

REAL ESTATE LAW

CLIENT INSTRUCTIONS

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Chapter 3

Client Instructions¹

[§3.01] Receiving Instructions from the Buyer

Once you have reviewed the purchase agreement, contact the buyer to discuss the purchase agreement and other matters.

Advise your client of all aspects of the transaction, including your analysis of the purchase agreement. You should also discuss the procedure and timing for completing the conveyance. Give your client a picture of what you propose to do and what timeframe you propose to do it in.

You must consider the level of knowledge your client has. If your client is a first time buyer, you will have to explain things in great detail and assist him or her in many ways. This is one of the most stressful times in your client's life, and your client may not be sure of what he or she is getting into. However, if your client is an experienced owner of real estate, you can approach the initial interview differently.

Presuming that you are acting for a first-time home buyer and you have received and reviewed the purchase agreement, discuss the following with your client during the initial telephone interview or in a preliminary reporting letter (for a discussion of preliminary and interim reporting letters, see §5.18).

1. Discuss fees, disbursements and applicable taxes fully and fairly with the buyer at this time. You will find that many buyers are embarrassed to ask you directly what your fees and disbursements will be and will appreciate a direct approach.
2. Advise what steps you propose to take to title searching, after confirming your instructions to act. You can also explain what you will be looking for and how you will communicate the results of that search.
3. State clearly that obtaining insurance is the responsibility of the buyer. Recommend that the client contact his or her insurance agent well in advance of the completion date to ensure that proper coverage is obtained. The buyer's coverage should be effective 12:01 a.m. on the completion date or earlier, rather than the possession date.

4. Ascertain whether your client is concerned about the location of improvements on the lot. If so, explain to the client the nature of a surveyor's certificate and the cost.
5. Discuss municipal zoning by-laws and building by-laws and their general effect. If your client is concerned with these matters, he or she should be given the responsibility to make his or her own enquiries.
6. If your client is concerned about the legality of suites on the property, the client should make enquiries of the appropriate regulatory authorities.
7. Discuss how the client is going to obtain the keys and discuss the moving expenses. Responsibility for these matters should be given to your client.
8. Discuss opening of accounts such as hydro, telephone, etc., with your client. It should be made clear that these matters are also the client's responsibility.
9. Enquire if the purchase price reflects the fair market value of the property. In an arm's-length transaction, it usually does.
10. Identify the name of the buyer, how he or she wants to be described in terms of both occupation and address, and whether, if there are two buyers, they are to hold the property as joint tenants or as tenants in common. This is probably the first time the choice between joint tenants and tenants in common has been considered and it will require some explanation by you.
11. Enquire whether any recent work has been done on or about the property which might raise concerns of a potential lien claim under the *Builders Lien Act*.
12. Enquire at this stage as to whether or not your client is aware of any marital difficulties between the seller and his or her spouse (which might attract the provisions of the *Family Relations Act*).
13. Find out if the buyer has received a disclosure statement or other documents under the *Real Estate Development Marketing Act* if the seller is required to deliver documents. Suggest that the documents be forwarded to you for you to review in order to ensure that any information contained in them, upon which the buyer is relying, is accurate.
14. Discuss with your client the proposed method of funding the purchase. Explain that you will require funds in your trust account before the completion date. If a mortgage is to be obtained, outline the steps that will be required to complete the mortgage transaction and the documents that must be signed by your client.

¹ Revised in July 2008, July 2006 and July 2005 by Joel Camley of Gowling Lafleur Henderson LLP. Reviewed annually by Lawson Lundell, Real Estate Department until June 2004.

15. Advise your client that property transfer tax will be payable, if applicable. Most transactions between unrelated parties are taxable and the tax (1% of the first \$200,000 of fair market value of the property and 2% of the balance, if any) may be a significant expense for which your client has not budgeted. Remember that there is an exemption on some purchases if the buyer is a first-time home buyer.
16. Determine from your client whether GST is payable. If GST is not dealt with in the contract, you should consider at least the following factors:
 - (a) whether he or she is a builder, or renovator, if the seller is an individual;
 - (b) whether the property is a new, substantially renovated or converted commercial property;
 - (c) whether the property is the seller's residence or personal recreational property; and
 - (d) whether the buyer is entitled to a GST credit either directly from the builder or from the Federal Government.

Depending on the information provided to you, the buyer or seller may have obligations under the *Excise Tax Act* to collect and remit GST, in which case you should consider obtaining instructions to negotiate further agreements with the other party, or obtain representations and warranties to clarify GST issues. You should be especially aware of situations where new housing is being sold, which may attract GST. The GST is discussed in more detail in §5.08.

Once you have verbally received all of the information from the buyer, you should confirm your instructions in writing. This is discussed in detail in §5.18.

[§3.02] Conflict of Interest

Remember for whom you will be acting when taking instructions. You should always be keenly aware of the Rules in Chapter 6 and Appendix 3 of the *Professional Conduct Handbook* regarding acting for more than one party in any matter where there is a conflict between any of the parties. Appendix 3 contains provisions that deal specifically with the circumstances in which a member will be permitted to act for more than one party with different interests in a conveyancing transaction.

Frequently, a real estate lawyer is asked to act for more than one party, particularly in residential transactions. The parties will perceive this as being in their interest, with a view to minimizing costs, and often have no idea of the extent of the lawyer's function in a conveyancing transaction, or how any conflict of interest could arise. The lawyer's function is often seen as merely filling in blanks in standard form documents. Parties often are not fully aware of the extent to which legal rights and

obligations are affected by a transaction.

If you are asked to act for more than one party in a real estate transaction, you must carefully consider for whom you are being asked to act and what potential there is for a conflict of interest. The Rules in the *Professional Conduct Handbook* must be strictly adhered to. Even when a transaction appears to be straightforward with little potential for a conflict of interest bear in mind that parties frequently have a change of heart about completing a transaction and "whatever can go wrong, will".

Section 2 of Appendix 3 sets out the guidelines for when a lawyer can act for parties with different interests. Typically, unless the transaction is a "simple conveyance", a lawyer should not act for both a buyer and a seller. Section 5 of Appendix 3 outlines the types of transactions that must not be treated as simple conveyances.

A number of cases have imposed liability on lawyers who acted for more than one party in a real estate transaction; you should be familiar with those cases. There are also discipline cases published in the Law Society's *Discipline Case Digest*. See, for example, the December 1992, No. 10 case, where the lawyer professionally misconducted himself by representing parties to real estate transactions in breach of the *Handbook* conflict rulings; the hearing panel found that the lawyer demonstrated a disturbing attitude to real estate practice, that he was unable to recognize conflicts of interest, and that he did not see himself as the protector of anyone's interests, but simply the mechanical facilitator of transactions.

Most often you will be asked to act for a buyer and a lending institution in a residential conveyance. Appendices 3 and 4 are sample conflict letters to the buyer and the lender.

There is a discussion of conflicts of interest at §6.14 of the *Practice Material: Professional Responsibility*.