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Retainer Letters – How to Cover Your Bases in Residential Conveyancing

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They go by many different names: “retainer letter”, “initial letter”, “introductory letter” or “engagement letter.” Whatever our favoured or habitual nomenclature (mine is “engagement letter”, which I shall generally use herein), these letters are a valuable, arguably under-utilized, tool in residential real estate practice. Beyond being a dry memorial of the contractual relationship of a conveyancing retainer, these letters should also be about fostering efficient communication between lawyer and client, informing our client of the key aspects of the transaction, defining the roles of each party, and outlining who will (or won’t) be expected to perform certain roles, and on what timelines.

This paper will focus on engagement letters in residential real estate – an area in which their potential utility as communications is great, given the unfamiliarity of the average client with the conveyancing process, but their adoption far from universal. This despite consistent warnings from LawPRO that poor communication between solicitor and client comprising the most numerous class of claims LawPRO addresses.¹ From a defensive practice standpoint, the use of engagement letters to communicate clearly and comprehensively with our clients can prove worth their weight in deductibles.

Beyond solicitor self interest, a good engagement letter can equally prove itself an invaluable service to the client, with little ongoing investment of time on the lawyer’s part. Indeed, engagement letters, properly prepared, can be a significant net time saver to the lawyer, if used correctly by both lawyer and client. Those of us who do a good volume of real estate transactions may easily forget how unfamiliar the process is to our clients. Even if we have a small real estate practice, there is a good chance that a lawyer does at least a few dozen transactions a year. Some offices may process multiple thousands a year. Matters such as insurance, ID, meeting times, key exchanges should be intimately familiar to all of us.

By contrast, a typical residential real estate client may buy or sell half a dozen homes in their lifetime. My experience has been that many (but by no means all) “difficult clients” become that way because of their unfamiliarity with nuances of conveyancing and closings, at times feeling that they are “in the dark”. For most of our clientele, a house purchase is the largest and most long-term investment they will make, in the course of which they will hand over a fair portion of their life’s savings. Client stress in the face of uncertainty is in no way hard to understand. Our best efforts at providing clarity may well confound the matter: what we may see as a concise intake script in an initial meeting or phone call is, demonstrably for many clients, simply information overload that has a low retention rate.

A thorough engagement letter can help educate our clients, giving them some assurance that their transaction is in good hands, and also allowing them to refer back to the contents at their convenience to refresh their memories about some of the many details with which we bombard them. Anecdotally, I

¹ See *LawPRO Annual Report 2013*, p. 10

have found that the use of more detailed engagement letters cuts down of the amount of time I spend answering routine client questions of transactional logistics, and focuses client questions on truly important matters, such as matters of supplemental due diligence or capacity of ownership.

As such, how is one best to craft an engagement letter? There is no universal answer, but I suggest that the letter try to place in one convenient document as much essential information as possible, written in accessible but precise language, allowing both the lawyer and client to establish a baseline common understanding of the transaction. Most of the topics that should be covered are back-to-basics and decidedly unglamorous, but that sort of information is precisely what our residential clients need to be an informed participant in a residential real estate transaction.

Here follow some thoughts on the key bases to cover. The categories described are by no means watertight compartments, and there is some topical overlap between them. The list is by no means exhaustive. The primary purpose of this essay is to rationalize conceptually what might best be incorporated in an individual practitioner's engagement letter.

I. Disclosures

The engagement letter affords a convenient place to outline our required disclosures to clients, whether based on professionalism and common law requirements. While such matters are of unquestionable importance as part of our professional duty, and defining our contractual and professional relationship with our clients, having to give the same speech about routine matters, over and over again, frankly becomes tedious, and client retention of information conveyed by such lectures is middling at best. This is your opportunity to drive home to the client your role as the conveyancing lawyer, while also protecting the lawyer by ensuring appropriate defensive practice.

a. Fees

No matter how clear one may be in outlining fees verbally, clients can be expected to forget about disbursements, HST, and what constitutes an "additional fee service" (e.g. late mortgage instructions, writs, extensions, post-closing disputes). Define this in black and white in the engagement letter – it will give you a far stronger case if the client needs reminding about what they had agreed to pay, or (should that fail) if the client later assesses your account.

b. Scope of Retainer: What you do (and don't do) for the client

From a typical purchaser client's perspective, the lawyer "does the paperwork to get them the house." Many clients haven't the faintest idea what this actually means or entails, but virtually all generally (and reasonably) expect that the lawyer role, broadly stated, is to protect them. Absent some qualification, it is not unreasonable for a client to presume that this role is very broad indeed. Such uncertainty sets ideal preconditions for the nuisance of litigation, or the embarrassment of reputational damage.

It is therefore important to clarify in an engagement letter the role of the lawyer. Rather than re-invent the wheel, one may wish to consider providing the joint LSUC-OBA brochure “Working with a Lawyer when you Buy a Home”² as an enclosure / attachment to a purchase engagement letter to outline the lawyer’s role. Similarly, resources being prepared by the Working Group on Lawyers and Real Estate Condominium Sub-committee will soon provide useful, near-universal condominium resources to help inform a purchaser.³ It is nevertheless important to define what one *will not* do in the course of one’s conveyancing retainer, with particular regard to matters that might reasonably arise in a typical transaction. Accordingly, a lawyer may wish to expressly exclude some or all of the following non-exhaustive list of potential matters from a purchase retainer unless the retainer be expressly extended:

- Negotiation of the terms of the Agreement of Purchase and Sale or mortgage
- Post-closing (or post-non-closing) disputes, litigation or title insurance claims
- Planning advice for tax/capital gains/investments
- Environmental matters
- Obtaining a new survey, unless directed otherwise
- Planning matters or future use of the property
- Conducting specific off-title searches that are “covered” by title insurance, unless otherwise directed in writing by client
- Any parts of a condominium status certificate the lawyer will not review and relies upon the client to make his or her own decision on whether or not to purchase (e.g. rules and regulations)

c. Securing Title: Title insurance vs. opinion on title

The Rules of Professional Conduct also require that we advise our clients about the options of securing title.⁴ The nuances of distinguishing title insurance from an opinion on title are both difficult to explain in a short conversation with a residential purchaser client, and unlikely to be retained by our client in any event. Give them a clear outline of both, and if it is your default practice to proceed by way of title insurance unless directed otherwise, say so, and be fully prepared to justify this position if the client asks why. Disclosures relating to certain insurer-specific matters, such as TitlePLUS’ relationship with the Law Society, or Stewart Title’s Examining Counsel Fee, may best be disclosed here.

d. Capacity of Ownership

Although I would hope that all lawyers discuss this point on intake with purchaser clients, repeating in detail the difference between joint tenancy and tenancy in common affords an opportunity for client reflection.

² Online: http://www.oba.org/CBAMediaLibrary/cba_on/pdf/workingWithLawyerBrochure.pdf

³ <http://www.lawyersworkinggroup.com/CondominiumDocuments.html>

⁴ Rules of Professional Conduct, r. 3.2-9.4 to 3.2-9.7

e. Joint Retainer

The Rules of Professional Conduct require that a lawyer disclose the nature of joint retainer obligations to our clients, along with any pre-existing relationship with one or more clients in that joint retainer.⁵ An engagement letter affords the ideal opportunity at the outset of the retainer to confirm this disclosure to clients, complying with professionalism requirements while mitigating the risk of a conflict arising before the appropriate disclosures are otherwise confirmed in writing.

f. Consent to e-mail communication

Beyond some overly broad interpretation of anti-spam legislation, one must bear in mind that e-mail is not always easy to secure. Many of our clients consider it a normal form of communication and simply don't care. Some care a great deal. Presuming that all clients fit into the former category is a recipe for disaster if data somehow becomes compromised.

II. Exchange of information with the client

Beyond a unilateral conveying of largely pro forma information from lawyer to client as discussed so far, an engagement letter should also try to help a client know what he or she needs to provide or confirm, and at what point in the transaction. Presuming the client reads the contents, this affords him or her the opportunity to be a helpful and cooperative participant in your retainer.

a. The basics

Don't overlook the most elemental intake information that may already have been collected: incorrect information or transcription errors on intake can be a cause of significant frustration if detected too late. As such, it is advisable to confirm in the engagement letter basic information as may have been received in an intake discussion (and/or input into productivity software), and also outline what information is outstanding, for example:

- Closing date
- Purchase Price
- Full legal names, dates of birth, desired capacity of ownership of clients
- Spousal status and name of off-title spouse(s)
- Whether any purchaser has indicated that he or she is a first-time home buyer

Clients can and do give incorrect information on intake, or a missing amendment to an APS, which can have consequences (and/or cause needless stress for all parties) if left undetected. It is a significant time-saver for all to catch these mistakes at the outset of the retainer – not, for example, mid-way

⁵ Rules of Professional Conduct, r. 3.4-5 to r. 3.4-7

through a signing meeting, the night before closing, only to discover thereafter that your purchaser client's actual name has a \$500,000 similar-name writ against it.

b. What you will need from the client

Work your checklists into the letter to reinforce what information you need from the client. Even if you routinely discuss these on intake interviews, repetition is beneficial in case an item gets skipped or a client forgets your requirement.

On a sale, we will typically wish to elicit from the client, at a minimum:

- Particulars on encumbrances to be discharged
- Tax bills, current common expenses, and details of any tenancy
- Forwarding address
- S. 116 residency status
- Name(s) of any off-title spouses

Likewise, on a purchase, we will typically wish to elicit from the client, at a minimum:

- Legal names, dates of birth, and spousal status of purchasers
- Whether any purchaser is a first-time home buyer
- Identity of mortgage lender
- Proof of insurance
- Survey, if provided to client directly
- Special characteristics of the property (e.g. ravine or water frontage, tenancies)

On all matters it is prudent to outline *identification requirements* in the engagement letter, specifically that you will likely need at least one, ideally two current pieces of government-issued pieces of ID, and that these cannot be a health card. Alerting your client to this requirement, at the outset and in writing, allows time for them to deal with ID issues (for example, obtaining an expedited passport or Ontario photo ID card) at the outset of the retainer, rather than on the eve of closing.

Outlining any steps you expect the client to take relating to *utilities* is also helpful, both in terms of what the client should do relating to public utilities you may contact on the client's behalf (i.e. contact them independently to confirm forwarding addresses or payment information) in addition to identifying the utilities for which you expect the client to take full responsibility for setting up or cancelling accounts.

c. Timelines

Note critical timelines in the engagement letter: outlining to the client when we need certain information is as critical as reminding them what we need from them. A few common situations:

- The timelines of any conditions as yet unfulfilled at the time of writing. Outline who (lawyer, client, agent) is responsible for fulfilment.

- Insurability of the property, per the APS. Lack of insurability of the property does allow a purchaser to exit a transaction in the OREA-form, but only within a defined time frame. Stress to the client the need to secure insurance early on, not just to provide proof of insurance to any mortgage lender on the eve of closing.
- When you expect or require mortgage instructions – how many business days before closing to your require mortgage instructions to avoid delay? This timeline may vary with the time of the year, or even time in a given month.
- Estimated timeline and purpose of signing meeting, who needs to be there, and what alternate arrangements may need to be made if these requirements cannot be met.
- Estimated key delivery / funds release timeline on the day of closing, and how this might impact move-in / move-out timing.

III. Invitation for questions

A short but important point: openly invite the client(s) to contact your office if any questions remain unanswered (or unaddressed) by your letter, or any part of the letter is in any way unclear to them. While such an invite tempts opening the floodgates, I consider it important to remind the client that they should not be afraid to contact me promptly if they have any concerns. What may initially seem to be a frivolous question may in fact lead to a conversation that reveals a critical point of the client's intention that merits further search enquiries.

IV. Special circumstances of a transaction

If one sets a good precedent for an engagement letter, properly coded for data merge functionality, most, if not all of the foregoing will be largely set for "standard" transactions (if there is truly such a beast). But special instructions from a client can (and should) be confirmed in the initial stages of the retainer, and incorporating them into the engagement letter is arguably the most convenient and accessible place to do so.

For example, if the property is a two-unit residential, and a purchaser client has advised you that it will not require building or fire searches, one can confirm same in the engagement letter, along with the consequent exceptions to title insurance coverage.

Likewise, if a client is proceeding on the basis of a same-day sale and purchase, rejecting the prospect of bridge financing, I will typically add a sentence or two outlining the risks of possible complications, and warning that these are beyond my control.

The engagement letter can fill the dual role of a "memo to file" confirming client discussions, but has the advantage of being forwarded to the client, affording a timely opportunity for client comment following his or her review of the letter's contents.

“Why bother?!? It’s a waste of time and clients won’t read something that long!”

I have heard this cry, and have uttered it myself on occasion. While clients evidently do not always read every word that in a multi-page engagement letter, I do find anecdotally that the greater majority review it, and act upon it whether by asking informed questions or providing me with items sought in the letter. It is admittedly painfully obvious when a given client has not read the engagement letter, but I cannot see it as appropriate to lower one’s standard of practice to that of the lowest possible client expectation, as doing so puts a diligent client at a potential prejudice. I frankly see there to be a net benefit to both lawyer and client in providing a detailed engagement letter, even if clients do not universally cooperate to this end.

In any event, the ongoing time commitment to engagement letters is minimal. With many residential real estate practices now using productivity software with document merge facilities (whether of their own making or off-the-shelf from a commercial provider), the ease with which a standard letter can be created is stunning. Both commercial software systems that I have used (RealtiWeb and The Conveyancer) come with a precedent introductory letter. With a basic knowledge of how the underlying master document templates can be edited, it is quite easy to amend these templates to reflect your own preferences. Conditional coding can allow a great deal of flexibility so that alternate text will automatically be inserted based upon multiple factors, including the type of property (condo vs. freehold) or the type of vendor (resale vs. now home). Once such a merge precedent is set (what I would call, “a good ‘February project’”), the time taken to generate the “guts” of an engagement letter from an opened file is well under a minute. One can spend as much or as little time on transaction-specific customization as one deems appropriate.

FURTHER RESOURCES AND PRECEDENTS

For those not already using them, some precedent real estate engagement/retainer letters are readily available for consideration, and/or incorporation of aspects of them into your own engagement letter:

Productivity Software

LawyerDoneDeal – RealtiWeb

Precedent engagement letters may be found in the Documents tab for each transactional file, under, item 1: "Initial Letters and Documents". Master Document names are "Mortgagor – Initial Letter", "Purchaser – Initial Letter", and "Vendor – Initial Letter".

Do Process – The Conveyancer

Assorted precedent introductory letters are available in purchase, sale and mortgage files, with master document file names generally commencing with "I1..."

Published Works and Online Resources

"TitlePLUS Sample Forms, Letters and Reports" – online:
http://www.titleplus.ca/resources/for_lawyers_and_law_firm_staff/sample_forms_letters_and_reports.html - contains a brief precedent retainer letter for a purchase

OBA Institute 2012, *Condominiums, Clients and Closings: Handling a New Condo Purchase*. Tab 1: "Sample Retainer Letter" – A comprehensive precedent retainer letter geared specifically to a new-build condo transaction.

Working Group on Lawyers and Real Estate: Condominium Documents Sub-committee – online:
<http://www.lawyersworkinggroup.com/CondominiumDocuments.html> - Contains a precedent condominium purchase retainer letter