

Reflections on

technology changes in real estate practice

Online real estate portals support client satisfaction, risk management, and profitability

Facilitating transfers of real estate has been the bread-and-butter of thousands of Ontario lawyers for generations. Despite occasional market wobbles, real estate business has helped firms to flourish in communities of all sizes, often supporting the delivery of family, estates, commercial and even criminal law services. Healthy real estate practices support both lawyers' own families and access to justice for their neighbours. But there is danger in taking the bread-and-butter work of one's practice for granted, and in forgetting that just as real estate supports lawyers, lawyers must support the system in which those real estate transactions are completed.

Real estate under pressure

While property law is long-standing and traditional, modern influences are shaping the real estate market. Population growth

and the concentration of employment in major cities have spurred sharp increases in property values. Demand for urban property has quickened the pace of deals, folding elevated risk into the mix as homebuyers forego home inspections and financing conditions to gain an edge in bidding wars. At the same time, new technologies reduce lawyer-client and client-lender face time, creating a changing dynamic in those relationships.

Most of the opportunities created by emerging technologies, however, are legitimate. The electronic transmission of transaction information between lenders and lawyers saves time and money, prevents communication lapses, and allows those lawyers who are willing to adopt new approaches to interaction to handle more deals. And pressure to adopt new technological supports is coming not only from the lender client, but from buyers and sellers as well.

According to the 2016 *Home Buyer and Seller Generational Trends* study conducted by the US National Association of Realtors, millennials (aged 35 and under) made up the largest share of US homebuyers – 35 per cent – in 2015. The same study found that millennial and Gen-X buyers were the most likely to use a tablet

or mobile-based search tool in their property search, and that millennials were less likely than the older Gen-Xers to rely on in-person strategies like visiting open houses. These tech-friendly millennial homebuyers will have the same influence on Canadian markets. In its own 2016 study¹, BMO reported that 76 per cent of millennials currently renting expect to buy homes within the next five years.

Too young to remember life before the internet, many millennials are more comfortable than are older generations with accelerated change. They are accustomed to quickly getting up-to-speed with new technologies. It is not surprising that they expect the same technology-friendly attitudes in their legal advisors, and that they also expect to be given access to shared tools – such as online transaction management portals – to monitor and participate in transactions. Lawyers who hope to continue in the practice of residential real estate law will need to engage with technology, actively considering and comparing solutions, including online portals, which propose to streamline and safeguard real estate deals.

Foot-dragging with respect to electronic solutions has been defended, by some, on the basis of risk avoidance. A vague awareness of cyber threats has led some lawyers to view technology with blanket distrust. But uninformed attachment to dated practices like internal data storage and email communications may leave lawyers exposed to greater privacy risks than would innovation. The pace and cost of change in security standards is quickly outstripping firms' capacity to keep up. Safeguarding client data is a complicated and critical task to which law firms must turn their attention. This means firms must come to grips with the time, money, and expertise needed to deal with information security.

Concerns about other risk exposures, such as the risk of practice errors, may be equally unjustified. While technological supports to practice may lead to the “automation” of certain tasks, the systems currently available anticipate a robust role for legal oversight and free up administrative time, allowing lawyers to focus on the aspects of transactions that most require their involvement. The increased transparency of electronic communication systems that allow information-sharing among multiple parties – including buyers, sellers, and lenders – minimizes the gaps in communication and misunderstandings that lead to about 40 per cent of malpractice claims. In other words, embracing technology may actually make the practice of law safer for lawyers.

It is worth remembering that technology-savvy millennials need to be considered not only in the context of the client base, but also, as the newest members of law practices. Recent law graduates are comfortable with technological change, and are likely to judge potential employers at least partly on the basis of how effectively they incorporate technological supports and solutions into the work of the firm. A lack of strategic leadership from the top when it

comes to technology may leave firms struggling to attract or retain new talent.

The adoption of technologies to systematize real estate practice imposes a learning curve and requires an investment of time. However, it is becoming increasingly clear that opting out of that investment or even delaying the transition will mean lawyers are in danger of being left behind by other market players who seek to replace them. In fact, the wisest lawyers will instead demand to be at the forefront of the development of the tools that shape their future practices.

The challenge: Real estate is a B2B/B2C system that requires multi-party communication and collaboration

Real estate transactions require a uniquely collaborative approach. Leading up to a transfer of title, buyers must collaborate with lenders (sometimes through brokers), often with the support of other specialists such as property valuers and insurance professionals. Sellers collaborate with real estate agents. As the proposed deal moves toward closing, both buyers and sellers engage the services of lawyers, who may in turn recommend the services of search and survey providers. Lawyers may act as the liaison between parties and land developers or condominium corporation representatives, and may assist with the purchase of title insurance.

As a result, the real estate community is at the same time a business-to-business (B2B) and a business-to-consumer (B2C) system. It depends, for successful operation, on the timely compilation, interpretation, and dissemination of many different but interrelated reports and analyses.

Communication between the business and consumer parties involved in a real estate transaction is multifaceted, and communications serve a wide range of purposes. Here are just a few examples:

Parties receive instructions – for example, a lawyer receives instructions from a buyer to waive conditions, or a borrower receives notice of the terms of a mortgage commitment from a lender.

Parties assign tasks to each other – for example, a buyer may ask a home inspector to conduct an inspection, a lawyer may ask a buyer to arrange home insurance, or a lender may ask a lawyer to obtain details from a borrower.

Parties receive advice – both seller and buyer receive advice from their lawyers, buyers receive advice from mortgage brokers and home inspectors, and lenders receive advice from valuers.

¹ See “First-Time Millennial Home Buyers Expect to Spend Average of \$350,000: BMO Report” at <https://newsroom.bmo.com/press-releases/first-time-millennial-home-buyers-expect-to-spend--tsx-bmo-201604131050390001>.



Parties confirm completion of steps – for example, the buyer confirms receipt of a financing commitment, the seller confirms mortgage particulars, or an insurer confirms that coverage is effective.

Parties share results of investigative processes – valuers share valuations, home inspectors share findings, surveyors share survey results, and lawyers share results of searches for encumbrances on title.

Parties demonstrate compliance with requirements – similarly, parties may need to share data or documents that prove compliance: for example, identification documents, mortgage or loan discharge statements, building permits, etc.

Prior to the advent of web-based communication, these tasks were tracked on paper in various parties' offices and files. Confirmation of completion of steps often required the transmission of paper, or that party A telephone party B, obtain an answer, and then make another phone call to party C to report the answer. Each party was required to rely on others to maintain orderly files and to complete tasks on time.

Electronic data transmission and cloud-based data storage have altered the process fundamentally by permitting real-time tracking to replace the traditional, labour-intensive "checking-up" process. A wide range of applications now permit users to access online document storage and sharing through multi-user platforms. But this is only the tip of the iceberg in terms of what is possible, and of what clients of the future will demand.

For example, some lawyers now use customized web "portals" that allow document sharing and the tracking of progress and processes on complex transactions. These portals can be built with individualized access profiles for different types of users (for example, some users will be able to edit documents, others only to view them), thereby protecting the integrity and confidentiality of information. Web portals also offer the potential to alert parties instantaneously to another party's completion of a step and to communicate automatically what must happen next, who is responsible for making it happen, how, and when.

Sophisticated portals make it possible to carry out these transaction-related tasks without leaving the portal itself; for example, by filling out a form that has "popped up" within the portal, that will be checked electronically for completeness and accuracy, and that may be submitted to the relevant individual or agency with the click of a button. Services like TD VIP from LawyerDoneDeal Corp. have already given lawyers a taste of the ease with which online transaction management systems can streamline key aspects of real estate transactions.

Because everything happens within the portal and because documents are stored there, parties will be able to see the current status of the transaction for themselves (as appropriate, based on their roles and system permissions). This level of transparency has the potential to eliminate not only effort, but also errors and misunderstandings that can threaten the transaction or even lead to malpractice claims.



Web-savvy clients will expect no less

Today's real estate vendors and purchasers are increasingly likely to access both commercial and government services online. In 2014, the Globe and Mail reported that more than 75 per cent of Canadians were filing their taxes electronically, and that the percentage was increasing each year. A number of tax filing websites allow taxpayers to "pull" information, including T4 forms, directly from the Canada Revenue Agency site as part of the filing process.

Many Canadians now apply for passport, health card and drivers' licence renewals online, and submit health insurance claims over the web. Millions shop for goods online, where they can track shipping and delivery information. In some jurisdictions, elementary school children are taught to access information about educational resources through school-sponsored web portals. They receive homework assignments and upload completed work through the system. Related systems communicate with parents about student absences. Some medical clinics even offer portals through which patients can view results of medical tests as soon as they are posted by the laboratory, saving the patient and the clinic the trouble of calling to report results.

Increasingly, consumers of services of all kinds expect electronic access to information about those services. They will expect the same immediacy and transparency in the reporting of legal "results" as they have grown used to receiving about the location of a purchased item that is in transit. It is equally likely that, within a few years, a *lack* of access to the details of legal transactions will provoke concern and even suspicion in some clients.

These disclosure expectations may initially feel foreign to lawyers who are used to tighter control of the timing and flow of information. However, after acclimatizing to these new expectations, savvy lawyers will come to understand that allowing clients a "window" into the details that must be managed in closing a real estate deal can promote an appreciation of the work involved and of the value those clients are receiving for their money. Lawyers who hesitate to adopt collaborative online portals may be perceived by consumers as secretive, protectionist, or simply out-of-date; and they may lose ground, at least among younger clients.

Losing millennials' business may not be the only risk. The systematization of real estate transactions is inevitable and underway, and if lawyers fail to "step up" and adopt (or even design) the relevant systems, other service providers will pick up the slack. It is up to lawyers to decide whether they are willing to be shoe-horned into systems created by, for example, lenders or real estate brokerages; or whether they will invest time and effort in developing or influencing the development of systems that support legal services delivery as effectively as possible.

Web-based platforms can support malpractice risk management

For LAWPRO, one of the most compelling benefits of web-based real estate portals is their potential to limit malpractice claims by reducing potential for errors and improving lawyer-client communications.

Real estate practice has been responsible for at least 20 per cent of LAWPRO claims by area of law since the company was founded, and because the value of claims in this area is tied to rising property values, real estate is associated with an equally significant proportion of overall claims costs.

Reducing communication-based claims

While causes of loss vary, approximately 25 to 40 per cent of real estate-related claims reported to LAWPRO each year flow from problems with lawyer-client communication. As a result, tools that improve communication, including web-based platforms that allow clients to communicate with their lawyers online, have the potential to reduce claims.

By providing a dedicated channel through which clients and lawyers can reach each other, online portals offer a convenient approach to documenting instructions, directions and waivers. A system that allows the client to log in to review information such as mortgage instructions, status certificates, search results, and other legal information at his or her convenience can ensure that the client is well-informed.

Systems can also be designed to track and document the timing and content of lawyer-client communications, including whether or not the client has reviewed the information posted. This built-in confirmation feature can provide a clear mandate for next steps, and can minimize disputes about both the content and timing of communications. This clarity, in turn, can make it easy to prove parties' knowledge of various transaction details in the event of a dispute.

Supporting thorough investigation of issues

Besides communication errors, another important cause of claims is the failure of parties to fully investigate the details of a matter

and to follow through with actions based on the result of those investigations. Many web-based programs designed to support the delivery of legal services track (and confirm) the completion of steps in a matter, allowing lawyers and other professionals (law clerks, lenders, insurers, etc.) to easily review whether key questions have been asked and answered, and to see which issues remain unresolved on a pending transaction.

Preventing missed deadlines

Many electronic systems can be programmed to prompt for completion of inquiries and tasks that might otherwise be missed, or to send alerts when a deadline for completion of a step is approaching, making it less likely that a lawyer will miss an important step.

Enabling clear delegation

Some claims against lawyers flow from problems with the delegation of work. Electronic transaction management systems can allow all users to quickly gain familiarity with the status of a transaction so that work can be shared seamlessly with others in real time, clearly identifying who is responsible for which tasks.

Supporting client satisfaction

Finally, some claims result from client dissatisfaction with perceived value delivered in exchange for fees. Electronic systems that allow clients to see the range of tasks that lawyers must complete and to see evidence that those tasks are being completed on schedule can give clients a clearer picture of the efforts being expended on their behalf, and may help to justify fees.

Secure data storage and management requires outsourcing for affordability

The secure management and storage of client data has always been an essential practice standard for Canadian lawyers. However, the move to electronic file storage has significantly complicated compliance with that standard.

Now that sensitive client data can be transported in a pocket, firms must grapple with how to prescribe and enforce rules for its protection. This task has become daunting and time-consuming in the face of the proliferation of privacy laws and the rapid evolution of data storage technologies. Many firms are coming to the conclusion that, without the kind of dedicated information systems departments that only the very largest firms can afford, information management policies become outdated as soon as they are put in place.



In a world of ever-expanding cyber liabilities, there is a risk that the storage of client and transaction data within lawyer and firm computers may often be insufficient from a security and confidentiality perspective. A consensus may even be emerging that storage of this data in local servers is suboptimal, as it puts too much reliance on the excellence of the firm's perimeter security; in other words, how hard would it be for someone to break in and grab the server?

While lawyers have been cautious about moving their firm data to the cloud,² many experts are advising that outsourcing data storage is more resource- and cost-effective than spending money and time building and updating local storage solutions to keep up with ever-changing compliance requirements.

Those compliance requirements come not only from legislation and law societies, but also from the private sector. Lenders, under scrutiny by their own regulators,³ have been exerting pressure on law firms to prove that their data is secure.

Law firms, as the recipients of sensitive data about mortgages, loans, and borrower details, pose a risk to lenders. As third parties to financial transactions, firms are a significant source of potential privacy exposure. In early 2007, for example, the Canadian Imperial Bank of Commerce (CIBC) revealed that account information for 470,000 customers of Talvest Mutual Funds, a subsidiary, had been

² Most provincial and territorial law societies have so far shied away from explicit rejection or endorsement of cloud storage. The exception is the Law Society of British Columbia, which introduced a "Cloud Computing Checklist" (<https://www.lawsociety.bc.ca/docs/practice/resources/checklist-cloud.pdf>) in 2013.

³ See, for example, the "Cybersecurity Self-Assessment" for federally-regulated financial institutions (FRFIs) developed in 2013 by the Office of the Superintendent of Financial Institutions (OSFI): <http://www.osfi-bsif.gc.ca/eng/fi-if/in-ai/pages/cbrsk.aspx>.

lost when a computer file went missing while in transit between company offices.⁴ Eager to prevent similar breaches, the CIBC and other banks have begun seeking assurances from third party recipients of borrower data, including law firms.

In the US, title agents and/or title insurance companies, not lawyers, handle most real estate deals. With no regulated fiduciary like a lawyer to rely upon as the protector of borrower information, US lenders are increasingly demanding that title agents obtain formal industry certification for their data security compliance.⁵ To date, those closing deals in Canada have mostly avoided the need for such certifications, largely because transactions in this country occur under the scrutiny of lawyers who are overseen by their own regulators and rules of professional conduct.

But as pressure continues to mount for firms to prove their compliance with current security standards, lawyers in an already cost-sensitive area of practice may find themselves hard-pressed to afford the time and expense to secure data in-house. The safer and more affordable strategy may well be to outsource data management completely to a third-party provider who in turn certifies compliance to a specified standard.

Web-based portals and practice management systems that include the storage of data remotely on servers managed by data storage specialists have come to be viewed as a welcome solution.

What is available in the market today?

Web and software-based real estate management products already exist, and new features are being added at a rapid pace. The introduction of Ontario's electronic land title registration system and professionals' increasing comfort with online file sharing systems have created both demand and opportunity for the development of internet-based transaction management tools.

Many lawyers are familiar with area-of-law specific software that supports the completion of documents (including precedents of the lawyer's own creation) using one-time-only data entry. Even without an internet component, these systems can both increase efficiency and reduce errors. In recent years, providers have incorporated features that allow lawyers to import information (for example, search results) directly from external sources into the program over the internet. Other features allow vendor and purchaser counsel to collaborate and exchange documents within the program itself. Title insurance for the property can be applied for without having to re-enter property or transaction



data. Finally, many of these systems, including RealtiWeb from LawyerDoneDeal Corp., allow title documents to be registered directly from within the program.

Considering the systems that already exist, the question is not *when* these portals will be introduced, but rather, who will be in a position to shape them.

LAWPRO has always taken the position that consumers benefit when lawyers are maintained as the fiduciaries and quarterbacks at the heart of real estate transactions.⁶ In the US, where real estate conveyancing is often completed by title insurance companies and title/escrow agents, complex regulatory safeguards have had to be introduced to protect the public. If lawyers fail to take an active role in developing and influencing the design of online real estate portals, it is likely that other parties – whether title insurers, lenders, real estate agents or others – may see an opportunity to take control of the process, leading to lawyers being squeezed out.

Lawyers have sometimes been criticized for being slow to adopt new technologies. It is evident that this criticism is not entirely fair, judging by the number of lawyers who have embraced electronic practice management systems. But if there has ever been a time to disprove it by taking an active role in investigating and shaping new technologies, that time is now. Clients are pressing for access, transparency, and value for money. Lenders are looking for support in meeting onerous data security and privacy regulations. Lawyers can satisfy both groups and reduce their own risk by moving real estate transactions under the shelter of an electronic umbrella that minimizes errors and offers certified security compliant protection for client data. ■

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⁴ See "Privacy breaches expose flaws in law" by Michael Geist, Toronto Star, January 2007: https://www.thestar.com/news/2007/01/22/privacy_breaches_expose_flaws_in_law.html.

⁵ See, for example, the American Land Title Association (ALTA)'s Title Insurance and Settlement Company Best Practices certification, which requires successful completion of testing based on the Service Organizations Controls (SOC) 2 requirements.

⁶ See for example "The future of law: Why the real estate lawyer is the quarterback of the real estate deal" in the February 2017 edition of *LAWPRO Magazine*.

⁷ 2017 LawyerDoneDeal Corp. and Lawyers' Professional Indemnity Company.