Overview Report: Anti-Money Laundering Initiatives of the LSBC and FLSC

A. Scope of Overview Report

1. This overview report provides a chronology of key changes made by the Law Society of British Columbia ("LSBC") and the Federation of Law Societies of Canada ("FLSC") to address money laundering. Its purpose is to provide background and contextual information to support *viva voce* evidence to be called during Commission hearings.

B. LSBC

2. The LSBC implemented the "no-cash rule" in 2004. Rule 3-59 of the Law Society Rules (the "Rules"), the "no-cash rule", provides that a lawyer may not accept more than a prescribed amount in cash on one client matter, with limited exemptions. Rule 3-59 applies when a lawyer or law firm engages in any of the following activities on behalf of a client, including giving instructions on behalf of a client in respect of those activities:

a. receiving or paying funds;

b. purchasing or selling securities, real property or business assets or entities; and

c. transferring funds or securities by any means.

3. The LSBC added an anti-money laundering component to the Professional Legal Training Course ("PLTC") in 2004.

4. In 2006, the LSBC introduced the current Trust Assurance Program for auditing compliance with the portion of the *Rules* covering trust accounts and other client property. The Trust Assurance Program proactively conducts compliance audits of law firms, reviews annual trust reports and lawyer self-reports, and provides education, resources and advice aimed at ensuring lawyers' trust accounting books and records comply with expected standards. At its outset, the Trust Assurance Program's mandate was to audit

each firm at least once every six years, and to audit more frequently those with a history of low compliance.

5. The LSBC implemented the client identification and verification ("CIV") rules in 2008 (then Rules 3-91 to 3-102), which were intended to codify steps lawyers must take in the course of providing legal services to their clients. The identification rules required lawyers to make reasonable efforts to obtain basic information about the identity of clients whenever the lawyer provided legal services. The verification rules required lawyers to take reasonable steps to verify, by using reliable, independent source documents, data or information, when lawyers provided legal services in respect of a "financial transaction". "Financial transaction" was defined to mean the receipt, payment or transfer of money on behalf of a client or giving instructions on behalf of a client in respect of the receipt, payment or transfer of money. Exemptions to the rules existed with respect to money received for professional fees and disbursements, and for money received from a financial institution, public authority or a reporting issuer (e.g. a corporation whose shares are traded on a stock exchange). The 2008 CIV rules also required lawyers to retain CIV records for a prescribed period.

6. In 2013, the *Code of Professional Conduct for BC* (the "*Code*") came into effect, replacing the *Professional Conduct Handbook*. The *Code* consists of rules, commentaries and appendices each of which contain statements that are mandatory or advisory. It contains several provisions directed at preventing lawyers' involvement in illegality, including money laundering. For example, lawyers must not engage in any activity that they know or ought to know assists in or encourages dishonesty, crime or fraud (rule 3.2-7). It also contains the *Canons of Legal Ethics*, which reinforce a lawyer's duties to uphold the law and discharge all professional responsibilities with honour and integrity.

7. In 2018, the LSBC adopted a plan under its Trust Assurance Program to continue to audit law firms that operate a trust account at least once every six years, with some firms audited more often depending on their firm size, primary practice areas, compliance history and risk-rating. Law firms that primarily practice (>50%) in the areas of wills and estates and real estate will be audited once every four years, new firms will be audited

within three years of inception, and lawyers and law firms considered to be at higher risk of non-compliance may be audited more often, either by the Trust Assurance Department or by an external accounting firm.

8. In July 2019, the Benchers made several changes to the Rules, based on amendments to the FLSC *Model Rules*:

a. The new trust account rule, Rule 3-58.1, effective July 2019, expressly provides that funds paid into or out of a trust account must be directly related to legal services provided by a lawyer or law firm. On completion of legal services to which the funds relate, a lawyer or law firm must take reasonable steps to obtain instructions to pay out the funds as soon as practicable. The amendments also narrow the definition of "trust funds" in Rule 1 so that funds received by a lawyer that are not "directly related to legal services" are not considered trust funds.

b. The LSBC also made changes to the "no-cash rule" concerning refunds, effective July 2019. A lawyer who receives or accepts cash for professional fees, disbursements or expenses in an aggregate amount greater than $7,500 must make any refund in cash. The cash limit under the rule also increased by one cent (from less than $7,500 to $7,500).

c. Changes to the CIV rules, effective January 1, 2020, introduced more stringent identification and verification requirements, added relationship monitoring requirements, and required lawyers to obtain information about a client's source of money when a lawyer provides legal services in respect of a financial transaction. For example, Rule 3-102(1) changes the requirement that a lawyer who provides services in respect of a financial transaction[1] "must take reasonable steps" to verify the client's identity to a requirement that the lawyer "must verify" the client's identity. Further, the changes eliminate the exemptions from verification of a client's identity when a lawyer pays or

[1] Rule 3-98 defines financial transaction to mean: the receipt, payment or transfer of money on behalf of a client or giving instructions on behalf of a client in respect of the receipt, payment or transfer of money.

receives money pursuant to the order of a court or other tribunal or as a settlement of any legal or administrative proceeding that has been commenced.

9. The LSBC provided comments to The Honourable Carole James on September 19, 2018 as part of the *Land Owner Transparency Act White Paper Consultation*. The LSBC's written comments are attached as Appendix "A".

C. FLSC

10. The FLSC adopted the *Model Rule on Cash Transactions* in October 2004. That rule provided that "[a] lawyer shall not receive or accept from a person, cash in an aggregate amount of $7,500 or more Canadian dollars in respect of any one client matter or transaction save for professional fees, disbursements expenses or bail, provided that any refund from such payment is also made in cash". Exceptions to the rule permitted legal counsel to receive cash in excess of the prescribed amount if the cash comes from a financial institution or public body, a peace officer law enforcement agency or other agent of the Crown acting in an official capacity, if the money is paid pursuant to a court order or is to pay a fine or penalty, or if it is for professional fees, disbursements, expenses or bail.

11. The FLSC adopted the *Model Rule on Client Identification and Verification Requirements* in 2008. The model rule describes requirements that lawyers record client information and take reasonable steps to verify the client and third parties when a lawyer engages in or gives instructions in respect of the receiving, paying or transferring of funds, other than an electronic funds transfer, including non-face-to-face transactions. The FLSC CIV model rules also contain rules with respect to withdrawing from representation when the lawyer knows or ought to know that continuing to act would result in assisting a client in fraud or other illegal conduct, timing of verification requirements, and identification of directors, shareholders and owners.

12. The FLSC adopted the *Model Code of Professional Conduct* in 2009. It sets the benchmark for harmonizing codes of conduct to be implemented in each of Canada's law societies. The *Model Code of Professional Conduct* is attached as Appendix "B".

13. In April 2012, the FLSC made submissions to the Senate Committee on Banking, Trade and Commerce on its review of anti-money laundering legislation. The FLSC's 2012 submissions are attached as Appendix "C".

14. In October 2016, the FLSC Council formed the Anti-Money Laundering and Terrorist Financing Working Group (the "FLSC Working Group"). The FLSC Working Group was established to undertake a review of the *Model Rules*, and to consider issues related to their enforcement. The FLSC Working Group's Terms of Reference are attached as Appendix "D".

15. The LSBC participates in the FLSC Working Group. Presently, the Chief Financial Officer and Director of Trust Regulation and the Deputy Chief Legal Officer are members of the FLSC Working Group. As well, a senior Practice Advisor also participates in the group.

16. From October 2017 until mid-March 2018, the FLSC Working Group held a consultation on several proposed amendments to the *Model Rules*, namely the "no-cash" and CIV rules, and the introduction of a trust account model rule.

17. The FLSC updated its *Model Rule on Cash Transactions* in 2018. The updated rule removes the exception that existed with respect to cash received pursuant to a court order, and considers some circumstances in which legal counsel may accept more than $7,500 in cash, namely, cash received from a peace officer, law enforcement agency or other agent of the Crown, and to pay bail. The 2018 FLSC *Model Rule on Cash Transactions* is attached as Appendix "E".

18. The FLSC also amended its *Model Rule on Client Identification and Verification* in October 2018. These amendments include requirements for a lawyer engaged in transactional work to obtain information regarding source of funds. The amendments also included further requirements regarding the use of agents to verify client information, and

now require lawyers to obtain client information, including with respect to trusts, on individuals with a direct or indirect ownership stake of 25% or more of an organization's shares. The CIV rules also now require that lawyers verify certain information within 30 days and keep verification records for a minimum of six years. The 2018 FLSC *Model Rule on Client Identification and Verification* is attached as Appendix "F".

19. The FLSC adopted the *Model Trust Accounting Rule* in 2018. Under that model rule, lawyers must pay into and withdraw from, or permit the payment into or withdrawal from, a trust account only money that is directly related to legal services that the lawyer or the lawyer's law firm is providing. The *Model Trust Accounting Rule* is attached as Appendix "G".

20. The FLSC made submissions on March 20, 2018 to the House of Commons Standing Committee on Finance regarding beneficial ownership. The FLSC also made submissions to the Department of Finance in its review of Canada's anti-money laundering regime on May 17, 2018. The FLSC submissions are attached as Appendices "H" and "I".

21. In 2019, the FLSC published a risk advisory in respect of five practice areas: (a) real estate; (b) private lending; (c) shell corporations; (d) trusts; and (e) litigation. The advisory highlights suspicious circumstance for lawyers and Quebec notaries, and is attached as Appendix "J".

22. The FLSC issued *Guidance for the Legal Profession – Your Professional Responsibility to Avoid Facilitating or Participating in ML and TF* in February 2019. The Guidance, which includes red flags and examples, is intended to assist lawyers in understanding their AML obligations, including those contained in the *Model Rules,* and in identifying money laundering red flags. The FLSC *Guidance for the Legal Profession* is attached as Appendix "K".

23. A joint working group comprised of the FLSC, the Department of Finance and other federal government departments and agencies was established in June 2019 to address issues related to money laundering and terrorist financing (the "Federal Working Group").

The FLSC representatives include members from provincial law societies (e.g., the LSBC). The Federal Working Group's mandate is to explore issues related to money laundering and terrorist financing that may arise in the practice of law and to strengthen information sharing between the regulators of the legal profession and the Government of Canada. The terms of reference of the Federal Working Group are attached as Appendix "L".

24. The FLSC published the *Risk Assessment Case Studies for the Legal Profession* in February 2020. The *Case Studies* document is designed to help lawyers better understand money laundering risks and red flags that may arise in their practice. The *Case Studies* also provide practical guidance on how to respond when faced with suspicious circumstances that might potentially involve money laundering. The FLSC *Risk Assessment Case Studies* is attached as Appendix "M".

25. The FLSC made submissions to the Department of Innovation, Science and Economic Development and the Department of Finance's consultation paper *Strengthening Corporate Beneficial Ownership Transparency in Canada* in May 2020. The FLSC's May 2020 submissions are attached as Appendix "N".

26. The FLSC published the *Guidance on Monitoring Obligations* and the *Guidance on Using an Agent* in July 2020. *Guidance on Monitoring Obligations* is attached as Appendix "O". *Guidance on Using an Agent* is attached as Appendix "P".

The Law Society
of British Columbia

September 19, 2018

The Honourable Carole James
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Dear Hon. Minister Carole James:

Re: Land Owner Transparency Act White Paper Consultation

The Law Society of British Columbia welcomes the government's efforts to increase the transparency of land ownership in BC to prevent tax evasion, fraud and money laundering. The proposed *Land Owner Transparency Act* (the "*Act*") and the creation of a publicly accessible, beneficial ownership registry are important steps towards this worthwhile objective. When the Law Society met with The Hon. David Eby, Attorney General last fall and again earlier this year, we discussed the importance of addressing beneficial ownership. The Law Society is encouraged by the steps the government is taking, and it is our hope that our comments will help you achieve the public interest objectives identified in the White Paper.

The mandate of the Law Society provides that it is to uphold and protect the public interest in the administration of justice by, among other things, preserving and protecting the rights and freedoms of all persons. In that context, one of the public's essential rights is the ability to seek legal advice and services within the protection of solicitor-client privilege. The Law Society appreciates the inclusion of section 53 in the *Act,* but has serious concerns about establishing the mechanism for dealing with claims of solicitor-client privilege by way of regulation. The Law Society is of the view that it is preferable, when seeking to place limits on an important civil right essential to fundamental justice and the rule of law, that the provisions be contained in the governing statute, rather than by way of regulation.

We welcome the opportunity to assist the government in developing an approach to claims of solicitor-client privilege that ensures the appropriate balance between maintaining the privilege, while providing a means to advance the public interest

objectives of the legislation in circumstance where access to lawyers' records may be required.

The Law Society also supports the certification of the accuracy and completeness of transparency declarations and disclosure reports by the transferee or reporting body and that subscribers' obligations are confined to ensuring that transparency declarations and disclosure reports have been certified as required and a true copy is in the possession of the subscriber.

In addition to ensuring solicitor-client privilege is properly protected in the legislation, it would also be useful if the enforcement contemplated in the legislation extended beyond law enforcement per se. In particular, searches for law enforcement purposes (s. 30) are presently limited to those conducted by a constable, officer or employee of a police force. We would suggest that there may be circumstances in a Law Society investigation or proceeding where it would be beneficial to the public interest for the Law Society to have recourse to the search provisions of the *Act,* in addition to the provisions of the *Legal Profession Act* and Law Society Rules.

It is clear that considerable thought has been given to the structure of the *Act*, in an effort to capture the various means by which beneficial ownership of land may be hidden. However, the definitions and provisions of the *Act* with respect to partnerships appear to create an ambiguity with respect to limited partners. Sections 25 and 55(2) of the *Partnership Act,* [RSBC 1998] c. 348, suggest the property right of limited partners is an interest in personal property, not land. Section 4(a) of the *Act* appears to contemplate that limited partners are not included as "partnership interest holders" because they do not have an interest in land. If that is the case, however, then it is unclear what is intended by including limited partnerships within the definition of "relevant partnership". If the intent is to require the disclosure of limited partners' property interest in a general partnerships' interest in land, we believe further consideration needs to be given to this matter.

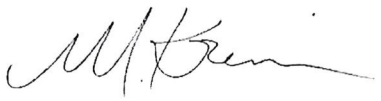
The Law Society recognizes that the proposed *Act* needs to fit within broader government objectives as well. There is an opportunity with the *Act* to assist in resolving family law disputes fairly and in a timely fashion. Considerable delay and cost can result from a family law dispute where property is hidden by one spouse from another. Government may wish to explore opportunities within the *Act* to permit searches for a spouse's beneficial ownership in property and explore the potential for a charge to be put on title to prevent a registered owner from selling the land while a claim is underway in court regarding a spouse with beneficial ownership / interest in the property. The *Act* should also clarify whether a spouse who separates has to register beneficial title to land, because separation triggers an interest in family property even if it is not in the spouse's name. Similarly with co-habitation marriage

agreements that provide for a property right in trust. There may be value in ensuring the language in the *Act* supports ongoing efforts to modernize family law.

Lastly, while the key priority of the *Act* is to increase transparency of land ownership, the Law Society emphasizes the importance of ensuring an appropriate balance with privacy rights. We believe it is essential the information collected be stored in a manner consistent with the provisions of the *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996, c. 165, with particular reference to sections 30 and 30.1. Furthermore, any databases should have comprehensive cybersecurity protections to prevent unlawful access to information, as well as providing for robust audit and investigation standards to ensure compliance and identify and mitigate any possible data breaches.

In closing, the Law Society appreciates the government taking steps to establish a registry of beneficial land ownership. My colleagues at the Bencher table and I look forward to working with you to address the protection of solicitor-client privilege and the other opportunities we have identified.

Yours truly,



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Fédération des ordres professionnels de juristes du Canada

Model Code of Professional Conduct

As amended October 19, 2019

Appendix B

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PREFACE

One of the hallmarks of a free and democratic society is the Rule of Law. Its importance is manifested in every legal activity in which citizens engage, from the sale of real property to the prosecution of murder to international trade. As participants in a justice system that advances the Rule of Law, lawyers hold a unique and privileged position in society. Self-regulatory powers have been granted to the legal profession on the understanding that the profession will exercise those powers in the public interest. Part of that responsibility is ensuring the appropriate regulation of the professional conduct of lawyers. Members of the legal profession who draft, argue, interpret and challenge the law of the land can attest to the robust legal system in Canada. They also acknowledge the public's reliance on the integrity of the people who work within the legal system and the authority exercised by the governing bodies of the profession. While lawyers are consulted for their knowledge and abilities, more is expected of them than forensic acumen. A special ethical responsibility comes with membership in the legal profession. This Code attempts to define and illustrate that responsibility in terms of a lawyer's professional relationships with clients, the Justice system and the profession.

The Code sets out statements of principle followed by exemplary rules and commentaries, which contextualize the principles enunciated. The principles are important statements of the expected standards of ethical conduct for lawyers and inform the more specific guidance in the rules and commentaries. The Code assists in defining ethical practice and in identifying what is questionable ethically. Some sections of the Code are of more general application, and some sections, in addition to providing ethical guidance, may be read as aspirational. The Code in its entirety should be considered a reliable and instructive guide for lawyers that establishes only the minimum standards of professional conduct expected of members of the profession. Some circumstances that raise ethical considerations may be sufficiently unique that the guidance in a rule or commentary may not answer the issue or provide the required direction. In such cases, lawyers should consult with the Law Society, senior practitioners or the courts for guidance.

A breach of the provisions of the Code may or may not be sanctionable. The decision to address a lawyer's conduct through disciplinary action based on a breach of the Code will be made on a case-by-case basis after an assessment of all relevant information. The rules and commentaries are intended to encapsulate the ethical standard for the practice of law in Canada. A failure to meet this standard may result in a finding that the lawyer has engaged in conduct unbecoming or professional misconduct.

The Code of Conduct was drafted as a national code for Canadian lawyers. It is recognized, however, that regional differences will exist in respect of certain applications of the ethical standards. Lawyers who practise outside their home jurisdiction should find the Code useful in identifying these differences.

The practice of law continues to evolve. Advances in technology, changes in the culture of those accessing legal services and the economics associated with practising law will continue to present challenges to lawyers. The ethical guidance provided to lawyers by their regulators should be responsive to this evolution. Rules of conduct should assist, not hinder, lawyers in providing legal services to the public in a way that ensures the public interest is protected. This calls for a framework based on ethical principles that, at the highest level, are immutable, and a profession that dedicates itself to practise according to the standards of competence, honesty and loyalty. The Law Society intends and hopes that this Code will be of assistance in achieving these goals.

CHAPTER 1 – INTERPRETATION AND DEFINITIONS

1.1 DEFINITIONS

1.1-1 In this Code, unless the context indicates otherwise,
"associate" includes:

(a) a lawyer who practises law in a law firm through an employment or other contractual relationship; and
(b) a non-lawyer employee of a multi-discipline practice providing services that support or supplement the practice of law;

"client" means a person who:

(a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or

(b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf.

and includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work.

Commentary

[1] A lawyer-client relationship may be established without formality.

[2] When an individual consults a lawyer in a representative capacity, the client is the corporation, partnership, organization, or other legal entity that the individual is representing;

[3] For greater clarity, a client does not include a near-client, such as an affiliated entity, director, shareholder, employee or family member, unless there is objective evidence to demonstrate that such an individual had a reasonable expectation that a lawyer-client relationship would be established.

A "**conflict of interest"** means the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person.

"consent" means fully informed and voluntary consent after disclosure

(a) in writing, provided that, if more than one person consents, each signs the same or a separate document recording the consent; or

(b) orally, provided that each person consenting receives a separate written communication recording the consent as soon as practicable;

“law firm” includes one or more lawyers practising:

(a) in a sole proprietorship;

(b) in a partnership;

(c) as a clinic under the [provincial or territorial Act governing legal aid];

(d) in a government, a Crown corporation or any other public body; or

(e) in a corporation or other organization;

“lawyer” means a member of the Society and includes a law student registered in the Society’s pre-call training program;

“limited scope retainer” means the provision of legal services for part, but not all, of a client’s legal matter by agreement with the client;

“Society” means the Law Society of <province or territory>;

“tribunal” includes a court, board, arbitrator, mediator, administrative agency or other body that resolves disputes, regardless of its function or the informality of its procedures.

CHAPTER 2 – STANDARDS OF THE LEGAL PROFESSION

2.1 INTEGRITY

2.1-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

Commentary

[1] Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be.

[2] Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.

[3] Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action.

[4] Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity.

2.1-2 A lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions.

Commentary

[1] Collectively, lawyers are encouraged to enhance the profession through activities such as:

(a) sharing knowledge and experience with colleagues and students informally in day-to-day practice as well as through contribution to professional journals and publications, support of law school projects and participation in panel discussions, legal education seminars, bar admission courses and university lectures;

(b) participating in legal aid and community legal services programs or providing legal services on a pro bono basis;

(c) filling elected and volunteer positions with the Society;

(d) acting as directors, officers and members of local, provincial, national and international bar associations and their various committees and sections; and

(e) acting as directors, officers and members of non-profit or charitable organizations.

CHAPTER 3 – RELATIONSHIP TO CLIENTS

3.1 COMPETENCE

Definitions

3.1-1 In this section,

"Competent lawyer" means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer's engagement, including:

(a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises;

(b) investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action;

(c) implementing as each matter requires, the chosen course of action through the application of appropriate skills, including:

(i) legal research;
(ii) analysis;
(iii) application of the law to the relevant facts;
(iv) writing and drafting;
(v) negotiation;
(vi) alternative dispute resolution;
(vii) advocacy; and
(viii) problem solving;

(d) communicating at all relevant stages of a matter in a timely and effective manner;

(e) performing all functions conscientiously, diligently and in a timely and cost-effective manner;

(f) applying intellectual capacity, judgment and deliberation to all functions;

(g) complying in letter and spirit with all rules pertaining to the appropriate professional conduct of lawyers;

(h) recognizing limitations in one's ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served;

(i) managing one's practice effectively;

(j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and

(k) otherwise adapting to changing professional requirements, standards, techniques and practices.

Competence

3.1-2 A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.

Commentary

[1] As a member of the legal profession, a lawyer is held out as knowledgeable, skilled and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf.

[2] Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises.

[3] In deciding whether the lawyer has employed the requisite degree of knowledge and skill in a particular matter, relevant factors will include:

(a) the complexity and specialized nature of the matter;
(b) the lawyer's general experience;
(c) the lawyer's training and experience in the field;
(d) the preparation and study the lawyer is able to give the matter; and
(e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

[4] In some circumstances, expertise in a particular field of law may be required; often the necessary degree of proficiency will be that of the general practitioner.

[4A] To maintain the required level of competence, a lawyer should develop an understanding of, and ability to use, technology relevant to the nature and area of the lawyer's practice and responsibilities. A lawyer should understand the benefits and risks associated with relevant technology, recognizing the lawyer's duty to protect confidential information set out in section 3.3.

[4B] The required level of technological competence will depend on whether the use of understanding of technology is necessary to the nature and area of the lawyer's practice and responsibilities and whether the relevant technology is reasonably available to the lawyer. In determining whether technology is reasonably available, consideration should be given to factors including:

(a) The lawyer's or law firm's practice areas;
(b) The geographic locations of the lawyer's or firm's practice; and

(c) The requirements of clients.

[5] A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk or expense to the client. The lawyer who proceeds on any other basis is not being honest with the client. This is an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.

[6] A lawyer must recognize a task for which the lawyer lacks competence and the disservice that would be done to the client by undertaking that task. If consulted about such a task, the lawyer should:

(a) decline to act;
(b) obtain the client's instructions to retain, consult or collaborate with a lawyer who is competent for that task; or
(c) obtain the client's consent for the lawyer to become competent without undue delay, risk or expense to the client.

[7] A lawyer should also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting or other non-legal fields, and, when it is appropriate, the lawyer should not hesitate to seek the client's instructions to consult experts.

[7A] When a lawyer considers whether to provide legal services under a limited scope retainer the lawyer must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. An agreement for such services does not exempt a lawyer from the duty to provide competent representation. The lawyer should consider the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services. See also rule 3.2-1A.

[7B] In providing short-term summary legal services under Rules 3.4-2A – 3.4-2D, a lawyer should disclose to the client the limited nature of the services provided and determine whether any additional legal services beyond the short-term summary legal services may be required or are advisable, and encourage the client to seek such further assistance.

[8] A lawyer should clearly specify the facts, circumstances and assumptions on which an opinion is based, particularly when the circumstances do not justify an exhaustive investigation and the resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications. A lawyer should only express his or her legal opinion when it is genuinely held and is provided to the standard of a competent lawyer.

[9] A lawyer should be wary of providing unreasonable or over-confident assurances to the client, especially when the lawyer's employment or retainer may depend upon advising in a particular way.

[10] In addition to opinions on legal questions, a lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy or social complications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.

[11] In a multi-discipline practice, a lawyer must ensure that the client is made aware that the legal advice from the lawyer may be supplemented by advice or services from a non-lawyer. Advice or services from non-lawyer members of the firm unrelated to the retainer for legal services must be provided independently of and outside the scope of the legal services retainer and from a location separate from the premises of the multi-discipline practice. The provision of non-legal advice or services unrelated to the legal services retainer will also be subject to the constraints outlined in the rules/by-laws/regulations governing multi-discipline practices.

[12] The requirement of conscientious, diligent and efficient service means that a lawyer should make every effort to provide timely service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed.

[13] The lawyer should refrain from conduct that may interfere with or compromise his or her capacity or motivation to provide competent legal services to the client and be aware of any factor or circumstance that may have that effect.

[14] A lawyer who is incompetent does the client a disservice, brings discredit to the profession and may bring the administration of justice into disrepute. In addition to damaging the lawyer's own reputation and practice, incompetence may also injure the lawyer's partners and associates.

[15] Incompetence, Negligence and Mistakes - This rule does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described by the rule. However, evidence of gross neglect in a particular matter or a pattern of neglect or mistakes in different matters may be evidence of such a failure, regardless of tort liability. While damages may be awarded for negligence, incompetence can give rise to the additional sanction of disciplinary action.

3.2 QUALITY OF SERVICE

Quality of Service

3.2-1 A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.

Commentary

[1] This rule should be read and applied in conjunction with section 3.1 regarding competence.

[2] A lawyer has a duty to provide a quality of service at least equal to that which lawyers generally expect of a competent lawyer in a like situation. An ordinarily or otherwise competent lawyer may still occasionally fail to provide an adequate quality of service.

[3] A lawyer has a duty to communicate effectively with the client. What is effective will vary depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions.

[4] A lawyer should ensure that matters are attended to within a reasonable time frame. If the lawyer can reasonably foresee undue delay in providing advice or services, the lawyer has a duty to so inform the client, so that the client can make an informed choice about his or her options, such as whether to retain new counsel.

Examples of expected practices

[5] The quality of service to a client may be measured by the extent to which a lawyer maintains certain standards in practice. The following list, which is illustrative and not exhaustive, provides key examples of expected practices in this area:

(a) keeping a client reasonably informed;
(b) answering reasonable requests from a client for information;
(c) responding to a client's telephone calls;
(d) keeping appointments with a client, or providing a timely explanation or apology when unable to keep such an appointment;
(e) taking appropriate steps to do something promised to a client, or informing or explaining to the client when it is not possible to do so;
(f) ensuring, where appropriate, that all instructions are in writing or confirmed in writing;

(g) answering, within a reasonable time, any communication that requires a reply;
(h) ensuring that work is done in a timely manner so that its value to the client is maintained;
(i) providing quality work and giving reasonable attention to the review of documentation to avoid delay and unnecessary costs to correct errors or omissions;
(j) maintaining office staff, facilities and equipment adequate to the lawyer's practice;
(k) informing a client of a proposal of settlement, and explaining the proposal properly;
(l) providing a client with complete and accurate relevant information about a matter;
(m) making a prompt and complete report when the work is finished or, if a final report cannot be made, providing an interim report when one might reasonably be expected;
(n) avoiding the use of intoxicants or drugs that interferes with or prejudices the lawyer's services to the client;
(o) being civil.

[6] A lawyer should meet deadlines, unless the lawyer is able to offer a reasonable explanation and ensure that no prejudice to the client will result. Whether or not a specific deadline applies, a lawyer should be prompt in handling a matter, responding to communications and reporting developments to the client. In the absence of developments, contact with the client should be maintained to the extent the client reasonably expects.

Limited Scope Retainers

3.2-1A Before undertaking a limited scope retainer the lawyer must advise the client about the nature, extent and scope of the services that the lawyer can provide and must confirm in writing to the client as soon as practicable what services will be provided.

Commentary

[1] Reducing to writing the discussions and agreement with the client about the limited scope retainer assists the lawyer and client in understanding the limitations of the service to be provided and any risks of the retainer.

[2] A lawyer who is providing legal services under a limited scope retainer should be careful to avoid acting in a way that suggests that the lawyer is providing full services to the client.

[3] Where the limited services being provided include an appearance before a tribunal a lawyer must be careful not to mislead the tribunal as to the scope of the retainer and should consider whether disclosure of the limited nature of the retainer is required by the rules of practice or the circumstances.

[4] A lawyer who is providing legal services under a limited scope retainer should consider how communications from opposing counsel in a matter should be managed (See rule 7.2-6A).

[5] This rule does not apply to situations in which a lawyer is providing summary advice, for example over a telephone hotline or as duty counsel, or to initial consultations that may result in the client retaining the lawyer.

Honesty and Candour

3.2-2 When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.

Commentary

[1] A lawyer should disclose to the client all the circumstances of the lawyer's relations to the parties and interest in or connection with the matter, if any that might influence whether the client selects or continues to retain the lawyer.

[2] A lawyer's duty to a client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise. The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.

[3] Occasionally, a lawyer must be firm with a client. Firmness, without rudeness, is not a violation of the rule. In communicating with the client, the lawyer may disagree with the client's perspective, or may have concerns about the client's position on a matter, and may give advice that will not please the client. This may legitimately require firm and animated discussion with the client.

Language Rights

3.2-2A A lawyer must, when appropriate, advise a client of the client's language rights, including the right to proceed in the official language of the client's choice.

3.2-2B Where a client wishes to retain a lawyer for representation in the official language of the client's choice, the lawyer must not undertake the matter unless the lawyer is competent to provide the required services in that language.

Commentary

[1] The lawyer should advise the client of the client's language rights as soon as possible.

[2] The choice of official language is that of the client not the lawyer. The lawyer should be aware of relevant statutory and Constitutional law relating to language rights including the Canadian Charter of Rights and Freedoms, s.19(1) and Part XVII of the Criminal Code regarding language rights in courts under federal jurisdiction and in criminal proceedings. The lawyer should also be aware that provincial or territorial legislation may provide additional language rights, including in relation to aboriginal languages.

[3] When a lawyer considers whether to provide the required services in the official language chosen by the client, the lawyer should carefully consider whether it is possible to render those services in a competent manner as required by Rule 3.1-2 and related Commentary.

When the Client is an Organization

3.2-3 Although a lawyer may receive instructions from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, the lawyer must act for the organization in exercising his or her duties and in providing professional services.

Commentary

[1] A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors and employees. While the organization or corporation acts and gives instructions through its officers, directors, employees, members, agents or representatives, the lawyer should ensure that it is the interests of the organization that are served and protected. Further, given that an organization depends on persons to give instructions, the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority.

[2] In addition to acting for the organization, a lawyer may also accept a joint retainer and act for a person associated with the organization. For example, a lawyer may advise an officer of an organization about liability insurance. In such

cases the lawyer acting for an organization should be alert to the prospects of conflicts of interests and should comply with the rules about the avoidance of conflicts of interests (section 3.4).

Encouraging Compromise or Settlement

3.2-4 A lawyer must advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must discourage the client from commencing or continuing useless legal proceedings.

Commentary

[1] A lawyer should consider the use of alternative dispute resolution (ADR) when appropriate, inform the client of ADR options and, if so instructed, take steps to pursue those options.

Threatening Criminal or Regulatory Proceedings

3.2-5 A lawyer must not, in an attempt to gain a benefit for a client, threaten, or advise a client to threaten:

(a) to initiate or proceed with a criminal or quasi-criminal charge; or

(b) to make a complaint to a regulatory authority.

Commentary

[1] It is an abuse of the court or regulatory authority's process to threaten to make or advance a complaint in order to secure the satisfaction of a private grievance. Even if a client has a legitimate entitlement to be paid monies, threats to take criminal or quasi-criminal action are not appropriate.

[2] It is not improper, however, to notify the appropriate authority of criminal or quasi-criminal activities while also taking steps through the civil system. Nor is it improper for a lawyer to request that another lawyer comply with an undertaking or trust condition or other professional obligation or face being reported to the Society. The impropriety stems from threatening to use, or actually using, criminal or quasi-criminal proceedings to gain a civil advantage.

Inducement for Withdrawal of Criminal or Regulatory Proceedings

3.2-6 A lawyer must not:

(a) give or offer to give, or advise an accused or any other person to give or offer to give, any valuable consideration to another person in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or the regulatory authority to enter into such discussions;

(b) accept or offer to accept, or advise a person to accept or offer to accept, any valuable consideration in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or regulatory authority to enter such discussions; or

(c) wrongfully influence any person to prevent the Crown or regulatory authority from proceeding with charges or a complaint or to cause the Crown or regulatory authority to withdraw the complaint or stay charges in a criminal or quasi-criminal proceeding.

Commentary

[1] "Regulatory authority" includes professional and other regulatory bodies.

[2] A lawyer for an accused or potential accused must never influence a complainant or potential complainant not to communicate or cooperate with the Crown. However, this rule does not prevent a lawyer for an accused or potential accused from communicating with a complainant or potential complainant to obtain factual information, arrange for restitution or an apology from an accused, or defend or settle any civil matters between the accused and the complainant. When a proposed resolution involves valuable consideration being exchanged in return for influencing the Crown or regulatory authority not to proceed with a charge or to seek a reduced sentence or penalty, the lawyer for the accused must obtain the consent of the Crown or regulatory authority prior to discussing such proposal with the complainant or potential complainant. Similarly, lawyers advising a complainant or potential complainant with respect to any such negotiations can do so only with the consent of the Crown or regulatory authority.

[3] A lawyer cannot provide an assurance that the settlement of a related civil matter will result in the withdrawal of criminal or quasi-criminal charges, absent the consent of the Crown or regulatory authority.

[4] When the complainant or potential complainant is unrepresented, the lawyer should have regard to the rules respecting unrepresented persons and make it clear that the lawyer is acting exclusively in the interests of the accused. If the

complainant or potential complainant is vulnerable, the lawyer should take care not to take unfair or improper advantage of the circumstances. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present.

Dishonesty, Fraud by Client or Others

3.2-7 A lawyer must never:

a) knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct.

b) do or omit to do anything that the lawyer ought to know assists in or encourages any dishonesty, fraud, crime, or illegal conduct by a client or others, or

c) instruct a client or others on how to violate the law and avoid punishment.

Commentary

[1] A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.

[2] A lawyer should be alert to and avoid unwittingly becoming involved with a client or others engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these and other criminal activities may be transactions for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate.

[3] If a lawyer has suspicions or doubts about whether he or she might be assisting a client or others in dishonesty, fraud, crime or illegal conduct, the lawyer should make reasonable inquiries to obtain information about the client or others and, in the case of the client, about the subject matter and objectives of the retainer. These should include verifying who are the legal or beneficial owners of property and business entities, verifying who has the control of business entities, and clarifying the nature and purpose of a complex or unusual transaction where the purpose is not clear. The lawyer should make a record of the results of these inquiries.

[4] A bona fide test case is not necessarily precluded by this rule and, so long as no injury to a person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a

technical breach giving rise to a test case. In all situations, the lawyer should ensure that the client appreciates the consequences of bringing a test case.

Dishonesty, Fraud when Client an Organization

3.2-8 A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally, or illegally, must do the following, in addition to his or her obligations under rule 3.2-7*:*

(a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct is, was or would be dishonest, fraudulent, criminal, or illegal and should be stopped;

(b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct was, is or would be dishonest, fraudulent, criminal, or illegal and should be stopped; and

(c) if the organization, despite the lawyer's advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with the rules in section 3.7.

Commentary

[1] The past, present, or proposed misconduct of an organization may have harmful and serious consequences, not only for the organization and its constituency, but also for the public who rely on organizations to provide a variety of goods and services. In particular, the misconduct of publicly traded commercial and financial corporations may have serious consequences for the public at large. This rule addresses some of the professional responsibilities of a lawyer acting for an organization, including a corporation, when he or she learns that the organization has acted, is acting, or proposes to act in a way that is dishonest, fraudulent, criminal or illegal. In addition to these rules, the lawyer may need to consider, for example, the rules and commentary about confidentiality (section 3.3).

[2] This rule speaks of conduct that is dishonest, fraudulent, criminal or illegal.

[3] Such conduct includes acts of omission. Indeed, often it is the omissions of an organization, such as failing to make required disclosure or to correct

inaccurate disclosures that constitute the wrongful conduct to which these rules relate. Conduct likely to result in substantial harm to the organization, as opposed to genuinely trivial misconduct by an organization, invokes these rules.

[4] In considering his or her responsibilities under this section, a lawyer should consider whether it is feasible and appropriate to give any advice in writing.

[5] A lawyer acting for an organization who learns that the organization has acted, is acting, or intends to act in a wrongful manner, may advise the chief executive officer and must advise the chief legal officer of the misconduct. If the wrongful conduct is not abandoned or stopped, the lawyer must report the matter "up the ladder" of responsibility within the organization until the matter is dealt with appropriately. If the organization, despite the lawyer's advice, continues with the wrongful conduct, the lawyer must withdraw from acting in the particular matter in accordance with Rule 3.7-1. In some but not all cases, withdrawal means resigning from his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter.

[6] This rule recognizes that lawyers as the legal advisers to organizations are in a central position to encourage organizations to comply with the law and to advise that it is in the organization's and the public's interest that organizations do not violate the law. Lawyers acting for organizations are often in a position to advise the executive officers of the organization, not only about the technicalities of the law, but also about the public relations and public policy concerns that motivated the government or regulator to enact the law. Moreover, lawyers for organizations, particularly in-house counsel, may guide organizations to act in ways that are legal, ethical, reputable and consistent with the organization's responsibilities to its constituents and to the public.

Clients with Diminished Capacity

3.2-9 When a client's ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary

[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions depends on such factors as age, intelligence, experience and mental and physical health and on the advice, guidance and support of others. A client's ability to make decisions may change, for better or worse, over time. A client may be mentally capable of

making some decisions but not others. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. Accordingly, when a client is, or comes to be, under a disability that impairs his or her ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.

[2] A lawyer who believes a person to be incapable of giving instructions should decline to act. However, if a lawyer reasonably believes that the person has no other agent or representative and a failure to act could result in imminent and irreparable harm, the lawyer may take action on behalf of the person lacking capacity only to the extent necessary to protect the person until a legal representative can be appointed. A lawyer undertaking to so act has the same duties under these rules to the person lacking capacity as the lawyer would with any client.

[3] If a client's incapacity is discovered or arises after the solicitor-client relationship is established, the lawyer may need to take steps to have a lawfully authorized representative, such as a litigation guardian, appointed or to obtain the assistance of the Office of the Public Trustee to protect the interests of the client. Whether that should be done depends on all relevant circumstances, including the importance and urgency of any matter requiring instruction. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned. Until the appointment of a legal representative occurs, the lawyer should act to preserve and protect the client's interests.

[4] In some circumstances when there is a legal representative, the lawyer may disagree with the legal representative's assessment of what is in the best interests of the client under a disability. So long as there is no lack of good faith or authority, the judgment of the legal representative should prevail. If a lawyer becomes aware of conduct or intended conduct of the legal representative that is clearly in bad faith or outside that person's authority, and contrary to the best interests of the client with diminished capacity, the lawyer may act to protect those interests. This may require reporting the misconduct to a person or institution such as a family member or the Public Trustee.

[5] When a lawyer takes protective action on behalf of a person or client lacking in capacity, the authority to disclose necessary confidential information may be implied in some circumstances: See Commentary under Rule 3.3-1 (Confidentiality) for a discussion of the relevant factors. If the court or other counsel becomes involved, the lawyer should inform them of the nature of the lawyer's relationship with the person lacking capacity.

3.3 CONFIDENTIALITY

Confidential Information

3.3-1 A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:

(a) expressly or impliedly authorized by the client;

(b) required by law or a court to do so;

(c) required to deliver the information to the Law Society; or

(d) otherwise permitted by this rule.

Commentary

[1] A lawyer cannot render effective professional service to a client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

[2] This rule must be distinguished from the evidentiary rule of lawyer and client privilege, which is also a constitutionally protected right, concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

[3] A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.

[4] A lawyer also owes a duty of confidentiality to anyone seeking advice or assistance on a matter invoking a lawyer's professional knowledge, although the lawyer may not render an account or agree to represent that person. A solicitor and client relationship is often established without formality. A lawyer should be cautious in accepting confidential information on an informal or preliminary basis, since possession of the information may prevent the lawyer from subsequently acting for another party in the same or a related matter (see rule 3.4-1 Conflicts).

[5] Generally, unless the nature of the matter requires such disclosure, a lawyer should not disclose having been:

(a) retained by a person about a particular matter; or

(b) consulted by a person about a particular matter, whether or not the lawyer-client relationship has been established between them.

[6] A lawyer should take care to avoid disclosure to one client of confidential information concerning or received from another client and should decline employment that might require such disclosure.

[7] Sole practitioners who practise in association with other lawyers in cost-sharing, space-sharing or other arrangements should be mindful of the risk of advertent or inadvertent disclosure of confidential information, even if the lawyers institute systems and procedures that are designed to insulate their respective practices. The issue may be heightened if a lawyer in the association represents a client on the other side of a dispute with the client of another lawyer in the association. Apart from conflict of interest issues such a situation may raise, the risk of such disclosure may depend on the extent to which the lawyers' practices are integrated, physically and administratively, in the association.

[8] A lawyer should avoid indiscreet conversations and other communications, even with the lawyer's spouse or family, about a client's affairs and should shun any gossip about such things even though the client is not named or otherwise identified. Similarly, a lawyer should not repeat any gossip or information about the client's business or affairs that is overheard or recounted to the lawyer. Apart altogether from ethical considerations or questions of good taste, indiscreet shoptalk among lawyers, if overheard by third parties able to identify the matter being discussed, could result in prejudice to the client. Moreover, the respect of the listener for lawyers and the legal profession will probably be lessened. Although the rule may not apply to facts that are public knowledge, a lawyer should guard against participating in or commenting on speculation concerning clients' affairs or business.

[9] In some situations, the authority of the client to disclose may be inferred. For example, in court proceedings some disclosure may be necessary in a pleading or other court document. Also, it is implied that a lawyer may, unless the client directs otherwise, disclose the client's affairs to partners and associates in the law firm and, to the extent necessary, to administrative staff and to others whose services are used by the lawyer. But this implied authority to disclose places the lawyer under a duty to impress upon associates, employees, students and other lawyers engaged under contract with the lawyer or with the firm of the lawyer the importance of non disclosure (both during their employment and

afterwards) and requires the lawyer to take reasonable care to prevent their disclosing or using any information that the lawyer is bound to keep in confidence.

[10] The client's authority for the lawyer to disclose confidential information to the extent necessary to protect the client's interest may also be inferred in some situations where the lawyer is taking action on behalf of the person lacking capacity to protect the person until a legal representative can be appointed. In determining whether a lawyer may disclose such information, the lawyer should consider all circumstances, including the reasonableness of the lawyer's belief the person lacks capacity, the potential harm that may come to the client if no action is taken, and any instructions the client may have given the lawyer when capable of giving instructions about the authority to disclose information. Similar considerations apply to confidential information given to the lawyer by a person who lacks the capacity to become a client but nevertheless requires protection.

[11] A lawyer may have an obligation to disclose information under Rules 5.5-2, 5.5-3 and 5.6-3. If client information is involved in those situations, the lawyer should be guided by the provisions of this rule.

Use of Confidential Information

3.3-2 A lawyer must not use or disclose a client's or former client's confidential information to the disadvantage of the client or former client, or for the benefit of the lawyer or a third person without the consent of the client or former client.

Commentary

[1] The fiduciary relationship between a lawyer and a client forbids the lawyer or a third person from benefiting from the lawyer's use of a client's confidential information. If a lawyer engages in literary works, such as a memoir or autobiography, the lawyer is required to obtain the client's or former client's consent before disclosing confidential information.

Future Harm / Public Safety Exception

3.3-3 A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.

Commentary

[1] Confidentiality and loyalty are fundamental to the relationship between a lawyer and a client because legal advice cannot be given and justice cannot be done unless clients have a large measure of freedom to discuss their affairs with their lawyers. However, in some very exceptional situations identified in this rule, disclosure without the client's permission might be warranted because the lawyer is satisfied that truly serious harm of the types identified is imminent and cannot otherwise be prevented. These situations will be extremely rare.

[2] The Supreme Court of Canada has considered the meaning of the words "serious bodily harm" in certain contexts, which may inform a lawyer in assessing whether disclosure of confidential information is warranted. In Smith v. Jones, [1999] 1 S.C.R. 455 at paragraph 83, the Court observed that serious psychological harm may constitute serious bodily harm if it substantially interferes with the health or well-being of the individual.

[3] In assessing whether disclosure of confidential information is justified to prevent death or serious bodily harm, a lawyer should consider a number of factors, including:

(a) the likelihood that the potential injury will occur and its imminence;

(b) the apparent absence of any other feasible way to prevent the potential injury; and

(c) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action.

[4] How and when disclosure should be made under this rule will depend upon the circumstances. A lawyer who believes that disclosure may be warranted should contact the local law society for ethical advice. When practicable and permitted, a judicial order may be sought for disclosure.

[5] If confidential information is disclosed under rule 3.3-3, the lawyer should prepare a written note as soon as possible, which should include:

(a) the date and time of the communication in which the disclosure is made;
(b) the grounds in support of the lawyer's decision to communicate the information, including the harm intended to be prevented, the identity of the person who prompted communication of the information as well as the identity of the person or group of persons exposed to the harm; and
(c) the content of the communication, the method of communication used and the identity of the person to whom the communication was made.

3.3-4 If it is alleged that a lawyer or the lawyer's associates or employees:

(a) have committed a criminal offence involving a client's affairs;

(b) are civilly liable with respect to a matter involving a client's affairs;

(c) have committed acts of professional negligence; or

(d) have engaged in acts of professional misconduct or conduct unbecoming a lawyer,

the lawyer may disclose confidential information in order to defend against the allegations, but must not disclose more information than is required.

3.3-5 A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but must not disclose more information than is required.

3.3-6 A lawyer may disclose confidential information to another lawyer to secure legal or ethical advice about the lawyer's proposed conduct.

3.3-7 A lawyer may disclose confidential information to the extent reasonably necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a law firm, but only if the information disclosed does not compromise the solicitor-client privilege or otherwise prejudice the client.

Commentary

[1] As a matter related to clients' interests in maintaining a relationship with counsel of choice and protecting client confidences, lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice.

[2] In these situations (see Rules 3.4-17 to 3.4-23 on Conflicts From Transfer Between Law Firms), rule 3.3-7 permits lawyers and law firms to disclose limited information. This type of disclosure would only be made once substantive discussions regarding the new relationship have occurred.

[3] This exchange of information between the firms needs to be done in a manner consistent with the transferring lawyer's and new firm's obligations to protect client confidentiality and privileged information and avoid any prejudice to the client. It ordinarily would include no more than the names of the persons and entities involved in a matter. Depending on the circumstances, it may include a

brief summary of the general issues involved, and information about whether the representation has come to an end.

[4] The disclosure should be made to as few lawyers at the new law firm as possible, ideally to one lawyer of the new firm, such as a designated conflicts lawyer. The information should always be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship.

[5] As the disclosure is made on the basis that it is solely for the use of checking conflicts where lawyers are transferring between firms and for establishing screens, the disclosure should be coupled with an undertaking by the new law firm to the former law firm that it will:

(a) limit access to the disclosed information;

(b) not use the information for any purpose other than detecting and resolving conflicts; and

(c) return, destroy, or store in a secure and confidential manner the information provided once appropriate confidentiality screens are established.

[6] The client's consent to disclosure of such information may be specifically addressed in a retainer agreement between the lawyer and client. In some circumstances, however, because of the nature of the retainer, the transferring lawyer and the new law firm may be required to obtain the consent of clients to such disclosure or the disclosure of any further information about the clients. This is especially the case where disclosure would compromise solicitor-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge).

3.4 CONFLICTS

Duty to Avoid Conflicts of Interest

3.4-1 A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

Commentary

[1] Lawyers have an ethical duty to avoid conflicts of interest. Some cases involving conflicts of interest will fall within the scope of the bright line rule as articulated by the Supreme Court of Canada. The bright line rule prohibits a lawyer or law firm from representing one client whose legal interests are directly adverse to the immediate legal interests of another client even if the matters are unrelated unless the clients consent. However, the bright line rule cannot be used to support tactical abuses and will not apply in the exceptional cases where it is unreasonable for the client to expect that the lawyer or law firm will not act against it in unrelated matters. See also rule 3.4-2 and commentary **[6]**.

[2] In cases where the bright line rule is inapplicable, the lawyer or law firm will still be prevented from acting if representation of the client would create a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer.

[3] This rule applies to a lawyer's representation of a client in all circumstances in which the lawyer acts for, provides advice to or exercises judgment on behalf of a client. Effective representation may be threatened where a lawyer is tempted to prefer other interests over those of his or her own client: the lawyer's own interests, those of a current client, a former client, or a third party.

[4] ***[deleted]***

The Fiduciary Relationship, the Duty of Loyalty and Conflicting Interests

[5] The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is based on trust. It is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Arising from the duty of loyalty

are other duties, such as a duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the duty to avoid conflicting interests.

[6] A client must be assured of the lawyer's undivided loyalty, free from any material impairment of the lawyer and client relationship. The relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate legal interests. One client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client.

Other Duties Arising from the Duty of Loyalty

[7] The lawyer's duty of confidentiality is owed to both current and former clients, with the related duty not to attack the legal work done during a retainer or to undermine the former client's position on a matter that was central to the retainer.

[8] The lawyer's duty of commitment to the client's cause prevents the lawyer from summarily and unexpectedly dropping a client to circumvent conflict of interest rules. The client may legitimately feel betrayed if the lawyer ceases to act for the client to avoid a conflict of interest.

[9] The duty of candour requires a lawyer or law firm to advise an existing client of all matters relevant to the retainer.

Identifying Conflicts

[10] A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest. Factors for the lawyer's consideration in determining whether a conflict of interest exists include:

(a) the immediacy of the legal interests;

(b) whether the legal interests are directly adverse;

(c) whether the issue is substantive or procedural;

(d) the temporal relationship between the matters;

(e) the significance of the issue to the immediate and long-term interests of the clients involved; and

(f) the clients' reasonable expectations in retaining the lawyer for the particular matter or representation.

Examples of areas where conflicts of interest may occur

[11] Conflicts of interest can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that may give rise to conflicts of interest. The examples are not exhaustive.

(a) A lawyer acts as an advocate in one matter against a person when the lawyer represents that person on some other matter.

(b) A lawyer provides legal advice on a series of commercial transactions to the owner of a small business and at the same time provides legal advice to an employee of the business on an employment matter, thereby acting for clients whose legal interests are directly adverse.

(c) A lawyer, an associate, a law partner or a family member has a personal financial interest in a client's affairs or in a matter in which the lawyer is requested to act for a client, such as a partnership interest in some joint business venture with a client.

    i. A lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest in acting for the corporation because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client.

(d) A lawyer has a sexual or close personal relationship with a client.

    i. Such a relationship may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning his or her affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by his or her lawyer. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work.

(e) A lawyer or his or her law firm acts for a public or private corporation and the lawyer serves as a director of the corporation.

    i. These two roles may result in a conflict of interest or other problems because they may

        A. affect the lawyer's independent judgment and fiduciary obligations in either or both roles,

        B. obscure legal advice from business and practical advice,

C. jeopardize the protection of lawyer and client privilege, and

D. disqualify the lawyer or the law firm from acting for the organization.

(f) Sole practitioners who practise with other lawyers in cost-sharing or other arrangements represent clients on opposite sides of a dispute.

i. The fact or the appearance of such a conflict may depend on the extent to which the lawyers' practices are integrated, physically and administratively, in the association.

The Role of the Court and Law Societies

[12] These rules set out ethical standards to which all members of the profession must adhere. The courts have a separate supervisory role over court proceedings. In that role, the courts apply fiduciary principles developed by the courts to govern lawyers' relationships with their clients, to ensure the proper administration of justice. A breach of the rules on conflicts of interest may lead to sanction by a law society even where a court dealing with the case may decline to order disqualification as a remedy.

Consent

3.4-2 A lawyer must not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all affected clients and the lawyer reasonably believes that he or she is able to represent the client without having a material adverse effect upon the representation of or loyalty to the client or another client.

(a) Express consent must be fully informed and voluntary after disclosure.

(b) Consent may be inferred and need not be in writing where all of the following apply:

i. the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;

ii. the matters are unrelated;

iii. the lawyer has no relevant confidential information from one client that might reasonably affect the other; and

iv. the client has commonly consented to lawyers acting for and against it in unrelated matters.

Commentary

Disclosure and consent

[1] Disclosure is an essential requirement to obtaining a client's consent and arises from the duty of candour owed to the client. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

[2] Disclosure means full and fair disclosure of all information relevant to a person's decision in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed. The lawyer therefore should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the lawyer's relations to the parties and any interest in or connection with the matter.

[2A] While this rule does not require that a lawyer advise a client to obtain independent legal advice about the conflict of interest, in some cases the lawyer should recommend such advice. This is to ensure that the client's consent is informed, genuine and uncoerced, especially if the client is vulnerable or not sophisticated.

[3] Following the required disclosure, the client can decide whether to give consent. As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the stage that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs.

Consent in Advance

[4] A lawyer may be able to request that a client consent in advance to conflicts that might arise in the future. As the effectiveness of such consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails, the more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. A general, open-ended consent will ordinarily be ineffective because it is not reasonably likely that the client will have understood the material risks involved. If

the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

[5] While not a pre-requisite to advance consent, in some circumstances it may be advisable to recommend that the client obtain independent legal advice before deciding whether to provide consent. Advance consent must be recorded, for example in a retainer letter.

Implied consent

[6] In limited circumstances consent may be implied, rather than expressly granted. In some cases it may be unreasonable for a client to claim that it expected that the loyalty of the lawyer or law firm would be undivided and that the lawyer or law firm would refrain from acting against the client in unrelated matters. In considering whether the client's expectation is reasonable, the nature of the relationship between the lawyer and client, the terms of the retainer and the matters involved must be considered. Governments, chartered banks and entities that might be considered sophisticated consumers of legal services may accept that lawyers may act against them in unrelated matters where there is no danger of misuse of confidential information. The more sophisticated the client is as a consumer of legal services, the more likely it will be that an inference of consent can be drawn. The mere nature of the client is not, however, a sufficient basis upon which to assume implied consent; the matters must be unrelated, the lawyer must not possess confidential information from one client that could affect the other client, and there must be a reasonable basis upon which to conclude that the client has commonly accepted that lawyers may act against it in such circumstances.

Short-term Summary Legal Services

3.4-2A In rules 3.4-2B to 3.4-2D "Short-term summary legal services" means advice or representation to a client under the auspices of a pro bono or not-for-profit legal services provider with the expectation by the lawyer and the client that the lawyer will not provide continuing legal services in the matter.

3.4-2B A lawyer may provide short-term summary legal services without taking steps to determine whether there is a conflict of interest.

3.4-2C Except with consent of the clients as provided in rule 3.4-2, a lawyer must not provide, or must cease providing short-term summary legal services to a client where the lawyer knows or becomes aware that there is a conflict of interest.

3.4-2D A lawyer who provides short-term summary legal services must take reasonable measures to ensure that no disclosure of the client's confidential information is made to another lawyer in the lawyer's firm.

Commentary

[1] Short-term summary legal service and duty counsel programs are usually offered in circumstances in which it may be difficult to systematically screen for conflicts of interest in a timely way, despite the best efforts and existing practices and procedures of the not-for-profit legal services provider and the lawyers and law firms who provide these services. Performing a full conflicts screening in circumstances in which the short-term summary services described in these rules are being offered can be very challenging given the timelines, volume and logistics of the setting in which the services are provided.

[2] The limited nature of short-term summary legal services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm. Accordingly, the lawyer is disqualified from acting for a client receiving short-term summary legal services only if the lawyer has actual knowledge of a conflict of interest between the client receiving short-term summary legal services and an existing client of the lawyer or an existing client of the pro bono or not-for-profit legal services provider or between the lawyer and the client receiving short-term summary legal services.

[3] Confidential information obtained by a lawyer providing the services described in Rules 3.4-2A-2D will not be imputed to the lawyers in the lawyer's firm or to non-lawyer partners or associates in a multi-discipline partnership. As such, these individuals may continue to act for another client adverse in interest to the client who is obtaining or has obtained short-term summary legal services, and may act in future for another client adverse in interest to the client who is obtaining or has obtained short-term summary legal services.

[4] In the provision of short-term summary legal services, the lawyer's knowledge about possible conflicts of interest is based on the lawyer's reasonable recollection and information provided by the client in the ordinary course of consulting with the pro bono or not-for-profit legal services provider to receive its services.

Dispute

3.4-3 Despite rule 3.4-2, a lawyer must not represent opposing parties in a dispute.

Commentary

[1] A lawyer representing a client who is a party in a dispute with another party or parties must competently and diligently develop and argue the position of the client. In a dispute, the parties' immediate legal interests are clearly adverse. If the lawyer were permitted to act for opposing parties in such circumstances even with consent, the lawyer's advice, judgment and loyalty to one client would be materially and adversely affected by the same duties to the other client or clients. In short, the lawyer would find it impossible to act without offending these rules.

Concurrent Representation with protection of confidential client information

3.4-4 Where there is no dispute among the clients about the matter that is the subject of the proposed representation, two or more lawyers in a law firm may act for current clients with competing interests and may treat information received from each client as confidential and not disclose it to the other clients, provided that:

(a) disclosure of the risks of the lawyers so acting has been made to each client;

(b) the lawyer recommends each client receive independent legal advice, including on the risks of concurrent representation;

(c) the clients each determine that it is in their best interests that the lawyers so act and consent to the concurrent representation;

(d) each client is represented by a different lawyer in the firm;

(e) appropriate screening mechanisms are in place to protect confidential information; and

(f) all lawyers in the law firm withdraw from the representation of all clients in respect of the matter if a dispute that cannot be resolved develops among the clients.

Commentary

[1] This rule provides guidance on concurrent representation, which is permitted in limited circumstances. Concurrent representation is not contrary to the rule prohibiting representation where there is a conflict of interest provided that the clients are fully informed of the risks and understand that if a dispute arises among the clients that cannot be resolved the lawyers may have to withdraw, resulting in potential additional costs.

[2] An example is a law firm acting for a number of sophisticated clients in a matter such as competing bids in a corporate acquisition in which, although the clients' interests are divergent and may conflict, the clients are not in a dispute. Provided that each client is represented by a different lawyer in the firm and there is no real risk that the firm will not be able to properly represent the legal interests of each client, the firm may represent both even though the subject matter of the retainers is the same. Whether or not a risk of impairment of representation exists is a question of fact.

[3] The basis for the advice described in the rule from both the lawyers involved in the concurrent representation and those giving the required independent legal advice is whether concurrent representation is in the best interests of the clients. Even where all clients consent, the lawyers should not accept a concurrent retainer if the matter is one in which one of the clients is less sophisticated or more vulnerable than the other.

[4] In cases of concurrent representation lawyers should employ, as applicable, the reasonable screening measures to ensure non-disclosure of confidential information within the firm set out in the rule on conflicts from transfer between law firms (see Rule 3.4-20).

Joint Retainers

3.4-5 Before a lawyer acts in a matter or transaction for more than one client, the lawyer must advise each of the clients that:

(a) the lawyer has been asked to act for both or all of them;

(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

[1] Although this rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the clients' consent to the joint retainer is informed, genuine and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than the other.

[2] A lawyer who receives instructions from spouses or partners to prepare one or more wills for them based on their shared understanding of what is to be

in each will should treat the matter as a joint retainer and comply with rule 3.4-5. Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that, if subsequently only one of them were to communicate new instructions, such as instructions to change or revoke a will:

(a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;

(b) in accordance with Rule 3.3-1, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and

(c) the lawyer would have a duty to decline the new retainer, unless:

(i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;

(ii) the other spouse or partner had died; or

(iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

[3] After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with rule 3.4-7.

3.4-6 If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer must advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

3.4-7 When a lawyer has advised the clients as provided under rules 3.4-5 and 3.4-6 and the parties are content that the lawyer act, the lawyer must obtain their consent.

Commentary

[1] Consent in writing, or a record of the consent in a separate written communication to each client is required. Even if all the parties concerned consent, a lawyer should avoid acting for more than one client when it is likely that a contentious issue will arise between them or their interests, rights or obligations will diverge as the matter progresses.

3.4-8 Except as provided by rule 3.4-9, if a contentious issue arises between clients who have consented to a joint retainer,

(a) the lawyer must not advise them on the contentious issue and must:

(i) refer the clients to other lawyers; or

(ii) advise the clients of their option to settle the contentious issue by direct negotiation in which the lawyer does not participate, provided:

A. no legal advice is required; and

B. the clients are sophisticated.

(b) if the contentious issue is not resolved, the lawyer must withdraw from the joint representation.

Commentary

[1] This rule does not prevent a lawyer from arbitrating or settling, or attempting to arbitrate or settle a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer.

[2] If, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

3.4-9 Subject to this rule, if clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and must refer the other or others to another lawyer.

Commentary

[1] This rule does not relieve the lawyer of the obligation when the contentious issue arises to obtain the consent of the clients when there is or is likely to be a conflict of interest, or if the representation on the contentious issue requires the lawyer to act against one of the clients.

[2] When entering into a joint retainer, the lawyer should stipulate that, if a contentious issue develops, the lawyer will be compelled to cease acting altogether unless, at the time the contentious issue develops, all parties consent to the lawyer's continuing to represent one of them. Consent given before the fact may be ineffective since the party granting the consent will not at that time be in possession of all relevant information.

Acting Against Former Clients

3.4-10 Unless the former client consents, a lawyer must not act against a former client in:

(a) the same matter,

(b) any related matter, or

(c) any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

Commentary

[1] This rule guards against the misuse of confidential information from a previous retainer and ensures that a lawyer does not attack the legal work done during a previous retainer, or undermine the client's position on a matter that was central to a previous retainer. It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that client if previously obtained confidential information is irrelevant to that matter.

3.4-11 When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer ("the other lawyer") in the lawyer's firm may act in the new matter against the former client if:

(a) the former client consents to the other lawyer acting; or

(b) the law firm has:

(i) taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the lawyer to any other lawyer, any other member or employee of the law firm, or any other person whose services the lawyer or the law firm has retained in the new matter; and

(ii) advised the lawyer's former client, if requested by the client, of the measures taken.

Commentary

[1] The Commentary to rules 3.4-17 to 3.4-23 regarding conflicts from transfer between law firms provide valuable guidance for the protection of confidential information in the rare cases in which it is appropriate for another lawyer in the lawyer's firm to act against the former client.

Acting for Borrower and Lender

3.4-12 Subject to rule 3.4-14, a lawyer or two or more lawyers practising in partnership or association must not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

3.4-13 In rules 3.4-14 to 3.4-16, **"lending client"** means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

3.4-14 Provided there is compliance with this rule, and in particular rules 3.4-5 to 3.4-9, a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction in any of the following situations:

(a) the lender is a lending client;

(b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price;

(c) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction; or

(d) the lender and borrower are not at "arm's length" as defined in the *Income Tax Act* (Canada).

3.4-15 When a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

Commentary

[1] What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or "flip", where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information.

3.4-16 If a lawyer is jointly retained by a client and a lending client in respect of a mortgage or loan from the lending client to the other client, including any guarantee of that mortgage or loan, the lending client's consent is deemed to exist upon the lawyer's receipt of written instructions from the lending client to act and the lawyer is not required to:

(a) provide the advice described in rule 3.4-5 to the lending client before accepting the retainer**,**

(b) provide the advice described in rule 3.4-6, or

(c) obtain the consent of the lending client as required by rule 3.4-7, including confirming the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.

Commentary

[1] Rules 3.4-15 and 3.4-16 are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g., mortgage loan instructions) and the consent is generally acknowledged by such clients when the lawyer is requested to act.

[2] Rule 3.4-16 applies to all loans when a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.

Conflicts from Transfer Between Law Firms

Application of Rule

3.4-17 In rules 3.4-17 to 3.4-23,

"matter" means a case, a transaction, or other client representation, but within such representation does not include offering general "know-how" and, in the case of a government lawyer, providing policy advice unless the advice relates to a particular client representation.

3.4-18 Rules 3.4-17 to 3.4-23 apply when a lawyer transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that:

(a) It is reasonable to believe the transferring lawyer has confidential information relevant to the new law firm's matter for its client; or

(b)

i. the new law firm represents a client in a matter that is the same as or related to a matter in which a former law firm represents or represented its client ("former client");

ii. the interests of those clients in that matter conflict; and
iii. the transferring lawyer actually possesses relevant information respecting that matter.

Commentary

[1] The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification. As stated by the Supreme Court of Canada in Macdonald Estate v. Martin, [1990] 3 SCR 1235, with respect to the partners or associates of a lawyer who has relevant confidential information, the concept of imputed knowledge is unrealistic in the era of the mega-firm. Notwithstanding the foregoing, the inference to be drawn is that lawyers working together in the same firm will share confidences on the matters on which they are working, such that actual knowledge may be presumed. That presumption can be rebutted by clear and convincing evidence that shows that all reasonable measures, as discussed in rule 3.4-20, have been taken to ensure that no disclosure will occur by the transferring lawyer to the member or members of the firm who are engaged against a former client.

[2] The duties imposed by this rule concerning confidential information should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

[3] Law firms with multiple offices — This rule treats as one “law firm” such entities as the various legal services units of a government, a corporation with separate regional legal departments and an interjurisdictional law firm.

3.4-19 Rules 3.4-20 to 3.4-22 do not apply to a lawyer employed by the federal, a provincial or a territorial government who, after transferring from one department, ministry or agency to another, continues to be employed by that government.

Commentary

[1] Government employees and in-house counsel — The definition of “law firm” includes one or more lawyers practising in a government, a Crown corporation, any other public body or a corporation. Thus, the rule applies to lawyers transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same.

Law Firm Disqualification

3.4-20 If the transferring lawyer actually possesses confidential information relevant to a matter respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless:

(a) the former client consents to the new law firm's continued representation of its client; or

(b) the new law firm has:

(i) taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the transferring lawyer to any member of the new law firm; and

(ii) advised the lawyer's former client, if requested by the client, of the measures taken.

Commentary

[1] It is not possible to offer a set of "reasonable measures" that will be appropriate or adequate in every case. Instead, the new law firm that seeks to implement reasonable measures must exercise professional judgment in determining what steps must be taken "to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information." Such measures may include timely and properly constructed confidentiality screens.

[2] For example, the various legal services units of a government, a corporation with separate regional legal departments, an interjurisdictional law firm, or a legal aid program may be able to demonstrate that, because of its institutional structure, reporting relationships, function, nature of work, and geography, relatively fewer "measures" are necessary to ensure the non-disclosure of client confidences. If it can be shown that, because of factors such as the above, lawyers in separate units, offices or departments do not "work together" with other lawyers in other units, offices or departments, this will be taken into account in the determination of what screening measures are "reasonable."

[3] The guidelines that follow are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

Guidelines: How to Screen/Measures to be taken

1. The screened lawyer should have no involvement in the new law firm's representation of its client in the matter.

2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.
3. No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.
4. The firm should take steps to preclude the screened lawyer from having access to any part of the file.
5. The new law firm should document the measures taken to screen the transferring lawyer, the time when these measures were put in place (the sooner the better), and should advise all affected lawyers and support staff of the measures taken.
6. These Guidelines apply with necessary modifications to situations in which non-lawyer staff leave one law firm to work for another and a determination is made, before hiring the individual, on whether any conflicts of interest will be created and whether the potential new hire actually possesses relevant confidential information.

How to Determine If a Conflict Exists Before Hiring a Potential Transferee

[4] When a law firm ("new law firm") considers hiring a lawyer, or an articled law student ("transferring lawyer") from another law firm ("former law firm"), the transferring lawyer and the new law firm need to determine, before the transfer, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the law firm that the transferring lawyer is leaving and with respect to clients of a firm in which the transferring lawyer worked at some earlier time.

[5] After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether any conflicts exist. In determining whether the transferring lawyer actually possesses relevant confidential information, both the transferring lawyer and the new law firm must be very careful, during any interview of a potential transferring lawyer, or other recruitment process, to ensure that they do not disclose client confidences. See Rule 3.3-7 which provides that a lawyer may disclose confidential information to the extent the lawyer reasonably believes necessary to detect and resolve conflicts of interest where lawyers transfer between firms.

[6] A lawyer's duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

Transferring Lawyer Disqualification

3.4-21 Unless the former client consents, a transferring lawyer referred to in rule 3.4-20 must not:

(a) participate in any manner in the new law firm's representation of its client in the matter; or

(b) disclose any confidential information respecting the former client except as permitted by rule 3.3-7.

3.4-22 Unless the former client consents, members of the new law firm must not discuss the new law firm's representation of its client or the former law firm's representation of the former client in that matter with a transferring lawyer referred to in rule 3.4-20 except as permitted by rule 3.3-7.

Lawyer Due-diligence for non-lawyer staff

3.4-23 A lawyer or a law firm must exercise due diligence in ensuring that each member and employee of the law firm, and each other person whose services the lawyer or the law firm has retained:

(a) complies with rules 3.4-17 to 3.4-23; and

(b) does not disclose confidential information:

i. of clients of the firm; or
ii. any other law firm in which the person has worked.

3.4-24 ***[deleted]***

3.4-25 ***[deleted]***

3.4-26 [deleted]

Doing Business with a Client

Definitions

3.4-27 In rules 3.4-27 to 3.4-41,

"**independent legal advice"** means a retainer in which:

(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction,

(b) the client's transaction involves doing business with

i. another lawyer, or

ii. a corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded,

(c) the retained lawyer has advised the client that the client has the right to independent legal representation,

(d) the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from another lawyer,

(e) the retained lawyer has explained the legal aspects of the transaction to the client, who appeared to understand the advice given, and

(f) the retained lawyer informed the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of a proposed investment from a business point of view;

"independent legal representation" means a retainer in which

(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction, and

(b) the retained lawyer will act as the client's lawyer in relation to the matter;

Commentary

[1] If a client elects to waive independent legal representation and to rely on independent legal advice only, the retained lawyer has a responsibility that should not be lightly assumed or perfunctorily discharged.

"lawyer" includes an associate or partner of the lawyer, related persons as defined by the *Income Tax Act* (Canada), and a trust or estate in which the lawyer has a beneficial interest or for which the lawyer acts as a trustee or in a similar capacity.

"related persons" means related persons as defined in the *Income Tax Act* (Canada).

Transactions with Clients

3.4-28 A lawyer must not enter into a transaction with a client unless the transaction with the client is fair and reasonable to the client.

3.4-29 Subject to rules 3.4-30 to 3.4-36, where a transaction involves: lending or borrowing money, buying or selling property or services having other than nominal value, giving or acquiring ownership, security or other pecuniary interest in a company or other entity, recommending an investment, or entering into a common business venture, a lawyer must, in sequence,

(a) disclose the nature of any conflicting interest or how a conflict might develop later;

(b) consider whether the circumstances reasonably require that the client receive independent legal advice with respect to the transaction; and

(c) obtain the client's consent to the transaction after the client receives such disclosure and legal advice.

3.4-30 Rule 3.4-29 does not apply where:

(a) a client intends to enter into a transaction with a corporation or other entity whose securities are publicly traded in which the lawyer has an interest, or

(b) a lawyer borrows money from a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of business.

Commentary

[1] The relationship between lawyer and client is a fiduciary one. The lawyer has a duty to act in good faith. A lawyer should be able to demonstrate that the transaction with the client is fair and reasonable to the client.

[2] In some circumstances, the lawyer may also be retained to provide legal services for the transaction in which the lawyer and a client participate. A lawyer should not uncritically accept a client's decision to have the lawyer act. It should

be borne in mind that if the lawyer accepts the retainer the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined. This is because the lawyer cannot act in a transaction with a client where there is a substantial risk that the lawyer's loyalty to or representation of the client would be materially and adversely affected by the lawyer's own interest, unless the client consents and the lawyer reasonably believes that he or she is able to act for the client without having a material adverse effect on loyalty or the representation.

[3] If the lawyer chooses not to disclose the conflicting interest or cannot disclose without breaching confidence, the lawyer must decline the retainer.

[4] Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, that independent legal advice was received by the client, where required, and that the client's consent was obtained.

Documenting Independent Legal Advice

[5] A lawyer retained to give independent legal advice relating to a transaction should document the independent legal advice by doing the following:

(a) provide the client with a written certificate that the client has received independent legal advice,

(b) obtain the client's signature on a copy of the certificate of independent legal advice; and

(c) send the signed copy to the lawyer with whom the client proposes to transact business.

Borrowing from Clients

3.4-31 A lawyer must not borrow money from a client unless

(a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public; or

(b) the client is a related person as defined by the *Income Tax Act* (Canada) and the lawyer:

i. discloses to the client the nature of the conflicting interest; and
ii. requires that the client receive independent legal advice or, where the circumstances reasonably require, independent legal representation.

3.4-32 Subject to rule 3.4-31, if a corporation, syndicate or partnership in which either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest borrows money from a client, the lawyer must:

(a) disclose to the client the nature of the conflicting interest; and

(b) require that the client obtain independent legal representation.

Commentary

[1] Whether a person is considered a client within rules 3.4-31 and 3.4-32 when lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

[2] Given the definition of "lawyer" applicable to these Doing Business with a Client rules, a lawyer's spouse or a corporation controlled by the lawyer would be prohibited from borrowing money from a lawyer's unrelated client. Rule 3.4-32 addresses situations where a conflicting interest may not be immediately apparent to a potential lender. As such, in the transactions described in the rule, the lawyer must make disclosure and require that the unrelated client from whom the entity in which the lawyer or the lawyer's spouse has a direct or indirect substantial interest is borrowing has independent legal representation.

Lending to Clients

3.4-33 A lawyer must not lend money to a client unless before making the loan, the lawyer

(a) discloses to the client the nature of the conflicting interest;

(b) requires that the client

i. receive independent legal representation, or
ii. if the client is a related person as defined by the *Income Tax Act* (Canada), receive independent legal advice; and

(c) obtains the client's consent.

Guarantees by a Lawyer

3.4-34 Except as provided by rule 3.4-35, a lawyer retained to act with respect to a transaction in which a client is a borrower or a lender must not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is the borrower or lender.

3.4-35 A lawyer may give a personal guarantee in the following circumstances:

(a) the lender is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of business, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent or child;

(b) the transaction is for the benefit of a non-profit or charitable institution, and the lawyer provides a guarantee as a member or supporter of such institution, either individually or together with other members or supporters of the institution; or

(c) the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and:

i. the lawyer has complied with rules 3.4-28 to 3.4-36; and
ii. the lender and participants in the venture who are clients or former clients of the lawyer have independent legal representation.

Payment for Legal Services

3.4-36 When a client intends to pay for legal services by transferring to a lawyer a share, participation or other interest in property or in an enterprise, other than a nonmaterial interest in a publicly traded enterprise, the lawyer must recommend but need not require that the client receive independent legal advice before accepting a retainer.

Commentary

[1] The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.

Gifts and Testamentary Instruments

3.4-37 A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.

3.4-38 A lawyer must not include in a client's will a clause directing the executor to retain the lawyer's services in the administration of the client's estate.

3.4-39 Unless the client is a family member of the lawyer, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer a gift or benefit from the client, including a testamentary gift.

Judicial Interim Release

3.4-40 A lawyer must not act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused person for whom the lawyer acts.

3.4-41 A lawyer may act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused who is in a family relationship with the lawyer when the accused is represented by the lawyer's partner or associate.

3.5 PRESERVATION OF CLIENTS' PROPERTY

Preservation of Clients' Property

3.5-1 In this rule, **"property"** includes a client's money, securities as defined in [provincial legislation], original documents such as wills, title deeds, minute books, licences, certificates and the like, and all other papers such as client's correspondence, files, reports, invoices and other such documents, as well as personal property including precious and semi-precious metals, jewellery and the like.

3.5-2 A lawyer must:

(a) care for a client's property as a careful and prudent owner would when dealing with like property; and

(b) observe all relevant rules and law about the preservation of a client's property entrusted to a lawyer.

Commentary

[1] The duties concerning safekeeping, preserving, and accounting for clients' monies and other property are set out in the [rules/regulations/by-laws of the relevant Law Society].

[2] These duties are closely related to those regarding confidential information. A lawyer is responsible for maintaining the safety and confidentiality of the files of the client in the possession of the lawyer and should take all reasonable steps to ensure the privacy and safekeeping of a client's confidential information. A lawyer should keep the client's papers and other property out of sight as well as out of reach of those not entitled to see them.

[3] Subject to any rights of lien, the lawyer should promptly return a client's property to the client on request or at the conclusion of the lawyer's retainer.

[4] If the lawyer withdraws from representing a client, the lawyer is required to comply with Rule 3.7-1 (Withdrawal from Representation).

Notification of Receipt of Property

3.5-3 A lawyer must promptly notify a client of the receipt of any money or other property of the client, unless satisfied that the client is aware that they have come into the lawyer's custody.

Identifying Clients' Property

3.5-4 A lawyer must clearly label and identify clients' property and place it in safekeeping distinguishable from the lawyer's own property.

3.5-5 A lawyer must maintain such records as necessary to identify clients' property that is in the lawyer's custody.

Accounting and Delivery

3.5-6 A lawyer must account promptly for clients' property that is in the lawyer's custody and deliver it to the order of the client on request or, if appropriate, at the conclusion of the retainer.

3.5-7 If a lawyer is unsure of the proper person to receive a client's property, the lawyer must apply to a tribunal of competent jurisdiction for direction.

Commentary

[1] A lawyer should be alert to the duty to claim on behalf of a client any privilege in respect of property seized or attempted to be seized by an external authority or in respect of third party claims made against the property. In this regard, the lawyer should be familiar with the nature of the client's common law privilege and with such relevant constitutional and statutory provisions as those found in the Income Tax Act (Canada), the Charter and the Criminal Code.

3.6 FEES AND DISBURSEMENTS

Reasonable Fees and Disbursements

3.6-1 A lawyer must not charge or accept a fee or disbursement, including interest, unless it is fair and reasonable and has been disclosed in a timely fashion.

Commentary

[1] What is a fair and reasonable fee depends on such factors as:

(a) the time and effort required and spent;

(b) the difficulty of the matter and the importance of the matter to the client;

(c) whether special skill or service has been required and provided;

(d) the results obtained;

(e) fees authorized by statute or regulation;

(f) special circumstances, such as the postponement of payment, uncertainty of reward, or urgency;

(g) the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's inability to accept other employment;

(h) any relevant agreement between the lawyer and the client;

(i) the experience and ability of the lawyer;

(j) any estimate or range of fees given by the lawyer; and

(k) the client's prior consent to the fee.

[2] The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the lawyer of any hidden fees. No fee, extra fees, reward, costs, commission, interest, rebate, agency or forwarding allowance, or other compensation related to professional employment may be taken by the lawyer from anyone other than the client without full disclosure to and the consent of the client or, where the lawyer's fees are being paid by someone other than the client, such as a legal aid agency, a borrower, or a personal representative, without the consent of such agency or other person.

[3] A lawyer should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements, and interest, as is reasonable and practical in the circumstances, including the basis on which fees will be determined.

[4] A lawyer should be ready to explain the basis of the fees and disbursement charged to the client. This is particularly important concerning fee charges or disbursements that the client might not reasonably be expected to anticipate. When something unusual or unforeseen occurs that may substantially affect the amount of a fee or disbursement, the lawyer should give to the client an immediate explanation. A lawyer should confirm with the client in writing the substance of all fee discussions that occur as a matter progresses, and a lawyer may revise an initial estimate of fees and disbursements.

Contingent Fees and Contingent Fee Agreements

3.6-2 Subject to rule 3.6-1, a lawyer may enter into a written agreement in accordance with governing legislation that provides that the lawyer's fee is contingent, in whole or in part, on the outcome of the matter for which the lawyer's services are to be provided.

Commentary

[1] In determining the appropriate percentage or other basis of a contingency fee, a lawyer and client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. The lawyer and client may agree that, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as a part of a settlement is to be paid to the lawyer, which may require judicial approval under the governing legislation. In such circumstances, a smaller percentage of the award than would otherwise be agreed upon for the contingency fee, after considering all relevant factors, will generally be appropriate. The test is whether the fee, in all of the circumstances, is fair and reasonable.

[2] Although a lawyer is generally permitted to terminate the professional relationship with a client and withdraw services if there is justifiable cause as set out in rule 3.7-1, special circumstances apply when the retainer is pursuant to a contingency agreement. In such circumstances, the lawyer has impliedly undertaken the risk of not being paid in the event the suit is unsuccessful. Accordingly, a lawyer cannot withdraw from representation for reasons other than those set out in rule 3.7-7 (Obligatory Withdrawal) unless the written contingency contract specifically states that the lawyer has a right to do so and sets out the circumstances under which this may occur.

Statement of Account

3.6-3 In a statement of an account delivered to a client, a lawyer must clearly and separately detail the amounts charged as fees and disbursements.

Commentary

[1] The two main categories of charges on a statement of account are fees and disbursements. A lawyer may charge as disbursements only those amounts that have been paid or are required to be paid to a third party by the lawyer on a client's behalf. However, a subcategory entitled "Other Charges" may be included under the fees heading if a lawyer wishes to separately itemize charges such as paralegal, word processing or computer costs that are not disbursements, provided that the client has agreed, in writing, to such costs.

[2] Party-and-party costs received by a lawyer are the property of the client and should therefore be accounted for to the client. While an agreement that the lawyer will be entitled to costs is not uncommon, it does not affect the lawyer's obligation to disclose the costs to the client.

Joint Retainer

3.6-4 If a lawyer acts for two or more clients in the same matter, the lawyer must divide the fees and disbursements equitably between them, unless there is an agreement by the clients otherwise.

Division of Fees and Referral Fees

3.6-5 If there is consent from the client, fees for a matter may be divided between lawyers who are not in the same firm, provided that the fees are divided in proportion to the work done and the responsibilities assumed.

3.6-6 If a lawyer refers a matter to another lawyer because of the expertise and ability of the other lawyer to handle the matter, and the referral was not made because of a conflict of interest, the referring lawyer may accept, and the other lawyer may pay, a referral fee, provided that:

(a) the fee is reasonable and does not increase the total amount of the fee charged to the client; and

(b) the client is informed and consents.

3.6-7 A lawyer must not:

(a) directly or indirectly share, split, or divide his or her fees with any person who is not a lawyer; or

(b) give any financial or other reward for the referral of clients or client matters to any person who is not a lawyer.

Commentary

[1] This rule prohibits lawyers from entering into arrangements to compensate or reward non-lawyers for the referral of clients. It does not prevent a lawyer from engaging in promotional activities involving reasonable expenditures on promotional items or activities that might result in the referral of clients generally by a non-lawyer. Accordingly, this rule does not prohibit a lawyer from:

(a) making an arrangement respecting the purchase and sale of a law practice when the consideration payable includes a percentage of revenues generated from the practice sold;

(b) entering into a lease under which a landlord directly or indirectly shares in the fees or revenues generated by the law practice;

(c) paying an employee for services, other than for referring clients, based on the revenue of the lawyer's firm or practice; or

(d) occasionally entertaining potential referral sources by purchasing meals providing tickets to, or attending at, sporting or other activities or sponsoring client functions.

Exception for Multi-discipline Practices and Interjurisdictional Law Firms

3.6-8 Rule 3.6-7 does not apply to:

(a) multi-discipline practices of lawyer and non-lawyer partners if the partnership agreement provides for the sharing of fees, cash flows or profits among the members of the firm; and

(b) sharing of fees, cash flows or profits by lawyers who are members of an interjurisdictional law firm.

Commentary

[1] An affiliation is different from a multi-disciplinary practice established in accordance with the rules/regulations/by-laws under the governing legislation, an interjurisdictional law firm, however structured. An affiliation is subject to rule 3.6-7. In particular, an affiliated entity is not permitted to share in the lawyer's

revenues, cash flows or profits, either directly or indirectly through excessive inter-firm charges, for example, by charging inter-firm expenses above their fair market value.

Payment and Appropriation of Funds

3.6-9 If a lawyer and client agree that the lawyer will act only if the lawyer's retainer is paid in advance, the lawyer must confirm that agreement in writing with the client and specify a payment date.

3.6-10 A lawyer must not appropriate any client funds held in trust or otherwise under the lawyer's control for or on account of fees, except as permitted by the governing legislation.

Commentary

[1] The rule is not intended to be an exhaustive statement of the considerations that apply to payment of a lawyer's account from trust. The handling of trust money is generally governed by the rules of the Law Society.

[2] Refusing to reimburse any portion of advance fees for work that has not been carried out when the contract of professional services with the client has terminated is a breach of the obligation to act with integrity.

3.6-11 If the amount of fees or disbursements charged by a lawyer is reduced on a review or assessment, the lawyer must repay the monies to the client as soon as is practicable.

Prepaid Legal Services Plan

3.6-12 A lawyer who accepts a client referred by a prepaid legal services plan must advise the client in writing of:

(a) the scope of work to be undertaken by the lawyer under the plan; and

(b) the extent to which a fee or disbursement will be payable by the client to the lawyer.

3.7 WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation

3.7-1 A lawyer must not withdraw from representation of a client except for good cause and on reasonable notice to the client.

Commentary

[1] Although the client has the right to terminate the lawyer-client relationship at will, a lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship. It is inappropriate for a lawyer to withdraw on capricious or arbitrary grounds.

[2] An essential element of reasonable notice is notification to the client, unless the client cannot be located after reasonable efforts. No hard and fast rules can be laid down as to what constitutes reasonable notice before withdrawal and how quickly a lawyer may cease acting after notification will depend on all relevant circumstances. When the matter is covered by statutory provisions or rules of court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril. As a general rule, the client should be given sufficient time to retain and instruct replacement counsel. Nor should withdrawal or an intention to withdraw be permitted to waste court time or prevent other counsel from reallocating time or resources scheduled for the matter in question (see rule 3.7-8 Manner of Withdrawal).

[3] Every effort should be made to ensure that withdrawal occurs at an appropriate time in the proceedings in keeping with the lawyer's obligations. The court, opposing parties and others directly affected should also be notified of the withdrawal.

[4] ***[deleted]***

Optional Withdrawal

3.7-2 If there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

Commentary

[1] A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for example, if a lawyer is deceived by his client, the client refuses to accept and act upon the lawyer's advice on a significant point, a client is persistently unreasonable or uncooperative in a material respect, or the lawyer is facing difficulty in obtaining adequate instructions from the client. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

Non-payment of Fees

3.7-3 If, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw unless serious prejudice to the client would result.

Commentary

[1] When the lawyer withdraws because the client has not paid the lawyer's fee, the lawyer should ensure that there is sufficient time for the client to obtain the services of another lawyer and for that other lawyer to prepare adequately for trial.

Withdrawal from Criminal Proceedings

3.7-4 If a lawyer has agreed to act in a criminal case and the interval between a withdrawal and the trial of the case is sufficient to enable the client to obtain another lawyer and to allow such other lawyer adequate time for preparation, the lawyer who has agreed to act may withdraw because the client has not paid the agreed fee or for other adequate cause provided that the lawyer:

(a) notifies the client, in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause;

(b) accounts to the client for any monies received on account of fees and disbursements;

(c) notifies Crown counsel in writing that the lawyer is no longer acting;

(d) in a case when the lawyer's name appears on the records of the court as acting for the accused, notifies the clerk or registrar of the appropriate court in writing that the lawyer is no longer acting; and

(e) complies with the applicable rules of court.

Commentary

[1] A lawyer who has withdrawn because of conflict with the client should not indicate in the notice addressed to the court or Crown counsel the cause of the conflict or make reference to any matter that would violate the privilege that exists between lawyer and client. The notice should merely state that the lawyer is no longer acting and has withdrawn.

3.7-5 If a lawyer has agreed to act in a criminal case and the date set for trial is not such as to enable the client to obtain another lawyer or to enable another lawyer to prepare adequately for trial and an adjournment of the trial date cannot be obtained without adversely affecting the client's interests, the lawyer who agreed to act must not withdraw because of non-payment of fees.

3.7-6 If a lawyer is justified in withdrawing from a criminal case for reasons other than non-payment of fees and there is not a sufficient interval between a notice to the client of the lawyer's intention to withdraw and the date on which the case is to be tried to enable the client to obtain another lawyer and to enable such lawyer to prepare adequately for trial, the first lawyer, unless instructed otherwise by the client, should attempt to have the trial date adjourned and may withdraw from the case only with the permission of the court before which the case is to be tried.

Commentary

[1] If circumstances arise that, in the opinion of the lawyer, require an application to the court for leave to withdraw, the lawyer should promptly inform Crown counsel and the court of the intention to apply for leave in order to avoid or minimize any inconvenience to the court and witnesses.

Obligatory Withdrawal

3.7-7 A lawyer must withdraw if:

a) discharged by a client;

b) a client persists in instructing the lawyer to act contrary to professional ethics; or

c) the lawyer is not competent to continue to handle a matter.

Leaving a Law Firm

3.7-7A When a lawyer leaves a law firm, the lawyer and the law firm must:

a) ensure that clients who have current matters for which the departing lawyer has conduct or substantial involvement are given reasonable notice that the lawyer is departing and are advised of their options for retaining counsel; and;

b) take reasonable steps to obtain the instructions of each affected client as to who they will retain.

Commentary

[1] When a lawyer leaves a firm to practise elsewhere, it may result in the termination of the lawyer-client relationship between that lawyer and a client.

[2] The client's interests are paramount. Clients must be free to decide whom to retain as counsel without undue influence or pressure by the lawyer or the firm. The client should be provided with sufficient information to make an informed decision about whether to continue with the departing lawyer, remain with the firm where that is possible, or retain new counsel.

[3] The lawyer and the law firm should cooperate to ensure that the client receives the necessary information on the available options. While it is preferable to prepare a joint notification setting forth such information, factors to consider in determining who should provide it to the client include the extent of the lawyer's work for the client, the client's relationship with other lawyers in the law firm and

access to client contact information. In the absence of agreement, both the departing lawyer and the law firm should provide the notification.

[4] If a client contacts a law firm to request a departed lawyer's contact information, the law firm should provide the professional contact information where reasonably possible.

[5] Where a client chooses to remain with the departing lawyer, the instructions referred to in the rule should include written authorizations for the transfer of files and client property. In all cases, the situation should be managed in a way that minimizes the expense and avoids prejudice to the client.

[6] In advance of providing notice to clients of their intended departure the lawyer should provide such notice to the firm as is reasonable in the circumstances.

[7] When a client chooses to remain with the firm, the firm should consider whether it is reasonable in the circumstances to charge the client for time expended by another firm member to become familiar with the file.

[8] The principles outlined in this rule and commentary will apply to the dissolution of a law firm. When a law firm is dissolved the lawyer-client relationship may end with one or more of the lawyers involved in the retainer. The client should be notified of the dissolution and provided with sufficient information to decide who to retain as counsel. The lawyers who are no longer retained by the client should try to minimize expense and avoid prejudice to the client.

[9] See also rules 3.7-8 to 3.7-10 and related commentary regarding enforcement of a solicitor's lien and the duties of former and successor counsel.

3.7-7B Rule 3.7-7A does not apply to a lawyer leaving (a) a government, a Crown corporation or any other public body or (b) a corporation or other organization for which the lawyer is employed as in house counsel.

Manner of Withdrawal

3.7-8 When a lawyer withdraws, the lawyer must try to minimize expense and avoid prejudice to the client and must do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor lawyer.

3.7-9 On discharge or withdrawal, a lawyer must:

(a) notify the client in writing, stating:

i. the fact that the lawyer has withdrawn;

ii. the reasons, if any, for the withdrawal; and

iii. in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain new counsel promptly;

(b) subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled;

(c) subject to any applicable trust conditions, give the client all relevant information in connection with the case or matter;

(d) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation;

(e) promptly render an account for outstanding fees and disbursements;

(f) co-operate with the successor lawyer in the transfer of the file so as to minimize expense and avoid prejudice to the client; and

(g) comply with the applicable rules of court.

Commentary

[1] If the lawyer who is discharged or withdraws is a member of a firm, the client should be notified that the lawyer and the firm are no longer acting for the client.

[2] If the question of a right of lien for unpaid fees and disbursements arises on the discharge or withdrawal of the lawyer, the lawyer should have due regard to the effect of its enforcement on the client's position. Generally speaking, a lawyer should not enforce a lien if to do so would prejudice materially a client's position in any uncompleted matter.

[3] The obligation to deliver papers and property is subject to a lawyer's right of lien. In the event of conflicting claims to such papers or property, the lawyer should make every effort to have the claimants settle the dispute.

[4] Co-operation with the successor lawyer will normally include providing any memoranda of fact and law that have been prepared by the lawyer in connection with the matter, but confidential information not clearly related to the matter should not be divulged without the written consent of the client.

[5] A lawyer who ceases to act for one or more clients should co-operate with the successor lawyer or lawyers and should seek to avoid any unseemly rivalry, whether real or apparent.

Duty of Successor Lawyer

3.7-10 Before agreeing to represent a client, a successor lawyer must be satisfied that the former lawyer has withdrawn or has been discharged by the client.

Commentary

[1] It is quite proper for the successor lawyer to urge the client to settle or take reasonable steps towards settling or securing any outstanding account of the former lawyer, especially if the latter withdrew for good cause or was capriciously discharged. But, if a trial or hearing is in progress or imminent, or if the client would otherwise be prejudiced, the existence of an outstanding account should not be allowed to interfere with the successor lawyer acting for the client.

CHAPTER 4 – MARKETING OF LEGAL SERVICES

4.1 MAKING LEGAL SERVICES AVAILABLE

Making Legal Services Available

4.1-1 A lawyer must make legal services available to the public efficiently and conveniently and, subject to rule 4.1-2, may offer legal services to a prospective client by any means.

Commentary

[1] A lawyer may assist in making legal services available by participating in the Legal Aid Plan and lawyer referral services and by engaging in programs of public information, education or advice concerning legal matters.

[2] As a matter of access to justice, it is in keeping with the best traditions of the legal profession to provide services pro bono and to reduce or waive a fee when there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation. The Law Society encourages lawyers to provide public interest legal services and to support organizations that provide services to persons of limited means.

[3] A lawyer who knows or has reasonable grounds to believe that a client is entitled to Legal Aid should advise the client of the right to apply for Legal Aid, unless the circumstances indicate that the client has waived or does not need such assistance.

[4] Right to Decline Representation - A lawyer has a general right to decline a particular representation (except when assigned as counsel by a tribunal), but it is a right to be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation. Generally, a lawyer should not exercise the right merely because a person seeking legal services or that person's cause is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved, or because of the lawyer's private opinion about the guilt of the accused. A lawyer declining representation should assist in obtaining the services of another lawyer qualified in the particular field and able to act. When a lawyer offers assistance to a client or prospective client in finding another lawyer, the assistance should be given willingly and, except where a referral fee is permitted by section 3.6-6, without charge.

Restrictions

4.1-2 In offering legal services, a lawyer must not use means that:

(a) are false or misleading;

(b) amount to coercion, duress, or harassment;

(c) take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet recovered; or

(d) otherwise bring the profession or the administration of justice into disrepute.

Commentary

[1] A person who is vulnerable or who has suffered a traumatic experience and has not recovered may need the professional assistance of a lawyer, and this rule does not prevent a lawyer from offering assistance to such a person. A lawyer is permitted to provide assistance to a person if a close relative or personal friend of the person contacts the lawyer for this purpose, and to offer assistance to a person with whom the lawyer has a close family or professional relationship. The rule prohibits the lawyer from using unconscionable, exploitive or other means that bring the profession or the administration of justice into disrepute.

4.2 MARKETING

Marketing of Professional Services

4.2-1 A lawyer may market professional services, provided that the marketing is:

(a) demonstrably true, accurate and verifiable;

(b) neither misleading, confusing or deceptive, nor likely to mislead, confuse or deceive;

(c) in the best interests of the public and consistent with a high standard of professionalism.

Commentary

[1] Examples of marketing that may contravene this rule include:

(a) stating an amount of money that the lawyer has recovered for a client or referring to the lawyer's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases;

(b) suggesting qualitative superiority to other lawyers;

(c) raising expectations unjustifiably;

(d) suggesting or implying the lawyer is aggressive;

(e) disparaging or demeaning other persons, groups, organizations or institutions;

(f) taking advantage of a vulnerable person or group; and

(g) using testimonials or endorsements that contain emotional appeals.

Advertising of Fees

4.2-2 A lawyer may advertise fees charged for their services provided that:

(a) the advertising is reasonably precise as to the services offered for each fee quoted;

(b) the advertising states whether other amounts, such as disbursements and taxes, will be charged in addition to the fee; and

(c) the lawyer strictly adheres to the advertised fee in every applicable case.

4.3 ADVERTISING NATURE OF PRACTICE

4.3-1 A lawyer must not advertise that the lawyer is a specialist in a specified field unless the lawyer has been so certified by the Society.

Commentary

[1] Lawyers' advertisements may be designed to provide information to assist a potential client to choose a lawyer who has the appropriate skills and knowledge for the client's particular legal matter.

[2] A lawyer who is not a certified specialist is not permitted to use any designation from which a person might reasonably conclude that the lawyer is a certified specialist. A claim that a lawyer is a specialist or expert, or specializes in an area of law, implies that the lawyer has met some objective standard or criteria of expertise, presumably established or recognized by a Law Society. In the absence of Law Society recognition or a certification process, an assertion by a lawyer that the lawyer is a specialist or expert is misleading and improper.

[3] If a firm practises in more than one jurisdiction, some of which certify or recognize specialization, an advertisement by such a firm that makes reference to the status of a firm member as a specialist or expert, in media circulated concurrently in [name of jurisdiction] and the certifying jurisdiction, does not offend this rule if the certifying authority or organization is identified.

[4] A lawyer may advertise areas of practice, including preferred areas of practice or a restriction to a certain area of law. An advertisement may also include a description of the lawyer's or law firm's proficiency or experience in an area of law. In all cases, the representations made must be accurate (that is, demonstrably true) and must not be misleading.

CHAPTER 5 – RELATIONSHIP TO THE ADMINISTRATION OF JUSTICE

5.1 THE LAWYER AS ADVOCATE

Advocacy

5.1-1 When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect.

Commentary

[1] Role in Adversarial Proceedings – In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.

[2] This rule applies to the lawyer as advocate, and therefore extends not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals, arbitrators, mediators and others who resolve disputes, regardless of their function or the informality of their procedures.

[3] The lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client's case.

[4] In adversarial proceedings that will likely affect the health, welfare or security of a child, a lawyer should advise the client to take into account the best interests of the child, if this can be done without prejudicing the legitimate interests of the client.

[5] A lawyer should refrain from expressing the lawyer's personal opinions on the merits of a client's case to a court or tribunal.

[6] When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent in the adversarial system cannot be achieved, the lawyer must

take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled.

[7] The lawyer should never waive or abandon the client's legal rights, such as an available defence under a statute of limitations, without the client's informed consent.

[8] In civil proceedings, a lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, attempts to gain advantage from slips or oversights not going to the merits or tactics that will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.

[9] Duty as Defence Counsel – When defending an accused person, a lawyer's duty is to protect the client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, and notwithstanding the lawyer's private opinion on credibility or the merits, a lawyer may properly rely on any evidence or defences, including so-called technicalities, not known to be false or fraudulent.

[10] Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, the form of the indictment or the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence that, by reason of the admissions, the lawyer believes to be false. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done or, in fact, has not done the act. Such admissions will also impose a limit on the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.

5.1-2 When acting as an advocate, a lawyer must not:

(a) abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;

(b) knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable;

(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice;

(d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate;

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;

(g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal;

(h) make suggestions to a witness recklessly or knowing them to be false;

(i) deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party;

(j) improperly dissuade a witness from giving evidence or advise a witness to be absent;

(k) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another;

(l) knowingly misrepresent the client's position in the litigation or the issues to be determined in the litigation;

(m) needlessly abuse, hector or harass a witness;

(n) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal or quasi-criminal charge or complaint to a regulatory authority or by offering to seek or to procure the withdrawal of a criminal or quasi-criminal charge or complaint to a regulatory authority;

(o) needlessly inconvenience a witness; or

(p) appear before a court or tribunal while under the influence of alcohol or a drug.

Commentary

[1] In civil proceedings, a lawyer has a duty not to mislead the tribunal about the position of the client in the adversarial process. Thus, a lawyer representing a party to litigation who has made or is party to an agreement made before or during the trial by which a plaintiff is guaranteed recovery by one or more parties, notwithstanding the judgment of the court, should immediately reveal the existence and particulars of the agreement to the court and to all parties to the proceedings.

[2] A lawyer representing an accused or potential accused may communicate with a complainant or potential complainant, for example, to obtain factual information, to arrange for restitution or an apology from the accused, or to defend or settle any civil claims between the accused and the complainant. However, when the complainant or potential complaint is vulnerable, the lawyer must take care not to take unfair or improper advantage of the circumstances. If the complainant or potential complainant is unrepresented, the lawyer should be governed by the rules about unrepresented persons and make it clear that the lawyer is acting exclusively in the interests of the accused or potential accused. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present.

[3] It is an abuse of the court's process to threaten to bring an action or to offer to seek withdrawal of a criminal charge in order to gain a benefit. See also Rules 3.2-5 and 3.2-6 and accompanying commentary.

[4] When examining a witness, a lawyer may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition.

Incriminating Physical Evidence

5.1-2A A lawyer must not counsel or participate in the concealment, destruction or alteration of incriminating physical evidence or otherwise act so as to obstruct or attempt to obstruct the course of justice.

Commentary

[1] In this rule, "evidence" does not depend upon admissibility before a tribunal or upon the existence of criminal charges. It includes documents, electronic information, objects or substances relevant to a crime, criminal investigation or a criminal prosecution. It does not include documents or communications that are solicitor-client privileged or that the lawyer reasonably believes are otherwise available to the authorities.

[2] This rule does not apply where a lawyer is in possession of evidence tending to establish the innocence of a client, such as evidence relevant to an alibi. However, a lawyer must exercise prudent judgment in determining whether such evidence is wholly exculpatory, and therefore falls outside of the application of this rule. For example, if the evidence is both incriminating and exculpatory, improperly dealing with it may result in a breach of the rule and also expose a lawyer to criminal charges.

[3] A lawyer is never required to take or keep possession of incriminating physical evidence or to disclose its mere existence. Possession of illegal things could constitute an offense. A lawyer in possession of incriminating physical evidence should carefully consider his or her options. These options include, as soon as reasonably possible:

(a) delivering the evidence to law enforcement authorities or the prosecution, either directly or anonymously;
(b) delivering the evidence to the tribunal in the relevant proceeding, which may also include seeking the direction of the tribunal to facilitate access by the prosecution or defence for testing or examination; or
(c) disclosing the existence of the evidence to the prosecution and, if necessary, preparing to argue before a tribunal the appropriate uses, disposition or admissibility of it.

[4] A lawyer should balance the duty of loyalty and confidentiality owed to the client with the duties owed to the administration of justice. When a lawyer discloses or delivers incriminating physical evidence to law enforcement authorities or the prosecution, the lawyer has a duty to protect client confidentiality, including the client's identity, and to preserve solicitor-client privilege. This may be accomplished by the lawyer retaining independent counsel, who is not informed of the identity of the client and who is instructed not to disclose the identity of the instructing lawyer, to disclose or deliver the evidence. A lawyer cannot merely continue to keep possession of the incriminating physical evidence.

[5] A lawyer has no obligation to assist the authorities in gathering physical evidence of crime but cannot act or advise anyone to hinder an investigation or a prosecution. The lawyer's advice to a client that the client has the right to refuse to divulge the location of physical evidence does not constitute hindering an investigation. A lawyer who becomes aware of the existence of incriminating physical evidence or declines to take possession of it must not counsel or participate in its concealment, destruction or alteration.

[6] A lawyer may determine that non-destructive testing, examination or copying of documentary or electronic information is needed. A lawyer should ensure that there is no concealment, destruction or any alteration of the evidence

and should exercise caution in this area. For example, opening or copying an electronic document may alter it. A lawyer who has decided to copy, test or examine evidence before delivery or disclosure should do so without delay.

Duty as Prosecutor

5.1-3 When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.

Commentary

[1] When engaged as a prosecutor, the lawyer's primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to defence counsel or directly to an unrepresented accused of all relevant and known facts and witnesses, whether tending to show guilt or innocence.

Disclosure of Error or Omission

5.1-4 A lawyer who has unknowingly done or failed to do something that, if done or omitted knowingly, would have been in breach of this rule and who discovers it, must, subject to section 3.3 (Confidentiality), disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it.

Commentary

[1] If a client desires that a course be taken that would involve a breach of this rule, the lawyer must refuse and do everything reasonably possible to prevent it. If that cannot be done, the lawyer should, subject to rule 3.7-1 (Withdrawal from Representation), withdraw or seek leave to do so.

Courtesy

5.1-5 A lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings.

Commentary

[1] Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative or disruptive conduct by a lawyer, even though unpunished as contempt, may constitute professional misconduct.

Undertakings

5.1-6 A lawyer must strictly and scrupulously fulfill any undertakings given and honour any trust conditions accepted in the course of litigation.

Commentary

[1] A lawyer should also be guided by the provisions of rule 7.2-11 (Undertakings and Trust Conditions).

Agreement on Guilty Plea

5.1-7 Before a charge is laid or at any time after a charge is laid, a lawyer for an accused or potential accused may discuss with the prosecutor the possible disposition of the case, unless the client instructs otherwise.

5.1-8 A lawyer for an accused or potential accused may enter into an agreement with the prosecutor about a guilty plea if, following investigation,

(a) the lawyer advises his or her client about the prospects for an acquittal or finding of guilt;

(b) the lawyer advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea;

(c) the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged; and

(d) the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea.

Commentary

[1] The public interest in the proper administration of justice should not be sacrificed in the interest of expediency.

5.2 THE LAWYER AS WITNESS

Submission of Evidence

5.2-1 A lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.

Commentary

[1] A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer should not, in effect, appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect or receive special treatment because of professional status.

Appeals

5.2-2 A lawyer who is a witness in proceedings must not appear as advocate in any appeal from the decision in those proceedings, unless the matter about which he or she testified is purely formal or uncontroverted.

5.3 ***[deleted]***

5.4 COMMUNICATING WITH WITNESSES

5.4-1 A lawyer may seek information from any potential witness, provided that:

(a) before doing so, the lawyer discloses the lawyer's interest in the matter;

(b) the lawyer does not encourage the witness to suppress evidence or to refrain from providing information to other parties in the matter; and

(c) the lawyer observes Rules 7.2-6 to 7.2-8 on communicating with represented parties.

Commentary

[1] There is generally no property in a witness. To achieve the truth-seeking goal of the justice system, any person having information relevant to a proceeding should be free to impart it voluntarily and in the absence of improper influence. A lawyer should not advise a potential witness to refrain from speaking to other parties except as provided in this rule.

Expert witnesses

[2] Special considerations may apply when communicating with expert witnesses. Depending on the area of practice and the jurisdiction, there may be legal or procedural limitations on the permissible scope of a lawyer's contact with an expert witness, including the application of litigation or solicitor-client privilege. This may include notifying an opposing party's counsel prior to communicating with that party's expert witness.

Conduct during Witness Preparation and Testimony

5.4-2 A lawyer must not influence a witness or potential witness to give evidence that is false, misleading or evasive.

5.4-3 A lawyer involved in a proceeding must not obstruct an examination or cross-examination in any manner.

Commentary

General Principles

[1] The ethical duty against improperly influencing a witness or a potential witness applies at all stages of a proceeding, including while preparing a witness to give evidence or to make a statement, and during testimony under oath or affirmation. The role of an advocate is to assist the witness in bringing forth the evidence in a manner that ensures fair and accurate comprehension by the tribunal and opposing parties.

[2] A lawyer may prepare a witness, for discovery and for appearances before tribunals, by discussing courtroom and questioning procedures and the issues in the case, reviewing facts, refreshing memory, and by discussing admissions, choice of words and demeanour. It is, however, improper to direct or encourage a witness to misstate or misrepresent the facts or to give evidence that is intentionally evasive or vague.

Communicating with Witnesses Under Oath or Affirmation

[3] During any witness testimony under oath or affirmation, a lawyer should not engage in conduct designed to improperly influence the witness' evidence.

[4] The ability of a lawyer to communicate with a witness at a specific stage of a proceeding will be influenced by the practice, procedures or directions of the relevant tribunal, and may be modified by agreement of counsel with the approval of the tribunal. Lawyers should become familiar with the rules and practices of the relevant tribunal governing communication with witnesses during examination-in-chief and cross-examination, and prior to or during re-examination.

[5] A lawyer may communicate with a witness during examination-in-chief. However, there may be local exceptions to this practice.

[6] It is generally accepted that a lawyer is not permitted to communicate with the witness during cross-examination except with leave of the tribunal or with the agreement of counsel. The opportunity to conduct a full-ranging and uninterrupted cross-examination is fundamental to the adversarial system. It is counterbalanced by an opposing advocate's ability to ensure clarity of testimony through initial briefing, direct examination and re-examination of that lawyer's witnesses. There is therefore no justification for obstruction of cross-examination by unreasonable interruptions, repeated objections to proper questions, attempts to have the witness change or tailor evidence, or other similar conduct while the examination is ongoing.

[7] A lawyer should seek approval from the tribunal before speaking with a witness after cross-examination and before re-examination.

Discoveries and Other Examinations

[8] Rule 5.4 also applies to examinations under oath or affirmation that are not before a tribunal including examinations for discovery, examinations on affidavits and examinations in aid of execution. Lawyers should scrupulously avoid any attempts to influence witness testimony, particularly as the tribunal is unable to directly monitor compliance. This rule is not intended to prevent discussions or consultations that are necessary to fulfil undertakings given during such examinations.

5.5 RELATIONS WITH JURORS

Communications before Trial

5.5-1 When acting as an advocate before the trial of a case, a lawyer must not communicate with or cause another to communicate with anyone that the lawyer knows to be a member of the jury panel for that trial.

Commentary

[1] A lawyer may investigate a prospective juror to ascertain any basis for challenge, provided that the lawyer does not directly or indirectly communicate with the prospective juror or with any member of the prospective juror's family. But a lawyer should not conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of either a member of the jury panel or a juror.

Disclosure of Information

5.5-2 Unless the judge and opposing counsel have previously been made aware of the information, a lawyer acting as an advocate must disclose to them any information of which the lawyer is aware that a juror or prospective juror:

(a) has or may have an interest, direct or indirect, in the outcome of the case;

(b) is acquainted with or connected in any manner with the presiding judge, any counsel or any litigant; or

(c) is acquainted with or connected in any manner with any person who has appeared or who is expected to appear as a witness.

5.5-3 A lawyer must promptly disclose to the court any information that the lawyer reasonably believes discloses improper conduct by a member of a jury panel or by a juror.

Communication During Trial

5.5-4 Except as permitted by law, a lawyer acting as an advocate must not communicate with or cause another to communicate with any member of the jury during a trial of a case.

5.5-5 A lawyer who is not connected with a case before the court must not communicate with or cause another to communicate with any member of the jury about the case.

5.5-6 A lawyer must not have any discussion after trial with a member of the jury about its deliberations.

Commentary

[1] The restrictions on communications with a juror or potential juror should also apply to communications with or investigations of members of his or her family.

5.6 THE LAWYER AND THE ADMINISTRATION OF JUSTICE

Encouraging Respect for the Administration of Justice

5.6-1 A lawyer must encourage public respect for and try to improve the administration of justice.

Commentary

[1] The obligation outlined in the rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet, for the same reason, a lawyer should not hesitate to speak out against an injustice.

[2] Admission to and continuance in the practice of law implies, on the part of a lawyer, a basic commitment to the concept of equal justice for all within an open, ordered and impartial system. However, judicial institutions will not function effectively unless they command the respect of the public, and, because of changes in human affairs and imperfections in human institutions, constant efforts must be made to improve the administration of justice and thereby, to maintain public respect for it.

[3] Criticizing Tribunals - Proceedings and decisions of courts and tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers, but judges and members of tribunals are often prohibited by law or custom from defending themselves. Their inability to do so imposes special responsibilities upon lawyers. First, a lawyer should avoid criticism that is petty, intemperate or unsupported by a bona fide belief in its real merit, since, in the eyes of the public, professional knowledge lends weight to the lawyer's judgments or criticism. Second, if a lawyer has been involved in the proceedings, there is the risk that any criticism may be, or may appear to be, partisan rather than objective. Third, when a tribunal is the object of unjust criticism, a lawyer, as a participant in the administration of justice, is uniquely able to, and should, support the tribunal, both because its members cannot defend themselves and because, in doing so, the lawyer contributes to greater public understanding of, and therefore respect for, the legal system.

[4] A lawyer, by training, opportunity and experience, is in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions and public authorities. A lawyer should, therefore, lead in seeking improvements in the legal system, but any criticisms and proposals should be bona fide and reasoned.

Seeking Legislative or Administrative Changes

5.6-2 A lawyer who seeks legislative or administrative changes must disclose the interest being advanced, whether the lawyer's interest, the client's interest or the public interest.

Commentary

[1] The lawyer may advocate legislative or administrative changes on behalf of a client although not personally agreeing with them, but the lawyer who purports to act in the public interest should espouse only those changes that the lawyer conscientiously believes to be in the public interest.

Security of Court Facilities

5.6-3 A lawyer who has reasonable grounds for believing that a dangerous situation is likely to develop at a court facility must inform the persons having responsibility for security at the facility and give particulars.

Commentary

[1] If possible, the lawyer should suggest solutions to the anticipated problem such as:

(a) further security, or

(b) reserving judgment.

[2] If possible, the lawyer should also notify other lawyers who are known to be involved in proceedings at the court facility where the dangerous situation is likely to develop. Beyond providing a warning of danger, this notice is desirable because it may allow them to suggest security measures that do not interfere with an accused's or a party's right to a fair trial.

[3] If client information is involved in those situations, the lawyer should be guided by the provisions of section 3.3 (Confidentiality).

5.7 LAWYERS AND MEDIATORS

Role of Mediator

5.7-1 A lawyer who acts as a mediator must, at the outset of the mediation, ensure that the parties to it understand fully that:

(a) the lawyer is not acting as a lawyer for either party but, as mediator, is acting to assist the parties to resolve the matters in issue; and

(b) although communications pertaining to and arising out of the mediation process may be covered by some other common law privilege, they will not be covered by solicitor-client privilege.

Commentary

[1] In acting as a mediator, generally a lawyer should not give legal advice, as opposed to legal information, to the parties during the mediation process. This does not preclude the mediator from giving direction on the consequences if the mediation fails.

[2] Generally, neither the lawyer-mediator nor a partner or associate of the lawyer-mediator should render legal representation or give legal advice to either party to the mediation, bearing in mind the provisions of section 3.4 (Conflicts) and its commentaries and the common law authorities.

[3] If the parties have not already done so, a lawyer-mediator generally should suggest that they seek the advice of separate counsel before and during the mediation process, and encourage them to do so.

[4] If, in the mediation process, the lawyer-mediator prepares a draft contract for the consideration of the parties, the lawyer-mediator should expressly advise and encourage them to seek separate independent legal representation concerning the draft contract.

CHAPTER 6 – RELATIONSHIP TO STUDENTS, EMPLOYEES, AND OTHERS

6.1 SUPERVISION

Direct Supervision Required

6.1-1 A lawyer has complete professional responsibility for all business entrusted to him or her and must directly supervise staff and assistants to whom the lawyer delegates particular tasks and functions.

Commentary

[1] A lawyer may permit a non lawyer to act only under the supervision of a lawyer. The extent of supervision will depend on the type of legal matter, including the degree of standardization and repetitiveness of the matter, and the experience of the non lawyer generally and with regard to the matter in question. The burden rests on the lawyer to educate a non lawyer concerning the duties that the lawyer assigns to the non-lawyer and then to supervise the manner in which such duties are carried out. A lawyer should review the non lawyer's work at sufficiently frequent intervals to enable the lawyer to ensure its proper and timely completion.

[2] A lawyer who practises alone or operates a branch or part time office should ensure that

(a) all matters requiring a lawyer's professional skill and judgment are dealt with by a lawyer qualified to do the work; and

(b) no unauthorized persons give legal advice, whether in the lawyer's name or otherwise.

[3] If a non-lawyer has received specialized training or education and is competent to do independent work under the general supervision of a lawyer, a lawyer may delegate work to the non-lawyer.

[4] A lawyer in private practice may permit a non lawyer to perform tasks delegated and supervised by a lawyer, so long as the lawyer maintains a direct relationship with the client. A lawyer in a community legal clinic funded by a provincial legal aid plan may do so, so long as the lawyer maintains direct supervision of the client's case in accordance with the supervision requirements of the legal aid plan and assumes full professional responsibility for the work.

[5] Subject to the provisions of any statute, rule or court practice in that regard, the question of what the lawyer may delegate to a non lawyer generally turns on the distinction between any special knowledge of the non lawyer and the professional and legal judgment of the lawyer, which, in the public interest, must be exercised by the lawyer whenever it is required.

Application

6.1-2 In this rule, a non-lawyer does not include a student-at-law.

Delegation

6.1-3 A lawyer must not permit a non-lawyer to:

(a) accept cases on behalf of the lawyer, except that a non-lawyer may receive instructions from established clients if the supervising lawyer approves before any work commences;

(b) give legal advice;

(c) give or accept undertakings or accept trust conditions, except at the direction of and under the supervision of a lawyer responsible for the legal matter, providing that, in any communications, the fact that the person giving or accepting the undertaking or accepting the trust condition is a non-lawyer is disclosed, the capacity of the person is indicated and the lawyer who is responsible for the legal matter is identified;

(d) act finally without reference to the lawyer in matters involving professional legal judgment;

(e) be held out as a lawyer;

(f) appear in court or actively participate in formal legal proceedings on behalf of a client except as set forth above or except in a supporting role to the lawyer appearing in such proceedings;

(g) be named in association with the lawyer in any pleading, written argument or other like document submitted to a court;

(h) be remunerated on a sliding scale related to the earnings of the lawyer, unless the non-lawyer is an employee of the lawyer;

(i) conduct negotiations with third parties, other than routine negotiations if the client consents and the results of the negotiation are approved by the supervising lawyer before action is taken;

(j) take instructions from clients, unless the supervising lawyer has directed the client to the non-lawyer for that purpose and the instructions are relayed to the lawyer as soon as reasonably possible;

(k) sign correspondence containing a legal opinion;

(l) sign correspondence, unless

(i) it is of a routine administrative nature,

(ii) the non-lawyer has been specifically directed to sign the correspondence by a supervising lawyer,

(iii) the fact the person is a non-lawyer is disclosed, and

(iv) the capacity in which the person signs the correspondence is indicated;

(m) forward to a client or third party any documents, other than routine, standard form documents, except with the lawyer's knowledge and direction*;*

(n) perform any of the duties that only lawyers may perform or do things that lawyers themselves may not do; or

(o) issue statements of account.

Commentary

[1] A lawyer is responsible for any undertaking given or accepted and any trust condition accepted by a non-lawyer acting under his or her supervision.

[2] A lawyer should ensure that the non-lawyer is identified as such when communicating orally or in writing with clients, lawyers or public officials or with the public generally, whether within or outside the offices of the law firm of employment.

[3] In real estate transactions using a system for the electronic submission or registration of documents, a lawyer who approves the electronic registration of documents by a non-lawyer is responsible for the content of any document that contains the electronic signature of the non-lawyer.

Suspended or Disbarred Lawyers

6.1-4 Without the express approval of the lawyer's governing body, a lawyer must not retain, occupy office space with, use the services of, partner or associate with or employ in any capacity having to do with the practice of law any person who, in any jurisdiction, has been disbarred and struck off the Rolls, suspended, undertaken not to practise or who has been involved in disciplinary action and been permitted to resign and has not been reinstated or readmitted.

Electronic Registration of Documents

6.1-5 A lawyer who has personalized encrypted electronic access to any system for the electronic submission or registration of documents must not

(a) permit others, including a non-lawyer employee, to use such access; or

(b) disclose his or her password or access phrase or number to others.

6.1-6 When a non-lawyer employed by a lawyer has a personalized encrypted electronic access to any system for the electronic submission or registration of documents, the lawyer must ensure that the non-lawyer does not

(a) permit others to use such access; or

(b) disclose his or her password or access phrase or number to others.

Commentary

[1] The implementation of systems for the electronic registration of documents imposes special responsibilities on lawyers and others using the system. The integrity and security of the system is achieved, in part, by its maintaining a record of those using the system for any transactions. Statements professing compliance with law without registration of supporting documents may be made only by lawyers in good standing. It is, therefore, important that lawyers should maintain and ensure the security and the exclusively personal use of the personalized access code, diskettes, etc., used to access the system and the personalized access pass phrase or number.

[2] In a real estate practice, when it is permissible for a lawyer to delegate responsibilities to a non-lawyer who has such access, the lawyer should ensure that the non-lawyer maintains and understands the importance of maintaining the security of the system.

6.2 STUDENTS

Recruitment and Engagement Procedures

6.2-1 A lawyer must observe any procedures of the Society about the recruitment and engagement of articling or other students.

Duties of Principal

6.2-2 A lawyer acting as a principal to a student must provide the student with meaningful training and exposure to and involvement in work that will provide the student with knowledge and experience of the practical aspects of the law, together with an appreciation of the traditions and ethics of the profession.

Commentary

[1] A principal or supervising lawyer is responsible for the actions of students acting under his or her direction.

Duties of Articling Student

6.2-3 An articling student must act in good faith in fulfilling and discharging all the commitments and obligations arising from the articling experience.

6.3 HARASSMENT AND DISCRIMINATION

6.3-1 The principles of human rights laws and related case law apply to the interpretation of this rule.

6.3-2 A term used in this rule that is defined in human rights legislation has the same meaning as in the legislation.

6.3-3 A lawyer must not sexually harass any person.

6.3-4 A lawyer must not engage in any other form of harassment of any person.

6.3-5 A lawyer must not discriminate against any person.

Commentary

[1] A lawyer has a special responsibility to respect the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws.

CHAPTER 7 – RELATIONSHIP TO THE SOCIETY AND OTHER LAWYERS

7.1 RESPONSIBILITY TO THE SOCIETY AND THE PROFESSION GENERALLY

Communications from the Society

7.1-1 A lawyer must reply promptly and completely to any communication from the Society.

Meeting Financial Obligations

7.1-2 A lawyer must promptly meet financial obligations in relation to his or her practice, including payment of the deductible under a professional liability insurance policy, when called upon to do so.

Commentary

[1] In order to maintain the honour of the Bar, lawyers have a professional duty (quite apart from any legal liability) to meet financial obligations incurred, assumed or undertaken on behalf of clients, unless, before incurring such an obligation, the lawyer clearly indicates in writing that the obligation is not to be a personal one.

[2] When a lawyer retains a consultant, expert or other professional, the lawyer should clarify the terms of the retainer in writing, including specifying the fees, the nature of the services to be provided and the person responsible for payment. If the lawyer is not responsible for the payment of the fees, the lawyer should help in making satisfactory arrangements for payment if it is reasonably possible to do so.

[3] If there is a change of lawyer, the lawyer who originally retained a consultant, expert or other professional should advise him or her about the change and provide the name, address, telephone number, fax number and email address of the new lawyer.

Duty to Report

7.1-3 Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer must report to the Society:

(a) the misappropriation or misapplication of trust monies;

(b) the abandonment of a law practice;

(c) participation in criminal activity related to a lawyer's practice;

(d) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer;

(e) conduct that raises a substantial question about the lawyer's capacity to provide professional services; and

(f) any situation in which a lawyer's clients are likely to be materially prejudiced.

Commentary

[1] Unless a lawyer who departs from proper professional conduct or competence is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these rules. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Society directly or indirectly (e.g., through another lawyer). In all cases, the report must be made without malice or ulterior motive.

[2] Nothing in this rule is meant to interfere with the lawyer-client relationship.

[3] Instances of conduct described in this rule can arise from a variety of stressors, physical, mental or emotional conditions, disorders or addictions. Lawyers who face such challenges should be encouraged by other lawyers to seek assistance as early as possible.

[4] The Society supports professional support groups, such as the [Lawyers' Assistance Program and the Risk and Practice Management Program], in their commitment to the provision of confidential counselling. Therefore, lawyers providing peer support for professional support groups will not be called by the Society or by any investigation committee to testify at any conduct, capacity or competence hearing without the consent of the lawyer from whom the information was received. Notwithstanding the above, a lawyer counselling another lawyer has an ethical obligation to report to the Society upon learning that the lawyer being assisted is engaging serious misconduct or in criminal activity related to the lawyer's practice or there is a substantial risk that the lawyer may in the future engage in such conduct or activity. The Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation.

Encouraging Client to Report Dishonest Conduct

7.1-4 A lawyer must encourage a client who has a claim or complaint against an apparently dishonest lawyer to report the facts to the Society as soon as reasonably practicable.

7.2 RESPONSIBILITY TO LAWYERS AND OTHERS

Courtesy and Good Faith

7.2-1 A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.

Commentary

[1] The public interest demands that matters entrusted to a lawyer be dealt with effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. The lawyer who behaves otherwise does a disservice to the client, and neglect of the rule will impair the ability of lawyers to perform their functions properly.

[2] Any ill feeling that may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. The presence of personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system.

[3] A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers, but should be prepared, when requested, to advise and represent a client in a complaint involving another lawyer.

[4] A lawyer should agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities and similar matters that do not prejudice the rights of the client.

7.2-2 A lawyer must avoid sharp practice and must not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other lawyers not going to the merits or involving the sacrifice of a client's rights.

7.2-3 A lawyer must not use any device to record a conversation between the lawyer and a client or another lawyer, even if lawful, without first informing the other person of the intention to do so.

Communications

7.2-4 A lawyer must not, in the course of a professional practice, send correspondence or otherwise communicate to a client, another lawyer or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.

7.2-5 A lawyer must answer with reasonable promptness all professional letters and communications from other lawyers that require an answer, and a lawyer must be punctual in fulfilling all commitments.

7.2-6 Subject to rules 7.2-6A and 7.2-7, if a person is represented by a lawyer in respect of a matter, another lawyer must not, except through or with the consent of the person's lawyer:

(a) approach, communicate or deal with the person on the matter; or

(b) attempt to negotiate or compromise the matter directly with the person.

7.2-6A Where a person is represented by a lawyer under a limited scope retainer on a matter, another lawyer may, without the consent of the lawyer providing the limited scope legal services, approach, communicate or deal with the person directly on the matter unless the lawyer has been given written notice of the nature of the legal services being provided under the limited scope retainer and the approach, communication or dealing falls within the scope of that retainer.

Commentary

[1] Where notice as described in rule 7.2-6A has been provided to a lawyer for an opposing party, the opposing lawyer is required to communicate with the person's lawyer, but only to the extent of the limited representation as identified by the lawyer. The opposing lawyer may communicate with the person on matters outside of the limited scope retainer.

7.2-7 A lawyer who is not otherwise interested in a matter may give a second opinion to a person who is represented by a lawyer with respect to that matter.

Commentary

[1] Rule 7.2-6 applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by a lawyer concerning the matter to which the communication relates. A lawyer may communicate with a represented person concerning

matters outside the representation. This rule does not prevent parties to a matter from communicating directly with each other.

[2] The prohibition on communications with a represented person applies only where the lawyer knows that the person is represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but actual knowledge may be inferred from the circumstances. This inference may arise when there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of the other lawyer by closing his or her eyes to the obvious.

[3] Rule 7.2-7 deals with circumstances in which a client may wish to obtain a second opinion from another lawyer. While a lawyer should not hesitate to provide a second opinion, the obligation to be competent and to render competent services requires that the opinion be based on sufficient information. In the case of a second opinion, such information may include facts that can be obtained only through consultation with the first lawyer involved. The lawyer should advise the client accordingly and, if necessary, consult the first lawyer unless the client instructs otherwise.

7.2-8 A lawyer retained to act on a matter involving a corporate or other organization represented by a lawyer must not approach an officer or employee of the organization:

(a) who has the authority to bind the organization;

(b) who supervises, directs or regularly consults with the organization's lawyer; or

(c) whose own interests are directly at stake in the representation,

in respect of that matter, unless the lawyer representing the organization consents or the contact is otherwise authorized or required by law.

Commentary

[1] This rule applies to corporations and other organizations. "Other organizations" include partnerships, limited partnerships, associations, unions, unincorporated groups, government departments and agencies, tribunals, regulatory bodies and sole proprietorships. This rule prohibits a lawyer representing another person or entity from communicating about the matter in question with persons likely involved in the decision-making process for a corporation or other organization. If an agent or employee of the organization is represented in the matter by a lawyer, the consent of that lawyer to the communication will be sufficient for purposes of this rule. A lawyer may

communicate with employees or agents concerning matters outside the representation.

[2] A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances, the lawyer must comply with the requirements of section 3.4 (Conflicts), and particularly rules 3.4-5 to 3.4-9. A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of section 3.4 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

7.2-9 When a lawyer deals on a client's behalf with an unrepresented person, the lawyer must:

(a) urge the unrepresented person to obtain independent legal representation;

(b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and

(c) make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client.

Commentary

[1] If an unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in this rule about joint retainers.

Inadvertent Communications

7.2-10 A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent must promptly notify the sender.

Commentary

[1] Lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to notify the sender promptly in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been lost. Similarly, this rule does not address the legal duties of a lawyer who

receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this rule, "document" includes email or other electronic modes of transmission subject to being read or put into readable form.

[2] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Unless a lawyer is required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer.

Undertakings and Trust Conditions

7.2-11 A lawyer must not give an undertaking that cannot be fulfilled and must fulfill every undertaking given and honour every trust condition once accepted.

Commentary

[1] Undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms. If a lawyer giving an undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking itself. In the absence of such a statement, the person to whom the undertaking is given is entitled to expect that the lawyer giving it will honour it personally. The use of such words as "on behalf of my client" or "on behalf of the vendor" does not relieve the lawyer giving the undertaking of personal responsibility.

[2] Trust conditions should be clear, unambiguous and explicit and should state the time within which the conditions must be met. Trust conditions should be imposed in writing and communicated to the other party at the time the property is delivered. Trust conditions should be accepted in writing and, once accepted, constitute an obligation on the accepting lawyer that the lawyer must honour personally. The lawyer who delivers property without any trust condition cannot retroactively impose trust conditions on the use of that property by the other party.

[3] The lawyer should not impose or accept trust conditions that are unreasonable, nor accept trust conditions that cannot be fulfilled personally. When a lawyer accepts property subject to trust conditions, the lawyer must fully comply with such conditions, even if the conditions subsequently appear unreasonable. It is improper for a lawyer to ignore or breach a trust condition he or she has accepted on the basis that the condition is not in accordance with the

contractual obligations of the clients. It is also improper to unilaterally impose cross conditions respecting one's compliance with the original trust conditions.

[4] If a lawyer is unable or unwilling to honour a trust condition imposed by someone else, the subject of the trust condition should be immediately returned to the person imposing the trust condition, unless its terms can be forthwith amended in writing on a mutually agreeable basis.

[5] Trust conditions can be varied with the consent of the person imposing them. Any variation should be confirmed in writing. Clients or others are not entitled to require a variation of trust conditions without the consent of the lawyer who has imposed the conditions and the lawyer who has accepted them.

[6] Any trust condition that is accepted is binding upon a lawyer, whether imposed by another lawyer or by a lay person. A lawyer may seek to impose trust conditions upon a non-lawyer, whether an individual or a corporation or other organization, but great caution should be exercised in so doing since such conditions would be enforceable only through the courts as a matter of contract law and not by reason of the ethical obligations that exist between lawyers.

[7] A lawyer should treat money or property that, on a reasonable construction, is subject to trust conditions or an undertaking in accordance with these rules.

7.3 OUTSIDE INTERESTS AND THE PRACTICE OF LAW

Maintaining Professional Integrity and Judgment

7.3-1 A lawyer who engages in another profession, business or occupation concurrently with the practice of law must not allow such outside interest to jeopardize the lawyer's professional integrity, independence or competence.

Commentary

[1] A lawyer must not carry on, manage or be involved in any outside interest in such a way that makes it difficult to distinguish in which capacity the lawyer is acting in a particular transaction, or that would give rise to a conflict of interest or duty to a client.

[2] When acting or dealing in respect of a transaction involving an outside interest, the lawyer should be mindful of potential conflicts and the applicable standards referred to in the conflicts rule and disclose any personal interest.

7.3-2 A lawyer must not allow involvement in an outside interest to impair the exercise of the lawyer's independent judgment on behalf of a client.

Commentary

[1] The term "outside interest" covers the widest possible range of activities and includes activities that may overlap or be connected with the practice of law such as engaging in the mortgage business, acting as a director of a client corporation or writing on legal subjects, as well as activities not so connected, such as a career in business, politics, broadcasting or the performing arts. In each case, the question of whether and to what extent the lawyer may be permitted to engage in the outside interest will be subject to any applicable law or rule of the Society.

[2] When the outside interest is not related to the legal services being performed for clients, ethical considerations will usually not arise unless the lawyer's conduct might bring the lawyer or the profession into disrepute or impair the lawyer's competence, such as if the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation.

7.4 THE LAWYER IN PUBLIC OFFICE

Standard of Conduct

7.4-1 A lawyer who holds public office must, in the discharge of official duties, adhere to standards of conduct as high as those required of a lawyer engaged in the practice of law.

Commentary

[1] The rule applies to a lawyer who is elected or appointed to a legislative or administrative office at any level of government, regardless of whether the lawyer attained the office because of professional qualifications. Because such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by a failure to observe its ethical standards.

[2] Generally, the Society is not concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely upon the lawyer's integrity or professional competence may be the subject of disciplinary action.

[3] Lawyers holding public office are also subject to the provisions of section 3.4 (Conflicts) when they apply.

7.5 PUBLIC APPEARANCES AND PUBLIC STATEMENTS

Communication with the Public

7.5-1 Provided that there is no infringement of the lawyer's obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements.

Commentary

[1] Lawyers in their public appearances and public statements should conduct themselves in the same manner as they do with their clients, their fellow practitioners, the courts, and tribunals. Dealings with the media are simply an extension of the lawyer's conduct in a professional capacity. The mere fact that a lawyer's appearance is outside of a courtroom, a tribunal or the lawyer's office does not excuse conduct that would otherwise be considered improper.

[2] A lawyer's duty to the client demands that, before making a public statement concerning the client's affairs, the lawyer must first be satisfied that any communication is in the best interests of the client and within the scope of the retainer.

[3] Public communications about a client's affairs should not be used for the purpose of publicizing the lawyer and should be free from any suggestion that a lawyer's real purpose is self-promotion or self-aggrandizement.

[4] Given the variety of cases that can arise in the legal system, particularly in civil, criminal and administrative proceedings, it is impossible to set down guidelines that would anticipate every possible circumstance. Circumstances arise in which the lawyer should have no contact with the media, but there are other cases in which the lawyer should contact the media to properly serve the client.

[5] Lawyers are often involved in non-legal activities involving contact with the media to publicize such matters as fund-raising, expansion of hospitals or universities, programs of public institutions or political organizations. They sometimes act as spokespersons for organizations that, in turn, represent particular racial, religious or other special interest groups. This is a well-established and completely proper role for lawyers to play in view of the obvious contribution that it makes to the community.

[6] Lawyers are often called upon to comment publicly on the effectiveness of existing statutory or legal remedies or the effect of particular legislation or decided cases, or to offer an opinion about cases that have been instituted or are

about to be instituted. This, too, is an important role the lawyer can play to assist the public in understanding legal issues.

[7] Lawyers should be aware that, when they make a public appearance or give a statement, they ordinarily have no control over any editing that may follow or the context in which the appearance or statement may be used or under what headline it may appear.

Interference with Right to Fair Trial or Hearing

7.5-2 A lawyer must not communicate information to the media or make public statements about a matter before a tribunal if the lawyer knows or ought to know that the information or statement will have a substantial likelihood of materially prejudicing a party's right to a fair trial or hearing.

Commentary

[1] Fair trials and hearings are fundamental to a free and democratic society. It is important that the public, including the media, be informed about cases before courts and tribunals. The administration of justice benefits from public scrutiny. It is also important that a person's, particularly an accused person's, right to a fair trial or hearing not be impaired by inappropriate public statements made before the case has concluded.

7.6 PREVENTING UNAUTHORIZED PRACTICE

Preventing Unauthorized Practice

7.6-1 A lawyer must assist in preventing the unauthorized practice of law.

Commentary

[1] Statutory provisions against the practice of law by unauthorized persons are for the protection of the public. Unauthorized persons may have technical or personal ability, but they are immune from control, from regulation and, in the case of misconduct, from discipline by the Society. Moreover, the client of a lawyer who is authorized to practise has the protection and benefit of the lawyer-client privilege, the lawyer's duty of confidentiality, the professional standard of care that the law requires of lawyers, and the authority that the courts exercise over them. Other safeguards include mandatory professional liability insurance, the assessment of lawyers' bills, regulation of the handling of trust monies and the maintenance of compensation funds.

7.7 RETIRED JUDGES RETURNING TO PRACTICE

7.7-1 A judge who returns to practice after retiring, resigning or being removed from the bench must not**,** for a period of three years, unless the governing body approves on the basis of exceptional circumstances, appear as a lawyer before the court of which the former judge was a member or before any courts of inferior jurisdiction to that court or before any administrative board or tribunal over which that court exercised an appellate or judicial review jurisdiction in any province in which the judge exercised judicial functions.

7.8 ERRORS AND OMISSIONS

Informing Client of Errors or Omissions

7.8-1 When, in connection with a matter for which a lawyer is responsible, a lawyer discovers an error or omission that is or may be damaging to the client and that cannot be rectified readily, the lawyer must:

(a) promptly inform the client of the error or omission without admitting legal liability;

(b) recommend that the client obtain independent legal advice concerning the matter, including any rights the client may have arising from the error or omission; and

(c) advise the client of the possibility that, in the circumstances, the lawyer may no longer be able to act for the client.

Commentary

[1] In addition to the obligations imposed by Rule 7.8-1, the lawyer has the contractual obligation to report to the lawyer's insurer. Rule 7.8-2 also imposes an ethical duty to report to the insurer(s). Rule 7.8-1 does not relieve a lawyer from the duty to report to the insurer or other indemnitor even if the lawyer attempts to rectify.

Notice of Claim

7.8-2 A lawyer must give prompt notice of any circumstance that may give rise to a claim to an insurer or other indemnitor so that the client's protection from that source will not be prejudiced.

Commentary

[1] Under the lawyer's compulsory professional liability insurance policy, a lawyer is contractually required to give written notice to the insurer immediately after the lawyer becomes aware of any actual or alleged error or any circumstances that could give rise to a claim. The duty to report is also an ethical duty which is imposed on the lawyer to protect clients. The duty to report arises whether or not the lawyer considers the claim to have merit.

[2] The introduction of compulsory insurance has imposed additional obligations upon a lawyer, but these obligations must not impair the relationship and duties of the lawyer to the client. A lawyer has an obligation to comply with

the provisions of the policy of insurance. The insurer's rights must be preserved, and the lawyer, in informing the client of an error or omission, should be careful not to prejudice any rights of indemnity that either of them may have under an insurance, client's protection or indemnity plan, or otherwise. There may well be occasions when a lawyer believes that certain actions or a failure to take action have made the lawyer liable for damages to the client when, in reality, no liability exists. Further, in every case, a careful assessment will have to be made of the client's damages arising from a lawyer's negligence.

Co-operation

7.8-3 When a claim of professional negligence is made against a lawyer, he or she must assist and co-operate with the insurer or other indemnitor to the extent necessary to enable the claim to be dealt with promptly.

Responding to Client's Claim

7.8-4 If a lawyer is not indemnified for a client's errors and omissions claim or to the extent that the indemnity may not fully cover the claim, the lawyer must expeditiously deal with the claim and must not take unfair advantage that would defeat or impair the client's claim.

7.8-5 If liability is clear and the insurer or other indemnitor is prepared to pay its portion of the claim, a lawyer has a duty to pay the balance (see also Rule 7.1-2).

Federation of Law Societies of Canada
Fédération des ordres professionnels de juristes du Canada

Submission of the Federation of Law Societies of Canada to the Senate Committee on Banking, Trade and Commerce

Review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (S.C. 2000, c. 17) pursuant to section 72 of the Act.

April 4, 2012

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Submission of the Federation of Law Societies of Canada to the Senate Committee on Banking, Trade and Commerce on Review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (S.C. 2000, c. 17) pursuant to section 72 of the Act

April 4, 2012

1. The Federation of Law Societies of Canada ("the Federation") appreciates the opportunity to provide comments to the Committee on the occasion of its review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("the Act").

2. The Federation is the coordinating body of the 14 governing bodies of the legal profession in Canada. Our member Law Societies are statutorily charged by legislation in each province and territory of Canada with the responsibility of regulating Canada's more than 100,000 lawyers and 4000 notaries in Quebec in the public interest. An important role of the Federation is to express the views of the governing bodies of the legal profession on national and international issues relating to the administration of justice and the rule of law.

3. The Federation's position remains essentially the same as when it last appeared before this Committee in June 2006. The Federation supports Canada's efforts to fight money laundering and terrorist financing. The Federation recognizes the importance of the objectives of the Act and concurs with its basic purpose. Initiatives to fight these crimes, which include fulfillment of Canada's commitments internationally as a result of its membership in the Financial Action Task Force[1], must be accomplished within the framework of the values and constitutional principles on which Canadian society rests. This includes the rule of law, and within that, the right of individuals to an independent judiciary and independent legal counsel. As the authority to regulate the legal profession in Canada rests with the provincial and territorial law societies, the public interest in addressing money laundering and terrorist financing as it relates to the legal profession is best served by having these regulators address any risks that the legal profession may present.

[1] The Financial Action Task Force ("FATF"), founded in 1989, is an inter-governmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing.

4. The Federation and its member law societies take seriously the problems of money laundering and terrorist financing. Law societies across Canada have demonstrated their commitment to protecting the public by regulating the legal profession to ensure that legal counsel do not engage in or facilitate such criminal activities. The development and adoption by the Federation of a model No Cash Rule and a model Client Identification, or "Client ID" Rule is evidence of its commitment to proactively regulate in this area. These model rules have been implemented by each Canadian law society.

5. A brief history of the Federation's activities in response to the Act will explain the Federation's perspective on the Act and on the government's current legislative initiatives. As we stated in our submissions to this Committee in June 2006, one of the most serious concerns the Federation has with the Act is that it would require lawyers to violate solicitor-client privilege and confidentiality and threatens the independence of the bar. The entire premise of the Act as it purportedly pertains to lawyers is to prescribe and gain access to information that lawyers and Quebec notaries would only obtain by virtue of being retained to provide legal advice to their clients. Members of the legal profession would be conscripted into fighting crime in the guise of serving clients. Such compulsion would prevent the frank disclosure by clients that is necessary for legal counsel to give proper legal advice, and indeed for the effective operation of our system of justice. To put this slightly differently, the right to confidential, loyal and independent counsel, and the privilege against self-incrimination, would be worthless if the state had routine access to counsel's client files, as proposed by the Act.

6. In 2001, the Federation began a constitutional challenge to the Act, arguing that it required lawyers to act as secret agents of the state, collecting information about clients against their interests and reporting to a government agency. As such, the Federation's position was that the Act threatened fundamental Canadian constitutional principles that require that lawyers maintain undivided loyalty to their clients, consistent with the independence of the Bar and the integrity of the administration of justice. The Federation's constitutional challenge resulted in an interlocutory injunction, which by May 2002, suspended the application of the Act to Canadian lawyers and Quebec notaries, pending a final decision on the merits of the constitutional challenge.

7. In December 2006, after the Federation's last submissions to this Committee, the Government of Canada amended the Act to exempt members of the legal profession from the suspicious and prescribed transactions reporting requirements. However, the government subsequently added provisions to the Regulations that purported to impose client identification and record-keeping requirements on legal counsel and law firms. These amendments to the legislative scheme led to the renewal of the legal proceedings.

8. In 2011, the British Columbia Supreme Court heard the constitutional challenge, and in September 2011, released its decision upholding the Federation's argument that the Act and Regulations violate the *Canadian Charter of Rights and Freedoms*, and are therefore unconstitutional insofar as the legislation, and in particular its client identification and record-keeping requirements, apply to legal counsel and law firms.[2] The BC Supreme Court agreed with the Federation's position that: (i) the Act and Regulations unduly infringe upon the solicitor-client relationship. and (ii) to the extent that one of the purposes of the Act and Regulations is to ensure adequate client identification and record-keeping by professionals, these objectives are already being met with respect to legal counsel by the regulation by law societies of their members. The BC Supreme Court ordered that relevant sections of the Act and Regulations be read down to exempt legal counsel and law firms or struck out entirely. The Government of Canada has appealed this decision. The injunction noted earlier continues to apply pending all appeals and, as a result, the client identification and verification provisions of the Act and Regulations presently do not apply to lawyers or Quebec notaries.

9. As previously reported to this Committee, in 2003, independent of the constitutional challenge the Federation undertook its own initiative to fight money laundering and terrorist financing. The first development in this respect was the Federation's October 2004 model No Cash Rule, pursuant to which each member law society has implemented rules prohibiting legal counsel from receiving cash in amounts over $7,500 and requiring them to keep a cash transactions record as part of their record-keeping requirements. The No Cash Rule is intended to augment longstanding law society rules prohibiting legal counsel from engaging in illegal activities, by preventing lawyers from being unwittingly involved in money laundering and other criminal schemes, while maintaining the longstanding principles underlying the solicitor-client relationship. The Federation's rule sets a higher threshold than that in the regulations for reporting large cash transactions as the amount is lower than the regulation's minimum limit of $10,000. Moreover, the rule prohibits legal counsel from accepting cash whereas the regulation would permit the receipt of cash, but require a report to FINTRAC. It is the position of the Federation that the No Cash Rule is an effective tool to prevent money laundering within the legal profession.

[2] *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2011 BCSC 1270, available online at **http://canlii.ca/t/fn82c**

10. To address the client due diligence issue, the Federation adopted a model rule on client identification and verification known as the "Client ID Rule". The Client ID Rule has been implemented by all Canadian law societies since 2008. Members of the legal profession must identify all clients who retain them to provide legal services, by recording basic information such as the client's name, address and telephone number. In addition, when legal counsel provide legal services in respect of the receipt, payment or transfer of funds, lawyers must verify their clients' identity by reference to independent source documents such as a driver's license, birth certificate, passport or other government-issued identification. The Client ID Rule respects the threshold between constitutional and unconstitutional requirements imposed on members of the legal profession when it comes to the gathering of information from clients: legal counsel must obtain and keep all information needed to serve the client, but must not obtain any information which serves only to provide potential evidence against the client in a future investigation or prosecution by state authorities.

11. Together, the No Cash Rule and the Client ID Rule and verification standards accomplish three goals:

    a. the rules impose on lawyers and Quebec notaries a rigorous standard with respect to cash transactions;
    b. the rules address the activities of lawyers and Quebec notaries as financial intermediaries but form part of the extensive statutorily authorized regulatory regime for members of the legal profession through law societies rather than federal legislation; and
    c. the rules, as law society regulations, respect the constitutional principles upheld by the legal profession for the benefit of the public, protect the right of citizens to independent legal counsel, and ensure that counsel can continue to protect the client's privilege, which is a constitutionally recognized principle.[3]

12. Any actual or perceived gap in the legislative scheme as a result of the exclusion of members of the legal profession from the provisions of the Act has been filled by the Federation's model rules. As implemented by provincial and territorial law societies these rules exist to address the conduct of legal counsel and to prevent them from becoming unwittingly involved in money laundering. Lawyers or Quebec notaries who wittingly participate in criminal activity are subject to criminal charges and sanctions. As the BC Supreme Court has already found:

[3] In *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink,* 2002 SCC 61, the Supreme Court of Canada in assessing the constitutionality of search warrant provisions in s. 488.1 of the *Criminal Code* said, "Privilege does not come into being by an assertion of a privilege claim; it exists independently. By the operation of s. 488.1, however, this *constitutionally protected right* can be violated by the mere failure of counsel to act, without instruction from or indeed communication with the client." (at para 39, emphasis added)

> "the law societies have adopted detailed client identification and verification requirements and restrictions on the receipt of cash, in addition to their professional conduct rules. Further, law societies undertake an extensive range of activities to promote and ensure compliance with their rules, including education, annual self-reporting, audits and investigations.
>
> As such, to the extent that one of the purposes of the Regime is to ensure adequate client identification and record-keeping by professionals, those objectives are already being met in respect of the legal profession by virtue of the law societies' regulation of their members." [4]

13. In summary, the Federation supports the goal of fighting money laundering and terrorist financing and ensuring the safety and security of Canadians. The Federation's overarching position remains that the public interest in addressing money laundering and terrorist financing as it relates to the legal profession is best served by having the regulators of the legal profession address the risk that the profession presents.

14. We urge the Committee to ensure that any amendments to the current legislative regime preserve the independence of the bar, and protect solicitor-client privilege and other the rights which have long been recognized as fundamental in Canadian society.

15. We welcome the opportunity to discuss these matters further, and otherwise assist the Committee in its review of the Act.

[4] *Federation of Law Societies of Canada v. Canada* (Attorney General), 2011 BCSC 1270, at paras. 186-187. Available online at: http://canlii.ca/t/fn82c

Anti-Money Laundering and Terrorist Financing Working Group

Terms of Reference

1. The Anti-Money Laundering and Terrorist Financing Working Group is to undertake a review of the Model No Cash and Client Identification and Verification Rules and to consider issues related to their enforcement.

2. The Working Group is to be comprised of CEOs and/or senior law society staff who collectively possess relevant knowledge and expertise in the areas of anti-money laundering and terrorist financing regulations, the Model Rules and the law society rules based on them, and the enforcement of law society rules and regulations.

3. The Working Group will refer all policy questions arising from its review to the Public Affairs and Government Relations Committee.

4. The Working Group will make such recommendations to Council on the content and enforcement of the Model Rules as it considers appropriate.

5. The Working Group will commence its work as soon as possible and will provide an interim report on its work no later than the end of 2016.

Model Rule on Cash Transactions

Adopted by the Council of the Federation of Law Societies of Canada September 11, 2004; amended October 19, 2018.

Definitions

"cash" means coins referred to in section 7 of the *Currency Act*, notes issued by the Bank of Canada pursuant to the *Bank of Canada Act* that are intended for circulation in Canada and coins or bank notes of countries other than Canada;

"disbursements" means amounts paid or required to be paid to a third party by the lawyer or the lawyer's firm on a client's behalf in connection with the provision of legal services to the client by the lawyer or the lawyer's firm which will be reimbursed by the client;

"expenses" means costs incurred by a lawyer or law firm in connection with the provision of legal services to a client which will be reimbursed by the client including such items as photocopying, travel, courier/postage, and paralegal costs;

"financial institution" means

(a) a bank that is regulated by the *Bank Act*,

(b) an authorized foreign bank within the meaning of section 2 of the *Bank Act* in respect of its business in Canada,

(c) cooperative credit society, savings and credit union or caisse populaire that is regulated by a provincial or territorial Act,

(d) an association that is regulated by the *Cooperative Credit Associations Act* (Canada),

(e) a financial services cooperative,

(f) a credit union central,

(g) a company that is regulated by the *Trust and Loan Companies Act* (Canada),

(h) a trust company or loan company that is regulated by a provincial or territorial Act,

(i) a department or an entity that is an agent of Her Majesty in right of Canada or of a province or territory when it accepts deposit liabilities in the course of providing financial services to the public, or

(j) a subsidiary of the financial institution whose financial statements are consolidated with those of the financial institution.

"financial services cooperative" means a financial services cooperative that is regulated by *An Act respecting financial services cooperatives, CQLR, c. C-67.3*, or *An Act respecting the Mouvement Desjardins,* S.Q. 2000, c.77, other than a caisse populaire.

..../2

“funds” means cash, currency, securities and negotiable instruments or other financial instruments that indicate the person’s title or right to or interest in them;

“professional fees” means amounts billed or to be billed to a client for legal services provided or to be provided to the client by the lawyer or the lawyer’s firm;

"public body" means

(a) a department or agent of Her Majesty in right of Canada or of a province or territory,

(b) an incorporated city, town, village, metropolitan authority, township, district, county, rural municipality or other incorporated municipal body in Canada or an agent in Canada of any of them,

(c) a local board of a municipality incorporated by or under an Act of a province or territory of Canada including any local board as defined in the *Municipal Act* (Ontario) [or equivalent legislation] or similar body incorporated under the law of another province or territory,

(d) an organization that operates a public hospital authority and that is designated by the Minister of National Revenue as a hospital under the *Excise Tax Act* (Canada) or an agent of the organization,

(e) a body incorporated by or under an Act of a province or territory of Canada for a public purpose, or

(f) a subsidiary of a public body whose financial statements are consolidated with those of the public body.

1. A lawyer must not receive or accept cash in an aggregate amount greater than $7,500 Canadian in respect of any one client matter.

2. For the purposes of this rule, when a lawyer receives or accepts cash in a foreign currency the lawyer will be deemed to have received or accepted the cash converted into Canadian dollars at

(a) the official conversion rate of the Bank of Canada for the foreign currency as published in the Bank of Canada’s Daily Noon Rates that is in effect at the time the lawyer receives or accepts the cash, or

(b) if the day on which the lawyer receives or accepts cash is a holiday, the official conversion rate of the Bank of Canada in effect on the most recent business day preceding the day on which the lawyer receives or accepts the cash.

3. Section 1 applies when a lawyer engages on behalf of a client or gives instructions on behalf of a client in respect of the following activities:

(a) receiving or paying funds;

(b) purchasing or selling securities, real properties or business assets or entities;

(c) transferring funds by any means.

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4. Despite section 3, section 1 does not apply when the lawyer receives cash in connection with the provision of legal services by the lawyer or the lawyer's firm
   (a) from a financial institution or public body,
   (b) from a peace officer, law enforcement agency or other agent of the Crown acting in his or her official capacity,
   (c) to pay a fine, penalty, or bail, or
   (d) for professional fees, disbursements, or expenses, provided that any refund out of such receipts is also made in cash.

Model Rule on Recordkeeping Requirements for Cash Transactions

"cash" means coins referred to in section 7 of the *Currency Act,* notes issued by the Bank of Canada pursuant to the *Bank of Canada Act* that are intended for circulation in Canada and coins or bank notes of countries other than Canada;

"money" includes cash, cheques, drafts, credit card sales slips, post office orders and express and bank money orders.

1. Every lawyer, in addition to existing financial recordkeeping requirements to record all money and other property received and disbursed in connection with the lawyer's practice, shall maintain
   (a) a book of original entry identifying the method by which money is received in trust for a client, and
   (b) a book of original entry showing the method by which money, other than money received in trust for a client, is received.
2. Every lawyer who receives cash for a client shall maintain, in addition to existing financial recordkeeping requirements, a book of duplicate receipts, with each receipt identifying the date on which cash is received, the person from whom cash is received, the amount of cash received, the client for whom cash is received, any file number in respect of which cash is received and containing the signature authorized by the lawyer who receives cash and of the person from whom cash is received.
3. The financial records described in paragraphs 1 and 2 may be entered and posted by hand or by mechanical or electronic means, but if the records are entered and posted by hand, they shall be entered and posted in ink.
4. The financial records described in paragraphs 1 and 2 shall be entered and posted so as to be current at all times.
5. A lawyer shall keep the financial records described in paragraphs 1 and 2 for at least the six year period immediately preceding the lawyer's most recent fiscal year end. [This paragraph does not apply to lawyers in Québec as the Barreau du Québec requires that such records be retained without any limitation.]

Model Rule on Client Identification and Verification

Adopted by the Council of the Federation of Law Societies of Canada March 20, 2008; amended December 12, 2008; amended October 19, 2018.

Definitions

1. In this rule,

"credit union central" means a central cooperative credit society, as defined in section 2 of the *Cooperative Credit Associations Act*, or a credit union central or a federation of credit unions or caisses populaires that is regulated by a provincial or territorial Act other than one enacted by the legislature of Quebec.

"disbursements" means amounts paid or required to be paid to a third party by the lawyer or the lawyer's firm on a client's behalf in connection with the provision of legal services to the client by the lawyer or the lawyer's firm which will be reimbursed by the client;

"electronic funds transfer" means an electronic transmission of funds conducted by and received at a financial institution or a financial entity headquartered in and operating in a country that is a member of the **Financial Action Task Force,** where neither the sending nor the receiving account holders handle or transfer the funds, and where the transmission record contains a reference number, the date, transfer amount, currency and the names of the sending and receiving account holders and the conducting and receiving entities.

"expenses" means costs incurred by a lawyer or law firm in connection with the provision of legal services to a client which will be reimbursed by the client including such items as photocopying, travel, courier/postage, and paralegal costs;

"financial institution" means

(a) a bank that is regulated by the *Bank Act*,

(b) an authorized foreign bank within the meaning of section 2 of the *Bank Act* in respect of its business in Canada,

(c) a cooperative credit society, savings and credit union or caisse populaire that is regulated by a provincial or territorial Act,

(d) an association that is regulated by the *Cooperative Credit Associations Act* (Canada),

(e) a financial services cooperative,

(f) a credit union central,

(g) a company that is regulated by the *Trust and Loan Companies Act* (Canada),

(h) a trust company or loan company that is regulated by a provincial or territorial Act;

(i) a department or an entity that is an agent of Her Majesty in right of Canada or of a province or territory when it accepts deposit liabilities in the course of providing financial services to the public; or

(j) a subsidiary of the financial institution whose financial statements are consolidated with those of the financial institution.

"financial services cooperative" means a financial services cooperative that is regulated by *An Act respecting financial services cooperatives,* CQLR, c. C-67.3, or *An Act respecting the Mouvement Desjardins,* S.Q. 2000, c.77, other than a caisse populaire.

"funds" means cash, currency, securities and negotiable instruments or other financial instruments that indicate the person's title or right to or interest in them;

"lawyer" means, in the Province of Quebec, an advocate or a notary and, in any other province or territory, a barrister or solicitor;

"organization" means a body corporate, partnership, fund, trust, co-operative or an unincorporated association;

"professional fees" means amounts billed or to be billed to a client for legal services provided or to be provided to the client by the lawyer or the lawyer's firm;

"public body" means

(a) a department or agent of Her Majesty in right of Canada or of a province or territory,

(b) an incorporated city, town, village, metropolitan authority, township, district, county, rural municipality or other incorporated municipal body in Canada or an agent in Canada of any of them,

(c) a local board of a municipality incorporated by or under an Act of a province or territory of Canada including any local board as defined in the *Municipal Act* (Ontario) [or equivalent legislation] or similar body incorporated under the law of another province or territory,

(d) an organization that operates a public hospital authority and that is designated by the Minister of National Revenue as a hospital under the *Excise Tax Act* (Canada) or an agent of the organization,

(e) a body incorporated by or under an Act of a province or territory of Canada for a public purpose, or

(f) a subsidiary of a public body whose financial statements are consolidated with those of the public body.

“reporting issuer" means an organization that is a reporting issuer within the meaning of the securities laws of any province or territory of Canada, or a corporation whose shares are traded on a stock exchange that is designated under section 262 of the *Income Tax Act* (Canada) and operates in a country that is a member of the Financial Action Task Force, and includes a subsidiary of that organization or corporation whose financial statements are consolidated with those of the organization or corporation.

"securities dealer" means persons and entities authorized under provincial or territorial legislation to engage in the business of dealing in securities or any other financial instruments or to provide portfolio management or investment advising services, other than persons who act exclusively on behalf of such an authorized person or entity.

Requirement to Identify Client

2. (1) Subject to subsection (3), a lawyer who is retained by a client to provide legal services must comply with the requirements of this Rule in keeping with the lawyer’s obligation to know their client, understand the client’s financial dealings in relation to the retainer with the client and manage any risks arising from the professional business relationship with the client.

(2) A lawyer's responsibilities under this Rule may be fulfilled by any member, associate or employee of the lawyer's firm, wherever located.

(3) Sections 3 through 10 do not apply to:

(a) a lawyer when he or she provides legal services or engages in or gives instructions in respect of any of the activities described in section 4 on behalf of his or her employer;

(b) a lawyer

(i) who is engaged as an agent by the lawyer for a client to provide legal services to the client, or

(ii) to whom a matter for the provision of legal services is referred by the lawyer for a client, when the client’s lawyer has complied with sections 3 through 10, or,

(c) a lawyer providing legal services as part of a duty counsel program sponsored by a non-profit organization, except where the lawyer engages in or gives instructions in respect of the receiving, paying or transferring of funds other than an electronic funds transfer.

3. A lawyer who is retained by a client as described in subsection 2(1) must obtain and record, with the applicable date, the following information:

(1) for individuals:

(a) the client’s full name,

(b) the client’s home address and home telephone number,

(c) the client’s occupation or occupations, and

(d) the address and telephone number of the client’s place of work or employment, where applicable;

(2) for organizations:

(a) the client's full name, business address and business telephone number,

(b) other than a financial institution, public body or reporting issuer, the organization's incorporation or business identification number and the place of issue of its incorporation or business identification number, if applicable,

(c) other than a financial institution, public body or a reporting issuer, the general nature of the type of business or businesses or activity or activities engaged in by the client, where applicable, and

(d) the name and position of and contact information for the individual who is authorized to provide and gives instructions to the lawyer with respect to the matter for which the lawyer is retained.

(3) if the client is acting for or representing a third party, information about the third party as set out in subsections (1) or (2) as applicable.

When Verification of Client Identity Required

4. Subject to section 5, section 6 applies where a lawyer who has been retained by a client to provide legal services engages in or gives instructions in respect of the receiving, paying or transferring of funds.

Exemptions re: certain funds

5. Section 6 does not apply

(1) where the client is a financial institution, public body or reporting issuer,

(2) in respect of funds,

(a) paid by or to a financial institution, public body or a reporting issuer;

(b) received by a lawyer from the trust account of another lawyer;

(c) received from a peace officer, law enforcement agency or other public official acting in their official capacity;

(d) paid or received to pay a fine, penalty, or bail; or

(e) paid or received for professional fees, disbursements, or expenses;

(3) to an electronic funds transfer.

Requirement to Verify Client Identity

6. (1) When a lawyer is engaged in or gives instructions in respect of any of the activities described in section 4, the lawyer must

(a) obtain from the client and record, with the applicable date, information about the source of funds described in section 4, and

(b) verify the identity of the client, including the individual(s) described in paragraph 3(2)(d), and, where appropriate, the third party using the documents or information described in subsection (6).

Use of Agent

(2) A lawyer may rely on an agent to obtain the information described in subsection (6) to verify the identity of an individual client, third party or individual described in paragraph 3(2)(d) provided the lawyer and the agent have an agreement or arrangement in writing for this purpose as described in subsection (4).

(3) Notwithstanding subsection (2), where an individual client, third party or individual described in paragraph 3(2)(d) is not physically present in Canada, a lawyer must rely on an agent to obtain the information described in subsection (4) to verify the person's identity provided the lawyer and the agent have an agreement or arrangement in writing for this purpose as described in subsection (4).

Agreement for use of Agent

(4) A lawyer who enters into an agreement or arrangement referred to in subsection (2) or (3) must:

(a) obtain from the agent the information obtained by the agent under that agreement or arrangement; and

(b) satisfy themselves that the information is valid and current and that the agent verified identity in accordance with subsection (6).

(5) A lawyer may rely on the agent's previous verification of an individual client, third party or an individual described in paragraph 3(2)(d) if the agent was, at the time they verified the identity,

(a) acting in their own capacity, whether or not they were required to verify identity under this Rule, or

(b) acting as an agent under an agreement or arrangement in writing, entered into with another lawyer who is required to verify identity under this Rule, for the purpose of verifying identity under subsection (6).

Documents and information for verification

(6) For the purposes of paragraph (1)(b), the client's identity must be verified by referring to the following documents, which must be valid, original and current, or the following information, which must be valid and current, and which must not include an electronic image of a document:

(a) if the client or third party is an individual,

(i) an identification document containing the individual's name and photograph that is issued by the federal government, a provincial or territorial government or a foreign government, other than a municipal government, that is used in the presence of the individual to verify that the name and photograph are those of the individual;

(ii) information that is in the individual's credit file if that file is located in Canada and has been in existence for at least three years that is used to verify that the name, address and date of birth in the credit file are those of the individual;

(iii) any two of the following with respect to the individual:

(A) Information from a reliable source that contains the individual's name and address that is used to verify that the name and address are of those of the individual;

(B) Information from a reliable source that contains the individual's name and date of birth that is used to verify that the name and date of birth are those of the individual, or

(C) Information that contains the individual's name and confirms that they have a deposit account or a credit card or other loan amount with a financial institution that is used to verify that information.

(b) For the purposes of clauses (6)(a)(iii)(A) to (C), the information referred to must be from different sources, and the individual, lawyer and agent cannot be a source.

(c) To verify the identity of an individual who is under 12 years of age, the lawyer must verify the identity of one of their parents or their guardian.

(d) To verify the identity of an individual who is a least 12 years of age but not more than 15 years of age, the lawyer may refer to information under clause (6)(a)iii(A) that contains the name and address of one of the individual's parents or their guardian and verifying that the address is that of the individual.

(e) if the client or third party is an organization such as a corporation or society that is created or registered pursuant to legislative authority, a written confirmation from a government registry as to the existence, name and address of the organization, including the names of its directors, where applicable, such as

(i) a certificate of corporate status issued by a public body,

(ii) a copy obtained from a public body of a record that the organization is required to file annually under applicable legislation, or

(iii) a copy of a similar record obtained from a public body that confirms the organization's existence; and

(f) if the client or third party is an organization, other than a corporation or society, that is not registered in any government registry, such as a trust or partnership, a copy of the organization's constating documents, such as a trust or partnership agreement, articles of association, or any other similar record that confirms its existence as an organization.

Requirement to Identify Directors, Shareholders and Owners

(7) When a lawyer is engaged in or gives instructions in respect of any of the activities in section 4 for a client or third party that is an organization referred to in paragraph (6)(e) or (f), the lawyer must:

(a) obtain and record, with the applicable date, the names of all directors of the organization, other than an organization that is a securities dealer; and

(b) make reasonable efforts to obtain, and if obtained, record with the applicable date,

(i) the names and addresses of all persons who own, directly or indirectly, 25 per cent or more of the organization or of the shares of the organization,

(ii) the names and addresses of all trustees and all known beneficiaries and settlors of the trust, and

(iii) in all cases, information establishing the ownership, control and structure of the organization.

(8) A lawyer must take reasonable measures to confirm the accuracy of the information obtained under subsection (7).

(9) A lawyer must keep a record, with the applicable date(s), that sets out the information obtained and the measures taken to confirm the accuracy of that information.

(10) If a lawyer is not able to obtain the information referred to in subsection (7) or to confirm the accuracy of that information in accordance with subsection (8), the lawyer must

(a) take reasonable measures to ascertain the identity of the most senior managing officer of the organization;

(b) determine whether

(i) the client's information in respect of their activities,

(ii) the client's information in respect of the source of the funds described in section 4, and

(iii) the client's instructions in respect of the transaction, are consistent with the purpose of the retainer and the information obtained about the client as required by this Rule;

(c) assess whether there is a risk that the lawyer may be assisting in or encouraging fraud or other illegal conduct; and

(d) keep a record, with the applicable date, of the results of the determination and assessment under paragraphs (b) and (c).

Timing of Verification for Individuals

(11) A lawyer must verify the identity of

(a) a client who is an individual, and

(b) the individual(s) authorized to provide and giving instructions on behalf of an organization with respect to the matter for which the lawyer is retained

upon engaging in or giving instructions in respect of any of the activities described in section 4.

(12) Where a lawyer has verified the identity of an individual, the lawyer is not required to subsequently verify that same identity unless the lawyer has reason to believe the information, or the accuracy of it, has changed.

Timing of Verification for Organizations

(13) A lawyer must verify the identity of a client that is an organization upon engaging in or giving instructions in respect of any of the activities described in section 4, but in any event no later than 30 days thereafter.

(14) Where the lawyer has verified the identity of a client that is an organization and obtained information pursuant to subsection (7), the lawyer is not required to subsequently verify that identity or obtain that information, unless thelawyer has reason to believe the information, or the accuracy of it, has changed.

Record Keeping and Retention

7. (1) A lawyer must obtain and retain a copy of every document used to verify the identity of any individual or organization for the purposes of subsection 6(1).

(2) The documents referred to in subsection (1) may be kept in a machine-readable or electronic form, if a paper copy can be readily produced from it.

(3) A lawyer must retain a record of the information, with the applicable date, and any documents obtained for the purposes of section 3, subsection 6(7) and subsection 10(2) and copies of all documents received for the purposes of subsection 6(1) for the longer of

(a) the duration of the lawyer and client relationship and for as long as is necessary for the purpose of providing service to the client, and

(b) a period of at least six years following completion of the work for which the lawyer was retained.

Application

8. Sections 2 through 7 of this Rule do not apply to matters in respect of which a lawyer was retained before this Rule comes into force but they do apply to all matters for which he or she is retained after that time regardless of whether the client is a new or existing client.

Criminal activity, duty to withdraw at time of taking information

9. (1) If in the course of obtaining the information and taking the steps required in section 3 and subsections 6(1), (7) or (10), a lawyer knows or ought to know that he or she is or would be assisting a client in fraud or other illegal conduct, the lawyer must withdraw from representation of the client.

(2) This section applies to all matters, including new matters for existing clients, for which a lawyer is retained after this Rule comes into force.

Monitoring

10. During a retainer with a client in which the lawyer is engaged in or gives instructions in respect of any of the activities described in section 4, the lawyer must:

(1) monitor on a periodic basis the professional business relationship with the client for the purposes of:

(a) determining whether

(i) the client's information in respect of their activities,

(ii) the client's information in respect of the source of the funds described in section 4, and

(iii) the client's instructions in respect of transactions are consistent with the purpose of the retainer and the information obtained about the client as required by this Rule, and

(b) assessing whether there is a risk that the lawyer may be assisting in or encouraging fraud or other illegal conduct; and

(2) keep a record, with the applicable date, of the measures taken and the information obtained with respect to the requirements of paragraph (1)(a) above.

Duty to withdraw

11. (1) If while retained by a client, including when taking the steps required in section 10, a lawyer knows or ought to know that he or she is or would be assisting the client in fraud or other illegal conduct, the lawyer must withdraw from representation of the client.

Application

(2) This section applies to all matters for which a lawyer was retained before this Rule comes into force and to all matters for which he or she is retained after that time.

Model Trust Accounting Rule

Approved by the Council of the Federation of Law Societies of Canada on October 19, 2018.

Definitions

"money" includes cash, cheques, drafts, credit card transactions, post office orders, express and bank money orders, and electronic transfer of deposits at financial institutions

1. A lawyer must pay into and withdraw from, or permit the payment into or withdrawal from, a trust account only money that is directly related to legal services that the lawyer or the lawyer's law firm is providing.

2. A lawyer must pay out money held in a trust account as soon as practicable upon completion of the legal services to which the money relates.

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

Submission of the Federation of Law Societies of Canada to the House of Commons Standing Committee on Finance

Statutory Review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*

March 20, 2018

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Federation of Law Societies of Canada

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Submission of the Federation of Law Societies of Canada to the House of Commons Standing Committee on Finance

Statutory Review of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act

March 20, 2018

Introduction

1. The Federation of Law Societies of Canada ("the Federation") appreciates the opportunity to provide comments to the Committee on the occasion of its review of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act ("the Act").

2. The Federation is the coordinating body of the 14 governing bodies of the legal profession in Canada. Our member law societies are statutorily charged by legislation in each province and territory with the responsibility for regulating more than 120,000 lawyers, 3,800 notaries in Quebec and Ontario's nearly 9,000 licensed paralegals in the public interest. An important role of the Federation is to express the views of the governing bodies of the legal profession on national and international issues relating to the administration of justice and the rule of law.

3. The Federation and its member law societies support Canada's efforts to fight money laundering and terrorist financing. We recognize the importance of the objectives of the Act and concur with its basic purpose. Initiatives to fight these crimes, which include fulfillment of Canada's commitments internationally as a result of its membership in the Financial Action Task Force ("FATF"), must respect the framework of the values and constitutional principles on which Canadian society rests. This includes the rule of law, and within that, the right of individuals to an independent judiciary and independent legal counsel.

4. In 2015 the Supreme Court of Canada recognized that the provisions in the legislation requiring legal counsel to collect and retain information not required for client representation, expansive powers to search law offices, and inadequate protection for solicitor-client privilege violated provisions of the Canadian Charter of Rights and Freedoms and undermined the ability of lawyers and Quebec notaries to comply with their duty of commitment to the client's cause, a principle of fundamental justice.[1]

5. As the authority to regulate the legal profession in Canada rests with the provincial and territorial law societies, the public interest in addressing money laundering and terrorist financing as it relates to the legal profession is best served by having these regulators address any risks that the legal profession may present.

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[1] Canada (Attorney General) v. Federation of Law Societies of Canada, [2015] 1 SCR 401, 2015 SCC 7 (CanLII).

Anti-money laundering and anti-terrorist financing initiatives

6. The Federation and the law societies of Canada have demonstrated their commitment to protecting the public by regulating the legal profession to mitigate the risk of legal counsel engaging in or facilitating money laundering or the financing of terrorism. The development by the Federation of model rules limiting the ability of legal counsel to accept cash (the "No Cash Rule") and imposing extensive client verification obligations (the "Client ID Rule") and their adoption and enforcement by the law societies is evidence of our commitment to proactively regulate in this area. Combined with extensive rules of professional conduct and financial accounting rules, the No Cash Rule and the Client ID Rule provide effective regulation of the risks of members of the legal profession becoming involved in money laundering or the financing of terrorism.

7. The No Cash Rule, adopted in 2004 prohibits legal counsel from receiving cash in amounts over $7,500 and requires them to keep a record of cash transactions as part of their accounting record-keeping. The rule is intended to augment longstanding law society rules aimed at preventing lawyers from being unwittingly involved in money laundering and other criminal schemes, while maintaining the core principles underlying the solicitor-client relationship. The threshold in the Federation's rule is stricter than that in the regulations for reporting large cash transactions ($10,000). By prohibiting legal counsel from accepting cash the rule addresses the risks associated with the handling and placement of cash and so provides an effective alternative to the reporting requirements that apply to other reporting entities under the federal anti-money laundering scheme.

8. To ensure that legal counsel engage in appropriate client due diligence, the Federation adopted a model rule on client identification and verification, the Client ID Rule. The rule has been in force in all Canadian jurisdictions since 2008. Members of the legal profession must identify **all** clients who retain them to provide legal services by recording basic information such as the client's name, address and telephone number. In addition, when legal counsel provide legal services in respect of the receipt, payment or transfer of funds, they must verify their clients' identity by reference to independent source documents such as a driver's license, birth certificate, passport or other government issued identification. The Client ID Rule respects the threshold between constitutional and unconstitutional requirements imposed on members of the legal profession when it comes to the gathering of information from clients: legal counsel must obtain and keep all information needed to serve the client, but must not obtain any information which serves only to provide potential evidence against the client in a future investigation or prosecution by state authorities.

9. Together, the No Cash and Client ID rules accomplish three goals:

   a. the rules impose on lawyers and Quebec notaries a rigorous standard with respect to cash transactions and limit the ability of legal counsel to accept cash from clients;

   b. the rules address the activities of lawyers and Quebec notaries as financial intermediaries but form part of the extensive statutorily authorized regulatory regime for members of the legal profession through law societies rather than federal legislation; and

   c. the rules, as law society regulations, respect the constitutional principles upheld by the legal profession for the benefit of the public, protect the right of citizens to independent legal counsel, and ensure that counsel can continue to protect the client's privilege, which is a constitutionally recognized principle.

10. It has been suggested in a number of forums, including a recently published Department of Finance consultation paper[2] that the exclusion of members of the legal profession from the federal anti-money laundering and anti-terrorism financing regime is "a major deficiency"[3] We note that in its 2016 Mutual Evaluation Report on Canada the FATF also was dismissive of law society regulation to combat money laundering and the financing of terrorist activities suggesting that as a result of the Federation's successful challenge to the constitutionality of the federal anti-money laundering and terrorist financing scheme "there is … no incentive for the profession to apply AML/CFT measures and participate in the detection of potential ML/TF activities." These suggestions ignore the serious regulatory initiatives of Canada's law societies in this area and the ongoing monitoring of members of the legal profession that law societies engage in including both periodic and risk-based audits.

11. Law societies take their mandate to regulate the legal profession in the public interest seriously. The rules and regulations implemented by provincial and territorial law societies based on the Federation's model rules exist to address the conduct of legal counsel and to prevent them from unwitting involvement in money laundering or the financing of terrorism. As noted earlier, legal counsel are also required to abide by comprehensive rules of professional conduct that include provisions prohibiting them from knowingly assisting in or encouraging any unlawful conduct. Measures to ensure that legal counsel maintain appropriate practice management systems and comply with law society regulations include annual reporting obligations, practice reviews and financial audits. Law societies also have extensive investigatory and disciplinary powers that include the ability to impose penalties up to and including disbarment when members fail to abide by law society rules and regulations. Lawyers and Quebec notaries are, of course, also bound by the criminal law and those who wittingly participate in criminal activity are subject to criminal charges and sanctions. In the submission of the Federation, any actual or perceived gap in the legislative scheme as a result of the exclusion of members of the legal profession from the provisions of the Act has been filled by these regulatory initiatives.

12. However the Federation also recognizes that it is important to ensure that the regulations in this area are as robust and effective as possible, and to that end the Federation recently undertook a comprehensive review of its model rules. Last fall a Federation special working group launched a consultation on draft amendments to the rules that clarify some of the provisions and add additional obligations including a requirement for legal counsel to obtain and verify the identity of the beneficiaries of trusts and the beneficial owners of organizations as well as requirements for ongoing monitoring of the professional relationship and the activities of clients. Also proposed is a new model rule (modeled on a rule that several law societies have implemented) that would tie the use of trust accounts to the provision of legal services thus ensuring that lawyer trust accounts cannot be used for purely financial transactions. The consultation ended on March 15, 2018. The working group is now considering the feedback it received and will also be reviewing the Department of Finance white paper referred to earlier. It is expected that final amendments to the rules will be approved by the Federation and implemented by the law societies later this year.

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2 Reviewing Canada's Anti-Money Laundering and Terrorist Financing Regime, page 21

3 Anti-money laundering and counter-terrorist financing measures in Canada – 2016, FATF page 95

13. The Federation's working group also has undertaken a review of law society compliance and enforcement activities and is now preparing guidance on best practices to assist law societies in ensuring that their activities in these areas are as effective as possible. The working group will also be preparing comprehensive guidance and educational materials for the legal profession to assist members in understanding the money laundering and terrorism financing risks they may encounter in their professional activities and their associated legal, regulatory and ethical obligations.

Beneficial ownership

14. As noted above, proposed amendments to the Federation's model rules would add a requirement for legal counsel to obtain and verify information on the beneficial owners of organizations and the beneficiaries of trusts. The proposed amendments reflect the Federation's recognition of the value of capturing this information. It is important to note, however, that compliance with such a rule, which would mirror requirements in federal regulations, will be greatly hampered by the lack of publicly available information on beneficial owners. In the absence of publicly accessible registries of beneficial owners, it simply may not be possible to impose an absolute requirement to verify beneficial ownership information.

15. Canada has been criticized by the FATF and others for the lack of transparency on beneficial owners that exists in this country. In its recent consultation paper, the Department of Finance indicates that access to accurate beneficial ownership information "is vital to combatting illicit financial flows including money laundering, terrorist financing and tax evasion."[4] The consultation paper also acknowledges the lack of transparency on beneficial ownership, noting in particular the lack of any central registry.

16. The Federation notes that governments in many countries have recognized the threats posed by a lack of transparency on the beneficial owners of organizations and the beneficiaries of trusts. According to a 2016 report produced by Transparency International Canada[5] the G20, of which Canada is a member, has adopted principles on the transparency of beneficial ownership information and several member states (the UK, France, Australia and South Africa) have committed to setting up public registries of beneficial owners. The European Union has also adopted a requirement for its member countries to *collect and publish* beneficial ownership information. A July 2017 report published by the United States Library of Congress indicates that most countries surveyed have amended their legislation on beneficial ownership in response to either the G20 principles or the recommendations of the FATF. The report notes that Canada is one of only 2 G7 countries not to have taken legislative action.[6]

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[4] *Reviewing Canada's Anti-Money Laundering and Terrorist Financing Regime, page 18.*

[5] *No Reason to Hide; Unmasking Anonymous Owners of Canadian Companies and Trusts, Transparency International Canada,* ***http://www.transparencycanada.ca/wp-content/uploads/2017/05/TICBeneficialOwnershipReport-Interactive.pdf.***

[6] *Disclosure of Beneficial Ownership in Selected Countries, July 2017, Library of Congress,* ***https://www.loc.gov/law/help/beneficial-ownership/disclosure-beneficial-ownership.pdf.***

17. In the submission of the Federation, in light of the identified risk that a lack of transparency creates, it is essential that beneficial ownership information is not only provided to government authorities but is also publicly available. We note that the government indicated in its recent budget that it plans to introduce legislative amendments to enhance the availability of beneficial ownership information at the federal level. The Federation recognizes that responsibility for this issue is shared by the federal, provincial and territorial governments, but this jurisdictional complexity ought not to stand in the way of legislative reform. Indeed we note that in its recent budget the government of British Columbia announced plans to track beneficial ownership information of property, organizations and trusts. The Federation supports these plans and urges the federal government to move forward promptly with legislative initiatives that include the creation of a publicly accessible registry of beneficial owners and to continue to work with the provincial and territorial governments toward similar amendments to the legislation in their respective jurisdictions.

Conclusion

18. We would welcome the opportunity to discuss these matters further and to otherwise assist the Committee in its review of the Act.

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

Submission of the Federation of Law Societies of Canada in response to the Department of Finance paper *Reviewing Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime*

May 17 2018

Appendix I

Introduction

1. The Federation of Law Societies of Canada ("the Federation") appreciates the opportunity to provide a submission in response to the consultation paper *Reviewing Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime* ("Consultation Paper") published by the Department of Finance in February 2018.

2. The Federation is the coordinating body of the 14 regulators of the legal profession in Canada. Our member law societies are statutorily charged by legislation in each province and territory with the responsibility for regulating more than 120,000 lawyers, 3,800 notaries in Quebec and Ontario's nearly 9,000 licensed paralegals in the public interest. An important role of the Federation is to express the views of the regulators of the legal profession on national and international issues relating to the administration of justice and the rule of law.

3. The Federation and its member law societies support Canada's efforts to fight money laundering and terrorist financing. We recognize the importance of the objectives of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (the "Act") and concur with its basic purpose. It is essential, however, that initiatives to fight these crimes, which include fulfillment of Canada's commitments internationally as a result of its membership in the Financial Action Task Force ("FATF"), respect the framework of the values and constitutional principles on which Canadian society rests. This includes the rule of law, and within that, the right of individuals to an independent judiciary and independent legal counsel.

4. In 2015 the Supreme Court of Canada recognized that the provisions in the Act requiring legal counsel to collect and retain information not required for client representation, expansive powers to search law offices, and inadequate protection for solicitor-client privilege violated provisions of the *Canadian Charter of Rights and Freedoms* and undermined the ability of lawyers and Quebec notaries to comply with their duty of commitment to the client's cause, a principle of fundamental justice.[1]

5. The Consultation Paper repeats the suggestion made on numerous occasions by the Department of Finance that the exclusion of members of the legal profession from the federal anti-money laundering and anti-terrorism financing regime is "a major deficiency". As noted in the Consultation Paper, this same suggestion has been made by the FATF. In its 2016 mutual evaluation report on Canada, the FATF was dismissive of law society regulation to combat money laundering and the financing of terrorist activities. The FATF suggested that as a result of the Federation's successful challenge to the constitutionality of the federal anti-money laundering and terrorist financing scheme, "there is … no incentive for the profession to apply AML/CFT measures and participate in the detection of potential ML/TF activities."[2]

6. In the submission of the Federation these statements ignore both the regulatory authority of Canada's law societies and the significant regulatory initiatives they have

[1] Canada (Attorney General) v. Federation of Law Societies of Canada, [2015] 1 SCR 401, 2015 SCC 7 (CanLII).
[2] Anti-money laundering and counter-terrorist financing measures in Canada – 2016, FATF page 95

taken to mitigate risks of money laundering and terrorist financing in the legal profession. Law societies take their mandate to regulate the legal profession in the public interest seriously and use their extensive investigatory and disciplinary powers to enforce the rules implemented to address money laundering and terrorism financing risks.

7. In our submission, as the authority to regulate the legal profession in Canada rests with the provincial and territorial law societies, the public interest in addressing money laundering and terrorist financing as it relates to the legal profession is best served by having these regulators address any risks that the legal profession may present.

Federation and law societies anti-money laundering and anti-terrorist financing initiatives

8. The Federation and the law societies of Canada have been actively involved in the fight against money-laundering and terrorism financing for more than 15 years. Together we have demonstrated our commitment to protecting the public by regulating the legal profession to mitigate the risk of legal counsel engaging in or facilitating these unlawful activities. The development by the Federation of model rules limiting the ability of legal counsel to accept cash (the "No Cash Rule") and imposing extensive client verification obligations (the "Client ID Rule") and their adoption and enforcement by the law societies is evidence of our commitment to proactively regulate in this area. Combined with extensive rules of professional conduct and financial accounting rules, the No Cash Rule and the Client ID Rule provide effective regulation of the risks of members of the legal profession becoming involved in money laundering or the financing of terrorism.

9. The No Cash Rule, adopted in 2004 prohibits legal counsel from receiving cash in amounts over $7,500 and requires them to keep a record of cash transactions as part of their accounting record-keeping. The rule is intended to augment longstanding law society rules aimed at preventing lawyers from being unwittingly involved in unlawful activities, while maintaining the core principles underlying the solicitor-client relationship. The threshold in the Federation's rule is stricter than that in the regulations for reporting large cash transactions ($10,000). By prohibiting legal counsel from accepting cash, the rule addresses the risks associated with the handling and placement of cash and so provides an effective alternative to the reporting requirements that apply to other reporting entities under the federal anti-money laundering scheme. The role played by this rule was recognized by former Finance Minister Jim Flaherty in 2006 while speaking about amendments to the federal anti-money laundering legislation that excluded legal counsel from the suspicious and large cash transaction reporting obligations.

10. To ensure that legal counsel engage in appropriate client due diligence, the Federation adopted a model rule on client identification and verification, the Client ID Rule. The rule, which closely tracks the obligations contained in the federal client identification regulations, has been in force in all Canadian jurisdictions since 2008. Members of the legal profession must identify <u>all</u> clients who retain them to provide legal services by recording basic information such as the client's name, address and telephone number. In addition, when legal counsel provide legal services in respect of the receipt, payment or transfer of funds, they must verify their clients' identity by reference to independent source documents such as a driver's license, birth certificate, passport or other government-issued identification. The Client ID Rule respects the threshold between constitutional and unconstitutional requirements imposed on members of the legal profession when it comes to the gathering of information from clients: legal counsel must obtain and keep all information needed to serve the client, but must not obtain any

information which serves only to provide potential evidence against the client in a future investigation or prosecution by state authorities.

11. Together, the No Cash and Client ID rules accomplish three goals:

    a. the rules impose on lawyers and Quebec notaries a rigorous standard with respect to cash transactions and limit the ability of legal counsel to accept cash from clients;

    b. the rules address the activities of lawyers and Quebec notaries as financial intermediaries but form part of the extensive statutorily authorized regulatory regime for members of the legal profession through law societies rather than federal legislation; and

    c. the rules, as law society regulations, respect the constitutional principles upheld by the legal profession for the benefit of the public, protect the right of citizens to independent legal counsel, and ensure that counsel can continue to protect the client's privilege, which is a constitutionally recognized principle.

12. Legal counsel are also required to abide by comprehensive rules of professional conduct that include provisions prohibiting them from knowingly assisting in or encouraging any unlawful conduct, doing or omitting to do anything that assists in or encourages illegal conduct, or instructing a client or others on how to violate the law. The rules of professional conduct include specific guidance on the need for vigilance due to the risk that transactions for which lawyers and notaries may provide services, such as establishing, purchasing or selling business entities, and purchasing and selling real estate, present for fraud and money laundering. They also identify steps that legal counsel should take when they have any suspicions about the bona fides of any transaction including making reasonable inquiries to obtain information about the subject matter and objectives of the retainer and verifying the identity of the legal or beneficial owners of property and business entities.

13. In addition, extensive trust accounting regulations impose specific requirements on lawyers and Quebec notaries in relation to handling client monies. These regulations address both deposits and withdrawals of client monies and include detailed record-keeping and reporting obligations.

14. Measures to ensure that legal counsel maintain appropriate practice management systems and comply with law society regulations include annual reporting obligations, practice reviews and financial audits. Law societies also have extensive investigatory and disciplinary powers that include the ability to impose penalties up to and including disbarment (revocation of license) when members fail to abide by law society rules and regulations. Lawyers and Quebec notaries are, of course, also bound by the criminal law and those who wittingly participate in criminal activity are subject to criminal charges and sanctions.

15. In the submission of the Federation, any actual or perceived gap in the legislative scheme as a result of the exclusion of members of the legal profession from the provisions of the Act has been filled by these regulatory initiatives.

16. However, the Federation also recognizes that it is important to ensure that regulations aimed at mitigating the risk of legal counsel engaging in illegal activities are as robust and effective as possible. To that end the Federation established a special working group to review the model rules and to consider whether additional regulatory action is required. In the first phase of its work, the group has proposed draft amendments to the rules that clarify some of the provisions and add additional obligations including a requirement for legal counsel to obtain and verify the identity of the beneficiaries of trusts and the beneficial owners of organizations as well as requirements for ongoing monitoring of the professional relationship and the activities of clients. Also proposed is a new model rule (modeled on a rule that several law societies have implemented) that would tie the use of trust accounts to the provision of legal services thus ensuring that lawyer trust accounts cannot be used for purely financial transactions. A consultation on the proposed amendments and new rule ended on March 15, 2018. The working group is now considering the feedback it received and will also be reviewing the various recommendations contained in the Department of Finance Consultation Paper. It is expected that final amendments to the rules will be approved by the Federation and implemented by the law societies later this year.

17. The Federation's working group also has undertaken a review of law society compliance and enforcement activities and is now preparing guidance on best practices to assist law societies in ensuring that their activities in these areas are as effective as possible. The working group will also be preparing comprehensive guidance and educational materials for the legal profession to assist members in understanding the money laundering and terrorism financing risks they may encounter in their professional activities and their associated legal, regulatory and ethical obligations.

Beneficial ownership

18. As the Consultation Paper notes, Canada has been criticized by the FATF and others for the lack of transparency on beneficial owners that exists in this country. The Consultation Paper recognizes that access to accurate beneficial ownership information "is vital to combatting illicit financial flows including money laundering, terrorist financing and tax evasion." The Consultation Paper also acknowledges the lack of transparency on beneficial ownership, noting in particular the lack of any central registry.

19. The Federation notes that governments in many countries have recognized the threats posed by a lack of transparency on the beneficial owners of organizations and the beneficiaries of trusts. According to a 2016 report produced by Transparency International Canada[3] the G20, of which Canada is a member, has adopted principles on the transparency of beneficial ownership information and several member states (the UK, France, Australia and South Africa) have committed to setting up public registries of beneficial owners. The European Union has also adopted a requirement for its member countries to collect *and publish* beneficial ownership information. A July 2017 report published by the United States Library of Congress indicates that most countries surveyed have amended their legislation on beneficial ownership in response to either

[3] No Reason to Hide; Unmasking Anonymous Owners of Canadian Companies and Trusts, Transparency International Canada, http://www.transparencycanada.ca/wp-content/uploads/2017/05/TIC-BeneficialOwnershipReport-Interactive.pdf.

the G20 principles or the recommendations of the FATF. The report notes that Canada is one of only 2 G7 countries not to have taken legislative action. [4]

20. We recognize that the government indicated in its recent budget that it plans to introduce legislative amendments to enhance the availability of beneficial ownership information at the federal level. The Consultation Paper describes efforts to "provide clear, standardized direction to corporations as to what information they should record and maintain in terms of their beneficial ownership" as "a critical first step toward improved corporate transparency." But the Consultation Paper stops short of recommending the creation of publicly accessible registries of beneficial owners and appears to suggest there is a need for a public debate on whether beneficial ownership information should be publicly available.

21. In our submission, in light of the identified risk that a lack of transparency creates, it is essential that beneficial ownership information be available in publicly accessible registries. Simply requiring corporations to provide the information to a government agency would be insufficient. As noted above, proposed amendments to the Federation's model rules would add a requirement for legal counsel to obtain and verify information on the beneficial owners of organizations and the beneficiaries of trusts. The proposed amendments reflect the Federation's recognition of the value of capturing this information. It is important to note, however, that the effectiveness of such a rule, which would mirror requirements in federal regulations, will be undermined by the lack of publicly available information on beneficial owners. In the absence of publicly accessible registries of beneficial owners, it simply may not be possible to impose an absolute requirement to verify beneficial ownership information.

22. The Federation recognizes that responsibility for this issue is shared by the federal, provincial and territorial governments, but this jurisdictional complexity ought not to stand in the way of legislative reform. Indeed we note that in its recent budget the government of British Columbia announced plans to track beneficial ownership information of property, organizations and trusts. The Federation supports these plans and urges the federal government to move forward promptly with legislative initiatives that include the creation of a publicly accessible registry of beneficial owners and to continue to work with the provincial and territorial governments toward similar amendments to the legislation in their respective jurisdictions.

Conclusion

23. For most of the past decade the dialogue about efforts to address the risks of involvement by legal counsel in money laundering and terrorism financing activities has been focused on the government's attempts to include legal counsel in the scope of the federal regulatory regime. Since the 2015 decision of the Supreme Court, the focus has been on concerns about the continued exclusion of the legal profession from the federal framework and suggestions that renewed efforts would be made to bring lawyers and Quebec notaries within the reach of the federal regulations. This focus is reflected in the Consultation Paper in which the Department of Finance states that it "continues to

[4] Disclosure of Beneficial Ownership in Selected Countries, July 2017, Library of Congress, https://www.loc.gov/law/help/beneficial-ownership/disclosure-beneficial-ownership.pdf.

believe that the application of the rules to the legal profession is important to maintain the integrity of Canada's AML/ATF framework" and reiterates its "intention to develop constitutionally compliant legislative and regulatory provisions that would subject legal counsel and legal firms to the [Act]."

24. In the submission of the Federation, this dialogue fails to acknowledge the very meaningful role that the regulators of the legal profession are playing in the fight against money laundering and terrorism financing as they fulfill their regulatory mandates. In our view it is time to change the nature of the dialogue and to find a way to work together that recognizes the shared goals of the regulators and the government while respecting the constitutional framework within which we operate. We look forward to engaging with the government on this important issue.

Anti-Money Laundering and Terrorist Financing Working Group

Risk Advisories for the Legal Profession

Advisories to Address the Risks of Money Laundering and Terrorist Financing

December 2019

Appendix J

About These Risk Advisories

The nature of legal practice makes it vulnerable to targeting by criminals seeking to launder the proceeds of crime or facilitate the financing of terrorist activities. Canadian legal professionals assist clients with the purchase and sale of real estate, the creation of corporations and trusts, and the acquisition and sale of businesses. They act as intermediaries for a wide range of financial transactions. Millions of dollars in client funds flow through lawyer trust accounts every year.

Criminals seek out legal professionals because their services may be required to complete certain transactions and to access specialised legal and notarial skills and services which could assist the laundering of the proceeds of crime and the funding of terrorism. The involvement of legal professionals can also lend an air of respectability to transactions undertaken by criminals seeking to convert the proceeds of crime into “clean” money.

Members of the legal profession in Canada are subject to a number of rules and regulations designed to mitigate the risks of becoming involved in money laundering and terrorism financing. These include requirements to identify and verify the identity of clients and third parties, manage risks, and understand the client’s financial dealings in relation to the retainer. Lawyers and Quebec notaries also must comply with rules that limit how much cash they may receive, and restrict the use of trust accounts. Members of the legal profession are also prohibited from assisting with or facilitating illegal conduct and have a positive duty to withdraw if continuing to act for a client would breach this rule.

To address the money laundering and terrorism financing vulnerabilities they may face legal professionals need to be aware of the risks that may be inherent in legal practice. Some risks may be related to the clients and their activities; others may arise from the nature or circumstances of a transaction. Some risks may be more likely to arise in specific practice areas, others may arise regardless of the area of practice.

The following advisories address risks arising in five areas: real estate, trusts, private lending, shell corporations, and litigation. They are intended to highlight specific client and transaction risks. While not exhaustive, the lists of risks will assist legal counsel in recognizing situations where additional due diligence may be required. The advisories also remind lawyers and Quebec notaries of the need to be satisfied, on an objective basis, that the transaction or other activity for which a client is seeking assistance is legitimate before acting or continuing to act on the matter.

AML Risk Advisory: Real Estate

When does this risk advisory apply?

Real estate is a popular vehicle for those engaged in fraud and money laundering. It is generally an appreciating asset and its sale can lend legitimacy to the appearance of funds.

Consequently, the purchase of real estate is a common outlet for criminal proceeds. Fraudsters and other criminals often go to great lengths to ensure that real estate transactions used to launder funds look legitimate, masking the true intent of the transaction, which could be a purchase, sale or refinancing.

Given the significant role members of the legal profession play in real estate transactions, to avoid assisting or furthering illegal activity, they must be aware of the risks associated with providing legal services in this area. Where there are suspicious circumstances, a legal professional must be satisfied on an objective basis that the transaction is legitimate, prior to acting or continuing to act.

Fraud in real estate generally occurs as:

- Fraud for shelter - to obtain a property for legitimate purposes, but by misrepresenting facts to obtain financing or to mask the identity of the beneficial owner.
- Fraud for profit – to acquiring large sums of money from different parties including a registered owner, a mortgagee or a bona fide purchaser by fraudulent means.

The proceeds of real estate fraud are the proceeds of crime. Laundering of the funds occurs when they are provided for the transaction, often flowing through the trust account of a lawyer or notary, and are disbursed at the direction of the fraudster.

Criminals will also attempt to use funds earned from other illicit activities to purchase and eventually sell real property, converting the illicit funds into legitimate funds. They may also use the property to house illegal activity, or as a vehicle to launder additional funds.

What are risk factors?

While the indicators of fraud and indicators of money laundering activity often overlap, it is important to be aware of the risks of both and develop mitigation strategies. Many of the common risks are identified in the table below, but these lists are not exhaustive. While it is not possible to completely eliminate all of the risks, lawyers and Quebec notaries must conduct proper due diligence. This involves taking into consideration the indicators of fraud and money laundering and relying on prior experience in these types of transactions. Even if not handling the money, a legal professional engaged on a transaction will be aware of the financial details and in many cases will be in a position to ask further questions about the transaction. If satisfied that a transaction is legitimate, lawyers and notaries must comply with all requirements to properly identify and verify the identity of clients, record this information and ensure proper accounting for the transactions.

Client Risks (Real Estate)	Real Estate Fraud	Money Laundering
The company or individual has no e-mail address, physical address, home or business telephone number (disconnected or fake), company logo, contact person.	X	X
The client uses a post office box or general delivery address where other options are available.	X	X
A party to the transaction is a foreign buyer, either an individual or company, notable especially if on a watch list, whose only connection to Canada is the real estate transaction.		X
The client refuses to provide their own name on documents, or uses different names on offers to purchase, closing documents and deposit receipts.	X	X
The legal advisor experiences difficulty obtaining necessary, reliable information to identify the client and verify the client's identity.	X	X
The client insists on choosing the agent where an agent is being used to verify identity.	X	X
The client changes instructions regarding amounts or payees just before closing, or fails to bring in funds as promised.	X	
The client does not care about the property, price, mortgage interest rate, legal and/or brokerage fees, and offers to pay higher than usual legal fees for the legal services for the transaction.	X	X
The client does not appear familiar with property.	X	
The client will not permit contact with a prior legal counsel.	X	
The client is "out of sync" with the property (e.g. occupation, personal wealth, level of sophistication).	X	X
A stranger who appears to control the client attends to sign documents.	X	X
One spouse or business partner is mortgaging equity in a property owned by both.	X	
The client buys and sells often, preferring to deal in cash.	X	
The client contact is only or primarily by email.	X	X
The client has owned vacant, disused or run-down properties for a long time, without activity on title or visible use of land.	X	
Corporate client officers and directors were appointed very recently.	X	
The company purchasing real estate has a complex ownership structure.		X
The head office of a corporate client is or has been recently changed to a non-existent address or one that is highly unusual or lacks credible explanation.	X	X
The client pushes for a fast closing.	X	
The client who has been named in the media as being involved with criminal organizations is purchasing a residential property.	X	X

Transaction Risks

(Real Estate)

	Real Estate Fraud	Money Laundering
The same legal advisor is acting for all parties, except legitimate vendor.	X	
Funds are directed to parties with no apparent connection to the borrower or the property.	X	X
Repeat activity occurs on a single property or for a single client. The title shows one or more recent transfers, mortgages, or discharges.	X	X
Frequent and quick mortgage discharges occur on the property.	X	
The transaction location is distant from the lawyer's office.	X	X
A buyer of income-generating property has no concern for generating profit by filling vacancies or by adjusting rent/lease rates.		X
The client produces a small deposit relative to price, or pays little or nothing from their own funds.	X	
The sale is presented as a "private agreement" – no agent is involved, or the named agent has no knowledge of the transaction.	X	X
The municipality or utility companies have no knowledge of the client's ownership.	X	
Unusual adjustments are made in favour of the vendor; the transaction involves a large vendor take-back mortgage or an existing mortgage on a purchased property is assumed by another individual without involvement of a financial institution.	X	X
Payments from the client are received by way of counter cheques, bank drafts and/or cash.	X	X
The transaction involves purchase of personal use property through a business.		X
Transactions involve a Power of Attorney or are carried out on behalf of minors, incapacitated persons or others who may not have sufficient economic capacity.	X	X
Behaviour or transactions are unusual compared to other similar clients (e.g. high levels of assets, volume of transactions, nature of business activity).	X	X
The transaction involves legal entities, when there does not seem to be any relationship between the transaction and the activity carried out by the buying company, or when the company has no business activity.		X
Last-minute transfers contemplating "Trustee" arrangements such as "Trustee to beneficial owner" are made at NIL consideration followed immediately by the registration of a mortgage and the advance of mortgage proceeds.	X	
An accelerated repayment of a loan/mortgage occurs shortly after the deal is completed even if penalties are incurred.		X
Transactions are not completed in seeming disregard of a contract clause penalizing the buyer with loss of the deposit if the sale does not go ahead.		X
The client makes a deposit for a house, reneges on the deal shortly thereafter, then obtains a legitimate cheque from the legal advisor for the value of the deposit.non-existent address or one that is highly unusual or lacks credible explanation.		X

AML Risk Advisory: Shell Corporations

When does this risk advisory apply?

Lawyers and Quebec notaries must be alert to the risks of becoming involved with a client engaged in criminal activity such as money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services.

Criminals are increasingly turning to shell companies to facilitate money laundering. Anonymous shell companies allow criminals to hide their identities, conceal the origin and flow of money, hide the identities of true beneficiaries or enhance the perception of legitimacy. They are typically used during the "layering phase" of money laundering involving often complex financial transactions designed to hide the illegal source of funds.

Legal advisors must be aware of the risks when dealing with clients looking for assistance with products or transactions that would facilitate anonymity and allow beneficial owners to remain hidden without a reasonable explanation. While client identification and verification rules are essential to ensure that lawyers know their clients, it is imperative that lawyers and notaries also understand the facts relating to their retainers, particularly when a shell corporation is involved.

They must ask probing questions to ensure that they understand the subject-matter and objectives of their retainers, including:

i) whether there is a legitimate business or legal reason for using a particular corporate structure;

ii) who are the legal and beneficial owners of the property and business entities;

iii) who has control of the business entities; and

iv) where it is unclear, what is the nature and purpose of complex or unusual transactions.

Legal advisors must be satisfied on an objective basis that every transaction is legitimate, prior to acting or continuing to act.

What are risk factors?

To address the risks, lawyers and Quebec notaries should be on the lookout for suspicious circumstances, including the following when setting up or representing shell corporations:

Description of Risk (Shell Corporations)	Client Risks	Transaction Risks
The retainer involves a non-face-to-face transaction where the legal advisor has not previously met the client seeking to establish a shell corporation or the agent of the corporation in person.	X	
The client or corporation's reasons for selecting the lawyer are unclear given the lawyer's geographic location or practice area.	X	
The lawyer is not asked to provide any legal services other than assisting with the creation of the shell corporation.	X	
The corporation is transacting with a party that has a suspected or known history of drug trafficking, money laundering, actions resulting in civil forfeiture, loansharking, fraud, high-stakes gambling or similar activity.	X	
The lawyer experiences difficulty obtaining necessary, reliable information to identify an agent of the corporation or verify the agent's identity.	X	
Insufficient information is provided by the client to identify the beneficial owners of the corporation.	X	
Third parties or intermediaries are involved, including in providing instructions.	X	
The corporation has been refused counsel or changed counsel recently or several times without apparent good reason.	X	
The corporation has no or nominal assets, or assets consisting solely of cash and cash equivalents.	X	
The corporation was incorporated in a jurisdiction that might enable anonymity.	X	
The corporation's financial transactions occur in a jurisdiction that minimizes transparency or provides an environment more amenable to money laundering.	X	
Gaps or red flags in the corporation's online presence are evident. One spouse or business partner is mortgaging equity in a property owned by both.	X	
Inconsistent information exists relating to the corporation; e.g. a corporation doing business in one jurisdiction has an address and contact information in one or more other jurisdictions.	X	
The lawyer encounters contact concealment, e.g. a generic email address, no physical address, etc.	X	
The client offers to pay an unusually high fee for the legal services.	X	
The lawyer is not asked to provide any substantial legal services in connection with the transaction.		X
The lawyer cannot obtain information necessary to identify the originator or beneficiary of a transaction.		X
The corporation's transactions appear inconsistent with the corporation's or the other party's profile/circumstances (e.g. age, income, geographic location or occupation).		X

Description of Risk (Shell Corporations)	Client Risks	Transaction Risks
The corporation transacts through a foreign bank and exceeds the anticipated volume projected in its client profile for wire transfers in a given time period, or the corporation exhibits a high level of sporadic activity that is inconsistent with normal business patterns.		X
A corporation makes payments that have no stated purpose, do not reference goods or services, or identify only a contract or invoice number.		X
The goods or services of the company do not match the company's profile based on information provided by the client.		X
The corporation transacts with businesses sharing the same address.		X
The client's business discloses the frequent involvement of beneficiaries located in high-risk, offshore financial centers.		X
Multiple high-value payments or transfers are made or instructed between shell companies with no apparent legitimate business purpose.		X
The client attempts cash transactions with an inability to explain the source of funds/wealth.		X
The client uses partial signatures on contracts and/or invoices		X
The lawyer is retained to complete a transaction after funds have already been advanced or after a loan agreement or a security agreement has been signed.		X
Transaction documents are unusual or inconsistent with the client's explanation of the transaction.		X
The corporation transacts from an offshore jurisdiction that is known to be secretive or restrictive.		X

AML Risk Advisory: Private Lending

When does this risk advisory apply?

Criminals may attempt to use private lending transactions to launder the proceeds of crime, and may engage the services of lawyers for the transactions.

Members of the legal profession must know their clients and properly understand the facts relevant to their retainers. Where there are suspicious circumstances, a legal professional must be satisfied on an objective basis that the transaction is legitimate, prior to acting or continuing to act.

All lawyers and Quebec notaries should be alert to and appropriately consider risk factors associated with illegal activity when retained to do any of the following:

- Drafting, reviewing or advising on a loan agreement, promissory note, guarantee, mortgage, security agreement or other loan documents;
- Registering a security agreement for a private loan; or
- Taking any steps to assist with the advance or recovery of funds related to a private loan.

What are risk factors?

In addressing the risks, legal counsel should be on the lookout for suspicious circumstances, including the following for private lending transactions:

Description of Risk	Client Risks	Transaction Risks
The retainer involves a non-face-to-face transaction where the legal advisor has not previously met the client in-person.	X	
The client's reasons for selecting the lawyer or Quebec notary are unclear given the geographic location or practice area.	X	
A party to the transaction (or a family member or close associate) has an alleged or known history of drug trafficking, money laundering, civil forfeiture, loansharking, fraud, high-stakes gambling or similar activity.	X	
The lawyer or notary experiences difficulty obtaining necessary, reliable information to identify the client and verify the client's identity. Conversely, the client appears unusually familiar with client identification and verification requirements.	X	
The transactions Involves third parties or intermediaries, including in providing instructions.	X	

Description of Risk (Private Lending)	Client Risks	Transaction Risks
The client has been refused counsel or changed counsel recently or several times without apparent good reason.	X	
The client offers to pay an unusually high fee for the services.	X	
The client's instructions change unexpectedly and for no logical reason.	X	
There is no clear or plausible reason for the borrower not borrowing from a commercial lender.		X
The loan seems inconsistent with the client's or the other party's profile/ circumstances (e.g. age, income, geographic location or occupation).		X
The lawyer or notary is not asked to provide any substantial legal services in connection with the transaction.		X
Funds are exchanged between the parties in cash but the parties are unable to explain the source of funds/wealth.		X
The borrower named in the loan documents is not the actual recipient of the funds.		X
There is no security registered for the loan, without explanation, or the security is a subsequent mortgage or charge on a fully or near-fully encumbered property.		X
The actual or agreed-to repayment period is unusually short.		X
The legal professional is retained after the funds have already been advanced or after the loan agreement or security agreements have been signed.		X
The loan documents are unusual or inconsistent with the client's explanation of the transaction.		X
The interest rate exceeds the criminal rate or is substantially above/below market rates.		X
The funds are received from or paid out to an offshore jurisdiction that is known to be secretive or restrictive.		X
The entity providing the loan proceeds (or receiving the loan payout) is not the party named in the loan documentation and the relationship between the entity and the named party is not apparent.		X

AML Risk Advisory: Trusts

When does this risk advisory apply?

While there are many legitimate uses of trusts for matters such as estate planning and asset management, members of the legal profession must be on guard against clients who wish to use such instruments for an improper or fraudulent purpose. Some criminals see trusts as potentially useful vehicles to hide the origin and ownership of assets.

Disguising the real owners and parties to a transaction is a necessary requirement for money laundering to be successful, and although there may be legitimate reasons for hiding ownership, it should be considered a red flag.

The use of trusts to purchase real property poses an increased risk that the trust will be used to obscure ownership and launder the proceeds of crime. Legal counsel who are asked to become involved in the management of a trust should be extremely wary, as this is a technique used by criminals to provide respectability and legitimacy to their activities.

Lawyers and Quebec notaries must strictly comply with client identification rules including the requirement to know their client and the source of the client's funds, and to understand the nature and scope of the retainer. Legal counsel must be satisfied on an objective basis that every transaction is legitimate, prior to acting or continuing to act.

What are risk factors?

To address the risks, lawyers should be on the lookout for suspicious circumstances, including the following when asked to create or be involved in the management of trusts:

Description of Risk	Client Risks	Transaction Risks
The retainer involves a non-face-to-face transaction where the legal advisor has not previously met the client in-person.	X	
The client's reasons for selecting the legal advisor are unclear given the geographic location or practice area.	X	
The client offers to pay an unusually high fee for the services or to provide a substantial retainer that is excessive considering the scope of the retainer.	X	
The client or a party in the matter (or a family member or close associate) has a suspected or known history of drug trafficking, money laundering, actions resulting in civil forfeiture, loansharking, fraud, high-stakes gambling or similar activity.	X	
The legal advisor experiences difficulty obtaining necessary, reliable information to identify the client and verify the client's identity, or the client appears unusually familiar with the client identification and verification requirements.	X	

Description of Risk (Trusts)	Client Risks	Transaction Risks
Third parties or intermediaries are involved, including in providing instructions, without good reason.	X	
The client has been refused counsel or changed counsel recently or several times without apparent good reason.	X	
A complicated ownership structure is created when there is no legitimate or economic reason for it.		X
There is no sensible reason for the transaction.		X
The client changes instructions without explanation, especially at the last minute.		X
The legal advisor is not asked to provide any substantial legal services in connection with the transaction.		X
The proposed retainer relates to keeping documents or other goods, holding large deposits of money or otherwise using the trust account of the lawyer or notary without the provision of legal services.		X
An existing trust agreement contains minimal details regarding the arrangement or is poorly drafted.		X
Beneficiaries are difficult to identify; beneficiaries are minors.		X
The relationship between individual people named in the trust agreement suggests that there may be no legitimate purpose to the transaction.		X
The transfer of funds is not consistent with the known legitimate income of the client.		X
The client is evasive about the source of funds for the trust.		X

AML Risk Advisory: Litigation

When does this risk advisory apply?

To avoid assisting or furthering illegal activity, lawyers must be aware of the risks associated with providing certain types of legal services. Litigation, particularly debt recovery actions, may pose risks. Criminals may attempt to launder proceeds of crime by filing and recovering on civil claims. This could, for example, involve using fabricated documents to misrepresent transactions or claim an interest in property. A lawyer should not assist a client in enforcing a contract that may be based on criminal activity.

Lawyers must know their clients and properly understand the facts relevant to their retainers. Where there are suspicious circumstances, a lawyer must be satisfied on an objective basis that the transaction is legitimate, prior to acting or continuing to act.

Lawyers should be alert to and appropriately consider risk factors when retained to assist with the recovery of funds including:

- a private loan (secured or unsecured);
- a builder's lien claim;
- a claim for recovery of capital investment;
- a claim for defective goods, including intellectual property; or
- a claim for unpaid commercial invoices.

What are risk factors?

In addressing the risks, legal counsel should be on the lookout for suspicious circumstances, including the following for private lending transactions:

Description of Risk	Client Risks	Transaction Risks
The retainer involves a non-face-to-face transaction where the legal advisor has not previously met the client in-person.	X	
The client's reasons for selecting the lawyer or Quebec notary are unclear given the geographic location or practice area.	X	
The client or a party in the matter (or a family member or close associate) has a suspected or known history of drug trafficking, money laundering, actions resulting in civil forfeiture, loansharking, fraud, high-stakes gambling or similar activity.	X	
The lawyer experiences difficulty obtaining necessary, reliable information to identify the client and verify the client's identity. Conversely, the client appears unusually familiar with client identification and verification requirements.identification and verification requirements.	X	

Description of Risk (Litigation)	Client Risks	Transaction Risks
The transactions involve third parties or intermediaries, including in providing instructions.	X	
The client has been refused counsel or changed counsel recently or several times without apparent good reason.	X	
The client offers to pay an unusually high fee for the services or to provide a substantial retainer that is excessive considering the scope of the retainer.	X	
Client instructions change unexpectedly and for no logical reason.	X	
The claim settles quickly with little or no work being done by the lawyer. The defendant does not contest the claim, resulting in default judgment with the claim paid immediately.		X
The debt relates to a contract based on criminal activity.		X
The claim seems inconsistent with the client's or the other party's profile/ circumstances (e.g. age, income, geographic location or occupation).		X
The claim asserts that funds were exchanged between the parties but the client is unable to satisfactorily explain the source of funds/wealth..		X
The claim is against an individual/entity that is not the actual recipient of the funds in question.		X
The documents supporting the claim are unusual or inconsistent with the client's explanation of the transaction or with other documents.		X
No security is registered for the loan, without explanation, or the security is a subsequent mortgage or charge on a fully or near-fully encumbered property.		X
The actual or agreed-to repayment period for the debt is unusually short.		X
The interest rate for the loan exceeds the criminal rate or is substantially above/below market rates.		X
The funds to settle the claim are received from or paid out to a third party whose relationship to the parties is unknown, or to an offshore jurisdiction that is known to be secretive or restrictive.		X

Anti-Money Laundering and Terrorist Financing Working Group

Guidance for the Legal Profession

Your Professional Responsibility to Avoid Facilitating or Participating in Money Laundering and Terrorist Financing

February 19, 2019

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Chapter 1: About This Guidance

Money laundering and terrorist financing, both offences under the *Criminal Code,* are on the rise in Canada. Because of the risks posed by money laundering and terrorist financing, Canada has adopted a comprehensive federal legislative regime to prevent these crimes through the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("PCMLTFA") requiring designated individuals and institutions to collect and report to a federal government agency[1] information about financial transactions of their clients, including large cash and suspicious financial transactions. Money laundering and terrorist financing affect us all, and the Canadian government makes serious efforts to prevent and prosecute these criminal acts.

Like all people in Canada, legal professionals[2] are subject to the *Criminal Code,* but they are exempted from the federal legislative regime under the PCMLTFA due to constitutional principles that protect the rights of clients and the obligations of legal professionals within their confidential relationships. The PCMLTFA was originally applicable to lawyers and Quebec notaries; this led to litigation launched by the Federation of Law Societies of Canada (the "Federation") and the Law Society of British Columbia, supported by the Canadian Bar Association, challenging the constitutionality of the legislation. The Supreme Court of Canada subsequently recognized that the provisions in the legislation requiring legal counsel to collect and retain information about their clients and their financial transactions and provide that information to government on demand, with expansive government powers to search law offices, provided inadequate protection for solicitor-client privilege and violated the *Canadian Charter of Rights and Freedoms.*[3] However, the legal profession must comply with significant, corresponding obligations to ensure they are not facilitating money-laundering and terrorist financing. These obligations are imposed on legal professionals through the regulatory regimes of Canadian law societies.

Lawyers, Quebec notaries, and paralegals in Ontario are obligated, amongst other duties, to identify and verify the identity of clients, to comply with limits on the amount of cash they may accept, to ensure that trust accounts are used only for the direct purpose of providing legal services, and to withdraw from representing a client if they know, or ought to know, that they would be assisting in criminal activity if they continue the representation. In this sense, the responsibilities of legal professionals go beyond the reporting and other duties of other professions and institutions in Canada under the PCMLTFA.

This Guidance, prepared by the Federation on behalf of all Canadian law societies, describes the responsibilities of Canada's legal professions to ensure they are not facilitating money laundering and terrorist financing. It describes the context for money laundering and terrorist financing in Canada and the sources of the responsibilities to avoid it. The detailed Guidance, which includes red flags and real-life examples, sets out the components of the legal professional's duties as contained in updated Model Rules approved on October 19, 2018 by the Federation, for adoption by all Canadian law societies. Additional resources appear at the end of the Guidance, and it is anticipated that over time, more will be added to this section for the benefit of legal professionals.

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[1] The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC)

[2] In this Guidance, the term "legal professionals" includes lawyers, Quebec notaries and licensed paralegals in Ontario.

[3] *Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015] 1 SCR 401, 2015 SCC 7 (CanLII).

Avoiding participation in money laundering and terrorist financing is rooted in knowing your client: their identity, their financial dealings in relation to your retainer, and any risks arising from your professional business relationship with them. When working with corporate clients, knowing your client means taking additional steps to ascertain ownership and control of the corporation, and routinely assessing the accuracy of your knowledge about them. Not facilitating money laundering and terrorist financing also means refusing to accept, except in limited circumstances, more than $7,500 in cash from clients or prospective clients. Finally, the fight against money laundering and terrorist financing requires you to be vigilant and exercise judgment about the use of your trust accounts, pursuant to established parameters.

Law societies take their mandate to regulate the legal profession in the public interest seriously. The rules and regulations implemented by provincial and territorial law societies, based on the Federation's Model Rules, exist to address the conduct of legal professionals, and to prevent them from unwitting involvement in money laundering or terrorist financing. Legal professionals are also required to abide by comprehensive rules of professional conduct that include provisions prohibiting them from knowingly assisting in or encouraging any unlawful conduct. Measures to ensure that legal professionals maintain appropriate practice management systems and comply with law society regulations include annual reporting obligations, practice reviews and financial audits. Law societies also have extensive investigatory and disciplinary powers that include the ability to impose penalties up to and including disbarment when members fail to abide by law society rules and regulations. Lawyers, Ontario paralegals, and Quebec notaries who wittingly participate in criminal activity are, of course, subject to criminal charges and sanctions.

While this Guidance discusses the legal profession's vulnerabilities related to money laundering and terrorist financing, these same vulnerabilities could lead to the profession's unwitting participation in other types of fraud or crime. It is important to understand that the duties and responsibilities contained in the Model Rules reflect the unique position of legal professionals in helping the public with their legal needs and in ensuring compliance with the law. By adhering to these fundamental principles, the legal profession helps to prevent all crime, and to maintain public trust in the justice system. Similarly, the Model Rules protect the right of citizens to independent legal counsel, and ensure that counsel can continue to protect the client's privilege.

Chapter 2: Understanding The Problem

Money laundering and the financing of terrorist activities affect us all. When criminals launder their illicit funds through the purchase and sale of properties, it can inflate the selling prices, making it unaffordable for community members to purchase homes. When criminals launder their dirty funds through front companies and sell products at significantly lower prices, legitimate businesses may be unable to compete. When large amounts of criminal proceeds are invested into our economy, currency exchange and interest rates can become volatile. The consequences of money laundering and terrorist financing are vast and significant – it is incumbent on each of us to prevent these criminal offences.

Legal professionals are perceived as "gatekeepers" within money laundering and terrorist financing systems because of our unique role in facilitating financial transactions. Specifically, legal professionals may be used to:

- give an appearance of legitimacy to a criminal transaction;
- facilitate money laundering through the creation of a company or trust, and/or the purchase and sale of property; and
- eliminate the trail of funds back to a criminal through the use of a professional trust account.[4]

Because of the role they play in facilitating transactions, and the fact that communications for the purpose of obtaining legal advice are protected by solicitor-client privilege, legal professionals may be targeted by criminals. Legal professionals should thus be able to determine the potential money laundering or terrorist financing risks posed by a client, as well as the risks presented by the context of their services. Without such risk-based awareness, legal professionals may find themselves participating in criminal activity, whether knowingly, recklessly, or unintentionally.

What is Money Laundering?

The Financial Action Task Force ("FATF"), an international, intra-governmental body combatting money laundering and terrorist financing, defines money laundering as the processing of criminal proceeds to disguise their illegal origin.[5] The Criminal Code similarly defines money laundering as the transfer, use, or delivery of property or proceeds with the intent to conceal or convert the property or proceeds, knowing that they were derived from criminal activity.[6]

Criminal proceeds are typically laundered through a three-stage process: placement, layering, and integration. In the placement stage, the launderer introduces the illegal profits into the financial system (for example, by depositing cash with financial institutions changing currency at currency exchanges, or depositing funds into lawyers trust accounts). In the layering stage, the launderer

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4 The International Bar Association, the American Bar Association, and the Council of Bars and Law Societies of Europe, "A Lawyer's Guide to Detecting and Preventing Money Laundering," October 2014 at p. 24, available online: https://www.anti-moneylaundering.org/AboutAML.aspx#The Guide

5 Financial Action Task Force, "What is Money Laundering?" online: http://www.fatf-gafi.org/faq/moneylaundering/

6 Section 462.31(1) ("Laundering proceeds of crime"), *Criminal Code*, R.S.C. 1985, c. C-46.

engages in a series of transactions to distance the funds from their source (for example, by creating trusts or shell companies, buying securities, or buying real estate). Finally, in the integration stage, the launderer integrates the funds into the legitimate economy, i.e. by investment into real estate or business ventures.[7] Money launderers may try to involve lawyers at any of these stages.

The FATF notes that money-laundering proceeds can be generated through a wide range of illegal activity, including illegal arms sales, smuggling, embezzlement, insider trading, and computer fraud schemes.[8] In the Canadian context, a 2015 Department of Finance report identified 21 profit-oriented crimes associated with money-laundering.[9] Those identified as posing a very high threat of money laundering include capital markets fraud, drug trafficking, mortgage fraud, and tobacco smuggling and trafficking. A high threat rating was given to such crimes as currency counterfeiting, human trafficking, illegal gambling, and robbery and theft. Experts have noted that those involved in such crimes range from the "unsophisticated, criminally inclined individuals, including petty criminals and street gang members, to criminalized professionals and organized crime groups." [10]

What is Terrorist Financing?

The FATF does not specifically define the term "terrorist financing." Instead, they urge states to adopt the United Nations International Convention for the Suppression of the Financing of Terrorism (1999), which prohibits any person from providing or collecting funds in order to carry out an offence as defined in related United Nations treaties, or any other act intended to cause death or serious bodily injury, or to any other person not taking any active part in the hostilities in a situation of armed conflict, when the purpose of such act is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing an act.[11]

Sections 83.02-83.04 of the Criminal Code define the terrorism financing offences. Collectively they prohibit the provision, collection and use of property to facilitate or carry out any terrorist activity. [12] In a 2015 report, the Department of Finance indicated that terrorist financing activities in Canada may include the payment of travel expenses, the procurement of goods, transferring funds to international locations through banks and other financial entities and the smuggling of bulk cash across borders.[13]

The FATF notes that terrorist financing can be challenging to detect for legal professionals without guidance on relevant typologies or unless acting on specific intelligence provided by the relevant authorities.[14] Because of this, legal professionals should consider consulting the reports regularly published by Canada's Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) on terrorist financing trends and typologies.[15]

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7 What is Money Laundering? *supra* note 2.

8 *Ibid.*

9 Finance Canada, *Assessment of Inherent Risks of Money Laundering and Terrorist Financing in Canada, 2015* at p. 19, online: https://www.fin.gc.ca/pub/mltf-rpcfat/mltf-rpcfat-eng.pdf

10 *Ibid*, at p. 18.

11 International Convention for the Suppression of the Financing of Terrorism, as adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999, online: http://www.un.org/law/cod/finterr.htm

12 Section 83.01(1) ("definition of terrorist activity"), *Criminal Code*, R.S.C. 1985, c. C-46.

13 Supra note 5 at p. 27.

14 Financial Action Task Force, "Risk-Based Approach Guidance for Legal Professionals," 23 October 2008 at p. 42, available online: http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Legal%20professions.pdf

15 FINTRAC Typologies and Trends Reports, available online: http://www.fintrac-canafe.gc.ca/publications/typologies/1-eng.asp

Chapter 3: Identifying and Verifying the Identity of Clients

Background to the Client Identification and Verification Rule

When retained to provide legal services, you must acquire basic knowledge about your clients and their financial dealings. The Model Rule requirements may be fulfilled by you, or any partner, associate or employee at your firm.

Legal professionals must identify each client, with limited exemptions. Identification is the process of obtaining and recording basic information about the client. Identification requirements differ slightly depending on whether your client is an individual or an organization. If your client is acting for or representing a third party, identifying information about that third party also must be obtained.

Identification and verification are two separate but related concepts. When you engage in or give instructions in respect of receiving, paying or transferring funds on behalf of a client you must also verify your client's identity. Verification is the process of obtaining information to confirm that the client is who or what they say they are. This involves reviewing independent source document(s) or information and comparing it to the actual client. The identity of a third party on whose behalf the client is acting must also be verified. You must also determine the source of the funds being dealt with.

For clients that are corporations, societies, or unregistered organizations, you are required to verify the identity of the person who instructs you on behalf of the organization. You are also required to make reasonable efforts to obtain information about beneficial owners – persons who own, directly or indirectly, 25% or more of the organization. In the event you are unable to do so, the Model Rule asks you to exercise diligence in determining and assessing potential risks associated with those clients.

Overall, the client identification and verification requirements, as stated in section 2 of the Model Rule, are part of your obligation to know your client, and ensure that you understand the intent and purpose of the legal services for which you have been retained. Reference should be made to Model Code of Professional Conduct Rules 3.1-2 (Competence), 3.2-1 (Quality of Service), 3.2-7 (Dishonesty, Fraud by Client or Others), and 3.2-8 (Dishonesty, Fraud when Client an Organization) including their respective commentaries, which elaborate on the standards expected of legal professionals in relationships with clients. The competent legal professional, as defined in Rule 3.1-1 is one who, amongst other things, investigates facts, identifies issues, ascertains client objectives, considers possible options, and develops and advises the client on appropriate courses of action. A legal professional's obligation to provide the requisite quality of service mirrors competent service - this includes communicating effectively with the client and ensuring, where appropriate, that all instructions are in writing or confirmed in writing.

Model Code Rule 3.2-7 and section 11(1) of the Client Identification and Verification Model Rule prohibit legal professionals from knowingly assisting in any illegal conduct or doing or omitting to do anything the legal professional knows or ought to know will assist with a crime. The prohibition means being vigilant when engaged in services involving financial transactions. When suspicions or doubts arise about whether the activities of a legal professional might be assisting in crime or fraud, the obligation is to make reasonable inquiries to obtain information about the subject matter and

objectives of the retainer and record it, and to consider whether withdrawal is required. By complying with the Model Rule and the Model Code, you will provide the appropriate services to clients, managing both their expectations and your duties, in a responsible and professional way. [16]

Guidance to the Client Identification and Verification Rule

Exemptions

Not all client relationships are captured by the Model Rule. For example, if you only provide legal services to your employer as in-house or corporate counsel, you are exempt from the requirements to identify the client and to verify the client's identity. Similarly, if you provide legal services through a duty counsel program you are exempted from the verification requirements, except when engaging in, or giving instructions in respect of, the receiving, paying, or transferring of funds. You also are exempted if you are engaged to act as an agent by another legal professional, or when another legal professional has referred a matter to you, provided the other legal professional has complied with the identification and verification requirements.

Other exemptions apply when the funds are from certain sources. The Model Rule does not apply to funds received by a legal professional when those funds are:

- from the trust account of anther legal professional;
- paid or received to pay a fine, penalty or bail or for professional fees; disbursements and expenses;
- paid by or to a financial institution, public body, or reporting issuer; or
- an electronic transfer of funds (EFT).

The Model Rule's definition of "electronic funds transfer" specifies that only EFTs conducted by and received at financial institutions headquartered and operating in a country that is a member of the FATF is covered by the exemption. Further, neither the sending nor receiving account holders may handle or transfer the funds. The Model Rule requires that the EFT transmission records contain a reference number, the date, transfer amount, currency, and the names of the sending and receiving account holders and the financial institutions conducting and receiving the EFT. This exemption will likely be subject to future review, as current developments or changes in the financial landscape may warrant a change in this approach.

The previous version of the Model Rule had exemptions for funds paid pursuant to a court order and paid or received pursuant to the settlement of any legal or administrative proceedings. Those exemptions have been removed. In the common situation, the funds in these circumstances are paid from one party to another and to the extent the funds flow through the legal professional's trust account, there is a risk that these types of payments could be in aid of schemes to launder money. To the extent that funds are paid into court as seized funds under forfeiture legislation and then released by the court pursuant to judicial order, it is suggested that these funds would fall under the exemption relating to a law enforcement agency or other public official acting in their official capacity.

[16] This portion of the Guidance is informed by guidance published by FINTRAC, found at: http://www.fintrac-canafe.gc.ca/guidance-directives/1-eng.asp

Identification Requirements

You must identify all clients regardless of the nature of the legal services you are providing, subject to limited exemptions. You are not required to identify your client when providing services to your employer as in-house counsel, when acting as an agent for another legal professional, or when providing legal services to a client referred by another legal professional who has already identified the client. The identification requirements also do not apply when you are acting as duty counsel.

Identifying Individuals

When retained by an individual, you must identify the client and record the client's full name, home address and home telephone number, occupation(s), and the address and telephone number of the client's place of work or employment.

Identifying Organizations

When retained by an organization, you must identify it by recording its name, business address and business telephone number, incorporation or business incorporation number, the general nature of its type of business or, and the name, position, and contact information of the individual who is authorized to give you instructions on behalf of the organization with respect to the matter for which you are retained.

Clients Acting For, or Representing, Third Parties

In some circumstances, you may be retained by a client who is acting for, or representing, a third party. In such cases, you must identify the third party, whether it is an individual or an organization.

A third party is a person or organization who instructs another person or organization to conduct an activity or financial transaction on their behalf. When determining whether a third party is giving instructions, it is not about who owns or benefits from the funds, or who is carrying out the transaction or activity, but rather about who gives the instructions to handle the funds or conduct a transaction or particular activity. Ask questions to find out if someone other than your client is pulling the strings. If you determine that the individual or organization who engages you is acting on someone else's instructions, that someone else is the third party. Determine the relationship between the client and the third party.

Verifying the Identity of Individuals

The following sections describe the options available to you when you are required to verify the identity of individual clients or third parties. Verification of identity is required when in the course of providing legal services, you engage in or give instructions in respect of the receiving, paying or transferring of "funds". Note that "funds" is widely defined and would include the transfer of securities. While much of this section describes how to verify a client in a face-to-face situation, you may choose instead to use an agent as described later in this section.

Government-issued Documentation

You may rely on a valid, original and current federal, provincial or territorial government-issued document containing the individual's name and photograph. See Appendix A for examples of acceptable government-issued documents. A foreign government issued photo identification document is acceptable if it is equivalent to a Canadian issued photo identification document listed in Appendix A. Note, however, that photo identification documents issued by any municipal government, whether Canadian or foreign, are not acceptable.

You or your agent must view the original document in the presence of the individual in order to compare them with their photo. The photo identification document must show the individual's name, include a photo of the individual, and have a unique identifier number. It is not acceptable to view photo identification online, through a video conference or through any virtual type of application; nor is a copy or a digitally scanned image of the photo identification acceptable.

Credit Files

Alternatively, you can verify an individual's identity by relying on information that is in their credit file if that file is located in Canada and has been in existence for at least three years. The information in the credit file must match the name, date of birth and address provided by the individual. If any of the information does not match, you must use another method to verify the individual's identity.

Note that a credit assessment is not needed to identify an individual through a credit file. Equifax Canada and TransUnion Canada are Canadian credit bureaus that provide credit file information for identification purposes.

To verify an individual's identity using information in their credit file, you must obtain the information directly from a Canadian credit bureau or a third-party vendor authorized by a Canadian credit bureau to provide Canadian credit information. You cannot rely on a copy of the credit file if provided by the individual. It is acceptable, however, to use an automated system to match the individual's information with the credit file information.

To rely on a credit file search, the search must be conducted at the time of verifying the individual's identity. An historical credit file is not acceptable. To be acceptable as a single source for verification of identity, the credit file must match the name, address, and date of birth that the individual provided, be from Canada, and have been existence for at least three years.

The individual does not need to be physically present at the time you verify their identity through a credit file.

The Dual Process Method

You can also use the dual process method to verify a client's identity, by relying on any two of:

- information from a reliable source that contains the individual's name and address;
- information from a reliable source that contains the individual's name and date of birth; and/or,
- information containing the individual's name that confirms they have a deposit account or credit card or other loan amount with a financial institution.

If using the dual process method, the information referred to must be from different sources. Neither the client (or individual instructing on behalf of the client), nor the legal professional (or the professional's agent) may be a source. The information may be found in documents from these sources or may be information that these sources are able to provide. Information refers to facts provided or learned about an individual and can come from various places, in contrast to a document, which refers to an official record that is either written, printed or electronic that provides evidence or facts.

If a document is used, you or your agent must view a valid, original and current document. Original documents do not include those that have been photocopied, faxed or digitally scanned. If information is used, it must be valid and current. Information found through social media is not acceptable.

The individual does not need to be physically present at the time you verify their identity through the dual process method.

A reliable source is an originator or issuer of information that you trust to verify the identity of the client. To be considered reliable under the Model Rule, the source should be well known and considered reputable. The source providing the information cannot be you, your client, or the individual who is being identified; the source must be independent. For example, reliable sources can be the federal, provincial, territorial and municipal levels of government, Crown corporations, financial entities or utility providers.

If a document is used as part of the dual process method, you must ensure that you see the original paper or electronic document, and not a copy. The original document is the one that the individual received or obtained from the issuer either through posted mail or electronically. For example, an original paper document can be a utility statement mailed to an individual by the utility provider, and it can also be a document that the individual received through email or by downloading it directly from the issuer's website. The document must appear to be valid and unaltered in order to be acceptable; if any information has been redacted, it is not acceptable.

An individual can email you the original electronic document they received or downloaded, show you the document on their electronic device (for example, a smartphone, tablet, or laptop), print the electronic document received or downloaded from the issuer, or show it to you in the original

format such as .pdf (Adobe) or .xps (Microsoft viewer). In practical terms, this means that an individual can:

- show you their original paper utility statement in person or by posted mail;
- email or show you on their electronic device an electronic utility statement downloaded directly from the issuer's website;
- print and show you the statement they downloaded from the issuer; or
- email or show you on their electronic device a mortgage statement received by email from the issuer.

See Appendix B for examples of information and documents that can be used for the dual process method of verifying identity.

Verifying the Identity of Children

The Model Rule requires you to take different steps to verify the identity of an individual who is a child.

If verifying the identity of an individual who is under 12 years of age, you must verify the identity of one of the child's parents or guardians.

If verifying the identity of an individual client who is at least 12 years of age but not more than 15 years of age, you can rely on any two of:

- information from a reliable source that contains the individual's parent or guardian's name and address;
- information from a reliable source that contains the individual's parent or guardian's name and date of birth; and/or,
- information containing the individual's parent or guardian's name that confirms the parent or guardian has a deposit account, credit card, or other loan amount with a financial institution.

If that is not possible, you can rely on information from a reliable source that contains the name and address of the child's parent or guardian and a second reliable source that contains the child's name and date of birth. For example, if the child has a passport, that can be used to ascertain their identity directly; if not, you can rely on the parent's driver's license to verify their common address, and use the child's birth certificate to verify the child's name and date of birth.

Use of an Agent

You may rely on an agent to verify the identity of an individual, including in circumstances where the individual is not physically present in Canada.

An agent can be utilized at any time. You may choose to use an agent if the client or third party is elsewhere in Canada and the method of verification is the use of a federal, provincial or territorial government-issued document containing the client's name and photograph, which must be provided in the client's presence. Other methods, as indicated above, do not require the individual's physical presence and as such an agent may not be necessary. If the client or third party is not physically present in Canada, an agent must be relied upon to verify the individual's identity.

The Model Rule requires that you and your agent have an express agreement or arrangement in writing for such purpose. The agreement need not be in any particular form, and it is up to you to decide on the level of formality required. It may take the form of a letter or email, for example. The agreement should set out in sufficient detail the purpose of the agreement and the expectations of the agent. As the responsibility to verify identity is yours, you – not the client or third party – must choose and retain the agent.

The identity verification information provided by the agent should include the information that you would have obtained and documented had you verified identity through one of the methods described above. As such, when using an agent, your records should include, through the agreement itself and the report from the agent:

- the full name of the agent who verified the individual's identity;
- the agent's status or occupation and business address;
- the client identification method the agent used;
- copies of the information and documents obtained by the agent to verify the individual's identity; and,
- the date on which the agent verified the individual's identity.

You should also note the date you received the verification information from the agent, as this relates to the currency of the identification information that you use and the time within which the verification must occur under the Model Rule.

The information on the client's identity that you obtain from the agent must match what the individual has provided to you when you obtained their basic identification information. You must satisfy yourself that the information is valid (authentic and unaltered) and current (not expired) and that your agent verified the individual client's identity through the methods prescribed by the Model Rule. You may also rely on an agent's previous verification of an individual client if the agent was, at the time that they verified the identity, acting in their own capacity or acting as an agent under an agreement or arrangement in writing with another legal professional who is similarly required to verify identity under the Model Rule.

The Model Rule does not specify who may act as an agent. However, given the responsibilities of the agent, you should ensure that the person engaged is reputable, can be relied upon to understand what is required, can capably carry out the required work to verify identity and will provide the information they have obtained as required under the Model Rule.

Timing for Verifying the Identity of Individual Clients

You are required to verify the identity of an individual (client or third party) upon being retained to engage in, or give instructions in respect of, receiving, paying or transferring funds other than an electronic funds transfer. You are not subsequently required to verify that individual's identity unless you have reason to believe the information, or the accuracy of it, has changed.

Verifying the Identity of Organizations

When retained by an organization to engage in, or give instructions in respect of, receiving, paying or transferring funds other than an electronic funds transfer, you must take certain specified steps to verify the client's identity. These additional requirements apply to all organizations with the exception of "financial institutions", "public bodies", and "reporting issuers", as defined in the Model Rule. The requirements to verify the identity of an organization include the requirement to verify the identity of the individual(s) authorized to give instructions on behalf of the organization for the matter for which you are retained.

If retained by a client who is acting for, or representing, a third party that is an organization, you are required to obtain information about that organization, and if applicable, verify the third party's identity, pursuant to your obligation to verify information about clients that are organizations.

In verifying an organization's identity, you have a few options available to you as outlined in the Model Rule. If the organization is created or registered pursuant to legislative authority, you may rely on written confirmation from a government registry as to the existence, name and address of the organization. Documents that you can rely on to confirm the existence of a corporation are: the corporation's certificate of corporate status; a record filed annually under provincial securities legislation; or any other record that confirms the corporation's existence, such as the corporation's published annual report signed by an independent audit firm, or a letter or notice of assessment for the corporation from a municipal, provincial, territorial or federal government. If the organization is not registered in any government registry, you may rely on documents that establish or create the organization; you can rely on a partnership agreement, articles of association, or any other similar record that confirms the entity's existence. You cannot rely on an agent to verify the identity of an organization.

If an electronic version of a record is used to verify the existence of an organization, you must keep a record of the:

- corporation's registration number or the organization's registration number;
- type of record referred to; and
- source of the electronic version of the record.

For example, a corporation's name and address and the names of its directors can be obtained from a provincial or federal database such as the Corporations Canada database, which is accessible from Innovation, Innovation, Science and Economic Development Canada website This information may also be accessed through a subscription to a corporation searching and registration service.

Ascertaining the Beneficial Ownership of an Organization

Except in the case of an organization that is a securities dealer, you must obtain and record, with the applicable date, the names of all directors of the organization. You are also required to make reasonable efforts to obtain information about the beneficial owners of the organization and about the control and structure of the organization. Identifying beneficial ownership is important in order to remove anonymity and identify the actual individuals behind a transaction. The concealment of the beneficial ownership information of accounts, businesses and transactions (i.e. the persons who own 25% or more) is a technique used in money laundering and terrorist activity financing schemes.

Collection and confirmation of beneficial ownership information is an important step in knowing the client and ensuring that the lawyer's work on the transaction is not in aid of money laundering and terrorist financing activity.

Beneficial owners are the actual individuals who are the trustees or known beneficiaries and settlors of a trust, or those who directly or indirectly own or control 25% or more of an organization, such as a corporation, trust or partnership. Another organization cannot be considered the ultimate beneficial owner; the information you must try to obtain is the identity of the actual individuals who are the owners or controllers of the other organization. The purpose of this requirement is for you to obtain sufficient information about the organization's structure so that you know who effectively owns and controls the organization.

The Rule asks you to meet the standard of reasonable efforts to obtain the information. This means applying sound, sensible judgment. Reasonable efforts include searching through as many levels of information as necessary to identify those individuals. In making reasonable efforts to ascertain beneficial ownership, it is important to understand that the names found on legal documentation may not represent the actual owners of an organization. You must exercise judgment in discerning the reasonable efforts that are appropriate for each distinct situation to confirm the accuracy of information obtained, while also considering the risk associated with each situation.

For example, consider the situation where a corporation is governed by a board of directors: you must ascertain both ownership and control of the corporation. You will need to obtain information on the shareholders who own 25% or more of the organization, as they must be recorded as beneficial owners. However, you must also obtain information about the board of directors, who has control of the organization. Once you have obtained information about both shareholders and corporate directors, the Rule also requires you make reasonable efforts to confirm the accuracy of the information pertaining to both ownership and control of the organization.

You may obtain information establishing beneficial ownership, as well as the required control and structure information, from the organization, either verbally or in writing. For example, the organization can:

- provide you with official documentation;
- advise you on the beneficial ownership information, which you can then document for record-keeping purposes; or
- fill out a document that provides the information.

Where the identity of those who own and those who control an organization is not the same, you must consider the ownership and control exercised by both. It is not sufficient to identify only the owners of an organization or those who control it; you must make reasonable efforts to identify both. Remember that you are required to obtain the names and addresses of only those persons who own or control 25% or more of the organization.

If referring to documents or records, the accuracy of the beneficial ownership, as well as ownership, control and structure information related to the organization, may be confirmed by referring to records, such as the:

- Minute book;
- Securities register;
- Shareholders register;
- Articles of incorporation;
- Annual returns;
- Certificate of corporate status;
- Shareholder agreements;
- Partnership agreements; or
- Board of directors' meeting records of decisions.

It is possible for one of these documents to be used to satisfy the two distinct steps, namely to obtain the information and to confirm the accuracy of it. You can also conduct an open-source search, or consult commercially available information. In the case of a trust, the accuracy of the information can be confirmed by reviewing the trust deed, which will provide information on the ownership, control and structure of the trust.

Legal professionals should use their judgment to assess whether the documentation is appropriate. Where possible, official documents, such as a share certificate, should be used to confirm the beneficial ownership information obtained. If no official document exists to confirm accuracy, a signed attestation would be acceptable.

It may not always be possible for you to determine full information totaling 100% of beneficial ownership. For example, a corporation may have several hundred or thousands of shareholders. In these cases, your best efforts might be obtaining general information about the ownership of an organization, which may or may not include the names of the owners with a breakdown of percentages owned.

You must set out the information obtained in a dated record, along with the measures taken to try to confirm the accuracy of that information is required.

If despite your best efforts you are unable to obtain information about the directors, shareholders, and owners of the organization, you must then take reasonable measures to ascertain the identity of the most senior managing officer of the organization, and assess the organizational client's activities in the context of any risks that the transaction(s) may be part of fraudulent or illegal activity. These obligations are responsive to concerns that arise when information cannot be obtained. If the organization's structure is more opaque than transparent, this may be a warning that the organization could be facilitating criminal or other illegal activity.

In ascertaining the identity of the senior managing officer of an organization, you should be aware that this may include, but is not limited to, a director, chief executive officer, chief operating officer, president, secretary, treasurer, controller, chief financial officer, chief accountant, chief auditor or chief actuary, or an individual who performs any of those functions. It may also include any other individual who reports directly to the organization's board of directors, chief executive officer or chief operating officer. In the case of a partnership, the

most senior managing officer can be one of the partners.

In the case of a trust, the senior managing officer of a trust is the trustee, that is, the person who is authorized to administer or execute on that trust.The reasonable measures standard ultimately requires you to exercise judgment about the potential risks associated with acting for an organizational client whose ownership, control or structure may not be entirely known to you. Because of this, along with ascertaining the identity of the most senior managing officer, you are also required to determine whether the client's information in respect of their activities, the client's information in respect of the source of funds, and the client's instructions in respect of the transaction are consistent with the purpose of their retainer and the information you have obtained about them. You must assess whether there is a risk that you are assisting in, or encouraging, dishonesty, fraud, crime or illegal conduct. Finally, you are obligated to keep a record, with the applicable date, of the results of these assessments.

Timing for Verifying the Identity of Organizations

The Model Rule requires you to verify the identity of an organization upon being retained to engage in, or give instructions in respect of, receiving, paying or transferring funds other than an electronic funds transfer. In no case may the verification occur more than 30 days after you have been retained. You are not subsequently required to verify that same identity unless you have reason to believe the information, or the accuracy of it, has changed.

Information on the Source of Client Funds

In addition to verifying clients' identities when engaging in, or giving instructions in respect of, receiving, paying or transferring funds on behalf of a client, legal professionals are also required to obtain information about the source of the funds relating to the retainer. This requirement applies to both individual and organizational clients.

The rule requires you to inquire about the expected source and origins of the funds related to the legal services to be provided. This may be apparent from the information obtained from the client for the retainer. In general, you should make sufficient inquiries to assess whether there is anything that suggests the proposed transaction is inconsistent with the client's apparent means, and the circumstances of the transaction.

In making this assessment, depending on the circumstances, you may wish to consider questions such as:

- Is someone other than the client providing information about the source of funds?
- Is the disclosed source consistent with the knowledge about the client's profile and activity?
- Is there anything unusual about the source of the funds in the context of the transaction?

For record-keeping purposes, you should also retain supporting documents that relate to how you determined the source of funds.

Consider these red flags about the source of funds:

- Funds are from, or are sent to, countries with high levels of secrecy;
- The client is not located near you and is asking for types of services that are not common for you to provide, or outside your area(s) of law entirely;
- The client expresses a sense of great urgency and asks you to cut corners;
- The funds received are inconsistent with the client's occupation or socio-economic profile.

Monitoring the Relationship

The Model Rule requires you to exercise vigilance about client relationships that involve the receipt, transfer, or payment of funds. As such, when retained by an individual or organizational client to engage in, or give instructions in respect of, receiving, paying or transferring funds other than an electronic funds transfer, you must monitor the professional business relationship on a periodic basis. This means that during the retainer you must periodically assess whether the client's information in respect of their activities and the source of their funds are consistent with the purpose of the retainer and the information about the client that you have obtained under the rule. You also need to assess whether there is a risk that you might be assisting in fraud or other illegal conduct. The Model Rule requires that you keep a dated record of your client monitoring measures, which may include the steps taken and any information obtained.

It may be useful to conceive of your monitoring requirement as a periodic check-in with a client with whom you have an established, long-term relationship. In other circumstances, the monitoring requirement may be triggered when your client provides you with new facts about their activities or source of funds, or when you are faced with unexpected client behavior.

You should use your discretion in defining the frequency of the monitoring. It will depend on the client, the nature of the work, the anticipated duration of the retainer and the services provided. The frequency of monitoring activities may be determined by any risks you believe arise from the retainer with the client in the context of the requirements of the Model Rule. The responsibilities are similar to those outlined in commentary to Model Code of Professional Conduct Rule 3.2-7, which set out your obligations not to engage, or to assist a client in engaging, in criminal activity.[17]

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[17] [1] A legal professional should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.

[2] A legal professional should be alert to and avoid unwittingly becoming involved with a client or others engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these and other criminal activities may be transactions for which legal professionals commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate.

[3] If a legal professional has suspicions or doubts about whether he or she might be assisting a client or others in dishonesty, fraud, crime or illegal conduct, the legal professional should make reasonable inquiries to obtain information about the client or others and, in the case of the client, about the subject matter and objectives of the retainer. These should include verifying who are the legal or beneficial owners of property and business entities, verifying who has the control of business entities, and clarifying the nature and purpose of a complex or unusual transaction where the purpose is not clear. The legal professional should make a record of the results of these inquiries.

On occasion, ongoing monitoring may require taking additional, enhanced measures. These might include:

- Obtaining additional information about your client (i.e. occupation, assets, information available through a public database, Internet, etc.);
- Obtaining information on the source of funds or source of wealth of your client;
- Obtaining information on the reasons for intended or conducted transactions;
- Gathering additional documents, data or information, or taking additional steps to verify the documents obtained;
- Flagging certain activities that appear to deviate from expectations;
- Reviewing transactions against the usual processes and procedures for such transactions relevant to the legal work for which you are retained.

Record-keeping and Retention

As noted previously, the Model Rule requires you to create and maintain certain records and to date those records. This includes a record of information that identifies each client. Where the retainer with the client involves the receipt, payment or transfer of funds, you must also keep records that contain;

- Information that identifies the source of funds;
- Copies in either paper or electronic format of every document used to verify the identity of the client and any third party;
- Information and any related documents on the directors, owners, beneficial owners and trustees, as the case may be, of an organizational client;
- Information and any related documents on the ownership, control and structure of an organizational client;
- Information and any related documents that confirm the accuracy of the information on directors, owners, beneficial owners and trustees and the ownership, control and structure of an organizational client; and,
- Measures taken and information obtained respecting your monitoring of the professional business relationship with the client.

Client identification and verification of identity records, as well as your records of having taken reasonable measures to obtain beneficial ownership of an organizational client and of your monitoring responsibilities, must be kept for the duration of the client relationship, or for a period of at least six years following the completion of the work for which you were retained, whichever is longer.

Duty to Withdraw Representation

At the core of the Model Rule is the professional responsibility not to participate in, or facilitate, money laundering or terrorist financing.

You must withdraw from representation of a client if, in the course of verifying that client's identity, or monitoring your professional business relationship, you know or ought to know that you are, or would be, assisting a client in fraud or illegal conduct.

Chapter 4: Limitations on Accepting Cash from Clients or Third Parties

The "No Cash" Rule

There have been limits on amount of cash you may receive from a client since the Model Rule on Cash Transactions (known as the "No Cash" rule) was adopted in 2004. Recent amendments have been made to clarify the $7,500 threshold for accepting cash and the exceptions to the rule. There is also a more robust definition section, explaining terms used in the rule.

The $ 7,500 Threshold

The rule prohibits you from accepting more than $7,500 in cash in respect of one client matter under all circumstances, with limited exception as discussed below. The $7500 threshold applies whether you receive the money in one payment or through aggregate or instalment payments. It also applies whether the cash is received from the client or a third party providing it on behalf of the

Consider the following example:

A legal professional is acting for a personal representative of an estate who has discovered cash amongst the deceased's possessions and wants the legal professional to deposit the funds in her trust account (the legal professional under the retainer is controlling the estate funds). If the client finds $2,000 in a safety deposit box, that may be deposited in the trust account. If the client finds an additional $8,000, that entire amount cannot be deposited as it would be an aggregate of $10,000. In such a circumstance it would be appropriate to advise the client to:

- open an estate account and deposit the cash into that account; or
- suggest that the client use the cash to get a bank draft payable to the legal professional's firm in trust.

Under the rule, legal professionals:

- cannot accept more than $7,500 cash on a client matter even if there is more than one client on the file. The limit applies with respect to the client matter despite the number of clients.
- cannot accept more than $7,500 from a client if the cash is tendered incrementally for a matter. It is, therefore, important to track receipt of cash to ensure the total received on the client matter does not exceed $7500.
- can accept greater than $7,500 cash from a client for three unrelated matters but only if the amount of cash provided for each individual matter is $7,500 or less.

"Cash" is defined in the rule and includes Canadian coins or banknotes and those of other countries. Note that bank drafts, money orders, electronic or wire transfers of funds are not considered cash for the purposes of the rule.

Foreign Currency

If you are accepting cash in a foreign currency, be aware that under Section 2 of the rule the currency is deemed to be the equivalent of Canadian dollars at the official conversion rate of the Bank of Canada for the foreign currency in effect that day, or on the most recent business day preceding the day on which you receive or accept the cash if the day it is received or accepted is a holiday.

If the amount of foreign currency as converted is greater than $7,500 you are prohibited from accepting it unless one of the exceptions applies.

As more fully discussed below, you should ensure that you and your staff are familiar with the rule, including the treatment of foreign currency.

Application of the Rule and Exceptions

It is important to understand that the rule applies not only to receiving cash from clients, but to the circumstances in which you receive cash on behalf of clients. This means that the rule applies when, on behalf of a client, you engage in or give instructions about receiving or paying funds, purchasing or selling securities, real properties or business assets or entities and transferring funds by any means. 'Funds' are defined in the rule as cash, currency, securities and negotiable instruments or other financial instruments that indicate the person's title or right to or interest in them.

There are limited exceptions to the rule limiting the cash you may receive in relation to a client matter. You may receive more than $7500 in cash in connection with the provision of legal services

- from a financial institution or public body,
- from a peace officer, law enforcement agency or other agent of the Crown acting in his or her official capacity,
- to pay a fine, penalty, or bail, or
- for professional fees, disbursements, or expenses, provided that any refund out of such receipts is also made in cash.

Note that the requirement to refund in cash received for fees, disbursements or expenses applies only when you have received more than $7,500 in cash. Again, "financial institution", "public body", "professional fees", "disbursements" and "expenses" are all defined terms in the rule.

The rule covers a broad range of activities. Careful consideration is required before determining that an exception applies. When accepting cash for professional fees, disbursements, expenses or bail, it would be prudent for you to:

- consider the purpose for which cash is received, and document the circumstances and any client instructions;
- ensure that the amount received for a retainer is commensurate with the services to be provided (i.e. do not accept a $50,000 retainer for a $5,000 matter);
- ensure that you keep appropriate records so that, if cash in excess of the limit is received for a retainer but the client later retains new counsel or the first retainer is otherwise terminated, any refund is paid in cash ; and
- ensure that appropriate accounting systems are in place to document and track the cash transactions, in particular when making a deposit of mixed cash and non-cash funds into trust; this could lead to difficulty in monitoring use.

Suggestions for Implementing the Rule in Your Workplace

The following are suggested procedures to assist in implementing the rule in your legal practice:

- Inform staff about the rule and what to do if a client unexpectedly shows up at the office with cash;
- Ensure that file opening procedures include a requirement to comply with the rule, in particular by requiring that you or your colleagues confirm each cash deposit in the trust accounts;
- Ensure that trust accounting procedures require confirmation of rule compliance before paying money out of trust;
- Appoint someone in the firm to ensure that professional and support staff keep up to date with any rule changes;
- Record any exemption from the “No Cash” rule; and
- Provide information about the rule to new and existing clients in retainer letters, on the firm website, and in mail inserts.

The rule also specifies record keeping requirements for cash transactions. Fully complying with these requirements prevents issues arising in the treatment of cash transactions in your practice.

Chapter 5: Proper Use of Your Trust Account

Background to the New Trust Accounting Rule

A new Model Rule now restricts the use of trust accounts to transactions or matters for which the legal professional or the legal professional's firm is providing legal services. This new model rule is a significant control that will help prevent the misuse of trust accounts, as it prohibits the use of your trust account for purposes unrelated to the provision of legal services.

The regulatory experience of law societies has shown that legal professionals sometimes use their trust accounts for purposes unrelated to the provision of legal services, and effectively act as a bank or deposit-taking institution, i.e. holding money for the limited purpose of transferring the trust money from one party to another without the provision of legal services. The use of trust accounts by clients or other parties for transactions that are completely unrelated to any legal services risks facilitating money laundering through transactions deliberately designed to disguise that the source of funds is from criminal activity. For that reason, trust accounts must not be used except when directly related to the legal services being provided by you or your firm.

Proper usage of a trust account requires you to monitor its usage and exercise your judgment about appropriate activity.

Even when the use of your trust account is related to the provision of legal services, you should ask yourself whether it is appropriate and necessary under the circumstances.

In the Real World

A 2016 discipline decision from the Law Society of British Columbia illustrates the practice and the risks it presents. In LSBC v. Donald Gurney, a lawyer used his trust account to transfer almost $26 million in connection with four line of credit agreements in which his client was the sole borrower. There were no legal services provided – only the receipt and disbursement of funds. The disciplinary panel found that Gurney had breached his professional and ethic duties by failing to make reasonable inquiries about the transactions, and by using his trust account as a conduit for funds notwithstanding "the series of transactions being objectively suspicious."

Features of the Model Trust Accounting Rule

"Money" is a defined term and includes cash, cheques, credit card transactions, post office orders, express and bank money orders and electronic transfer of deposits at financial institutions.

Under the rule only money that may be deposited into a trust account is money that is directly related to legal services that you or your firm are providing. The term “legal services”, which is not defined in the rule, generally means the application of legal principles and legal judgement to the circumstances or objectives of a person or entity and can include:

- Giving advice with respect to a person’s or entity’s legal interests, rights or responsibilities of the person or of another person;
- Selecting, drafting, completing or revising documents that affect or relate to the legal interests, rights or responsibilities of a person or entity;
- Appearing as counsel or advocate for a person or entity in a proceeding before a court or an adjudicative body; and
- Negotiating or settling the legal interests, rights or responsibilities of a person or entity.

Money that is not related to the legal services provided by you or your legal practice may not be placed in a trust account.

In the Real World

Ms. G used her trust accounts to disburse business expenses for a client who owns a marina. Ms. G billed her client for drafting contracts,depositing moorage revenue into trust, paying marina operating expenses via trust cheque, and day-to-day bookkeeping services.

When asked for an explanation, Ms. G explained that the client did not utilize the services of an accountant because the client wanted to "keep her funds safe".

As set out in the rule, you must pay out any money remaining in trust following the completion of a transaction or matter as soon as practical.

In the spirit of the rule, you should ideally review client trust ledger accounts at least monthly. Every effort should be made to pay funds due to the client and to third parties within one month of all trust conditions being satisfied, and similarly, to swiftly transfer funds to your chequing account upon billing for your legal fees, disbursements or expenses.

Appendix A

Examples of Acceptable Photo Identification Documents

Source: http://www.fintrac-canafe.gc.ca/guidance-directives/client-clientele/Guide11/11-eng.asp

Type of card or document	Issuing jurisdiction and country
Canadian passport	Canada
Permanent resident card	Canada
Citizenship card (issued prior to 2012)	Canada
Secure Certificate of Indian Status	Canada
Driver's licences	
British Columbia Driver's Licence	British Columbia, Canada
Alberta Driver's Licence	Alberta, Canada
Saskatchewan Driver's Licence	Saskatchewan, Canada
Manitoba Driver's Licence	Manitoba, Canada
Ontario Driver's Licence	Ontario, Canada
Québec Driver's Licence	Québec, Canada
New Brunswick Driver's Licence	New Brunswick, Canada
Nova Scotia Driver's Licence	Nova Scotia, Canada
Prince Edward Island Driver's Licence	Prince Edward Island, Canada
Newfoundland and Labrador Driver's Licence	Newfoundland and Labrador, Canada
Yukon Driver's Licence	Yukon, Canada
Northwest Territories Driver's Licence	Northwest Territories, Canada
Nunavut Driver's Licence	Nunavut, Canada
The DND 404 Driver's Licence	The Department of National Defence, Canada
Provincial services cards	
British Columbia Services Card	British Columbia, Canada
Provincial or territorial identity cards	
British Columbia Enhanced ID	British Columbia, Canada
Alberta Photo Identification Card	Alberta, Canada
Saskatchewan Non-driver photo ID	Saskatchewan, Canada
Manitoba Enhanced Identification Card	Manitoba, Canada
Ontario Photo Card	Ontario, Canada
New Brunswick Photo ID Card	New Brunswick, Canada
Nova Scotia Identification Card	Nova Scotia, Canada
Prince Edward Island Voluntary ID	Prince Edward Island, Canada
Newfoundland and Labrador Photo Identification Card	Newfoundland and Labrador, Canada
Yukon General Identification Card	Yukon, Canada
Northwest Territories General Identification Card	Northwest Territories, Canada
Nunavut General Identification Card	Nunavut, Canada
Type of card or international document	
United States passport	United States
France driver's licence	France
Australian driver's licence	New South Wales, Australia

Appendix B

Examples of Reliable Sources of Information Under the Dual Process Method to Identify an Individual

Source: http://www.fintrac-canafe.gc.ca/guidance-directives/client-clientele/Guide11/11-eng.asp

Documents or information to verify name and address

1. Issued by a Canadian government body

- Any card or statement issued by a Canadian government body (federal, provincial, territorial or municipal)
  - Canada Pension Plan (CPP) statement
  - Property tax assessment issued by a municipality
  - Provincially-issued vehicle registration
- Benefits statement
  - Federal, provincial, territorial, and municipal levels
- CRA documents:
  - Notice of assessment
  - Requirement to pay notice
  - Installment reminder / receipt
  - GST refund letter
  - Benefits statement

2. Issued by other Canadian sources

- Utility bill (for example, electricity, water, telecommunications)
- Canada 411
- T4 statement
- Record of Employment
- Investment account statements (for example, RRSP, GIC)
- Canadian credit file that has been in existence for at least 6 months
- Product from a Canadian credit bureau (containing two trade lines in existence for at least 6 months)

3. Issued by a foreign government

- Travel visa

Documents or information to verify name and date of birth

1. Issued by a Canadian government body

- Any card or statement issued by a Canadian government body (federal, provincial, territorial or municipal)
  - Canada Pension Plan (CPP) statement of contributions
  - Original birth certificate
  - Marriage certificate or government-issued proof of marriage document (long-form which includes date of birth)
  - Divorce documentation
  - A permanent resident card
  - Citizenship certificate
  - Temporary driver's licence (non-photo)

2. Issued by other Canadian sources

- Canadian credit file that has been in existence for at least 6 months
- Insurance documents (home, auto, life)
- Product from a Canadian credit bureau (containing two trade lines in existence for at least 6 months)

Documents or information to verify name and confirm a financial account

Confirm that the individual has a deposit account, credit card or loan account by means of:

- Credit card statement
- Bank statement
- Loan account statement (for example. mortgage)
- Cheque that has been processed (cleared, non-sufficient funds) by a financial institution
- Telephone call, email or letter from the financial entity holding the deposit account, credit card or loan account.
- Identification product from a Canadian credit bureau (containing two trade lines in existence for at least 6 months)
- Use of micro-deposits to confirm account

How to rely on the credit file for the dual process method

A Canadian credit file that has been in existence for at least 6 months can be referred to as one source to verify name and address, name and date of birth or name and confirmation of a financial account. A second source from the dual process method, for example a CRA notice of assessment, must be relied on to verify the second category of information. In this instance, the two sources are the credit bureau that provided the credit file and CRA as the source of the notice of assessment. The information from these two sources must match the information provided by the individual.

The reference number for a credit file must be unique to the individual and associated to the credit file; it cannot be a reference number created by the legal professional.

Information from a credit bureau can also be obtained if they are acting as an aggregator and compiling original sources, often referred to as tradelines, so long as the identifying information is obtained from those tradelines. In this instance, the credit bureau must provide **two** independent, original tradelines as sources that verify the individual's **name and address, name and date of birth** or **name and confirmation of financial account**. Each tradeline is a source, not the credit bureau.

If the full financial account number is not provided because it was truncated or redacted, it is not acceptable. The legal professional must also confirm that each tradeline originates from a different source.

Appendix C

Additional Resources

Canada

The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) website contains links to numerous publications and guidance documents. For example, there is a useful guidance document on Methods of identify individuals and confirm the existence of entities and, for those lawyers practicing in the area of real estate transactions, an operational brief on Indicators of Money Laundering in Financial Transactions Related to Real Estate.

Provincial law societies will have different levels of information available to their members. At the time of publishing this Guidance, the Law Society of British Columbia has published numerous FAQs, Discipline Advisories, and articles in its Bencher Bulletins on topics related to client ID and verification, the "no cash rule", and other red flags that lawyers should watch out for. Similarly, the Law Society of Ontario has a dedicated FAQ page for cash transactions and the Law Society of Alberta has a page dedicated to client ID and verification. Contact your law society for more information.

United States

The American Bar Association, the International Bar Association, and the Council of Bars and Law Societies of Europe co-authored in 2010 a comprehensive guide for lawyers in detecting and preventing money laundering in their practices ("Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing").

Various sections of the ABA have also produced materials that may be useful and relevant. The Criminal Justice Group has formed a Task Force on Gatekeeper Regulation and the Profession. The International Anti-Money Laundering Committee facilitates discussion and examination of issues related to AML through the organization of educational programs and sessions for ABA members.

International

The Financial Action Task Force (FATF) is an international body that sets standards and promotes effective implementation of legal, regulatory and operational measures for combating money laundering and terrorist financing. Their website contains links to various country reports and guidance documents, including their 2008 Risk-Based Guidance for Legal Professionals.

The International Bar Association's (IBA) Anti-Money Laundering Forum is a mechanism that brings together information on AML legislation and compliance requirements, organized by jurisdiction. The IBA Anti-Money Laundering Forum Reading Room contains links to a range of AML resources (presentations, articles, books, websites and media); however, it should be noted that the links do not appear to have been updated since 2012.

The Council of Bars and Law Societies of Europe (CCBE) Anti-Money Laundering Committee follows the work of the FATF and developments in European jurisdictions on AML legislation. The Committee's website contains links to position papers, letters, guides and recommendations, and reports and studies.

Federation of Law Societies of Canada and the Government of Canada Working Group on Money Laundering and Terrorist Financing

Terms of Reference

Mandate

The mandate of this Working Group is to explore issues related to money laundering and terrorist financing in the legal profession and to strengthen information sharing between the law societies and the Government of Canada.

Objectives

- Strengthen lines of communication between the federal government and the law societies to provide regular opportunities to discuss issues and challenges and information sharing related to ML/TF, tax evasion and other serious crimes and the legal profession
- Share information such as data, trends, typologies, indicators and case examples related to ML/TF (personal identifying information about individual lawyers or clients will not be shared by the FLSC)
- Discuss how existing systems, e.g., FLSC model rules can be leveraged to improve education, awareness and due diligence in the legal profession to deter and prevent ML/TF
- Assist the FLSC in preparing and enhancing their guidance to the legal profession related to ML/TF
- Discuss compliance and enforcement issues in the legal profession by the law societies
- Discuss on an exploratory basis appropriate practices on referrals of cases/ information to inform law societies and/or law enforcement
- Discuss and understand Canada's linkages to the international community and the Financial Action Task Force concerning Canada's commitment to AML/ATF
- Discuss on an exploratory basis appropriate collaboration on efforts to deter and prevent ML/TF in the legal profession
- Support joint public-facing communications where there is effective collaboration between the Government and the law societies

Co-Chairpersons

The Working Group is to be co-chaired by Frederica Wilson the Federation of Law Societies of Canada and Lynn Hemmings of the Department of Finance Canada.

Reporting

The work is intended to provide information and analysis, to encourage frank and productive discussions amongst participants. Working Group members will report findings and summaries of discussions to their respective senior officials as necessary within the federal government, each provincial and territorial law society and within the FLSC.

These reports will lead to more senior level meetings, between Annette Ryan, Associate ADM of Financial Sector Policy Branch, Finance Canada and Jonathan Herman, CEO of the FLSC to discuss objectives, progress, work planning and next steps. Such meetings shall occur at least twice a year with additional meetings as needed.

Meetings

Meetings will be held on a quarterly basis and in-person meetings will occur in Ottawa, Ont.

Communication

Communications will be conducted by a variety of methods including in-person meetings, teleconferences, and by electronic means, for example email.

Published by the Federation of Law Societies of Canada, June 2019

Anti-Money Laundering and Terrorist Financing Working Group

Risk Assessment Case Studies for the Legal Profession

February 2020

Appendix M

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OVERVIEW

The practice of law exposes members of the legal profession[1] to unique risks and vulnerabilities in relation to money laundering. Criminals may target legal advisors to lend legitimacy to their illicit operations or make use of trust accounts to launder proceeds of criminal activity. Legal advisors are also necessary to complete real estate transactions and set up trusts, both common vehicles for cleaning dirty money.

As a legal advisor you have important legal and ethical duties in relation to money laundering and other crimes. Under the rules of professional conduct, legal advisors must not knowingly assist in or encourage any fraud, crime or other illegal conduct. Additionally, you must withdraw if a client persists in instructing you to act contrary to law or professional ethics. As a legal advisor it is important for you to be aware of a recent amendment to the Criminal Code that added a recklessness standard to the offence of money laundering. This amendment makes it an offence to deal with property or proceeds of property "knowing or believing or being reckless as to whether" they are the proceeds of crime[2] .

Understanding these duties and knowing how to recognize the risks and vulnerabilities are essential to protecting you and your practice, the legal profession, and the public.

This document is designed to help you become familiar with and learn how to spot red flags, as well as to guide practical responses when faced with situations of possible money laundering. It is recommended that you review the document periodically, as a preventative measure, to enhance your ability to spot and avoid problems.

The following case studies[3] , which describe the scenario, identify red flags, and include commentary on how you can respond, are divided thematically according to common methods that criminals use in targeting legal advisors[4] :

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[1] Members of the legal profession in Canada include lawyers, Quebec notaries, and Ontario paralegals. For simplicity the term legal advisor is used throughout the document to refer to all members of the profession.

[2] Section 462.31, effective June 21, 2019.

[3] The case studies are adapted from the Financial Action Task Force's (FATF) Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals (2013), the International Bar Association, the American Bar Association and the Council of Bars and Law Societies of Europe's A Lawyer's Guide to Detecting and Preventing Money Laundering (2014), case law and other open source materials.

[4] See, for example, FATF Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals (2013).

1. Misuse of trust accounts
2. Purchase and sales of real estate property and other transactions
3. Creation and management of trusts and companies
4. Managing client affairs and making introductions
5. Disputes and litigation

A quick reference guide of red flags is included as an Appendix.

Several of the case studies include reference to individuals who come from, or transactions that involve, "countries that pose a geographic risk." These are countries that have been identified by competent authorities as posing a high risk for money laundering based on, among other things, prevalence of corruption and financial crime, and weakness of anti-money laundering laws and measures[5].

Some case studies refer to "politically exposed persons" (PEPs). These are individuals who are or have been entrusted with prominent public functions within domestic or foreign governments, or international organizations, as well as their family and business associates[6]. Due to the opportunity that PEPs have to influence decisions and control resources, they are vulnerable to corruption.

Heightened scrutiny and enhanced risk assessment measures are required when a case involves a PEP and/or a country that poses a geographic risk.

If you have questions about a case or circumstance in which you are involved that may relate to money laundering, you may wish to consult your law society or independent legal counsel.

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[5] Government of Canada-imposed Economic Sanctions (https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/current-actuelles.aspx?lang=eng), FATF (http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/), FINTRAC (https://www.fintrac-canafe.gc.ca/new-neuf/1-eng#tab2), United Nations Security Council (https://www.un.org/securitycouncil/sanctions/information.

[6] Defined under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA), S.C. 2000, c. 17, section 9.3, PEPs include the head of state or government, member of executive council of a government, member of a legislature, deputy minister (or equivalent), ambassador, senior military officer, president of a state-owned corporation, head of a government agency, judge, and president of a political party represented in a legislature, as well as the personal . Domestic PEPs include officials at the federal and provincial/territorial level as well as a mayor of a municipality. The head of international organizations are also considered PEPs. See the PCMLTFA for a full list of PEPs and visit FINTRAC's website for more information on PEPs: https://www.fintrac-canafe.gc.ca/publications/general/faq-pep-eng.

1. MISUSE OF TRUST ACCOUNTS

SCENARIO:

Aborted transaction and transfer of funds without substantial legal work done

A law firm was approached by a new client seeking legal services on some asset purchases. The firm assigned the matter to a junior lawyer, who was keen to grow their client list and help bring new work into the firm. The new client also seemed eager to retain the lawyer and the firm. At the client's request, the lawyer gave the client the law firm's trust account details before the client identification and verification checks on the client were completed or the engagement letter was signed. The client quickly deposited funds in the law firm's trust account.

Following the deposit of funds, the client did not immediately respond to communications or requests to attend at the firm's office and she did not give any further instructions. When the client responded to the lawyer a few days later by email, the client explained that she no longer intended to purchase the assets and asked for the deposited funds to be returned; however, she requested they be sent to a third party, rather than to the original account.

RED FLAGS

- Urgency on the part of the client to deposit funds.
- Transaction is aborted shortly after funds deposited.
- Client initially appears keen but becomes difficult to reach following the deposit of funds.
- Client requests the deposited funds be returned before any substantive legal work has commenced.
- Client requests that deposited funds be sent to a new account or a third party, rather than returned to the same account.
- Client avoids personal contact without good reason.

What can you do?

Client funds should not be deposited into your trust account until you have completed your due diligence and risk assessment of the client, including the required client identification and verification steps, established the details of the transaction (including its purpose), and satisfied yourself that there is no reasonable risk that acting for the client or on the transaction will involve assisting in or encouraging any fraud or other illegal conduct including money laundering.

To avoid the risk of a client depositing funds into your trust account before you have taken these due diligence steps, you should not provide the client with the details of your trust account. Any unused client trust funds should be returned to the client or the original payor (if received from someone on behalf of the client).

Where a client directs that funds deposited into your trust account be paid out to a third party, you should, at a minimum seek an explanation for the directions. If you have concerns about the bona fides of the proposed payment, you should return the funds to the original source. You should also consult your regulator's rules regarding the acceptance and return of cash or other money.

2. PURCHASE AND SALE OF REAL ESTATE PROPERTY AND OTHER TRANSACTIONS

SCENARIO:
Investing potential proceeds of crime

A client retained a legal advisor for the purchase of a residential property. The client did not come into the office and communicated by telephone and email only. At the outset of the engagement, the client indicated that he wished to pay the total purchase price for deposit into the law firm's trust account before the final agreement was reached.

The legal advisor's due diligence suggested that the sum provided was a large amount relative to the client's employment income. After the client's funds were deposited the client became slower to respond with instructions and seemed less interested in the details of the transaction as it progressed. At one point, the legal advisor told the client about an easement discovered on title that would allow his neighbour to drive through the back part of the property. The client did not seem concerned about this or ask many questions. The purchase of the property went ahead for a sum smaller than that deposited.

RED FLAGS

- Client's unusual request to deposit funds early in the transaction, especially before the purchase price had been finalized.
- Sum deposited appears large relative to the client's income.
- Client becomes evasive and less interested in the transaction despite depositing a large sum of money.
- Transaction results in surplus funds from the initial large deposit.

What can you do?

You should be wary of clients who are prepared to deposit large sums into a trust account at the very outset of an engagement (and certainly prior to the agreement being finalized). Advise the client on a more common or appropriate time to deposit funds (i.e. just prior to closing). If the funds the client has deposited are large relative to their socio-economic profile, you should consider conducting enhanced verification of the source of funds.

This may include asking for additional information and documents demonstrating how the client acquired and maintained the funds (e.g. banking and investment records, receipts, contracts). Be wary of accepting client funds in excess of those required for the transaction and associated expenses (e.g. fees and disbursements).

SCENARIO:
Unexplained source of wealth used to purchase property[7]

A couple with some wealth recently immigrated to Canada from a country that poses a geographic risk. They retained a legal advisor to assist with the purchase of a large residential property and to set up a company. The home was paid for without any financing. The couple separated soon after moving to Canada. Despite separating, they continued to buy and develop residential properties together, usually without financing through their joint company.

At one point, the ex-husband transferred his interest in the company to a real estate agent they had been using for the purchases, only to transfer the interest back a short time later. The couple did not have any employment or business interests in Canada beyond real estate investing. The ex-husband was an extensive gambler and required income from the properties to pay for these activities.

RED FLAGS

- Clients coming from a high risk country.
- Unexplained source of wealth for the purchase of properties.
- Purchase of several residential properties without financing over a short period of time.
- Potential marriage of convenience (separating soon after entering Canada).
- Unusual transfer of the client's interest in the company only to be returned for no apparent reason.
- Client heavily involved in gambling activities.

What can you do?

In addition to verifying the source of funds, when a client is from a high-risk country and has wealth of a mysterious origin, you should conduct further inquiries including requesting additional supporting documentation. Additional red flags – extensive gambling, possible marriage of convenience, large purchases without financing – also indicate the need for caution. Unless you are satisfied to a reasonable standard that the money is not the proceeds of crime, you must not act or continue to act for the clients.

[7] Based on *Wang v. Kesarwani,* 2017 ONSC 6821 (CanLII).

SCENARIO:
Back-to-back sales from client with low income relative to amounts paid

An individual in his 20s who worked as a labourer approached a legal advisor to purchase multiple real estate properties. The client appeared to have negotiated good prices for the properties. The legal advisor believed the client was getting a very good deal even in the current slow market. The client claimed to be funding the purchases from previous real estate sales. Shortly after the purchases, the client instructed another lawyer to re-sell the same properties at a higher price. The purchasers were also in their early 20s with low-paying jobs. The client had in fact taken out mortgages on these properties using false documents, generating proceeds of crime. The multiple re-sales helped to launder those funds.

RED FLAGS

- Funds at the client's disposal appear large relative to the client's income.
- Client and other parties appear to be young for high value transactions given their income.
- Properties are paid for without financing.
- Client engaged in back to back property transactions, out of sync with normal market dynamics.
- Reason for the transactions is unclear.
- Purported value of the properties rapidly increases with each subsequent transaction despite the short period of time in between transactions.
- Client changes legal advisor in a short time period for no apparent reason.

What can you do?

If a client with a low to modest income and no other apparent source of wealth proposes to buy property with no financing, additional information is required. In this case, you need to conduct enhanced due diligence on the source of funds including obtaining supporting documentation for the "previous real estate sales" that reportedly generated the initial funding.

Before acting you must be satisfied that the explanation provides a reasonable basis for concluding that the transactions are legitimate. A subsequent legal advisor hired in a back to back sale should also inquire about the reasons for the client retaining new legal representation.

SCENARIO:
Criminal uses elderly parents to launder proceeds of crime

An elderly couple and their adult son met with a legal advisor about the purchase of a home. The son explained he was there to support his parents. The parents acknowledged this and presented valid identification. The son did most of the talking for his parents during the meeting. The parents' income consisted of a modest pension. They lived in a trailer home, which they planned to keep for their son's use. About half of the purchase price for the new home came from a bank account in the parents' name, which the son helped to set up. The balance was financed through a private mortgage in the parents' names.

The legal advisor assisted the couple in purchasing the property speaking mainly with the son and, as instructed, registered title in the parents' names. The mortgage, which was over $300,000, was paid off immediately. The son returned to the legal advisor's office soon after and inquired about new wills for his parents. The son turned out to be a career criminal using his parents to launder proceeds of crime from drug trafficking, fraud, and auto theft.

RED FLAGS

- Third party, rather than the clients, appears to be directing decision making.
- Disproportionate amount of private funding or availability of cash, which is inconsistent with the known legitimate income of the clients.
- There is uncertainty about who the real beneficiary or owner is.
- Mortgage repaid significantly prior to the maturity date with no logical explanation.

What can you do?

Although it is not uncommon for family members to assist in legal matters, you should carefully consider who you are really acting for and whether there may be capacity issues. Additional steps may be necessary to confirm who is giving the instructions and to ascertain who are the true beneficiaries of the transactions. Enhanced verification of the source of funds is also warranted when the client's income is modest, they have no other apparent source of wealth (such as selling property) and they are financing only a portion of the purchase price.

3. CREATION AND MANAGEMENT OF TRUSTS AND COMPANIES

SCENARIO:
Creation of a private trust

A woman contacted a mid-sized law firm seeking legal advice on creating a trust. She found the law firm through an internet search. The woman was from a country that poses a geographic risk. She provided a valid visa as proof of identification. She asked the lawyer to prepare a trust to handle an inheritance she received back in her home country. The trust was to be funded via wire transfer of the inheritance into the law firm's trust account in Canada. She asked for a legal opinion on tax issues and filing requirements in relation to the trust.

The client wanted to be the trustee with her adult children, one of whom lives in Canada named as the beneficiaries. She did not have a Canadian residence or bank account. The client also wanted an introduction to a chartered accountant and a banker in Canada. The type of trust requested by the client was a normal structure familiar to most legal counsel with experience with trusts. The goal of the client appeared to be asset management for the benefit of her children. While the tax consequences may have been complex, the plan itself was relatively typical.

RED FLAGS

- Client is not known to the legal advisor and the source of the connection (i.e., internet search) does not add any comfort.
- Client comes from a country that poses a geographic risk.
- The funds are to be wired from outside of the country into the law firm's trust account.
- Client does not have a bank account in the jurisdiction.
- Client requires introduction to multiple professionals (i.e. certified accountant and banker) indicating lack of connection with the jurisdiction.

What can you do?

Despite the fact that the plan for the trust is not unusual, several factors give cause for concern and suggest a potential money laundering risk, including the client's geographic location, limited connection to the jurisdiction, and rationale for selecting the legal advisor. There is also no compelling reason for the funds to flow through the legal advisor's trust account. In such cases, you should advise the client to open a Canadian bank account and not accept the funds directly into your trust account.

Additional inquiries should be made into the source of funds, including a request for supporting documentation. If after further inquiries, you are not satisfied on an objective basis that the transactions are legitimate, you must not act.

SCENARIO:

Management of an existing trust that may contain criminal property

A client went into the trust lawyer's office to terminate a trust established by his deceased mother. The client was the sole beneficiary of the trust. When asked about the source of the funds in the trust, the client was ambiguous and appeared evasive. When pressed, the client informed the legal advisor that he believed his mother may have embezzled the funds over many years from her long-time employer. The client asked the legal advisor for advice regarding the disposition of the assets in the trust and any legal obligations to the former employer.

RED FLAGS

- Client is not well known to the lawyer.
- The funds in the trust may be from illegal activity.

What can you do?

If you suspect assets may have been obtained through illegal activity, you have legal and ethical duties to make further inquiries. Facilitating the distribution of the trust assets to the client without making such inquiries and without being satisfied that the funds in the trust account were not obtained illegally would likely result in the breach of the applicable legal and ethical duties. There are no legal or ethical issues with preparing an opinion on the rights of the defrauded employer and the impact of those rights on the trust assets and client's entitlement to them.

SCENARIO:
Trust managed to facilitate a fraud[8]

A client retained a legal advisor to set up a trust. After the trust was established and the retainer had ended, the client created a false genealogy for the trust claiming it was a long-standing trust associated with a European monarchy. He then solicited investments for phony loans. The client hired a new legal advisor to manage the trust and publicized the advisor's credentials to legitimize the trust. The client provided the second legal advisor with false documentation about the trust.

The client then instructed the legal advisor to provide guarantees on behalf of the trust, maintain an escrow account into which "investments" could be deposited, and distribute the deposited monies to the client and his third party associates when requested.

RED FLAGS

- Client retained different legal advisors for setting up the trust, and later managing it, to hide the origins of the trust.
- Payments to the trust appear to be advance fees in a potentially fraudulent scheme.
- Client relied on the reputation of the second legal advisor to bolster the trust.
- Client instructed the legal advisor to give guarantees, receive advance fees, and distribute funds out of the trust to the client and third parties.

What can you do?

The legal and ethical obligation on legal professionals to not act for a client if there is reasonable likelihood it will aid or result in the commission of a crime is a very serious one. In this case, there are strong indications that the trust was being used fraudulently. Additional due diligence should be undertaken in such cases, including obtaining and carefully inspecting documents related to the creation and existence of the trust and scrutinizing the transactions that fund the trust.

[8] Based on *United States v. Anderskow,* 88 F.3d 245 (3d Cir. 1996).

4. MANAGING CLIENT AFFAIRS AND MAKING INTRODUCTIONS

SCENARIO:
Legal advisor fails to respond to money laundering warning signs

A client who owned several residential rental properties contacted a legal advisor for assistance with the purchase of another rental property. He had not yet decided on a property to purchase. He told the legal advisor that he wanted to choose a legal advisor he liked working with and whom he could trust before making his decision on a property. The two had several common interests and got along very well. They met often and became friends, but the client did not provide any immediate work.

One day, the client told the legal advisor that he had found a suitable property but could not proceed due to temporary cash flow difficulties caused by the need to make repairs to one of his rental units. He asked for a short-term loan, which the legal advisor agreed to, lending the money from his personal account. The legal advisor did not advise the client to get independent legal advice. The transaction went ahead and, shortly after closing, the client settled the loan. The client subsequently purchased two more properties, one funded by another loan from the legal advisor; the other funded by payments from a third party account. The client explained that the third party owed him a debt for unpaid rent.

The legal advisor took the client at his word and did not ask for additional information or supporting documents about this debt. Around this time, the legal advisor saw a news report indicating the client was being investigated for involvement with organized crime. The real estate deals closed without issue and the second loan was repaid quickly.

RED FLAGS

- Client is seeking to establish a relationship without specific work identified.
- Source of funds for the transactions are unusual.
- Lack of information on the source of funds for loan repayments.
- Payments from third parties.
- Client has suspected criminal associations.

What can you do?

You should exercise a high degree of caution when a client seeks to establish a relationship without asking you to undertake any specific legal work. Criminals may seek to “groom” you as part of their illegal scheme. The rules of professional conduct prohibit the lending of money to a client unless you explain the conflicting interest and require the client to obtain independent legal advice. Short-term loans of large sums raise red flags and, in circumstances such as these, particularly if discovering suspected links to organized crime, you should not act for the client.

SCENARIO:
Lawyer's judgment clouded by relationship with longstanding client

A sole practitioner, with 18 years of estates law practise, was asked by a longstanding client for help in selling his cottage. The legal advisor very rarely did real estate work, but wanted to keep this client's employment law business. She relied on her longstanding relationship with the client and did not take steps to verify the client's identity or otherwise try to learn anything more about the client. The client told her that he wished to sell the property quickly and was willing to list it at almost two-thirds its potential value.

The legal advisor found this odd, but accepted the client's explanation that he was experiencing financial difficulties and could no longer keep up with mortgage payments on his home. The legal advisor had heard a rumour that the police had investigated the client at some point for involvement in drug dealing, but she was not aware of any details. The client was subsequently convicted of drug trafficking. It emerged that he sold the cottage in a hurry as he feared it might be confiscated as part of the criminal proceedings.

RED FLAGS

- Client asked the lawyer to perform work outside her usual scope of practice.
- The instructions to sell the house below value were unusual and could result in a loss to the client.
- Client may be involved in the illegal drug trade.

What can you do?

You should make inquiries if you have information or hear "rumours" indicating the transaction may pose a risk for illegal activity, even with long-standing clients. You should also monitor your clients on an ongoing basis to ensure the information and instructions given are consistent with the purpose of the retainer and that you are not involved in or encouraging dishonesty, fraud, or illegal conduct. In this case, the client's possible criminal activity and his instructions to proceed with an expedited sale of property below market value were indicators that the lawyer might be facilitating criminal activity. In such circumstances, it would not be reasonable to proceed with the transaction.

SCENARIO:
Failure to complete due diligence due to source of referral

A junior partner in a law firm visited an important corporate client to make a pitch on a potential major new file. During a break in the meetings, the CEO for the client introduced the legal advisor to his nephew. The nephew needed help on some commercial matters and the director told the legal advisor that he would be “very grateful” if he would act for his nephew. The legal advisor wanted to please the corporate client and the work sounded straightforward. Urged to say "yes" or "no" right away, the lawyer agreed to act for the new client. Relying on the referral by a respected client and proof that the nephew had accounts with at least two major banks, the legal advisor decided to forgo the full due diligence checks.

Over the next two years, the lawyer acted for the nephew in straightforward commercial matters and significant funds remained in the law firm’s trust account following the transactions. One day, the police contacted the legal advisor and advised that they were investigating the nephew for suspected involvement in a fraud ring. Shortly afterward, the nephew called to ask the lawyer to transfer a large sum of money held in the client trust account to an overseas bank.

RED FLAGS

- Client puts pressure on the lawyer to represent unknown relative of client (in this case leveraging the lawyer’s desire to please another important client).
- Significant funds were being held for the client in the firm’s trust account following completion of transactions.
- Client is being investigated for fraudulent activities.

What can you do?

Always complete your client identification and verification checks, regardless of who the source of the referral. Only funds directly related to legal services are permitted to be held in a lawyer’s trust account. You must disburse funds held in trust for the client as soon as practicable following completion of the related legal services.

SCENARIO:
International client and creation of shell corporations

A woman contacted a law firm and met with a legal advisor looking to set up some companies under the *Canada Business Corporations Act.* She presented valid identification and said she is a dual citizen of Canada and a country that poses a geographic risk. She was not employed in Canada, but acted as a director of several corporations in other jurisdictions. She described these other corporations in general terms, stating that most were in the importing and exporting business. The woman gave a similar description for the Canadian companies she wanted to set up. She told the legal advisor that the Canadian companies would initially be funded by the corporations outside the country.

The woman provided documentation and the law firm conducted a search of the corporations, which were verified but appeared to be mainly holding companies. The law firm and the woman entered into engagement retainer agreement. After the legal advisor began setting up the Canadian companies, as instructed, she came across news articles indicating that, even though they had different family names, the client appeared to be the daughter of a former well-known head of state, accused of corruption.

RED FLAGS

- Client is a citizen of a country that poses a geographic risk.
- Client is a director of several corporations in multiple jurisdictions.
- Client can only provide general descriptions of the companies of which she is a director.
- Reason for setting up the new corporations is vague.
- Source of funds is uncertain.
- Funding for the new Canadian corporations is coming exclusively from outside the country.
- Client appears to be a politically exposed person, or have links to one.
- Client's role as director could be an attempt to disguise the real owner or parties to the transaction.

What can you do?

In a situation like this you should make further inquiries about the source of funds and business plan for the companies to be set up in Canada and the client's actual role in these and other corporations. You should also take steps to determine whether the client is a PEP. There are a number of online lists of PEPs. Before acting in such a case, you must be satisfied on reasonable grounds that the matters for which you are being retained are legitimate.

SCENARIO:
International politically exposed person investing in Canada

An individual approached a senior lawyer in a law firm to act for him in the purchase of a local sports franchise. The lawyer and the firm were pleased because the firm's sports law work had been declining lately. The potential client was a wealthy individual who made his fortune in the mining industry in a country that poses a geographic risk due to a high level of corruption. The law firm completed its client identification and verification checks and found out that the client was heavily involved in politics in his home country, serving as a member of the national legislature and, at one time, minister of natural resources. These positions made the client a foreign PEP as defined under Canadian anti-money laundering legislation.

The senior lawyer raised the issue of source of funds with the client who responded that the acquisition would be funded out of the proceeds of the sale of one of his former mining businesses. The law firm accepted the engagement. During the course of advising on the proposed investment, a junior lawyer brought to the attention of the senior lawyer a news article reporting that the client had been accused of bribery in obtaining the mining concessions on which his fortune was built. Further, during his time in politics, the client was implicated in an expenses scandal, although a parliamentary investigation found him not guilty of these accusations.

The senior lawyer raised this issue (accusation of bribery) with the client and the client explained that the charges were politically motivated and were made up by an opponent to discredit him. The law firm accepted the client's explanation. A couple of years later, a foreign court convicted the client of bribery and corruption in connection with the mining rights and the parliamentary investigation, which had been conducted by a close associate, and ordered the client's assets frozen.

RED FLAGS

- Client obtained his wealth from a country that poses a geographic risk.
- Mining and natural resource extraction in a country with high corruption may pose a higher risk for money laundering.
- Client is a politically exposed person.
- Client is the subject of allegations of corruption.

What can you do?

You should engage in more thorough risk assessment and due diligence when the client is a PEP or is from a high risk country or region. In this case, the client is both. You should undertake independent research instead of relying on the client's explanation. Before acting or continuing to act for a client in these circumstances, you must be satisfied on an objective basis that you are not facilitating a criminal offence.

SCENARIO:
Multiple high-risk factors relating to an international transaction

An individual attended at the office of a mid-sized law firm without a scheduled appointment seeking legal advice on setting up a business. He told the legal advisor he was an international businessman from a country in Europe and was in the process of moving to Canada. He said that he had secured $700K in funding for the Canadian business from a company located in a country that poses a geographic risk. When asked for identification, he told the legal advisor he misplaced his passport in the move and had applied to replace it. He produced a photocopy of some temporary travel papers and promised to bring in his new passport as soon as it was issued. He also produced the investment agreement with the company from the high-risk jurisdiction.

The agreement was very basic and did not appear to have been drafted by a lawyer/legal professional. The individual said the funds would be wired by the company from a bank account in a country known for banking secrecy. The legal advisor performed an Internet search on the individual, his other businesses, and the investing company. The search showed that the individual had a very common name in his jurisdiction making it difficult to verify information on him. A Facebook page was found for one of his international companies, but the site had only the company's name, a low resolution logo and a street address with no phone number or email. The legal advisor did not find any information on the investing company.

RED FLAGS

- Client shows up at the law office without an appointment or prior phone or email contact despite the relatively large investment at stake.
- Client and investing company are both located in high-risk countries.
- Client's connection to the jurisdiction is unclear beyond desire to start a business there.
- Client is not able to present valid identification.
- There is little to no information available on the potential client, his business or investing company.
- The purported investment agreement documentation is uncharacteristically simple for the nature of the transaction.
- Funding is arriving from a jurisdiction known for banking secrecy.

What can you do?

You must satisfy the requirements under your regulator's client identification and verification rules. Given the lack of information on the client, his business and the investing company, you should conduct a risk assessment on the client and the other parties to the transaction to find out who they are and determine the source of funds. You should decline to act where there are multiple high-risk factors, as in this case.

SCENARIO:
Failure to consider who controls the client

A corporation retained a law firm in relation to the sale of assets. The corporation "passed" the law firm's client identification and verification checks and provided documentation on the client's ownership of the assets. In email communications with the legal advisor, the client copied several other individuals and asked that these individuals be included in future emails from the law firm.

When complications arose on the asset sale, a previously unidentified individual started to attend meetings and appeared to be leading the discussions and decisions for the client. It emerged that this individual had an outstanding warrant for fraud and was making decisions for the client despite holding no formal role with the corporation.

RED FLAGS

- Client is requesting that individuals with no apparent relation to the client be included in communications or meetings.
- Client decisions and instructions appear to be coming from a third party.
- Actual directing party has been charged with fraud.
- There appears to be an attempt to disguise the real owner or parties to the transaction.

What can you do?

You may only take instructions from third parties in very limited circumstances, and only after verifying their identity and obtaining the clear consent of the client. The absence of a logical explanation for the role of the third party is a red flag. The fact that the person who is apparently directing the transaction faces criminal charges for fraud significantly increases the risk of illegal activity. In this scenario, the red flags are sufficient to suggest that the lawyer ought not to continue acting.

SCENARIO:
Questionable source of funds

A legal advisor represented a company trying to create an initial public offering (IPO) for an opaque tech start-up. Due to concerns over the company's financial viability and a potentially messy ownership dispute, the company struggled to make the IPO a success. At the last minute, a previously unknown wealthy investor came along and made a substantial bid.

The money offered by the wealthy investor was actually the company's money. Representatives of the company were paying money to the purported investor to promote the investment.

RED FLAGS

- Purpose of the client company is ambiguous.
- Unexplained financing arrangements.
- Appearance of sudden willing investor when previous interest was lacking.

What can you do?

When questionable circumstances arise, such as the unexpected and last minute appearance of a wealthy investor, you should take additional steps, including requesting additional information on the source of funds, inquiring about the reasons for the investor's sudden appearance in the transaction, and/or establishing whether a relationship exists between the investor and the company. Also, when acting on an IPO, the legal advisor must have clear and detailed information on the nature of the corporation and its plans.

SCENARIO:
Instructions from an overseas client

A woman who was a UK national, phoned a Canadian legal advisor specializing in estates law seeking representation in relation to the purchase of some high-value properties. The woman told the legal advisor that he came highly recommended by a close friend of hers who was a long-time client and whose opinion she valued highly. The potential client said that she understood that her matter was not in the legal advisor's primary area of practice, but what mattered most to her was that she be able to deal with someone she could trust. The woman did not intend to travel to visit the properties prior to purchasing them.

She asked that the purchases be completed as soon as possible and offered to pay the legal advisor an extra fee if the purchases were completed by a certain date. She assured the legal advisor that financing would not delay the purchase since no loans were required.

RED FLAGS

- Legal advisor being asked to advise on an area of law outside his expertise.
- Client is not planning to visit the properties, despite the high value of the transaction.
- No financing is required for the transactions despite their high value.
- Client promises to pay extra fees for speedily completing transaction.
- Client provides no explanation for an expedited transaction.

What can you do?

You must always verify a client's identity and obtain information about the source of funds when a financial transaction is involved, even for referrals from trusted sources. You should undertake additional inquiries when there are high risk indicators, such as the client not visiting the properties, paying for high value properties without financing, asking you to take on a matter outside your areas of expertise or requesting you to expedite the transaction without a logical explanation. It is good practice to check any referral source. You can ask the client who referred them, and request consent to contact the referral source. If the client says "no", that is an additional red flag. If the client says "yes", you may discover that the source doesn't know the client well or at all, which may also be a red flag.

SCENARIO:
Performing due diligence on other parties to a transaction

A Canadian company was a longstanding and major client of a large law firm. The company planned to acquire a construction entity based in a country that poses a geographic risk. The client wanted the entity for its many lucrative government contracts. Very late into the negotiations, it was revealed that the construction entity had made a large number of payments to companies described in the records only as “consulting services”. Establishing the identity of the consultants or the exact nature of the services they provided was difficult. The legal advisors recommended that the client obtain more information about the consultant contracts and the fees paid under those contracts.

On a more detailed analysis, it became apparent that many of the consultants were linked to government officials responsible for awarding public contracts, licenses and permits. No details as to the precise services performed for the construction company were provided. The law firm became concerned that the fees might constitute bribes paid by the construction entity to secure contracts. The legal advisor informed the client that the construction entity it planned to purchase may have obtained its contracts through illegal acts and that the resulting revenue could constitute the proceeds of crime. Since the client was very interested in acquiring the entity, it asked the law firm to proceed with the transaction.

RED FLAGS

- Involvement of a higher-risk jurisdiction.
- Difficulty in obtaining satisfactory information related to services being provided to the target construction company and related to the payments it made.
- Certain assets of the entity being purchased (i.e., construction contracts) appear to have been illegally obtained.

What can you do?

As a legal advisor you have an obligation to satisfy yourself that the transaction with which you are assisting is legal. In this scenario, you would have to inform the client that you could not complete the transaction unless additional information and supporting documentation was obtained to demonstrate the contracts were not illegally acquired. It is important to undertake appropriate risk assessment and due diligence, and to seek additional information when concerns arise. This may occur at any stage of the transaction. In the circumstances of this scenario, seeking further clarification was part of the legal advisor’s duty of care to the client.

SCENARIO:
Third party involvement in an expedited transaction

Legal advisor A is good friends with legal advisor B, whom she has known for years as their practices are similar. B called A and advised that a former client needed assistance with papering a loan that the client was going to make to Company X. B told A that she did not know much about the matter and could not act because she had a trial coming up. A didn't know (and didn't ask) any details about B's relationship with the client, including whether B had complied with the client identification and verification rules. A met with the client, who attended with two other individuals: the person to whom the client had made the loan at issue; and, a third party, introduced only by his first name. No information was provided about the third party's relationship to the lender or the borrower.

The third party did most of the talking during the meeting, explaining that the client lent $500,000.00 to the borrower a few months ago at an interest rate of 30%. The third party said the proposal was to place a mortgage on the borrower's property for the loan. The third party told A that the borrower was leaving the country shortly on a business trip so they would need to get everything set up and signed immediately. Before anyone asked what A would charge for the retainer, the third party said they could pay her fees with cash or run out to get a bank draft.

RED FLAGS

- No certainty that the client(s)/beneficial owners have been properly identified/verified.
- Involvement of a third party, whose relationship to the client and other parties is not known.
- Both client and other party meet with the lawyer together despite obvious conflict of interest issues.
- Third party appears to be in control of client and other party, and gives instructions.
- Desire to complete the transaction very quickly (i.e. same day).
- Third party offers to pay lawyer's fees in cash or bank draft right away without knowledge of the lawyer's rate.

What can you do?

You should always ensure you know who the client is. Clarify the relationship of any third parties who may appear to be controlling or wanting to give instructions on behalf of the named client. You need the client's clear consent before accepting instructions from a third party and have an obligation to identify and verify the identity of the third party in such circumstances. You should also always assess and communicate any potential conflicts of interest if multiple parties are looking to retain you. It is important to be cautious when faced with a client seeking a transaction within a very short timeline and expressing a willingness to pay your fees immediately in cash without first learning your rate or an estimate of the final bill. You should also avoid entering into a joint retainer with the borrower and lender in private loan agreements.

5. DISPUTES AND LITIGATION

SCENARIO:
Claim for debt recovery with little substantive legal work required

A foreign company retained a legal advisor at a small firm to commence a debt recovery claim against a company located in the firm's jurisdiction. The legal advisor's main area of practice was employment law. At the time, he was busy with several large files. However, the matter appeared straightforward and he decided to take it on. A search verified the identity of the debtor company as a registered corporation, but it was not clear whether it had any assets in the jurisdiction. The legal advisor told the client, but the client did not seem concerned and instructed the legal advisor to proceed with the claim.

After one initial phone call with the legal advisor, the client only communicated via email. The legal advisor asked the client to send him documents to support the debt claim. The client sent a scanned copy of an invoice marked "unpaid" by email. The defendant company did not contest the claim and a default judgment was entered. The legal advisor served the default judgment on the defendant company and a demand letter explaining how to make payment. The defendant company responded by immediately transferring the sum into the law firm's trust account.

RED FLAGS

- Legal services sought by client are beyond the expertise of the legal advisor.
- Foreign company without an obvious connection to the place of litigation.
- Defendant company with no apparent assets in the jurisdiction.
- Limited documentation on the nature of the debt underlying the claim.
- Defendant does not contest default judgment.
- Defendant pays the amount with little debt recovery work required by the legal advisor.

What can you do?

It may be difficult to establish whether one is dealing with fictitious claims, but you must keep an eye out where matters seem to be proceeding too smoothly. You should also be cautious when being asked to take on matters outside your usual area(s) of practise. In this scenario, the legal advisor should have been alerted by the client's lack of concern about the defendant appearing to have no assets in the jurisdiction and the ease with which the litigation was settled. You should always obtain an explanation when asked to provide unused or excess trust funds to a third party since this can increase the risk of money laundering. To avoid this, you should return trust funds to the client or the original payor (if received from someone on behalf of the client).

SCENARIO:
Demand letter and settlement with little substantive legal work

A legal advisor was approached by a new potential client who asked for help regarding a dispute with the owner of ABC Ltd. The client said that the owner of ABC Ltd. convinced her to invest in his company by regaling her with its impressive sales numbers and promising the imminent global launch of ABC's product. The client bought shares in ABC Ltd. for $100,000 with the expectation that the shares would be worth at least $600,000 within 12 months. The client said that she now realizes that the owner of ABC Ltd. duped her and that the shares she bought are worthless. Although the legal advisor was busy with several tight deadlines on other files, he agreed to prepare a demand letter. He did not ask her for any documents since he thought the client had told him what he needed and he was only making a demand at this stage.

He sent the demand letter to a Hotmail email address that the client provided for the owner of ABC Ltd. The owner replied within days and agreed to buy-back the client's shares for $500,000. The client was delighted and asked for the payment to be made by ABC Ltd. into the legal advisor's trust account, and then paid out equally to two separate numbered companies that she controlled. A few days later, the legal advisor received the settlement funds into his trust account by wire transfer from a country known for banking secrecy. The client thanked the legal advisor by giving him a $5,000 bonus on top of his fees.

RED FLAGS

- Client's loss relates to misleading and potentially fraudulent activity.
- Free online email (i.e., Hotmail) is used to communicate with corporate party.
- Settlement funds are paid very quickly and without explanation following the demand letter, particularly large sums.
- Settlement funds are received from an account located out of the country without explanation.
- Client requests, without explanation, that settlement funds on a personal debt be sent to two corporate accounts with no apparent connection to the dispute.
- Client pays a bonus in addition to fees.

What can you do?

When acting for clients on a claim or demand for recovery of a debt or actionable loss, you should request and review documents supporting the debt or loss. In this scenario, the fact that the client claimed to have lost the money in potentially fraudulent circumstances ought to have reinforced the need for investigation into the nature of the debt. The other red flags, including the quick payment of settlement funds following a simple demand letter and the payment coming from out of the country, suggest this situation is high-risk for money laundering. If a client makes specific unusual requests about how to transfer the funds (e.g., to unrelated corporate accounts) you should make inquiries as to the reason for these instructions.

APPENDIX
RED FLAGS QUICK REFERENCE GUIDE

This appendix provides a list of red flags that indicate potential risks of money laundering and other illegal activity, including fraud. They are arranged by the nature of the risk.[9] This list is not exhaustive and is intended as a quick reference guide to identify common red flags. Other circumstances may arise suggesting a particular client or transaction poses a money laundering risk.

Identity of the client

- Reluctant to provide or refuses to provide information relating to their identity and/or the identity of a beneficial owner or controlling interest.
- Provides false information or counterfeited documentation in relation to their identity and/or the identity of a beneficial owner or controlling interest.
- Known to have convictions or to be currently under investigation for acquisitive crime, or has known connections with criminals.
- Age or capacity of the client is unusual for the transaction, especially if they are under legal age and there is no logical explanation for their involvement.
- Business entity that has no internet presence at all, cannot be found in corporate registries, and/or is only using an email address from a free web-based email provider (e.g., Hotmail, Gmail, Yahoo, etc.), especially if the client is otherwise secretive or avoids direct contact.
- Business is in cash-intensive industries that are not usually cash-rich but generate substantial amounts of cash (e.g., money-service businesses and casinos).
- Structure of the client organization makes it difficult to identify its beneficial owner or controlling interests (e.g., the unexplained use of legal persons or legal instruments).
- Domestic or international politically exposed person (PEP); i.e. holds or has previously held a public position (political or high-level professional appointment) or has professional or family ties to such an individual and is engaged in unusual private business given the frequency or characteristics involved.
- Originally from, a resident of, or owner of a company incorporated in a high-risk country as identified by credible sources (e.g., Government of Canada, FINTRAC, FATF, UN) as:
    - Generally lacking appropriate AML laws, regulations and other measures;
    - Being in a location from which funds or support are provided to terrorist organisations; or
    - Having significant levels of corruption or other criminal activity.
- Related to or is a known associate of a person listed as being involved or suspected of involvement with terrorist or terrorist financing related activities.

[9] This list is based on resources from the Financial Action Task Force, the International Bar Association, the American Bar Association and the Council of Bars and Law Societies of Europe.

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RED FLAGS QUICK REFERENCE GUIDE

Behaviour of the client

- Overly secretive or evasive about:
  - Their identity
  - Their address or contact information
  - Identity of the true client
  - Identity of the beneficial owner
  - Where the money is coming from (i.e., source of funds)
  - Why they are doing the transaction this way
  - The overall reason for, or purpose of the transaction i
- Chooses a legal advisor who is:
  - At a distance from the client or the transaction without legitimate or economic reason.
  - Without experience in a particular specialty or without experience in providing services in complicated or especially large transactions.
- Has changed legal advisor a number of times in a short time or engaged multiple legal advisors without legitimate reason.
- Uses an agent or intermediary without good reason.
- Uses financial intermediaries that are neither subject to adequate anti-money laundering laws nor adequately supervised by authorities.
- Is evasive or actively avoiding personal contact without good reason.
- Is prepared to pay substantially higher fees than usual or bonus for services that would not warrant such a premium or without good reason.
- Demonstrates an excessive desire to expedite the transaction and/or offers an incentive to complete the transaction by a certain date (e.g., higher fee or bonus), without a good reason.
- Changes settlement or execution instructions multiple times or in a short period of time without good reason.
- Is reluctant to provide or refuses to provide information, data and documents usually required in order to enable the transaction's execution.
- Provides false or counterfeited documentation.
- Demonstrates unusual familiarity with the ordinary standards provided for by the law in satisfactory customer identification, data entries and suspicious transaction reporting or asks repeated questions on related procedures.

APPENDIX

RED FLAGS QUICK REFERENCE GUIDE

Source of Funds/ Source of Wealth

- Transaction involves a disproportionate amount of private funding, bearer cheques, bank drafts or an attempt to use cash, especially if it is inconsistent with the socio-economic profile of the individual or the company's economic profile.
- Source of funds is unusual, e.g.:
    - Third party funding for the transaction with no apparent connection or legitimate explanation.
    - Funds received from or sent to a foreign country when there is no apparent connection between the country and the client.
    - Funds received from or sent to high-risk countries.
- Client is using multiple bank accounts and/or foreign accounts without good reason.
- Client funds provided for a transaction appear to be large relative to the client's income without logical explanation.
- Personal private expenditure is funded by a company, business, or government.
- Collateral being provided for the transaction is currently located in a higher-risk country
- Unusually short repayment period has been set without logical explanation.
- Mortgages are repeatedly repaid well before the initially agreed maturity date, with no logical explanation.
- High value transaction does not require financing.
- Asset is purchased without financing and then rapidly used as collateral for a loan.
- Request to change the payment procedures previously agreed upon without logical explanation, especially when payment instruments are suggested that are not appropriate for the common practice used for the ordered transaction.
- Financing provided by a lender other than a bank or credit institution with no logical explanation or economic justification.
- Significant increase in capital for a recently incorporated company or successive contributions over a short period of time to the same company, with no logical explanation.
- Increase in capital from a foreign country, which either has no relationship to the company or is high risk.
- Business receives an injection of capital or assets suddenly and/or notably high in comparison to the business, size or market value of the company, with no logical explanation.
- Excessively high or low price attached to the securities transferred.
- No legitimate explanation for large financial transactions, especially if requested by recently created companies, where these transactions are not justified by the corporate purpose, the activity of the client or the possible group of companies.

APPENDIX

RED FLAGS QUICK REFERENCE GUIDE

Nature of the retainer or transaction

- Transaction is unusual, e.g.:
    - Type, size, frequency, manner of execution of transaction is unusual for or inconsistent with the size (entity), age, or activity of the client.
    - Remarkable and highly significant differences between the declared price and the approximate or actual values in accordance with any reference that could give an approximate idea of this value or in the judgement of a legal advisor.
    - Non-profit organization requests services for purposes or transactions not compatible or typical with those declared for that body.
- Requested service was refused by another legal advisor or professional or the relationship with another legal advisor or professional was terminated.
- Transaction does not correspond to client's normal professional or business activities.
- Client lacks suitable knowledge of the nature, object or the purpose of professional services requested.
- Client wishes to establish or take over a legal person or entity with a dubious description of the aim, or a description that is not related to client's normal professional or commercial activities or his other activities.
- Client frequently changes legal structures and/or managers without legitimate reason.
- Unexplained changes in instructions, especially at the last minute.
- Client asks for short cuts or unexplained speed in completing the transaction.
- Client requires introduction to financial institutions to help secure banking facilities in the context of the transaction.
- Client instructs the creation of complicated ownership structures when there is no legitimate business or economic reason.
- Involvement of entities in multiple countries where there is no apparent link to the client or transaction, with no legitimate or economic reason.
- Incorporation and/or purchase of stock or securities of several companies, enterprises or legal entities within a short time with elements in common (one or several partners or shareholders, director, registered company office, corporate purpose etc.) with no logical explanation.
- Absence of documentation to support client's story, previous transactions, or company activities.
- Several common elements in a number of transactions in a short period of time without logical explanation.
- Back-to-back property transactions, with rapidly increasing value or purchase price.
- Abandoned transactions with no concern for the fee level or after receipt of funds.
- Retainer exclusively relates to keeping documents or other goods, holding large deposits of money or otherwise using the legal advisor's trust account without the provision of legal services.
- Lack of sensible commercial/financial/tax or legal reason for the transaction.
- Increased complexity in the transaction or the structures used for the transaction that result in higher taxes and fees than apparently necessary.
- Power of attorney is sought for the administration or disposal of assets under conditions that are unusual, where there is no logical explanation.
- Investment in immovable property, without any links to the place where the property is located and/or without any financial advantage from the investment.
- Litigation is settled too easily or quickly, with little to no involvement by the legal advisor retained.
- Includes requests for payments to third parties without substantiating reason and/or corresponding transaction.

APPENDIX

RED FLAGS QUICK REFERENCE GUIDE

Parties

- Originally from, resident or incorporated in a country posing a high risk to money laundering.
- No apparent business reason connecting the parties to the transaction.
- Ties between the parties of a family, employment, corporate or any other nature generate doubts as to the real nature/reason of the connection.
- Multiple appearances of the same parties in transactions over a short period of time.
- Age or capacity of the executing parties is unusual for the transaction, especially if they are under legal age and there is no logical explanation for their involvement.
- Attempts to disguise the real owner or parties to the transaction.
- Business entities cannot be found and/or have no presence on the internet and/or in corporate registries.
- Person directing the operation is not one of the formal parties to the transaction or the representative.
- Natural person acting as the director or representative does not appear to be a suitable representative.

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

Submission of the Federation of Law Societies of Canada in response to the Department of Innovation, Science and Economic Development and the Department of Finance's *Consultation Paper: Strengthening Corporate Beneficial Ownership Transparency in Canada*

May 15, 2020

Introduction

1. The Federation of Law Societies of Canada ("the Federation") appreciates the opportunity to provide written comments on the Consultation Paper: Strengthening Corporate Beneficial Ownership Transparency in Canada ("the Consultation Paper") prepared by Innovation, Science and Economic Development Canada ("ISED Canada") and Finance Canada.

2. The Federation is the coordinating body of the 14 governing bodies of the legal profession in Canada. Our member law societies are mandated by provincial and territorial legislation to regulate more than 130,000 lawyers across the country, 3,800 notaries in Quebec and nearly 11,300 licensed paralegals in Ontario in the public interest. An important role of the Federation is to express the views of the regulators of the legal profession on national and international issues relating to the administration of justice and the rule of law.

3. The Federation and its member law societies have been actively engaged in the fight against money laundering and terrorist financing for over 15 years and support the government's efforts to fight these crimes. It is the Federation's position that a beneficial ownership registry would be a valuable tool in this fight and would assist the legal profession in complying with law society anti-money laundering and terrorist financing rules and regulations. As with all other anti-money laundering initiatives, a beneficial ownership registry must respect the constitutional principles on which Canadian society rests including the rule of law and the protection of solicitor-client privilege and professional secrecy.

Anti-money laundering and anti-terrorist financing initiatives in the legal profession

4. In 2015 the Supreme Court of Canada recognized that the provisions in federal anti-money laundering legislation requiring legal counsel to collect and retain information not required for client representation, granting expansive powers to search law offices, and providing inadequate protection for solicitor-client privilege violated provisions of the *Canadian Charter of Rights and Freedoms.* The Court also held that the legislation undermined the ability of lawyers and Quebec notaries to comply with their duty of commitment to the client's cause, a principle of fundamental justice.[1]

5. There has not, however, been a vacuum in the regulation of legal counsel with respect to money laundering and terrorist financing. Members of the legal profession in Canada have been subject to comprehensive anti-money laundering regulations for more than a decade. Canada's law societies are committed to protecting the public through regulatory measures that mitigate the risks of money laundering and the financing of terrorism that may arise in the practice of law. This commitment has been demonstrated by the adoption and enforcement of rules limiting the ability of legal counsel to accept cash, regulating the use of trust accounts and imposing extensive client verification obligations.[2] In combination with comprehensive rules of professional conduct and rules that govern financial accounting, these regulatory requirements effectively address the risk of potential involvement in money laundering or terrorism financing by legal professionals.

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[1] *Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015] 1 SCR 401, 2015 SCC 7 (CanLII).

[2] The Model Rules are available here: https://flsc.ca/national-initiatives/model-rules-to-fight-money-laundering-and-terrorist-financing/

6. A model rule developed by the Federation and implemented by all Canadian law societies, ensures that legal counsel engage in rigorous client due diligence. The Client Identification and Verification rule, which closely tracks the obligations contained in the federal client verification regulations, has been in force in all Canadian jurisdictions since 2008. Members of the legal profession must identify all clients by recording basic information such as the client's name, address, telephone number, and occupation and must verify the identity of clients, those giving instructions on behalf of clients, and third parties represented by clients when providing legal services in respect of the receipt, payment or transfer of funds.

7. In 2018, the Federation amended the Client Identification and Verification rule, closely tracking federal regulatory changes. The revised rule requires legal counsel acting for an organization (e.g. a corporation, trust, or partnership) in a matter involving a financial transaction to make reasonable efforts to identify the persons who own or control 25 per cent or more of the organization (beneficial owners). However, in the absence of access to reliable information in a central registry, legal counsel and others obliged to identify beneficial owners as part of due diligence requirements are left with no choice but to rely on information provided by their clients or the entities themselves with limited means of verifying the accuracy of the information.

Beneficial ownership registry

8. There is a clear international consensus that transparency in ownership and control of entities enhances anti-money laundering efforts. Like the federal regulations, the Federation's due diligence rules include obligations to obtain and record beneficial ownership information. For such requirements to be effective, however, there must be ready access to reliable information identifying those who own and control corporations and other entities.

9. The Federation is on record as supporting a public registry (or registries) of beneficial owners.[3] This consultation by ISED Canada and Finance Canada allows us to address important considerations about the scope of access to information in such a register.

10. Providing broad public access to beneficial ownership information would be consistent with the objective of greater transparency and would enhance efforts to fight money laundering and the financing of terrorism. The Federation recognizes, however, that there are competing public policy interests, including protecting privacy and confidentiality, and encouraging investment and economic activity, that must be considered in determining who should have access to a registry and what the extent of that access should be.

11. The Consultation Paper states that the primary goal of a central registry model would be to ensure authorities have immediate access to corporate ownership information to allow for more rapid investigations with reduced risk of tipping off parties. In the Federation's view, restricting access to government authorities would significantly limit the registry's utility and effectiveness. It is the Federation's position that access to the registry must be provided

[3] See the Federation's May 2018 submissions in response to Finance Canada's consultation paper: *Reviewing Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime* and the submission of the Federation to the House of Commons Standing Committee on Finance Statutory Review of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, https://flsc.ca/wp-content/uploads/2018/03/MONEYLaunderENMarch2018F.pdf.

both to competent authorities (e.g. law enforcement) and all persons with due diligence obligations under federal anti-money laundering and terrorist financing legislation or provincial/territorial law society rules. As noted above, access to reliable beneficial ownership information is essential if the obligations on reporting entities under federal regulations and those imposed on legal counsel by the law societies are to be meaningful and effective.

12. The Federation agrees, however, that careful consideration must be given to how to balance the goal of greater corporate transparency with the need to respect the reasonable privacy interests of individuals whose information would be accessible through a registry (i.e. individuals with significant control). Highly restricted access would undermine the objective of corporate transparency as a means of combatting money laundering, while providing unfettered public access to personal and sensitive information would create risks that the information might be used improperly or for illicit purposes (e.g. identity theft, extortion). The models adopted in the United Kingdom and France, provide contrasting examples of how these competing interests have been addressed elsewhere.

13. The UK Companies House regime, described in some detail in the Consultation Paper, provides a publicly accessible and searchable registry, although access to some personal information, including full date of birth and residential address, is restricted. This approach is consistent with the requirements of the European Union's Fifth Anti-Money Laundering Directive ("EU Fifth Directive").[4] In contrast, France restricts access to its central register to a prescribed list of positions and entities, including judges, law enforcement officials, customs officials, and officials from the Public Finances General Directorate.[5] Other individuals, including members of the public, may obtain access to information in the French register through a court order where they demonstrate a "legitimate interest" (not defined) in the information.

14. While the EU Fifth Directive calls for public access to beneficial ownership information it does not propose unfettered access, stating that "a fair balance should be sought in particular between the general public interest in the prevention of money laundering and terrorist financing and the data subjects' fundamental rights." To that end the EU Fifth Directive calls for clearly defining and limiting the information made publicly available and also allows for exemptions to the disclosure of beneficial ownership information and access to the information in exceptional circumstances (e.g. where disclosure would expose the subject to a risk of fraud, kidnapping, blackmail, extortion etc.).[6]

15. Establishing a beneficial ownership registry would mark a significant shift in Canadian policy on corporate transparency. This is a shift that the Federation supports, but we understand that achieving the appropriate balance between the benefits of greater corporate transparency and privacy interests is essential. This may require a tiered approach to access to the information in a registry with different categories of persons and organizations being granted different levels of access. There may also be merit in phasing-in access over time. The French approach of restricting access to specified persons and organizations but providing an avenue for broader access based on demonstrating a legitimate interest is another option. In that case, however, it would be important to clearly define "legitimate interest" and to ensure that the definition is not overly narrow. Another, and perhaps

[4] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.156.01.0043.01.ENG.
[5] https://www.legifrance.gouv.fr/eli/decret/2017/6/12/ECOT1706881D/jo/texte.
[6] Supra note 4 at para 36.

preferable option, would be to allow exemptions from disclosure in certain specified circumstances including those identified in the EU Fifth Directive.

16. In the Federation's view, whichever model is pursued, legal professionals and other reporting entities must be given access to the registry from the start to ensure that they have an objective, reliable means of fulfilling their obligations to identify beneficial owners.

Additional comments about implementation

17. While lawyers and Quebec notaries will benefit from accessing information in the proposed beneficial ownership registry, such a registry must not, directly or indirectly, require legal professionals to report information protected by solicitor-client privilege or professional secrecy to government authorities. It is thus imperative that the registry regime be designed and implemented in a manner that respects the constitutional protections for solicitor-client privilege and professional secrecy recognized by the Supreme Court of Canada.

18. Since the regulation of corporations is an area of shared responsibility, federal, provincial and territorial jurisdictions should adopt a consistent approach to beneficial ownership registries. The Federation recommends that ISED Canada and Finance Canada work closely with their provincial and territorial counterparts in this regard to develop a national, unified registry or a series of linked registries accessible through a single portal.

Conclusion

19. In the submission of the Federation, the creation of a public beneficial ownership registry for privately-held federally incorporated companies is an appropriate, necessary and welcome measure to combat money laundering, terrorist financing and other illicit activities. While there are many factors to consider in determining the extent of public access to such a registry, for the reasons outlined above it is essential that legal counsel be provided access. We look forward to further engagement with the federal government on this important issue.

Anti-Money Laundering and Terrorist Financing Working Group

Guidance on Monitoring Obligations

Client Identification and Verification

July 6, 2020

Monitoring

The Client Identification and Verification rule requires legal professionals who are retained in respect of a financial transaction[1] to periodically monitor their professional business relationship with their client. This requirement applies to all clients in such circumstances, including long-standing clients.

What is required?

While retained in respect of a financial transaction, you must periodically assess:

(1) Whether the information you have obtained about (i) your client's activities, (ii) the source of funds used in the transaction, and (iii) your client's instructions are consistent with the purpose of the retainer and the information you have about the client; and

(2) Whether there is a risk that you may be assisting in or encouraging fraud or other illegal conduct.

You must also keep a record of the measures you have taken to comply with the monitoring requirements, including the applicable date and the client information that you have obtained. The record must be kept for at least six years following completion of the work for which you were retained.

What steps should you take?

The nature, degree and frequency of periodic monitoring and what information should be recorded will depend on what is reasonable in each case considering the client, the nature of the work, the anticipated duration of the retainer and the services provided. The measures taken should be commensurate with the risk associated with these or other relevant factors. More thorough or frequent monitoring may be required when the circumstances indicate an elevated risk.

Although risk must be assessed on a case by case basis, some examples of factors indicating an elevated risk include: unusual or inconsistent client behaviour, activities, or instructions; a transaction of relatively high value is undertaken without financing; the financing arrangements or source of funds are unclear or unexplained; the client has modest income relative to the transaction without a reasonable explanation; the client is an elected official or other politically exposed person[2] as defined by legislation; the transaction involves a country identified by competent authorities as having weak anti-money laundering laws and measures.

You are required to apply your professional judgment to assess risks in any given circumstance.[3]

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1 This means "to engage in, or give instructions in respect of receiving, paying or transferring of funds". Common examples include providing legal services in relation to the purchase or sell of business entities, arranging financing for the purchase or sale of business entities or assets, and purchasing or selling real estate.

2 For information on politically exposed persons (PEPs) see https://www.fintrac-canafe.gc.ca/guidance-directives/client-clientele/Guide12/12-eng.

3 For more detail on identifying and assessing risk see the Federation of Law Societies of Canada's Risk Assessment Case Studies for the Legal Profession.

Duty to withdraw representation

If while retained, including in the course of obtaining the required information and taking the steps under the monitoring requirements, you know or ought to know that you are or would be assisting a client in fraud or other illegal conduct, you must withdraw from representation of the client.[4]

The Client Identification and Verification rule is designed to mitigate risks of involvement in or facilitation of money laundering or terrorist financing. The *Model Code of Professional Conduct* rules for the legal profession also require legal professionals to be diligent against potential client dishonesty, fraud or other illegal activities.[5]

You are encouraged to contact a practice advisor or the equivalent at your Law Society for further guidance on what may be required in a particular matter.

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4 See Client Identification and Verification rule ss. 9(1) and 11.

5 See the Federation of Law Societies of Canada's *Model Code of Professional Conduct* rules 3.2-7 (dishonesty, fraud by client or others) and 3.2-8 (dishonesty, fraud when client an organization), in particular, regarding the duty to withdraw.

Anti-Money Laundering and Terrorist Financing Working Group

Guidance on Using an Agent

Client Identification and Verification

July 6, 2020

Use of Agents

The Client Identification and Verification rule requires legal professionals to verify an individual's identity when they are retained to provide legal services in respect of a financial transaction.[1]

You **may use an agent** to verify the identity of an individual at any time.

When must an agent be used?

If the individual whose identity is to be verified is outside of Canada and you cannot meet with them in person, you must use an agent for the verification.

You also must use an agent when relying on the government-issued document method for verification if the client or third party is located elsewhere in Canada and you, or a partner, associate or employee at your firm, cannot meet with them in person.

Agreement or arrangement in writing

When you are using an agent to verify identity you must have a written agreement with the agent. The agreement does not need to be in any particular form; it may be a letter or email, for example. However, the agreement should set out in sufficient detail the purpose of the arrangement and what the agent is expected to do.

Who may act as an agent?

There are no set qualifications or credentials for who may act as an agent to verify identity. You must use your professional judgment to choose a suitable agent.

The responsibility for verifying an individual's identity is yours, even when using an agent. You should always choose the agent; don't rely on your client or the individual whose identity is being verified to find the agent.

You should ensure that the agent is reputable, reliable, accountable, and, where feasible, familiar with anti-money laundering due diligence requirements. For instance, in the case of a potential agent who is a member of a regulated profession, you should check the agent's status and contact information with the regulator.[2]

Caution should be used when seeking an agent in a country other than Canada, particularly where the individual or the subject matter of the retainer involves a high-risk jurisdiction[3]. In some cases, embassies or consulates may offer verification of identity services.

If you do not know a suitable candidate to act as agent, you should check with the regulator for the legal profession in the jurisdiction where the individual is located.

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[1] This means "to engage in or give instructions in respect of the receipt, payment or transfer of funds".of business entities, arranging financing for the purchase or sale of business entities or assets, and purchasing or selling real estate.

[2] As a general guidance, the following professionals may be suitable to act as agents within Canada: lawyers; Quebec notaries; Ontario paralegals; British Columbia notaries; notaries public; peace officers; justices of the peace; professional accountants; banks and other financial and life insurance companies, brokers and agents; securities dealers; and real estate brokers and real estate agents.

[3] Resources to help identify a high-risk jurisdiction include current sanctions imposed by the Government of Canada and information on countries from the Financial Action Task Force (FATF).

Information from the agent

You must obtain from the agent and keep a record of all information they use to verify the individual's identity. The information from the agent should include:

- The agent's full name, occupation and business address;
- The method(s) used to verify the client's identity;
- Copies of the information and documents obtained by the agent to verify the individual's identity; and
- The date on which the agent verified the individual's identity.

You should also record the date the agent delivered the information to you.

Due diligence

You must be satisfied that the verification information obtained from the agent is valid (authentic and unaltered) and current (not expired) and that the agent verified the individual's identity through a prescribed method (government-issued documentation, credit file, or dual process method) in accordance with the rules. The verification information must match the basic identification information provided by the client.

Previous verification

You may rely on an agent's previous verification of an individual if the agent was, at that time, acting in their own capacity (e.g. as a legal advisor verifying identity) or as an agent under an agreement or arrangement in writing with another legal advisor required to verify identity under the Client Identification and Verification rule. You must still have an agreement or arrangement in writing in these circumstances and the previous verification must meet the requirements of the Client Identification and Verification rule.