GUIDELINES FOR CONDUCT OF PROPERTY LAW MATTERS

The Society is often asked by members to give guidance on procedures or to lay down rules of practice. It has become apparent that members require guidance on the ethical principles and codes of professional conduct that apply to property law practice. This document is intended to serve the needs of the experienced conveyancer and also to serve as an introduction to conveyancing practice for newly qualified practitioners who may not have had sufficient exposure to the practical and ethical aspects of conveyancing. The Property Law Committee in conjunction with the Ethics Committee accordingly offers the following guidance, including principles of practice that are widely accepted by conveyancing attorneys. It must be emphasised that these guidelines are not exhaustive and must be read and applied together with the provisions of the Attorneys Act, 1979, other relevant legislation, the conduct Rules of the Law Society as well as the Rulings* on conveyancing and property law matters made by the Society from time to time.

*The Council resolved that the new sub-Ruling 2(5)(d) (published in Circular 9/2006 pursuant to the Council Resolution taken on 25 August 2006) be specifically included in these guidelines:

"In conveyancing matters members may not –

(i) debit conveyancing fees prior to registration of transactions in the Deeds Office, and/or

(ii) come to any arrangements with their clients permitting them to debit such fees prior to such registration

save in respect of wasted costs when the transaction is cancelled or the transaction is not being proceeded with."

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1. **ETHICS AND HONESTY**

### 1.1 Accuracy and Transparency

Conveyancers register transactions involving large sums of money, represented by undertakings exchanged on trust. Mutual interest grounded in the highest standards of professionalism and honesty is so fundamental to conveyancing that the process will disintegrate if these standards are not maintained. The fact that a very small number of conveyancing matters end up in litigation is proof of the efficiency of the current system.

The general public, business and all public sectors rely on the accuracy of the registration system, where the input of the conveyancer is of vital importance. Apart from duties towards the parties involved in the transaction, the conveyancer has a duty towards the State and to the public to ensure that no incorrect or misleading information is recorded or perpetuated in the Deeds Office. The conveyancer is obliged to point out any error or change in information for recording, even if this may result in a delay to registration. In this respect, the duties of the conveyancer, with professional obligations, override the interests of a client, who may feel that such aspects should be overlooked if the registration can be achieved sooner or at lower cost. For example, a conveyancer attending to a transfer is obliged to advise a colleague attending to the bond if he/she, at any stage, becomes aware of an addendum that may adversely affect the price or the property rights, from the perspective of the bondholder. It is not sufficient to argue that the information need only be divulged if especially requested by the other conveyancer.

“Dummy transactions”, shortcuts” to achieve faster registration or the eliciting of information from another party, who would not otherwise divulge same, amounts to unprofessional conduct. For example, a conveyancer requests figures for the cancellation of a bond from a bank on the basis of a fictitious transfer, well knowing that legal steps to recover arrear bond instalments will be suspended because the bank is under the impression that the bond is about to be repaid. Another example, the conveyancer becomes aware that the transaction is not genuine and is intended to hide assets from creditors or to frustrate pending litigation. No conveyancer may be a knowing party to such a transaction.

Conveyancers have a particular duty of care when dealing with clients at less than arms length, for example, where the conveyancer is party to the contract, registers a bond or will receive commission or some other benefit, directly or indirectly arising from the transaction. Complaints are unlikely to arise if any such benefit or interest is disclosed to all interested parties at the earliest opportunity. Another example, the practice of conveyancers registering bonds in favour of themselves has become widespread but remains risky. The conveyancer must be aware that such a transaction is particularly vulnerable to allegations of a conflict of interest or failure to protect the interests of the other party. If the conveyancer cannot find it in his heart to refer to such a transaction to a colleague, prudent practice would dictate that a colleague be requested to supervise the transaction in order to ensure that justice is not only done but is also seen to be done.

### 1.2 Purchasing of Work

The purchasing of work is undoubtedly the worst problem that conveyancers have faced in the past decade. It is unprofessional and unacceptable for a practitioner to reward third parties for the referral of instructions.

The attorney who is party to a transaction where the agent or bank manager receives a benefit, not disclosed to the seller or purchaser, may well be guilty of purchasing work. The independence of the practitioner is undermined when the conveyancer becomes beholden to the agent and accepts instructions from him/her, to the prejudice of the client, whose interests are not then protected. The independence of the practitioner is of paramount importance in the public interest.
A practitioner found guilty of purchasing work will be disciplined. The payment by an attorney to a non-professional person of a portion of the professional fee, that constitutes fee sharing, is prohibited. Apart from all other considerations, the purchasing of work falls within the ambit of the Corruption Act and the attorney, agent or other facilitator involved in purchasing work should expect no mercy from the courts if such matters are brought before them.

A result of this practice has been that many are now convinced that conveyancers make excessive profit and should be squeezed to the limit to extract the biggest possible advantage from the referral instructions. The purchasing of work has undermined the profession so seriously that it may result in the loss of conveyancing as work reserved to practising attorneys. Such a move is likely to enjoy support from a public who feels that it cannot trust corrupt practitioners who associate themselves with corrupt agents and officials. There should be no doubt that such conduct is unprofessional and not in the public interest and the Society will deal harshly with any practitioner found guilty of buying instructions, either directly or indirectly.

The buying of instructions means a payment in cash or in kind made to an intermediary or agent, either directly or indirectly, in order to solicite or procure the referral of work. The buying of work can also be achieved by the giving of a financial inducement to the intermediary. Financial inducements may take many forms such as:

(i) Soft loans and prepayment of agents commission.
(ii) The payment of a portion of the advertising costs of an agent or mortgage originator.
(iii) The payment of travel expenses of an agent.
(iv) The grant of excessive sponsorships or rewards.
(v) The payment of business expenses incurred by the agent such as rental, telephone or computer hire.
(vi) Lavish entertainment.
(vii) The performing of legal services for no reward.

A distinction is drawn between an attorney, on the one hand, rendering legal services to a client for a reduced fee or for no reward and the attorney, on the other hand, performing such services for an intermediary who is able to refer work to the attorney. It is the latter activity, which concerns the Law Society.

To remove any confusion on the question of shared costs for advertising, an attorney may not pay any expenses incurred by an estate agent or mortgage originator in advertising or promoting the services of the estate agent or mortgage originator. If the advertisement of an attorney appears on the same page of a publication as that of an estate agent or mortgage originator, the publisher must invoice the attorney for the attorney’s advertising costs and invoice separately the agent or mortgage originator for its advertising costs.

Your Council believes it important to draw members’ attention to the definition of commercial bribery laid down by the Supreme Court in Extel Industrial (Pty) Ltd and another versus Crown Mills (Pty) Ltd 1998 (4) All SA 465 which has the following elements:

(i) a reward
(ii) paid or promised
(iii) by one party (the briber)
(iv) to another (the agent)
(v) who is able to exert influence over
(vi) a third party (the principal)
(vii) with the intention that the agent
(viii) should induce the principal
(ix) without the latter’s knowledge and
(x) for the direct or indirect benefit of the briber
(xi) to enter into, or maintain, or alter, a contractual relationship
(xii) with the briber, his principal, associate or subordinate.

Members who have queries or concerns on whether any activities may contravene the Law Society Rules or Rulings are invited to submit such queries to the Law Society.

2. HONOURING OF UNDERTAKINGS

2.1 Undertakings are asked and given freely between co-operating colleagues in order to facilitate registration of transactions. A practitioner is not compelled to give, or to accept, an undertaking in any matter. It is established practice, and widely accepted, that attorneys facilitate registration of transactions by giving undertakings to make a payment against the happening of certain future events.

2.2 An undertaking can be qualified to be revocable. Revocable undertakings should not be given lightly. An attorney who gives a revocable undertaking is professionally bound to honour the undertaking if reliance has been placed on it, irrespective of changes in the circumstances of the client on whose behalf the undertaking was given.

Many conveyancers have found that the insistence on unconditional, irrevocable undertakings poses too high a risk or obligation on the attorneys requested to furnish it. This may result in a situation where the attorney refuses to give an undertaking and gives a bank guarantee, with commensurate costs for the client and inconvenience for the attorney demanding the undertaking.

2.3 Revocable undertakings (and undertakings that are not stated to be irrevocable) can be revoked but ethical considerations apply where the party in whose favour the undertaking has been issued has already acted on the strength of such undertaking. Revocation should be made timeously and the party who has acted in reliance on the undertaking should be given an opportunity to restore the status quo ante.

2.4 Care should be taken in drafting undertakings. Attorneys issuing undertakings should be aware of the application of the “reliance theory” pursuant to which the substance of an undertaking may take precedence over its form. Reference in this regard should be made to Ridon vs Van der Spuy & Partners (Wes Kaap) Inc 2002(2) SA 121(C) in which it was held that an undertaking by the defendant firm of attorneys to pay on behalf of its client was properly construed as a personal undertaking of the firm and not that of the client.

For example, the attorney for a judgement creditor uplifts an attachment over immovable property on the strength of an undertaking furnished by the transferring attorney. Should the latter, at any stage, exercise the right to revoke the undertaking, professional ethics require that the attorney for the judgement creditor be advised timeously and given proper opportunity to restore the position ante i.e., to re-attach the property, alternatively, to obtain new instructions.
An attorney, who furnishes an undertaking to gain a specific advantage and then withdraws the undertaking without permitting the other party to re-affirm its rights, will be exposed to complaints to, and inquiry by, the Society for acting unprofessionally, in addition to other civil remedies of the offended party.

2.5 An undertaking may be conditional or unconditional. Care should be taken to disclose any relevant conditions upon which payment is dependent and to disclose any circumstances that might influence the acceptance of the undertaking. For example, if an undertaking is given to pay over the net proceeds of a sale on transfer, the existence of an unfulfilled suspensive condition at the time of giving undertaking should be specifically disclosed.

2.6 Undertakings should not be given lightly, should not be misleading and should be given only once the financial details of the underlying transaction have been established.

For example, where the amount owing in respect of a bond over the property exceeds the sale price, an undertaking to pay the net proceeds of the sale is misleading.

2.7 The onus of collecting bond costs is generally that of the attorney attending to the registration of the bond. However, where bond registration costs are included in the purchase price of a property, convenience may dictate that the costs are deducted from the proceeds of the bond before the net proceeds are paid to the transferring attorney.

If this is the case, any undertaking to pay the proceeds of a bond to the transferring attorney should make it clear that costs are to be deducted. This should be communicated in good time to enable the transferring attorney to plan the financial aspects of the transaction timeously.

To summarise –

The continued acceptance by conveyancers of undertakings as a useful means of facilitating transactions is dependent on the honouring by them of their legal and professional obligations. Care must be taken in the calculation, and the wording, of the undertaking, as other parties will rely and act thereon. An attorney may be held to the letter and intent of an undertaking and is, accordingly, at risk of civil action and/or a complaint of unprofessional conduct.

3. RELATIONSHIP WITH COLLEAGUES

3.1 Duty to transact openly, to co-operate and not to delay matters

In conveyancing, a number of attorneys, dealing with different aspects of a batch, are required to co-operate with each other to ensure that the entire batch of transactions is successfully lodged and timeously registered.

If we assume that a standard batch contains a transfer, a bond cancellation and a new bond, each being attended to by a separate conveyancer, the duties of each of the conveyancers include *inter alia* the following:

3.1.1 The transferring attorney should

(a) Send the draft deed of transfer timeously to the bond attorney, with full details of the guarantee requirements. If a preliminary power of attorney has been provided, ensure that it is followed up with a draft deed of transfer.
(b) Immediately advise the bond attorney of any changes made to the draft deed of transfer.

(c) Act promptly when receiving the title deed from the bond cancellation attorney, by acknowledging receipt of the title deed and furnishing the latter with the required undertaking or guarantee for payment of the outstanding capital and interest secured by the bond.

(d) Answer any queries raised by the bond cancellation attorney regarding account numbers and the address of the mortgagor after registration of the bond cancellation as soon as possible to enable the bond cancellation attorney to inform the mortgagee.

(e) Honour any undertaking given.

(f) Deliver the newly registered title deed to the bond attorney within a reasonable time after receipt thereof from the Deeds Office.

3.1.2 The bond registration conveyancer should

(a) Write to the transferring attorney as soon as instructions are received to cancel the bond, furnishing the transferring attorney with the title deed, or a copy thereof, as well as the mortgagee’s cancellation requirements.

(b) Prepare the consent to cancellation of the bond, without delay, and submit it for signature as soon as the required letter of undertaking or guarantee is received.

3.1.3 The bond attorney should

(a) Contact the transferring attorney as soon as instructions to register the bond are received with a request that the transferring attorney furnish a draft deed of transfer. It is important to indicate precisely how much of the proceeds of the bond will be available for payment on registration of transfer and whether or not the bond registration costs are to be deducted from the proceeds of the bond. It is unacceptable to advise the transferring attorney only on registration that the bond registration costs are to be deducted.

(b) Draw the bond documents and arrange as soon as possible for the mortgagor to sign them in order that they may be ready to lodge upon the request of the transferring attorney.

(c) Ensure that all the mortgagee’s conditions are fulfilled prior to the deeds becoming available for registration to obviate any delay with registration.

(d) Honour any undertakings to pay on registration.

(e) Ensure that a full draft deed of transfer is provided and checked for any detrimental conditions and/or consents that may be required. Obtain any waiver of conditions that prejudice the mortgagee’s rights.

It is clear that conveyancing transactions must be conducted in a spirit of co-operation, with each conveyancer doing their best to ensure that other linked conveyancers are assisted in the performance of their respective mandates.

It is wise to accommodate, as far as possible, any special requests for assistance from other conveyancers since no conveyancer can know when the assistance of a colleague will be required by them.
3.2 Duty to use the title deed and other documents for intended purpose and to return the deed after declared purpose has been (or cannot be) achieved

Each conveyancer receiving a title deed, released to him/her for a declared purpose, has a duty of care in respect of that title. Should the title remain open after the registration of the transaction for which it was released or should that transaction be cancelled or unduly delayed, the title must be safely returned to the attorney who provided it.

The attorney delivering the deed must also make sure that such deed is correctly despatched to the intended recipient. All reasonable steps must be taken to ensure that the deed reaches its destination.

In the event that the attorney charged with its care mislays a title deed, that attorney is required to make an application for the issue of certified copy and to bear the cost of such application.

3.3 Duty not to interfere with a transaction nor to quote for work, where the work has already been allocated to a colleague

Although there is a guideline for fees, it is only a guideline and fees may be negotiated. When the profession passed the resolution permitting that conveyancing fees be negotiated, it was clearly stated that a conveyancer, who undercut the fee of a colleague to whom instructions have been issued with a view to procuring the work, will be guilty of touting. Touting is prohibited. Undercharging is considered to be a calculated means of attracting clients and is tantamount to touting. However, professional business approaches are permitted.

Unless acting pro amico, an attorney is expected to charge a reasonable fee for work done. He/she should act fairly and honourably towards clients, colleagues and the profession as a whole.

Once a conveyancer has received an instruction to register a transaction, it is unprofessional for any other conveyancer to cause the former conveyancer’s mandate to be terminated in order that he/she is instructed. Even more unprofessional is the action of the conveyancer who, having ascertained that a colleague has been instructed, approaches the purchaser or mortgagor to cause the former conveyancer’s mandate to be terminated because the latter is prepared to reduce his/her fee should he/she be substituted.

3.4 Obligation not to interfere with, or give, instructions to a colleague’s staff

It is very tempting when a conveyancer is tardy in responding to letters and requests of linked conveyancers to telephone the former conveyancer’s secretary and give her instructions to deal with matters, for example, asking her to telephone her client’s bank regarding the return of a signed consent to cancellation of a bond. Even though a conveyancer may be frustrated with the lack of attention paid to a matter by a colleague, it is improper interference in a colleague’s practice to give instructions to the colleague’s secretary without the prior authority of the colleague. The conveyancer should deal directly with the colleague.

3.5 Conduct in the Deeds Office and duty to co-operate

3.5.1 Unless other arrangements have been made, it is the duty of the conveyancer representing number one of the batch of deeds, to collect the deeds from the simultaneous conveyancers and hand them in for execution.

3.5.2 Whichever conveyancer has handed in the deeds has the obligation to confirm the registration of the batch with the simultaneous conveyancers.
3.5.3 It is unprofessional conduct for a conveyancer to execute and/or hand in a deed for execution on behalf of another conveyancer, without his express authority. This is a dangerous transgression with very serious financial implications, especially when consent to cancellation of a bond is tendered for registration without the knowledge and consent of the lodging firm.

3.5.4 If a conveyancer wishes to withdraw a deed from the Deeds Office for whatever reason, such conveyancer must inform the simultaneous conveyancers of his intention and complete the necessary application form for the Deeds Office. On receipt of the deeds, the said conveyancer must immediately return all deeds belonging to the simultaneous conveyancers to the relevant firms.

3.5.5 If for whatever reason, a conveyancer is in possession of the deeds of a colleague, he has the duty to notify the colleague immediately to enable him to keep track of the whereabouts of his deeds.

3.5.6 If a conveyancer wishes to expedite or restore deeds, he must make arrangements to collect the deeds from the simultaneous conveyancers. After consulting with the Deeds Office, it is his duty to inform the simultaneous conveyancers of the outcome of his application and confirm that he has relodged the deeds and when he expects the deeds to be on prep.

3.5.7 If deeds are rejected it is the duty of the conveyancer whose deeds were rejected, to rectify or redraw the documents as a matter of urgency and to arrange relodgement with the simultaneous conveyancers. If it is not possible to rectify or relodge the deeds within 2 working days, the relevant conveyancer is obliged to notify the simultaneous conveyancers of his problem and tell them when he expects to be in a position to relodge.

3.5.8 There rests no duty on a conveyancer whose deeds have been rejected, to apply for expedition or restoration of the deeds at the Deeds Office. It is in his own discretion to do so. If another simultaneous conveyancer chooses to apply, he may do so with the consent of the simultaneous conveyancers.

3.5.9 If deeds have been rejected and the nature of the note is such that it is necessary for one conveyancer to inspect the documents or notes on deeds of the other conveyancer, such firm is obliged to comply with the request of the relevant conveyancer to provide him/her with the necessary copies or information without delay, to ensure that the deeds can be relodged as soon as possible.

3.5.10 If a conveyancer arranges simultaneous lodgement with one or more colleagues, in the knowledge that he may not be able to execute the transaction when it comes up for registration in the normal course, as there are certain requirements still outstanding, he has a duty to disclose this fact to the conveyancers attending to the simultaneous transactions at the time of the lodgement.

3.6 Roving Conveyancers

3.6.1 It is proper for an attorney who is admitted conveyancer to carry out and complete conveyancing transactions on behalf of a colleague who is not an admitted conveyancer, as long as the conveyancer acts bona fide in one of the following capacities:

(a) as the partner of the non-conveyancer
(b) as the correspondent of the non-conveyancer
(c) pro amico, subject to the strict guidelines issued by the Law Society in relation to pro amico work.
3.6.2 It is considered an undesirable practice if a conveyancer accepts work from a number of firms who do not have an admitted conveyancer on their staff, unless the relationship complies with the requirements as set out above.

3.6.3 The reasons why it is considered an undesirable practice are as follows:

(a) the client has a reasonable expectation that a transaction entrusted to a practitioner will be attended to by that practitioner and the question of ultimate responsibility for the transaction and the right of recourse of the parties should be clearly defined.

(b) It is misleading to the public – the impression is created that a firm specialises in property work while there is no qualified conveyancer. This is not in the public’s interests and reflects negatively on the conveyancing profession as a whole.

(c) If frustrates the efforts of the Law Society to encourage attorneys to become qualified conveyancers.

(d) Often there is no control and communication between the Registrar and the firm concerned or between the simultaneous firms. As a result the public suffers. Removal of notes is not attended to and it is difficult to find a responsible conveyancer to discuss problems with. These unnecessary delays cause inconvenience and a loss of financial interest.

4. THE RELATIONSHIP BETWEEN THE CONVEYANCER AND THE PURCHASER/SELLER/ MORTGAGOR/MORTGAGEE

A conveyancer should be mindful and take great care to avoid a conflict of interest at all times, especially when attending to both the transfer and the bond registration.

4.1 Relationship with the seller

4.1.1 Upon receipt of an instruction to attend to a transfer, contact the seller to acknowledge receipt of the instruction and explain to him/her the legal process to be followed to finalise registration of transfer.

4.1.2 Highlight to the seller all clauses contained in the deed of sale which could have a detrimental impact on the transfer i.e. suspensive conditions, especially those referring to the prior sale of the purchaser’s property.

4.1.3 Keep the seller informed of progress.

4.1.4 Pay particular attention to the seller’s bond settlement amount and warn him/her timeously of any penalty interest, notice periods or other administrative charges to be levied against cancellation of the bond, which might increase the amount beyond the seller’s expectations.

4.1.5 Obtain the seller’s permission before issuing any guarantee or undertaking on his/her behalf.

4.1.6 Endeavour to cause transfer to be registered on the date stipulated in the deed of sale or as close as possible thereto.

4.1.7 Ensure that the seller complies with all his/her obligations in the deed of sale and remind the seller thereof timeously in order to avoid delays to the registration of transfer.

4.1.8 Attend personally on the seller when he/she calls to sign the transfer documents and explain to him/her the nature and purpose thereof.
4.1.9 Prepare the deed of transfer and supporting documents carefully, prior to lodgement in the Deeds Office, to minimise the chance of rejection.

4.1.10 Inform the seller of registration of transfer in the purchaser’s name on the same day of such registration and account for finances relating to the transaction within two working days after registration.

4.1.11 Members should note that, unless the member had the permission of the client, reporting on the progress made with a transaction should not be done to the estate agent, which would be regarded as a breach of confidentiality/privilege applicable to the attorney-client relationship.

4.2 Relationship with purchaser

4.2.1 Contact the purchaser immediately upon receipt of instructions to attend to the transfer and introduce yourself.

4.2.2 Inform the purchaser of his/her obligations in terms of the deed of sale and, in particular, explain to him/her the legal consequences of the material conditions.

4.2.3 Call upon the purchaser to sign the transfer documents as early as possible after receipt of instructions and attend on him/her when signing personally to explain to him/her the nature and purpose of the documents, which require signature.

4.2.4 Explain to the purchaser how the transfer costs are calculated and when payable. Also explain the obligation to pay municipal rates and services or levies to a body corporate or Home Owners Association.

4.2.5 Call for the purchaser’s guarantee in respect of the purchase price or balance thereof timeously, as stipulated in the deed of sale.

4.2.6 Invest all moneys paid by the purchaser towards the purchase price in an interest bearing account in terms of Section 78(2A) of the Attorneys Act, as is normally provided in the agreement of sale or, if not, with the written consent of the purchaser as stipulated in the said Act. Ensure that the requirements of the Act are complied with and remember that you have a duty of care in this regard.

4.2.7 Keep the purchaser fully informed as to progress.

4.3 Relationship with the mortgagee

4.3.1 In most cases, the mortgagee is your client, i.e. a bank or financial institution instructs you to attend to the registration of a mortgage bond in its favour.

4.3.2 On receipt of the bond instruction, immediately acknowledge receipt thereof.

4.3.3 Peruse the instructions to ascertain what conditions imposed by the mortgagee should be complied with prior to registration of the bond.

4.3.4 Make sure that you are familiar with the administrative process required by the mortgagee for the registration of its bonds, in particular, reporting requirements and highlighting any potential problems that may cause a delay in registering the bond.

4.3.5 You should comply with all the requirements set by the mortgagee as far as computer hardware and software are concerned.
4.3.6 You should protect the interest of the mortgagee at all times. If demand is made for return of a title deed released by the mortgagee, you are obliged to immediately return the deed to the mortgagee.

4.3.7 Title conditions of the property to be bonded should be carefully perused and any detrimental condition immediately brought to the attention of the mortgagee.

4.3.8 Inform the mortgagee immediately of the registration of the bond and ensure that funds are only released on behalf of the mortgagee in accordance with the authority for payment and guarantees and/or undertakings issued.

4.3.9 Attend to delivery of all securities to the mortgagee, without delay, after finalisation of transfer.

4.4 **Relationship with the mortgagor**

4.4.1 Although the mortgagor is normally not your client, it is your duty to look after his/her interests in respect of the bond to be registered.

4.4.2 Contact the mortgagor as soon as possible after receipt of the bond instruction and introduce yourself. Explain to mortgagor the process to be followed in having the bond registered.

4.4.3 As soon as the bond documents have been drawn, call on the mortgagor to sign it.

4.4.4 Attend personally on the mortgagor when signing the bond documents and explain to him/her every aspect of the documents he/she is about to sign. In particular, you should highlight all detrimental conditions contained in the bond documents e.g. notice period for the cancellation.

4.4.5 Explain to the mortgagor how bond costs are calculated and when payable.

4.4.6 Assist the mortgagor in all aspects to meet the conditions of grant of loan imposed by the mortgagee.

5. **THE RELATIONSHIP WITH THE DEEDS OFFICE**

5.1 **Formal Contact**

5.1.1 **Deeds Lodged**

Contact with the Deeds Office is established through the deeds being lodged.

(a) Utmost care should be taken to ensure that deeds are properly and correctly prepared, in all respects.

(b) The lodgement cover should be neatly and correctly opened, the linking completed, the Deeds Office Tracking System sticker affixed and the documents inside the cover neatly inserted, without unnecessary staples and covers. Remember that these documents have to be microfilmed so all unnecessary pages and documents should be removed from the lodgement cover.

(c) Care must be taken, on preparation, to pre-empt notes that may be raised by the Deeds Office.
5.1.2 Adhering to office hours and general matters

(a) Deeds must be lodged by the time determined by the Registrar of Deeds. The reason for this cut-off time is to ensure that all deeds are lodged timeously and to give personnel undisturbed time to collate deeds and compile batches.

(b) Adhere to the execution time as determined by the Registrar. This is the time when all the conveyancers gather in the execution room and ensure, not only that communication with fellow conveyancers is punctual, but also that the deeds are executed as quickly as possible and handed to the registering personnel to facilitate prompt registration.

(c) Adhere to the hours for the removal of notes. These hours are published by the Registrar from time to time to ensure that examiners are available to remove notes. Outside of these hours, examiners expect to be left undisturbed to examine deeds.

(d) Hand in deeds for execution as soon as possible but not later than the stipulated time. This assists Deeds Office personnel to collate deeds handed in for execution quickly and efficiently and to commence with final Black Bookings. The execution room is not the place to discuss notes and queries with Deeds Office personnel.

(e) If, for whatever reason, the Registrar decides not to register a deed or a batch of deeds that have been handed in for execution the Registrar will telephone the attorneys firm which is linked as number one of the batch. Attorneys must ensure that the telephone number, which appears with the firm number on the cover of the deed, is the correct, current telephone number to facilitate the Deeds Office to make speedy and easy contact with the conveyancer concerned.

(f) Conveyancers must emphasise the seriousness of a telephone call from the Deeds Office to their receptionists/secretaries. On receiving word from the Deeds Office that a batch of deeds has not been executed – it is the duty of the conveyancer as number one of the batch, to contact the simultaneous firms concerned and inform them that registration has in fact not taken place. This will prevent conveyancers from incorrectly advising their clients/banks of registration and prevent them from presenting guarantees and making payments.

(g) A conveyancer is obliged to attend to his deeds on prep or execution on a strictly daily basis. Unless the conveyancer has no deeds on prep or execution on a specific day, it is the duty of a conveyancer or his representative to be present in the Deeds Office every day. It is unprofessional conduct for a conveyancer not to attend promptly to prep notes and to hold over deeds unnecessarily, causing delays and financial prejudice to the public and his/her colleagues, unless there are valid reasons to hold over.

(h) No conveyancer is allowed to use the lodgement number or facilities of another firm. A conveyancer who wishes to render conveyancing services in the Deeds Office, must complete the prescribed application form of the Deeds Office to obtain his own lodgement number, furnishing all relevant information as required by the Registrar. It is the prerogative of the Registrar to withdraw or suspend a lodgement number and facilities if it appears to him that a lodgement facility has become inactive or for any other valid reason, in his own discretion.
(i) A conveyancer is obliged to execute matters that are lodged during the festive season and other holiday periods or, alternatively, timeously to notify practitioners attending to simultaneous transactions, including his client, of any special arrangements made for his purpose. This includes the duty timeously to notify banks and other institutions to effect payment of property guarantees pursuant to registration.

5.1.3 Payment of Deeds Office Charges

(a) When a conveyancer makes use of the facilities of the Deeds Office, he is contractually and personally bound to pay his account of Deeds Office fees punctually. It is regarded as unprofessional conduct not to pay the account of the Deeds Office and the following remedies are available to the Registrar:

- he can institute legal action against the defaulting conveyancer or firm in order to collect the outstanding debt;

- simultaneously, he can report the conveyancer or firm to the Law Society;

- he has the right to refuse entry to and suspend the executing powers of the defaulting party.

(b) If the Registrar refuses registration of a deed, due to the fact that the account of the conveyancer is in arrears, it may cause prejudice, not only to the clients concerned, but also to the simultaneous attorneys in the batch and their clients. The Law Society regards such delays in a serious light and will act decisively against such conveyancer, when reported to the Law Society. There is no reason to be in arrears. The conveyancer is required to make arrangements to be covered for his expenditure and disbursements, prior to lodgement.

(c) If the conveyancer refuses to pay his account to the Deeds Office, due to the fact that there is a dispute over the accuracy of the amount or items concerned, the correct procedure to be followed by the conveyancer is to arrange the Deeds Office to pay cash for each transaction on an ad hoc basis – until the dispute is resolved and the suspension uplifted. It is not an excuse for the conveyancer to hold over the registration of deeds due to his suspension, because of the fact that he does not agree with the statement of account as rendered by the Deeds Office.

(d) In order to prevent the trouble, which is caused by non-payment by practitioners, it is envisaged that the Registrar will introduce a system of pre-payment. Once this system is implemented the problems as discussed above will hopefully be something of the past. A conveyancer will then be required to pay in advance in order to have his transaction registered.

5.2 Personal contact with Deeds Office personnel

(i) Controversial notes or notes of substance should be discussed with the examiner by a conveyancer and not by a prep clerk or candidate attorney. Conveyancers should be thoroughly prepared to discuss the note.

(ii) If Deeds Office personnel need to be consulted over matters other than notes raised in deeds, a prior appointment will ensure the availability of the examiner. A conveyancer and not a clerk or candidate attorney must do applications for restoring or expediting deeds.

(iii) Switch off cell phones when discussing notes with examiners or refrain from taking calls.
(iv) Be courteous when dealing with Deeds Office personnel. Even where you believe that an examiner has made a mistake, do not be rude.

(v) Always follow the correct administrative procedure and do not pressure junior staff members to bypass internal procedures. There are good reasons for such procedures and they should be adhered to.

(vi) Do not enter offices and sift through deeds without having obtained the necessary permission beforehand. Deeds often get lost in the Deeds Office, not through negligence of the Deeds Office, but through unauthorised entry and handling of deeds by employees of conveyancers.

(vii) Unless prior consent has been expressly obtained from the relevant official, no deeds, books, records or property belonging to the deeds Office may be removed from strong rooms or place of storage. It is prohibited to carry such records or property around the passages of the Deeds Office. If necessary, the examiner must accompany you to the place of record to inspect and discuss the document in question.

(viii) When executing deeds, always greet the registering official to whom deeds are handed for registration. Except for conveyancers, the only other people allowed in the execution room are those accredited people with permission from the Registrar.

(ix) Accept responsibility when you have made a mistake and do not blame the Deeds Office.

(x) Discuss notes with the examiner who made them or his/her senior. Do not go directly to senior examiner unless the responsible examiner is not available.

(xi) The conveyancer is ultimately responsible for the conduct and behaviour of his prep clerks, candidate attorneys or other staff working for his firm in the Deeds Office. If any complaints are received from the Deeds Office, it is the duty of the conveyancer or firm employing such staff member, to deal with the complaint and to sort it out with the Deeds Office. If necessary an apology must be tendered to the Deeds Office and a stern warning must be issued against such staff member. Remember that the Registrar of Deeds reserved the right of admission to his office and is entitled to ban a person from attending his office if he or she misbehaves.

(xii) Sometimes prep clerks act as free agents or independent contractors and work for more than one firm. This obviously creates a problem of discipline and control for the Deeds Office. The Registrar will only allow such a person access if he or she can produce a letter from a firm confirming that such a person is in their employment and that the firm accepts responsibility for the conduct and behaviour of such person. Conveyancers are discouraged from making use of such persons, but if they do, it is important to make certain that such a prep clerk is accredited in the Deeds Office and it is advisable to have a letter of appointment setting out the duties of such person.

(xiii) Remember that the profession has established channels of interface with the Deeds Office. Regular meetings are held with a view to facilitating the whole registration process, marrying the needs of the professionals and the Deeds Office personnel. In need, you should contact the Property Law Committee of the relevant Attorneys Association or members or the relevant Law Society Property Law Committee.
6. THE RELATIONSHIP WITH THE RECEIVER OF REVENUE, LOCAL AUTHORITIES AND OTHER PARTIES WITH A VESTED INTEREST IN THE CONVEYANCING PROCESS

6.1 Relationship with the Receiver of Revenue

In terms of Section 92(1) of the Deeds Registries Act 47 of 1937, no transfer of land shall be registered unless accompanied by a receipt or certificate from a public revenue officer that taxes and duties payable on the property have been paid. The main duties payable are transfer duty, imposed and collected in terms of the Transfer Duty Act 40 of 1949 and Value-Added Tax, which is imposed in terms of the Value-Added Tax Act 89 of 1991 and collected in terms of Section 9(15) of the Transfer Duty Act.

It should be noted that SARS has the power to declare a conveyancer an agent for the purposes of the taxes and duties. The conveyancer has a positive duty to uphold the revenue legislation and to ensure that what is due to Revenue is paid to Revenue.

A conveyancer may not assist a purchaser or seller to enter into a scheme to evade the payment of property taxes. Lawful avoidance of the payment of taxes is acceptable; evasion is unlawful and a conveyancer may not advise or assist a purchaser or seller to act unlawfully.

A conveyancer may not be party any arrangement whereby the purchase price is deflated in the deed of sale and side agreements are entered into between the purchaser and the seller and even third parties with regard to the payment of funds.

With regard to the collection of Value-Added Tax, the Transfer Duty Section of the SARS has indicated that it intends discontinuing the practice of issuing a transfer exemption certificate in respect of a vatable transaction without an undertaking from the conveyancer that the Value-Added Tax due in respect of the transaction will be paid on registration of the transfer.

6.2 Relationship with local authorities

Section 118 of the Municipal Systems Act 32 of 2000 prohibits the transfer of property without the production to the Registrar of Deeds of a prescribed certificate issued by the municipality in which the property is situate certifying that all amounts due, in connection with the property, for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of the application for the certificate have been fully paid up.

Regulation 63(2) of the Deeds Registries Act provides that “all deeds, bonds, diagrams or documents necessary in connection with the examination, execution or registration of any deed, bond, power or other document lodged in a Deeds Registry, including all receipts or certificates required by law to be produced, shall accompany such deed.”

The Municipal Systems Act has caused immense problems for conveyancers and purchasers and sellers given the wide interpretation of the words “and other municipal taxes, levies and duties” by local authorities. At present, most local authorities will not issue a rates clearance certificate unless ALL charges levied have been paid.

In the interim, conveyancers will have to collect and pay over to the local authority the amounts required to enable a transaction to proceed.
6.3 Relationship with parties with vested interest in the conveyancing practice process

6.3.1 Estate agents

In a property transaction requiring the transfer of property, the seller is the client of the conveyancer and not the estate agent appointed by the seller for purposes of the sale. It is therefore the prerogative of the seller to nominate the conveyancer. It is recognised that in practice the estate agent often recommends the conveyancer to be nominated by the seller. Such recommendation should be based on the quality and efficiency of professional services rendered. No undue influence may be exerted on the seller or estate agent by the conveyancer whether it is in the form of monetary or other improper inducement. Such conduct, apart from the disturbing fact that it may in certain instances constitute corruption, severely affects not only the prerogative of the seller to nominate but also the independence of the profession. This is not in the public interest and will be severely dealt with by the Law Society. In certain situations, the relationship between the conveyancer and the estate agent may be that of attorney and client. However, the conveyancer's role is to effect registration of the transfer in terms of the deed of sale. If for some reason a conflict situation arises, the conveyancer may find himself torn between his duty to the seller and his estate agent client, in which event, he/she must disclose the fact that there is a conflict and, if necessary, withdraw. As the conveyancer is, in the normal course, not a party to the deed of sale, it is advisable that the conveyancer obtains written authority from the seller to pay the agent's commission out of the sale upon registration of transfer.

In general, once the conveyancer has been instructed, the conveyancer will liaise with the estate agent insofar as fulfilment of any suspensory conditions is concerned and the pest and electrical inspection of the property, advise the agent of any delays or problems and ensure that the agent is paid the commission due in terms of the deed of sale on registration of the transfer.

6.3.2 Mortgage Bond Originators

Although the Law Society is not in principle opposed to the concept of mortgage or bond origination, the methods used and the basis on which some of these originators operate, may be a cause of concern. The objection mainly relates to the fact that add-on commissions and charges are sometimes being levied by mortgage originators, not only against members of the public but also banking institutions and ultimately attorneys which inflates costs for members of the public. Such charges may be tantamount to hidden or secret commissions and this is not in the public interest.

The Council has resolved that participation by a conveyancer in the activities of mortgage originators by making payment to them of a fee for service ostensibly to be rendered by originators is a contravention of section 83(6) of the Attorneys Act, 1979 and is a criminal offence in terms of section 83(7) of the Attorneys Act, 1979.

6.3.3 Managing agents or body corporates – issuing of levy clearance certificates

In terms of Section 15B(3) of the Sectional Title Act 95/1986, the Registrar of Deeds shall not register the transfer of a unit unless there is produced to the Registrar a certificate from a conveyancer in terms of Section 15B(3)(a)(i)(aa) certifying that as at date of registration of the transfer all monies due to the body corporate by the seller have been paid or secured. If you have undertaken to pay the levy against registration of transfer, you must then do so.

In order to enable the conveyancer to issue this certificate, the conveyancer must liaise with either the managing agents or the chairperson of the body corporate to ascertain what amounts are outstanding in order to enable the managing agent or the body corporate to issue the levy clearance certificate. Conveyancers may not rely on the say-so of the seller that all amounts owing to the body corporate have been paid.
The managing agent will often require the completion of a “questionnaire” by the conveyancer to be forwarded to the managing agent on registration of the transfer which questionnaire is used by the managing agents to update their records. The conveyancer should co-operate with the managing agent in this regard.

6.3.4 Suppliers of pest- and electrical certificates of clearance

In many instances the estate agent liaises with the above suppliers to arrange for the inspection of the property. The reports and clearance certificates are forwarded to the conveyancer who often arranges that the suppliers be paid for the inspection and the report and any work done from the proceeds of the sale.

In certain instances, the conveyancer may be requested by a seller (or purchaser) to arrange for the necessary inspections to be done. In particular, with the issuing of Electrical Clearance Certificates, the conveyancer should ensure that the supplier is of sound reputation.

A conveyancer should not recommend a particular firm to do the work if that firm is paying the conveyancer a commission or referral fee, unless the payment of the commission is disclosed.