Bob Aaron, Kathleen Yeoman, Ian Kirby, Ray Leclair

The Future of Real Estate Practice?

Residential real estate practice has changed over the past decade with the introduction of title insurance, the creation of the TitlePLUS program, mortgage outsourcing initiatives and competition from non-lawyers. At TitlePLUS conferences across Ontario, and in follow up interviews, we asked panels of regional real estate practitioners their views on the changing role of lawyers in residential real estate transactions. Following is a selection of their comments.

Lender outsourcing became a major issue in 2003 when a number of outsourcing companies, working with major financial institutions, piloted mortgage processing programs in selected areas in Ontario. Among the concerns these programs raised were: potential conflict of interest issues; liability issues surrounding trust accounts; less emphasis on the role of the lawyer; putting third party intermediaries between the lender and the lawyer; and the fact that additional costs were being carried by the consumer without corresponding benefit. A joint OBA-CDLPA-ORELA working group was formed to raise awareness of the issue among lawyers, and to advocate on lawyers' behalf with the lenders and title insurers. At the same time, the County of Carleton Law Association mobilized lawyers in the Ottawa Valley against a local mortgage outsourcing initiative.

While these groups were successful in stopping these pilot programs from expanding, the real estate bar has not been completely successful at getting lenders to understand the value of lawyers in conveyancing. Why not?

Brenda Bell: When you read Justice (Peter) Cory's Report, you realize it's a slippery slope between when they let non-lawyers into real estate work, and when title insurers start introducing closing centres. My concern is that if we don't promote ourselves in the deal, people don't realize our value. I think it's very important to market ourselves not just to the general public, but to others involved in real estate: agents and the banks, the people who are the first ones on the scene. If the banks promote a cheaper solution, such as paralegals, we'll be out of the deal entirely. We need to let them

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know how important we are. We have to band together and work with TitlePLUS and move beyond not just the online product, but the VIP program and RealtiPLUSWeb product. This gets the banks involved and gets us all on the same team again.

Jerry Udell: More and more lenders are using TitlePLUS instead of U.S. title insurance companies. They (commercial title insurers) are making many mistakes that lawyers generally don't make: I've heard of discharged mortgages that should have been assigned and mortgages put under wrong names or wrong properties. Lenders are starting to realize what lawyers do; the dotting the i's and crossing the t's is time consuming. We clear their desks so they can do what they do best: selling products to clients. What other title insurers have done with these low-cost arrangements is download work onto the desk of the lender. The cost is their time and delays, and to everybody, time is money. As word filters up to those in administration and they realize that lawyers can do the work at or close to the same cost, they realize the value. Their bottom line is being met.

Ray Leclair: We've forgotten to maintain the communication with clients, in particular, our biggest clients: the banks. We must ensure the communication is flowing to and from banks to maintain our role in the transaction. We shouldn't be waiting to hear from them on new initiatives, we should be proactive in going to them with new ideas.

Traditionally, bar-related organizations work toward specific purposes that are often not shared goals: At times they can even work at cross-purposes to each other. Does the real estate bar need one voice to represent it, and if so, how can that be accomplished?

Ray: Our success in fighting mortgage outsourcing demonstrates the strength of our profession when we work together as a group. ORELA, the OBA and CDLPA worked together, their lobbying shut down what the other title insurers were trying to do, and we're continuing to push on lender outsourcing. Other initiatives are the Seminar in a Box program (see story on page 29) to promote ourselves to the community, and we're working together on ideas for standards and a suggested fee schedule to be presented to the Law Society for consideration.

We're beyond the point where we spin our wheels – we now have a real focus on what needs to be done for the real estate bar, and we're working together to make change happen. We have to market with one voice for the real estate lawyer in Ontario, and the Working Group on Lawyers and Real Estate (which is an extension

Selected panelists

Moderator:
Maurizio Romanin is the president of LawyerDoneDeal Corp. After being called to the bar in 1987, he joined the firm of DelZotto, Zorzi. Maurizio is on the OBA Real Property Executive and is co-chair of the OBA Condominium Committee and Joint OBA/LSUC Joint Committee on Electronic Registrations. Maurizio moderated panel discussions at all 2005 TitlePLUS conferences.

Panelists:
Bob Aaron (Orillia panel): Bob is a sole practitioner in Toronto practising in the areas of real estate, estates, and corporate/commercial law. He is a bencher of the Law Society. In 1993, he founded the Ontario Real Estate Lawyers Association. Bob writes the Title Page column in the Toronto Star.

Brenda Bell (Thunder Bay panel): Brenda started a successful practice in Marathon, with offices in Terrace Bay and Manitouwadge, and now practises with McAuley & Partners in Dryden.

Ian Kirby (Orillia panel): Current president of the Ontario Bar Association, he has served the OBA in numerous roles since 1989. Ian practises exclusively in the area of civil litigation.

Ray Leclair (Kingston & Orillia panels): General Counsel for Kanata Research Park Corporation, Ray is also VP – Ontario Real Estate Lawyers Association and co-chair of the Working Group on Lawyers and Real Estate.

Bob Tchegus (Kingston panel): Bob is the partner responsible for the real estate group at Cunningham, Swan, Carty, Little & Bonham LLP in Kingston. He is a certified instructor for the OREA Real Property Law Course and is a special lecturer in Residential Real Estate for the Bar Admission Course. He is designated as a Certified Specialist (Real Estate Law) by the Law Society of Upper Canada.

Jerry Udell (Windsor panel): A partner with the McTague Law Firm in Windsor, Jerry is counsel to a number of financial institutions and is on the Working Group on Lawyers and Real Estate. He has been designated a Certified Real Estate Specialist by the Law Society, and has been appointed to the Board which oversees the Certified Real Estate Specialist program.

Kathleen Yeoman (Orillia panel): After working with the Department of Justice and the Institute of Chartered Accountants, Kathleen returned to private practice in Mississauga in 1987, practising primarily in residential real estate.

of our collaborative efforts to fight mortgage outsourcing) is one voice, and we've been making inroads.

Bob Aaron: I just want to see the interests of lawyers represented: We need to deal with issues on a case-by-case basis and forget about politics and mergers.

Brenda: People who think we should have one voice are talking about legal organizations that don't necessarily see eye to eye. Regardless of whether it's one voice, or a band of common voices, it doesn't matter. On this issue, we've all got the same point of view we want to get across, we can team up.

Jerry: The problem is that each group has its own agenda. I think OBA has taken positive steps to put more practitioners on its council. To be able to contribute in a significant way to any of those groups, you have to make the sacrifice of not being in your office: that's really part of the issue. We all get involved in our own lives and don't see the bigger picture. The voice of the bar outside of Toronto has to be heard, so you have to subsidize the cost. Then it becomes a matter of conscience. Everyone has to make concessions to benefit the bar and public. Everyone would benefit from a merger. Ultimately, the OBA, CDLPA and Law Society have to come to the conclusion that without the real estate bar, the whole bar is in trouble.

In real estate transactions, the work of lawyers is often time consuming and highly specialized. While the fees that real estate agents collect have increased exponentially in the last years, lawyers' fees have not witnessed corresponding increases. What can lawyers do to ensure they receive a reasonable fee necessary for a viable real estate practice? How can we ensure that standards are met? With the amount of competition and reported undercutting of fees in the real estate bar in jurisdictions across Ontario, are lawyers their own worst enemies?

Ian Kirby: It's wrong that consumers are willing to pay much more to their real estate agent than to their lawyer. We need to be able to charge reasonable fees so others are drawn to our profession. In 1950, the real estate agent got a six percent commission on a listing, – Today, it's still six per cent, but look at selling prices today – it works out to 4,000 per cent or more increase in fees for agents – while lawyers are working for less and less.

The problem is that real estate groups have not been effective in advancing their cause. Groups that represent real estate agents have been more effective than lawyers. A good example is the *Mortgage Brokers Act*: The proposed amendments would restrict activities lawyers can engage in. The OBA view is that rather than limit the range of activities, we need to have lawyers more involved in more aspects of real estate, so we're making a submission to ensure lawyers' practice is protected and expanded. The CBA also has been advertising on behalf of the profession.

We're all afraid of the word 'tariff' – but we should be taking our cue from litigation lawyers who have set up a cost grid based on the types of work they do.

Bob Tchegus: What we've done at our firm is to work on a percentage, just like the real estate agent: 0.5 per cent on a purchase and 0.4 per cent on a sale (with minimum fees between $650-750). Since the average real estate lawyers' fees are $650 to $750, it works out for houses in the $150,000 market and, heaven forbid, we actually can make some money on the higher-end properties. We've probably lost a lot of price-sensitive shoppers, but they're the ones we don't want. The people who are most cost-sensitive are often ironically the most demanding. The lawyers who cater to them are perhaps more likely to get sued. You can't just bang these deals out without applying any kind of effort to them, and yet a low fee doesn't justify any effort!

Maurizio Romanin

Set percentages work for the real estate agents. I don't understand where the fear comes from at the bar. Perhaps a standard fee across the board would be appropriate, but the problem is one of enforcement. Even if you could get the real estate bar in unison, you're always going to have the general practitioner who dabbles in real estate or the criminal lawyer who does so when times are tough.

Brenda: Some lawyers feel it won't be easily received, but I think the fee schedule is a good idea; it can calm people's fears that we're charging too much. It works for realtors because everyone knows they get six per cent. If it's just acknowledged this is how much lawyers charge, it will make us all work to the same standard. If the fees are the same, you have to provide good service to stay in business.

Ray Leclair, Ian Kirby

Jerry: When you get into a jurisdiction such as Windsor, the majority of clients are CAW (Canadian Auto Workers Union) members: they set the fee, you have to try to match it. When you talk to the CAW people setting the fees, they say, "lawyers are willing to do it for this price, so why not?" Technology has allowed us to remain competitive: We can do more for less expense, but then your exposure is high. The TitlePLUS program has been our saving grace; it has really allowed us to remain competitive.

We are all suspicious that there are people out there who are bait-and-switch lawyers. They mislead the public by advertising their quoted fees as lower, and then later add on a bunch of extras. Some call it smart marketing; I call it deception. Not enough has been done to get rid of the people who are misrepresenting themselves, and the public ultimately suffers; the public at large has become the sacrificial lambs. But until there are a number of complaints, tremendous damage is done.

Kathleen Yeoman: We are our own worst enemies. It's harder than ever to do business because the issues in closing are often more complex, clients are more difficult to deal with, more litigious – yet we have lawyers willing to undercut each other, we're competitive, litigious and argumentative – it's crazy.

Ray: The Law Society standards are basically the Rules, and there are very few practice-specific Rules. We're trying to establish standards that may or may not create new Rules that we'll be able to monitor. That's why we'll be asking the bar: How do you want to see this happen? Rules? Certification with audits? Or something else? We haven't come to resolution on that.

The Law Society has now created a working group on real estate issues; on a related note there's been some pressure on the Law Society to come out with new rules for fraud. We're working in combination to produce one package, so that we can go out with the message of professionalism, and explain the long-term view for the public and the short-term view for practitioners. If fees keep going down, the lawyer gets put to the side, and the public suffers. We're elevating that message to countrywide via the Canadian Bar Association. We're finding banks want national, not province-wide solutions.

As consumers shop for the lowest quote they can get on legal fees, it becomes clear that the real estate bar has not done enough to make clear the value they bring to real estate transactions. How can real estate lawyers change public perception?

Ray: We need to keep educating – both lawyer and consumer – about the value the lawyer adds to a real estate transaction. We say we quarterback – when in reality we're only involved at the tail end. We need to get out in front of the transaction. Can we expand where we're involved? We have to. We are professionals and we cannot forget that: We have to maintain a certain level of professionalism.

Bob Aaron: We need to reinforce that if a lawyer is not involved, there is no one there to protect the public – that's where the interests of the Law Society dovetail with ours, as their mandate is to protect the public.

Ray: At this point the best marketing the individual lawyer can do is to make sure the day-to-day business is continuing to be done. They should make sure the client knows all the work they're doing, and they should organize Seminar in a Box presentations.

Kathleen: It's up to us to demonstrate value, and we can all do it with our own clients. When you hear that someone is offering a $999 "all in" package to close a purchase you need to explain

what that lawyer is likely **not doing**, all the searches he/she won't be doing if the fees are going to be capped. We also need to work together; we need the help of others in the real estate arena to come up with the money to help make education efforts successful.

Bob Tchegus: The only marketing out there for lawyers at this time is for TitlePLUS. Real estate lawyers aren't really out there marketing themselves. Wherever I go, it's title insurers who are spending the money. It's all marketing: The lawyers have to have a presence, and that's how to do it. The ironic thing is that it is the lawyer who really takes pride in his/her work, compared to all the other parties involved. What lawyers have to do is stop selling themselves short and get their confidence and measure of self-value back. Real estate lawyers have knowledge that people want, and they tend to forget that and sell it too cheaply, if not give it away.

You have independents fighting the cause. With more dollars, you're going to get a bigger bang for the buck. Politics have to be put aside. We need a one-shot effort with the money to do the advertising and take on the commercial title insurers. They haven't won yet. We need the resources to get people sitting down with the banks and selling lawyers and what we do in the real estate transaction/market.

Brenda: Lawyers really aren't good at marketing: for a long time we weren't able to advertise. Meanwhile, realtors are on every channel telling people how important they are. Every time someone's rights are trampled on or he is being taken advantage of, he calls a lawyer. In real estate practice, we're preventing people from getting into trouble in the first place. We have an important role in society and real estate. We should be putting up more of a fight to make others realize that importance.

Jerry: We can do better. As a member of the working group, we've tried to lay out the tools, such as the Seminar in a Box program. Most people don't take advantage of these tools. A lot of time and effort has gone into making these tools available; we have to learn to be better marketers. If we can't take care of ourselves we can't expect others to do it for us.

With all the upheaval that the real estate bar has faced in the last decade, what trends are of major concern? What can lawyers do to ensure they remain an essential component of real estate conveyancing?

Bob Tchegus: I recall in 1997, attending a seminar on title insurance and being told we have to tell people about title insurance. Back then, if the other title insurers had made a deal right off the bat to use Ontario solicitors, it wouldn't have been necessary to create the TitlePLUS program.

Bob Aaron: I have to give credit to the Law Society for creating TitlePLUS – because the closing centres were out to put us out of business. The Law Society realized there would be a wholesale dislocation of lawyers, as there was with the closing centres in the States, so they created TitlePLUS.

Bob Tchegus: The American title insurers are flooding the market with low premiums; eventually they won't need lawyers. They are insulting us by asking us to work as brokers. I know of a number of major builders with closing centres that refuse to execute the Planning Act statements. That's the first step in our losing control. We need to demand that there be law statements

on all instruments. The one thing that everyone has to realize is that TitlePLUS is LawPRO – TitlePLUS is us. I believe all lawyers should be buying TitlePLUS. It's self-insuring. Other title insurers have told us of their policy of not suing lawyers, but I believe that this policy will change. But TitlePLUS is the only company where that it is just common sense to not sue lawyers.

Ray: Is there a future? Yes, very much so. We need to seize the role. We've been letting it slide. We need to be a little more proactive in maintaining our role, educating the public, the lenders, the broker, the agents. We've been lax on doing that. The Working Group is working on those issues, and on a major marketing effort to the public. People don't think about all of the legal steps and the transactions we do in their deal. People don't hear about problems, because of all the good work we've done in past. We're going to see a lot more of people getting the short end of the stick.

We shouldn't go to a U.S. model where the lawyer isn't involved. In Canada, we try to identify the issues and make sure the purchaser gets what she bargained for. We need a marketing strategy. The Law Society's report on small firms and sole practitioners is a starting point: The Law Society wants feedback from the practising bar on the recommendation pertaining to marketing. We want to go back to them and say we want to partner all the groups together and do a joint marketing campaign.

Ian: Real estate is the only butter left in the sandwich for many lawyers. Legislation has made motor vehicle negligence into work that no one wants to touch; provincial criminal work is being usurped by paralegals – all that's left is real estate.

This has major implications for small communities where lawyers are active in local politics and often the pillars of the community. If they leave because they can't practise real estate law and they can't support a family, it creates major access to justice issues for these communities.

Brenda: If we keep selling ourselves short, we're only going to get stuck with the more complicated deals as non-lawyers take over the more straightforward transactions. We'll only get involved when things get messy, which means fees will go up. Society in general will be left with lawyers they can't afford.

We're moving towards better promoting ourselves. Everyone on the panel is on fast forward. It's time to get out there and show how important we are. The U.S. title insurers are a major force; most of us don't realize how huge they are. We have to put up a fight: It's time to band together as lawyers.

Bob Tchegus: In all honesty, I think lawyers are running hard because of the economy. We know it's cyclical and we're wondering what's going on? No one wants a recession, but there will be a slowdown and that's when things will get tough. Now is the time for planning and marketing, so when things tighten up, we'll be prepared.

Jerry: Ten years ago I thought we'd be out of real estate practice by now. Fortunately the TitlePLUS program and the Law Society have made the playing field more level. The ability to computerize, openness to adapting to new technology and integrating it into your practice are essential: Without them you're a dinosaur.

Seminar in a Box

Critical to the future of the real estate bar is the need to educate the public on the value that lawyers add to the transaction. To that end, the Working Group on Lawyers and Real Estate has created Seminar in a Box – a complete presentation and information package for lawyers to use in a public presentation on the work they do in a residential real estate deal.

The package – **available at no cost to lawyers** – includes: a PowerPoint presentation, key messages, task checklists (For example, book a room, confirm a date, arrange audio/visual equipment), ideas for other speakers who could be invited to present (for example a banker or home inspector), a mission statement, a draft budget and correspondence templates for invitations, thank you notes and more.

Seminar in a Box was developed over the winter, and was tested by volunteers during the past few months. According to Ray Leclair and Clare Brunetta, co-chairs of the Working Group, audience reaction has been positive: "By putting the lawyer in charge, we're making sure our message gets out in the way we want and need it to," says Leclair. He's quick to add that the program will evolve as additional materials and ideas from lawyers are incorporated into the package.

Leclair encourages anyone in real estate practice to request a package, get out into the community and make sure the public understands the importance of having a lawyer involved in their real estate transactions. Brunetta explains that the program "is designed as a user friendly tool that we as lawyers can use to raise consumer awareness about the critical role that we play."

He believes lawyers need to take an active part in explaining the importance of legal services to the public: "People need to be aware that real estate conveyancing is much more than just document processing. If we as lawyers don't deliver that message, then nobody else will do it for us. Seminar in a Box gives us the ability to do just that."

Interested lawyers can request information or the Seminar in a Box by contacting one of the co-chairs of the Working Group, Ray Leclair at: ray.leclair@krpc.net or Clare Brunetta at cbrunetta@nwonet.net.