on a lawyer regarding the use of PSPs issued under the lawyer’s Teraview account. Each user under such an account, that is each person in a law firm that accesses the e-reg™ system, must obtain his or her own PSP (a personalized specially encrypted diskette and corresponding pass phrase) to access the system.

Subrule 5.01(7) provides that a lawyer shall not permit others, including a non-lawyer employee, to use the lawyer’s personalized specially encrypted diskette and shall not disclose his or her personalized e-reg™ pass phrase to others.

Subrule 5.01(8) imposes obligations on a lawyer regarding the use of PSPs by the lawyer’s non-lawyer employees. It provides that when a lawyer has a non-lawyer employee who has a personalized specially encrypted diskette to access the system, the lawyer shall ensure that the non-lawyer employee does not permit others to use the diskette and does not disclose his or her personalized e-reg™ pass phrase to others.

The commentary following these subrules explains the reason for these subrules. The integrity and security of the e-reg™ system is achieved, in part, by its maintaining a record of those using the system for any transactions. Moreover, under the system only lawyers entitled to practice law may make compliance with law statements.

In addition to this commentary, three other commentaries were added to the *Rules*.

Supervision of Non-Lawyers

The commentary to *subrule* 5.01(2) dealing with direct supervision by a lawyer of a non-lawyer now provides that **only** a lawyer may sign for completeness any document that requires compliance with law statements.

The commentary following *subrule* 5.01(3) dealing with delegation provides that a lawyer who approves the electronic registration of title documents by a non-lawyer is responsible for the content of any document that contains the electronic signature of the non-lawyer.

Undertakings and Document Registration Agreements

Finally, a commentary was added to *subrule* 6.03(8). This subrule provides that a lawyer shall not give an undertaking that cannot be fulfilled and shall fulfill every undertaking given. The new commentary explains that the Document Registration Agreement (DRA) contains undertakings and that when a lawyer enters into such an agreement the lawyer must comply with his or her obligations under the subrule.

Practice Guidelines

In addition to these subrules and commentaries, there are six practice guidelines for the electronic registration of title documents. Practice guidelines, unlike rules, are not mandatory. They contain recommended procedures and aim at loss prevention and risk management. The six practice guidelines replace the five practice directives that had been drafted by the Joint Committee with the approval of the Law Society and that had been submitted to the profession for testing over the course of the past two years. The following is a summary of some of the key practice issues addressed in each guideline and other related issues:

Practice Guideline 1 - Maintaining Integrity of Access and Accounts

This guideline deals with the responsibility of lawyers and law firms regarding access to the e-regTM system and accounts.

Office Procedures regarding PSPs

The guideline provides that since the knowledge of, and control over movements of members of law firms (employees, associates or partners) rests with the firm, law firms must ensure that appropriate safeguards are implemented in relation to PSPs issued under the firm's account. The guideline contains a list of the minimum steps that firms should take in this regard.

Sharing of Accounts by Lawyers Practising in Association

Where lawyers practice in association and there is no intended joint and several liability, they should not subscribe to e-regTM under the same account.

Lawyers who practice in association and who are not practising in the manner of employed solicitors are not permitted to share a common trust account and therefore cannot share a special trust account for the payment of land transfer tax and registration fees.

The Effect of a Lawyer's Suspension

The guideline warns lawyers that e-regTM will automatically verify the status of a lawyer and will

not permit a lawyer who is not entitled to practice to approve documents containing compliance with law statements. Lawyers who are suspended, even for administrative reasons such as non-payment of fees or levies or failure to make annual filings, will be precluded from making such statements.

Practice Guideline 2 - Obligations Regarding Document Preparation

This guideline deals with computerization and the consequences of the failure to computerize. It provides that lawyers practising real estate should equip themselves with the required technological tools to properly service their clients. In particular, lawyers should acquire the necessary computer equipment to function as real estate practitioners in the e-regTM system.

Consequences of the Failure to Computerize

The guideline provides that a lawyer who does not have the technological tools to complete e-regTM transactions must make suitable arrangements to meet his or her obligations to the client. These arrangements may include retaining an agent or making arrangements with a lawyer for another party to the transaction. In these situations the lawyer should be prepared to compensate the agent or other lawyer for the costs associated with assisting the lawyer in completing his or her obligations.

Lawyers who require assistance should identify this early in the transaction so as not to inconvenience other lawyers in the transaction or to prejudice the lawyers' own clients.

Practice Guideline 3 - The Acknowledgment and Direction

This guideline deals with the Acknowledgment and Direction. It recommends that lawyers have clients sign this form before each electronic document is released for registration. The form contains the client's approval of the contents of the document to be registered together with the client's authorization to the lawyer to sign and register the document.

Amendments to the Acknowledgment and Direction

Although the guideline recommends that lawyers use the form generated by the e-regTM system, lawyers may draft their own forms. If a lawyer drafts his or her own form, the guideline recommends that the e-regTM document registration report be attached to that form.

If the document to be registered relates to a transaction where it is also appropriate for the lawyer to enter into a DRA, a statement authorizing the lawyer to enter into the DRA should be included in the Acknowledgment and Direction and a true copy of the DRA should be appended as a schedule and signed by the client.

If an amendment that is not merely clerical in nature is to be made to an existing Acknowledgment and Direction, an amended form should be prepared and signed by the client to confirm the changes.

Execution of the Acknowledgment and Direction

The acknowledgment and direction should be reviewed where possible and/or practicable with

the client in a personal interview with the lawyer before the document is released for registration.

Reliance on other documents as the Acknowledgment and Direction

During the transition period in which e-reg™ is being introduced in a region, lawyers may find it appropriate to rely on documents other than the Acknowledgment and Direction to confirm client instructions. For example, documents prepared in Polaris format and signed by the clients can serve as instructions to counsel if this is fully explained to the clients.

Practice Guideline 4 - The Document Registration Agreement (DRA)

This practice guideline discusses the DRA. When lawyers are closing e-reg™ transactions, they may agree or be obliged under the terms of the agreement of purchase and sale to exchange funds, keys and off-title documents before closing on the understanding that these items will be held under strict escrow terms until the electronic documents have been registered. The guideline recommends that in such situations the DRA, a standardized form of agreement posted on the Law Society website at www.lsuc.on.ca, be used to deal with the escrow closing arrangements.

As a result of input received from the profession and on the recommendation of the Joint Committee, the DRA has been revised a number of times.

Execution of the DRA

Lawyers may either sign the DRA or agree that the DRA form the basis for a closing protocol. Rather than signing the DRA, lawyers may exchange letters agreeing to be bound by its terms. Such letters should set out any amendments to the DRA and in particular, should clearly state the manner in which the blank spaces in the DRA are to be completed.

Amendments to the DRA

A lawyer should make amendments to the DRA to meet the circumstances of the individual transaction.

LAWPRO's Position Regarding the DRA

LAWPRO in order to encourage the use of the DRA and to alleviate concerns that practitioners might have regarding the need to verify the reliability of the other lawyer in the transaction, has indicated that it will not require payment of the deductible or impose a claims history levy surcharge where a claim is brought against a member due to a purported breach of the DRA by the opposing counsel during the escrow closing.

Authorization to Enter into the DRA and Professional Obligations

Lawyers should obtain specific authority from the client authorizing the lawyer to enter into the DRA.

Finally, the guideline reminds lawyers that when they enter into a DRA they incur professional obligations. They must fulfill all undertakings given pursuant to the DRA.

Electronic Closings and Mortgage Transactions - Practice Guideline 5

This guideline addresses a number of practice issues regarding mortgage transactions and

electronic registration.

Parties to the DRA

Where appropriate lawyers should amend the DRA to add as parties lawyers representing the mortgagee, guarantor or others in the transaction.

Delivery of Paper Copy of Mortgage

Lawyers acting for mortgagees are reminded that they should comply with section 4 of the *Mortgages Act* (R.S.O. 1990 , Chap. M.40, as amended) which requires delivery of a true copy of the mortgage to the mortgagor. The mortgagee's lawyer should print out a copy of the electronic charge as registered and deliver it to the mortgagor (or his or her solicitor) within thirty days of registration.

Guarantees

Where the charge contains a guarantor, it would still appear necessary for the guarantor to sign a separate paper form of the guarantee to bind the guarantor to the covenant.

Discharges of Mortgages

Undertakings to Discharge Institutional Mortgages

The form of agreement of purchase and sale in common use provides for the payment and subsequent discharge of institutional mortgages (mortgages in favour of banks, trust companies, insurance companies, credit unions or finance companies). The vendor's lawyer is required by the terms of the agreement to deliver on closing a personal undertaking to the purchaser to obtain and register discharges of such mortgages after closing. Some financial institutions have developed a practice of creating and registering the electronic discharge after receipt of the discharge funds without the assistance of the vendor's lawyer. The guideline recommends that the following procedure be followed by the vendor's lawyer when dealing with the payout of institutional mortgages:

- The lawyer when requesting the mortgage statement from the institution, should seek clarification on whether the lawyer or the institution itself will prepare and register the electronic discharge;
- If the institution authorizes the lawyer to create and register the electronic discharge, the lawyer should be able to give the undertaking pursuant to the agreement of purchase and sale;
- If the institution indicates that it will create and register the electronic discharge, the lawyer should obtain written confirmation to this effect from the institution and then subject to any contrary provisions in the agreement of purchase and sale, deliver an undertaking that the lawyer " will cause a discharge of the mortgage to be registered"; and

- The vendor's lawyer continues to be responsible for the delivery of discharge funds to the institution. Additionally, the vendor's lawyer should ensure that the discharge is registered by the institution in a timely manner and should provide registration particulars of the discharge to the purchaser's lawyer.

Electronic Payment of Closing Proceeds

The Law Society 1992 practice guideline regarding Undertakings to Discharge Mortgages contained in *The Adviser Supplement* continues to apply to mortgage transactions other than transactions where the **electronic real time cleared funds transfer capability** is utilized. Where that capability is utilized and subject to the provisions of the agreement of purchase and sale, it would be acceptable for the purchaser's lawyer to transfer the amount required to pay out the institutional mortgage directly to the vendor's lawyer's trust account. The purchaser's lawyer would rely on the vendor's lawyer's personal undertaking to deliver the discharge funds to the mortgagee and procure a discharge of the mortgage.

Private Mortgages

In the absence of any express provision to the contrary in the agreement of purchase and sale, lawyers should not give nor accept undertakings to discharge private mortgages (mortgages held by persons other than financial institutions) after closing.

Private mortgages should be discharged either prior to or on closing. Where the private mortgage is being discharged on closing, the guideline provides that it would be acceptable for a lawyer to transfer amounts required to pay out the mortgage directly to the vendor's lawyer's trust account if the mortgage itself comprises one of the documents to be registered under the DRA.

It should be noted that the DRA imposes an obligation on the lawyer to forward promptly to the appropriate mortgage lender any monies representing payout funds for mortgages to be discharged, as soon as funds and closing documentation can be released in accordance with the terms of the agreement.

Use of Compliance With Law Statements - Practice Guideline 6

The e-regTM system permits lawyers to make compliance with law statements without filing a paper copy of the evidence upon which the statements are based. These statements require the application of a lawyer's legal expertise and judgment.

Supporting Evidence

The guideline provides that lawyers should obtain and retain in their files the evidence upon which compliance with law statements are based or should ensure that publicly available information to fully support the statements is and remains available. The lawyer may require the supporting information to respond to claims made against the lawyer in consequence of such statements.

Going Behind Compliance With Law Statements

Lawyers need not look to, nor request, nor require evidence behind registered compliance with

law statements. The guideline provides that lawyers should rely upon the provisions of the *Land Titles Act* as to the sufficiency of title once certified.

In addition, with regards to liability arising from compliance with law statements, LAWPRO has indicated that it believes that there should be no need for a lawyer (*with no adverse knowledge*) to verify compliance with law statements made by the opposing counsel, even if the compliance with law statement is being made to close a pending transaction as opposed to a historic transaction. LAWPRO has indicated that it will waive any deductible and claims history levy surcharge in situations where a negligence claim is brought against a lawyer who *innocently* relied on the compliance with law statement made by the lawyer representing the other party.

Conclusion

It is important that lawyers practising real estate and their staff become familiar with both the electronic registration practice guidelines and the amendments to the *Rules*. The guidelines and amendments to the *Rules* were prepared with the assistance and input of the Joint Committee and real estate practitioners from across the province. They assist lawyers to manage risk and to practice competently in an e-reg™ environment.