FEEDBACK FROM CONSULTATION ON AMLTF MODEL RULES

GENERAL

Definitions

Consistency between No Cash and Client ID rules

The definition of "public body" in the cash rule does not match the definition in the identification rule (Alberta feedback, Law Society of B.C.)

The definition of "funds" in the case rule does not match the definition in the client identification section (Alberta feedback, Law Society of B.C.)

The definition of "financial institution" differs in the cash and client identification rules – we prefer the definition in the client identification rule (Law Society of B.C.)

Additional definitions

In the definition of "electronic funds transfer" in the client identification rule, there is a reference to the "Financial Action Task Force" – that term should be defined. (Law Society of NWT)

Quality and consistency of drafting

In a number of locations, the rules use "provincial" or "province" – those references should be more properly to "province or territory" or "provincial or territorial." (Law Society of NWT)

Proper drafting rules require the i. ii. iii. to be (i) (ii) (iii) ... this is inconsistently done in this document, the rules and references to the rules. (Alberta feedback)

The Working Group discussed whether a band defined under the Indian Act (Canada) should be added to the definition of "public body" - This should be considered for the definition of public body for both the cash and identification rules. (Alberta feedback)

The Model Code references Fees and Disbursements not Disbursements and Expenses - make it consistent. (Alberta feedback)

The interplay of sections 4, 5 and 6(1) of the client identification rule are awkward and could benefit from an experienced legislative draftsperson. The Federation

could hire two legislative co-drafters (one French, one English) to renumber, rewrite, and reorganise this rule. (Law Society of New Brunswick)

The possessive pronoun "their" is much too vague for the client identification rule. (Individual feedback from New Brunswick)

"Their" is used interchangeably with "his or her" – this usage should be consistent. (Law Society of NWT)

Enforcement strategies

There may be other avenues for consideration through the rules to improve a regulatory response on the issues of cash transaction and client identification of verification in an effort to reduce money laundering or terrorist financing through the legal profession. For example, we believe some consideration should be given to the use of administrative penalties in addition to disciplinary consequences for rule violations. We have given thought to what this might look like and would like the opportunity to share those thoughts with you as you move forward with best practices for enforcement. (Law Society of B.C.)

NO CASH RULE

Threshold

The inclusion of "of transaction" at the end creates confusion; arguably there could be many transactions week after week of $7500 from the same client. Delete "or transaction" to make it more clear. (Alberta feedback)

Exemptions

The CBA believes that the No Cash Rule should encompass lawyers using trust accounts while acting in representational capacities. They recommend that Sections 1, 3, and 4 be amended to include "while acting in a representative capacity where the fiduciary property will be placed into a trust account." (CBA Submission)

There should be a blanket prohibition on the lawyer receiving cash in an amount more than $7500 no matter what the circumstances. The new language in paragraph 4 ("in connection with the provision of legal services by the lawyer or the lawyer's firm") will let the lawyer receive cash in circumstances that they say aren't legal services, whether that is legitimate or not. The lawyer shouldn't be receiving cash in large sums, period. (Alberta feedback)

Exception (a) allows receipt of cash from a financial institution or public body. LSM audit experience has been not to see these types of exceptions in practice. If other exceptions are being removed due to lack of use, perhaps this should be removed as well. (Manitoba feedback)

The most vulnerable members of society who does not have access to a bank account or a credit card will be penalised by these amendments. (Alberta feedback)

We have received no feedback that the exemption for cash received from a peace officer, etc., is necessary. However, if the exemptions do serve a purpose, even if rarely used, we would be cautious about removing them. (Law Society of B.C.)

We recommend against the proposed amendment to paragraphs 4(b) and (c) to remove the exceptions to the "No Cash" Rule for cash received "from a peace officer, law enforcement agency or other agent of the Crown acting in his or her official capacity" and "pursuant to a court order, or to pay a fine or penalty." Feedback received by the LSO indicates that lawyers in Ontario do use and rely on these exceptions. In addition, the feedback we received noted that there are safeguards governing seized funds, which mitigate against concerns about those funds being returned to a lawyer, and ultimately the lawyer's client, and being used to launder money or finance terrorism. (Law Society of Ontario)

The deletion of (e) (funds paid as a result of settlement) will impact the way personal injury settlements have been managed. The requirement to identify these clients will not be difficult, but does add another step to the firms' process. (Nova Scotia Barristers' Society)

Deletion of exception for money that is paid or received pursuant to the settlement of any legal or administrative proceeding presents a problem. Occasionally, foreclosure files may receive cash in excess of the limit. (Manitoba feedback)

CLIENT IDENTIFICATION AND VERIFICATION

Definitions

Why does the reference to public bodies need to be specific to Canada? I get that we're trying to match the federal legislation, but this just narrows the scope when lawyers may be working with international public bodies. (Alberta feedback)

Could there be a definition of "agent" in order to help our members identify whom they can rely on, in Canada or in other countries? (Law Society of New Brunswick letter)

Why is a securities dealer defined as "persons" plural or "entities" plural? Why is the word "entities" used at all when "organization" is a defined term that appears broader than "entity"? It is arguable that neither a trust nor a partnership is an "entity." (Individual feedback from New Brunswick)

In the definition of organization in the client identification rule, the word "means" should be replaced with "includes" so that the definition is inclusive, rather than exclusive. (Law Society of NWT)

"Income Tax Act" in the definition of "reporting issuer" should be underlined or in italics. (Law Society of NWT)

The Rule should include a definition of "monitor." (Law Society of Ontario)

There are challenges with verifying entities that do not fall under "individual" or "organization" (i.e. Indian Banks and Unions) and the Working Group may want to consider adding a section on this. (Law Society of Saskatchewan)

Know your client language (paragraph 2)

Specifically, what are the expectations in terms of knowledge of our clients' financial dealings? (McCuaig Desrochers LLP letter)

What is due diligence for lawyers in "manag(ing) any risk arising from the professional relationship"? (Law Society of Saskatchewan)

This seems to confer to the lawyer a role of perpetual investigator to his or her client by placing the latter in a position of constant suspicion – up to what point do the lawyers' obligations go? (Chambre des Notaires)

Does the language about "in keeping with" qualify the degree of compliance called for, or does it qualify the existence of the Rule? (Individual feedback from New Brunswick)

The Working Group should consider whether the proposed amendments to subsection 2(1) may actually create new unintended conduct obligations for lawyers, in particular to "manage any risks arising from the professional business

relationship with the client", and consider whether redrafting is necessary or advisable. (Law Society of Ontario)

The concept of "gives instruction" (paragraph 2(3)(a)) is confusing and clearer wording would be beneficial. (Manitoba feedback) (NB. This term is also used in the No Cash Rule)

Rule 2(3)(b) should read "a lawyer, when the client's lawyer has complied with sections 3 through 9" (Law Society of NWT)

General identification provisions (paragraph 3)

Add source of wealth to information required from individuals (Norton Rose letter)

Add email address to information required (Norton Rose letter)

For individuals' home addresses, shouldn't it be necessary to use a street address rather than a PO Box? (Individual feedback from New Brunswick)

For organizations' business addresses, what if the organization does not carry on business but merely holds assets? (Individual feedback from New Brunswick)

What is the difference between the "general nature of a business" and the "general nature of the type of business"? (paragraph 3(b)(iv)) (Individual feedback from New Brunswick) (NB. Should this actually read "…the general nature or the type of business….)

For a client acting for / representing a third party, if the client is the trustee of a trust, are the trust beneficiaries third parties? If the client is the general partner of a limited partnership, is the partnership a third party? (paragraph 3(c)) (Individual feedback from New Brunswick)

Electronic Funds Transfer (paragraph 4)

The CBA Working Group believes the exception in section 4 for electronic funds transfer (EFT) causes confusion. We understand the reason for the exception is a presumption that there are additional safeguards within financial institutions for EFTs. However, there is a lack of clarity whether this applies to two-way EFT transactions only or also captures one-way EFT transactions (e.g. funds received by EFT and paid out by bank draft, or vice versa). We question why other types

of transactions are not included, such as certified cheques when similar safeguards are in place. (CBA Submission)

We are unclear why "other than an electronic fund transfer" has been included in the rule and think it should be removed. (Law Society of B.C.)

The LSO also suggests that the Working Group consider removing the phrase "other than an electronic funds transfer" from section 4, and instead adding a new paragraph to subsection 5(2) to include "received, paid, or transferred by an electronic funds transfer" as a specific exemption to section 6. (Law Society of Ontario)

While there is an exemption for electronic funds transfer under the rules, it is unclear why there is no similar exemption for certified cheques or bank drafts. In the view of our members, in the case of a bank draft, all of the same or similar verification elements are present and/or available. It is not clear what prevents the circumvention of this rule where a bank draft can be deposited and an electronic transfer used to transfer the same funds. (OBA Submission)

Exemptions (paragraph 5)

I do not support the broad exemption from the application of section 6 for reporting issuers. In my practice, I do corporate searches on reporting issuers. Some reporting issuers have been shown to be broad-based frauds. The Ontario Securities Commission expended significant resources to expose the problems at Sino Forest, for example. I encourage the Law Society to discuss this broad exemption with the Securities Commissions, as I question whether those commissions consider that the granting by them of reporting issuer status is intended to confer a "bill of health" that is equivalent to a financial institution or a public body. From my perspective, it would be more appropriate to give some more limited exemption to reporting issuers. (Alberta feedback)

By removing the exceptions for funds paid pursuant to orders or settlements appears to imply that funds paid by a party adverse in interest to a law firm (acting for the other party) could be subject to the implied duty of making inquiries re: the source of the settlement or ordered funds – is this a correct reading? (McCuaig Desrochers LLP letter)

The LSO opposes the proposed amendment to paragraphs 5(2)(c), (d), and (e) to remove three of the exceptions to the identification and verification requirements on the same basis that it opposes removing the two exceptions to the "No Cash" Model Rule. (Law Society of Ontario)

The exemptions regarding law enforcement officers, agents of the crown and funds received pursuant to a court order in both the cash and client ID requirements serve a purpose and should not be deleted (Law Society of Saskatchewan)

The exception for money received from another lawyer's trust account is confusing. It implies that the lawyer acting for the seller in a real estate transaction does not need to verify the identity of the client – yet that is not what is intended. (Manitoba feedback)

Source of funds (Paragraph 6(1))

Clarify meaning of "source of funds" (Norton Rose letter)

The references to "source of funds" and "must be for a legal purpose" are too general (Law Society of Saskatchewan)

Consider risk in determining whether source of funds needs to be verified in all cases (Norton Rose letter)

With respect to information about the source of funds, in Rule 6(1)(a), we are concerned that the phrases are vague and should specify what information is required. We encourage guidance or Commentary that suggests what questions should be asked, from whom, and how the lawyer should assess the information obtained in order to determine whether they can represent the client. (LSBC)

Clarification about the meaning of "source of funds" in the proposed paragraph 6(1)(a) would assist lawyers to better understand the scope of their obligations in this area and the role of certain institutions in screening the flow of funds. (Law Society of Ontario)

Paragraph 6(1)(b)

Under 6(1)(b), does the phrase "where appropriate" mean "if a third party is involved," or does it mean some sort of judgment is required about whether the identity of the third party should be verified? (Individual feedback from New Brunswick)

Do not abolish the reasonable measures standard – it will prevent low-income, homeless, hospitalised, criminalised, incarcerated and/or elderly individuals from accessing legal services. It could be challenged on its constitutionality. A lawyer would also have to choose between providing services to a vulnerable section of

society or following the rules of the law society. (Alberta feedback, multiple occasions)

Feedback received by the LSO expressed concern that removing the "reasonableness" standard would leave little room for the exercise of professional judgment by lawyers in verifying client identity and may impede access to justice in certain circumstances. Additional guidance is required for lawyers about the scope of inquiry that they would be expected to conduct, what constitutes a "reliable independent source" for the purposes of paragraph 6(1)(b), and what risk factors and "red flags" lawyers should look for, as well as a list of documents or information that a lawyer may use to meet these requirements.

In the view of our members, this rule should be adjusted to permit appropriate verification of identity but not require face-to-face methods. (OBA)

On clients or third parties as individuals, is the information required for both client and individual? The possessive pronoun "their" used in the next sentence and elsewhere in the document is much too vague for this kind of rule. (Individual feedback from New Brunswick)

Independent source documents (Paragraph 6(2))

In 6(2), the word "shall" should be replaced by "may." (Law Society of NWT)

In changing the Rule to require photo ID, would we be placing lawyers in the difficult spot of having to choose between compliance with their regulator on one hand and privacy/human rights legislation on the other? If the short answer is that prevention of fraud/terrorism trumps privacy/human rights, the Working Group may want to develop some speaking points to justify its recommendation. (Alberta feedback)

Regarding Verification of Individuals, many people do not have photo ID or a credit file. Certain people, for example with mental health issues, cannot even undertake the steps required to get photo ID, or to get the documents required for photo ID. Homeless people cannot get ID as they do not have an address or mail to prove their address. People in jail do not have access to their ID. While I always make an effort to obtain ID from clients despite the reasonable measures rule, It simply is not always possible. (Alberta feedback)

There ought to be some kind of exception for criminal law clients who have been identified by the police by way of fingerprints and photo, not to mention tattoos,

scars, piercings, etc. Many of these criminal clients are in custody and have no access to identification. (Manitoba feedback)

In criminal defence, a significant number of our clients do not have government id, nor are there two independent are reliable sources to confirm their identity. The fact of the matter is that people do not lie about being charged with a criminal offence. Applying such strict verification of identity requirements in the case of criminal defence files is absolutely absurd. Many of our clients do not have bank accounts. Many do not have drivers licenses, either due to the police seizing their licence as in the case of impaired driving charges or as a result of driving prohibitions. We serve people who are not part of average and polite society. They do not have connections to reputable institutions and people. Many are living from paycheque to Patchogue. If I have a potential client in custody, how could I collect a retainer and begin providing legal services to him? He can't just pop into my office and show me a government id. He has no identification beyond the remand center within which he is incarcerated. But according to the amendments, I would have to find an additional source to confirm this potential client's identity. As outlined above, finding an additional reliable source would be impossible. If these amendments were enacted, a defence lawyer would have to choose between providing services to a vulnerable section of society or following the rules of the Law Society. (Alberta feedback)

In the experience of our members, the in-person verification of government issued identification can, in certain cases, pose challenges for access to justice and available alternatives (such as the use of Notaries) are often themselves onerous for clients facing access concerns. Our members would welcome appropriate identification methods that can maintain confidence in the system, while providing reasonable alternatives for clients and practitioners. (OBA Submission) (see also comment re face-to-face above)

In cases where government issued photo ID is not produced – there should be an explanation why not and to supplement the other forms of ID provided a photo of the client should be taken and added to the file and signed by the lawyer taking the ID. (Alberta feedback)

Prohibition on electronic image of a document (paragraph 6(2)) problematic; need to clarify what constitutes electronic image (Norton Rose letter)

What does “current” mean? (Nova Scotia Barristers’ Society)

Shouldn’t this just say that an electronic image of a document is not considered an original and cannot be relied upon? Or, is some limitation on the “information”

also implied here? Do these opening words require that the certificate of status for a corporation under (e) be an original rather than an electronic coy? If so, it is impractical. (Individual feedback from New Brunswick)

The requirement in subsection 6(2) that information "must not include an electronic image of a document" creates some inconsistencies. For example, a hydro bill satisfies one of the criteria in subparagraph 6(2)(a)(iii). The criteria permit an email "copy" of the hydro bill, but not a printout from an online hydro account. This is an example of a technologically-embedded and dated requirement. Further, the reference in the subparagraph to "a reliable source" lacks clarity. If this paragraph remains, we recommend adding commentary on what constitutes a reliable source. (CBA Submission)

It would be appropriate to add the term "and" at the end of subparagraph 6(2)(a)(i) and subparagraph 6(2)(a)(ii) if the documents listed at 6(2)(a)(i) and (ii) are both required in addition to any two of the three options listed in subparagraph 6(2)(a)(iii). (Norton Rose letter)

The credit file provision is not a practical alternative given the obtuseness and notorious unreliability of credit agencies and the insecure nature of their databases. (Individual feedback from New Brunswick)

Identity verification (through a Canadian credit file) is not as straightforward as the draft model rule would purport. Law firms, generally speaking, do not have arrangements with the credit bureaus to obtain credit information. In addition, identity verification using this method is a resource and technology intensive process for which most law firms are not properly equipped. (OBA Submission)

There is no reference to the need for consent from a client when accessing a credit file. (Nova Scotia Barristers' Society)

Does identity information in a credit file that has built on information reported by third parties truly constitute a reliable source? Does the identity information in these credit files validly confirm the identity? What are the verification measures used by companies operating in this sector of activity? This information may be inaccurate, easily modified, and leaked in the past. So, can we really trust the information in it? We have the same questions regarding bank account or credit card information. Who can confirm this information? (Chambre des Notaires)

6(2)(a)(iii)(A) and 6(2)(b) could benefit from the attention of a legislative drafter. (Individual feedback from New Brunswick)

It is unclear as to what steps are required from the receiving firm to comply with the requirement to "[use] that information to verify the name, address and date of birth of the individual" at 6(2)(a)(iv) when obtaining a confirmation in writing from an affiliated legal firm that it has previously verified the individual's identity in accordance with subparagraph 6(2)(a) (Norton Rose letter)

It is unfair to leave it to a lawyer's discretion as to what are "reliable sources." The current rule gives specific examples of who can objectively be seen as reliable – there is no such clarity in the proposed amendments. (Law Society of NWT) (NB seems to be referring to the consultation report not the language of the rule)

The rule is silent on the lawyer's ability to rely on another firm's information on a client. Our suggestion is that some guidance be included. (Norton Rose letter)

The method proposed in subparagraph 6(2)(a)(iv) – written confirmation that verification has already been done by an affiliated firm – offers an advantage to lawyers in large firms. However, we encourage robust options that offer a level playing field to all lawyers, making it easier for lawyers to enter into agency relationships with lawyers at other firms, rather than law firms in affiliation. (CBA Submission)

Along with law firm alliances, we should be allowed to rely on another Canadian lawyer (McCuaig Desrochers LLP letter)

There is no logic to the distinction between identity confirmation from affiliated / allied law firms vs. from unaffiliated law firms. It suggests that lawyers in large firms are more trustworthy than small firm or solo practitioners – a view that the Federation should not be supporting. (Law Society of NWT)

In subparagraph 6(2)(b), our suggestion is to consider permitting the lawyer to be considered a source of verification under 6(2)(a)(iii)(A) to (C). (Norton Rose letter)

The proposed amendments do not address the situation when a client is present elsewhere in Canada. We believe the current provisions on clients present elsewhere in Canada offer a workable solution and should be retained. We recommend the rules permit the use of an agent (such as Dye & Durham), and

more generally, a registry run by an appropriate third party, similar to "e-reg", may provide a more reliable, and practical option for the profession. (CBA Submission) (see also Non-Face-to-Face below)

For 6(2)(f), what is there is no written partnership agreement for the organization? (Individual feedback from New Brunswick)

Identifying children

Additional clarification should be considered in order to confirm that a lawyer may verify the identity of a parent or guardian instead of the individual under the age of 12. (Law Society of Ontario) (see paragraph 6(2)(c))

We prefer a broader approach that simply indicates that legal counsel must verify the identity of his client and his agent or representative, without including all the circumstances of the case. (Chambre des Notaires)

Identifying Directors, Shareholders and Owners (Paragraph 6(3))

It would be preferable if "director" were defined to cover a member of the governing body or person performing a similar function. (Individual feedback from New Brunswick)

Should relax the requirement for entities that are traded on a recognised stock exchange, often by institutional investors (Alberta feedback)

If lawyers who cannot obtain and confirm required information from a non-individual client are going to be required to take additional steps, the rule should identify what those steps are. We also suggest that paragraph 6(b) may be superfluous given Model Rules 9 and 10. (LSBC)

Additional consideration must be given to the operation of these proposed amendments. In the absence of an effective corporate ownership registry, there are complex corporate ownership structures, which may render compliance with these requirements extremely difficult, if not impossible. (Law Society of Ontario)

Reasonable efforts/measures

Two different issues were raised: many were concerned about the removal of the "reasonable efforts" standard in rule 6(3); others were concerned about the new requirement in 6(4) to "take reasonable measures to confirm the accuracy of information ….."

Reasonable Efforts:

I am opposed to raising the standard required for lawyers to verify identity of clients beyond that which currently applies - i.e. to take reasonable steps. We are not agents of the Government, nor are we civil servants. We are professionals, with duties to the profession, our clients, the courts and the law. the proposed amendments add another layer of red tape, expense and complication without the prospect of meaningful improvement to expected outcomes. (Alberta individual)

I urge the Law Society not to abolish the "reasonable measures" standard to verify identity. I suspect the result would only interfere with low income individuals accessing lawyers and the justice system generally. A low-income individual does not always have government-issued ID. I've only been presented with this situation one time, but in that instance, I would not have been able to complete the ILA for an adoption (thereby inhibiting the adoption of a newborn infant) had I not been able to use reasonable measures. In that case, I was able to verify identity using a hospital bracelet and by confirming the identity with a representative at the shelter where the birth mother resided. (Alberta individual)

Generally speaking, we feel that the move from a system based on a 'reasonable effort' standard to one that requires verification by the lawyer and implicitly holds lawyers strictly liable for being misled by a client or a third party is troubling. (McCuaig Desrochers)

Reasonable measures:

The CBA Working Group believes the requirement in paragraph 6(6)(a) – triggered when a lawyer is unable to identify individuals behind an organization – to "take reasonable measures to ascertain the identity of the most senior managing officer" requires context or instruction. For example, there is a difference between a requirement to ascertain identity and the subsection 6(3) requirement to "obtain" names and information. It is unclear if there is any additional or different requirement between obtaining names and information and ascertaining identity. We also recommend adding a paragraph in the Rule to provide examples ("includes but is not limited to") of reasonable measures. (CBA Submission)

Unclear as to the extent of due diligence required by lawyers (Law Society of New Brunswick)

Examples and education around "reasonable measures" would assist. (Manitoba feedback)

Why the reference to "entity" in both 6(6)(a) and (b) when the defined term is "organization"? (Individual feedback from New Brunswick)

Consideration should also be given to amending subsection 6(4) to provide that a lawyer shall obtain the information required in subsection (3) from "sources that are reasonably reliable". In addition, if these proposed amendments are adopted, consideration should be given to the operation of paragraph 6(6), as it is not clear how a provision that provides steps for a lawyer to take where the identity of directors, shareholders, and owners is not verifiable interacts with the seemingly mandatory preceding provisions with respect to verifying the identity of those same individuals. (Law Society of Ontario)

What are the reasonable steps to confirm the accuracy of the information that the lawyer apply? It is then to transform, in some way, the jurist in investigator. Is it that this obligation must go that far? (Chambre des Notaires)

We recommend that greater consideration be given as to when subsection 6(6) could be used appropriately, and what additional or alternative information could be gathered to satisfy the identification requirements. (OBA Submission)

Beneficial owners

In the absence of a robust corporate registry, compliance with respect to beneficial ownership is not reasonably possible. (OBA Submission)

Clarify whether 25 per cent requirement (paragraph 6(3)(b)) refers to votes or equity ownership (Norton Rose letter)

The CBA Working Group recommends the reference in paragraph 6(3)(b) to "all persons who own, directly or indirectly, 25 per cent or more of the organization or the shares of the organization" be clarified to indicate whether voting rights, equity or both are intended to be captured. Alternatively, the concept of "control" could be added in this paragraph, so the applicable words read "all persons who own or control, directly or indirectly…" This would accord with the reference to control in paragraph 6(3)(d). (CBA Submission)

We propose expanding the scope of the obligation of verification of the identity to other persons to cover all those who can exercise a control on a body. (Chambre des Notaires)

Additional commentary or guidance is required for lawyers and law societies about compliance where ownership structures are complex, as well as for

specific entities that may indirectly own shares in corporations, for instance municipal corporations or education institutions. Clarification is also required about whether the 25% requirement refers to votes or equity ownership, or both, and whether equity ownership would include entitlement to income or capital. (Law Society of Ontario)

Clarification is also needed with respect to 6(3)(d) ("ownership, control, and structure"): lawyers require guidance about whether control would include *de facto* as well as *de jure* control, what would be expected of lawyers with respect to their obligation to inquire into control structures, and whether the requirement is that the lawyer obtain all information establishing the ownership, control and structure of the entity, or only such information for the ownership, control or structure of 25% or more of the organization. The Working Group may wish to test the provisions based on typical and more complex ownership arrangements. (Law Society of Ontario)

The CBA Working Group also considered the potential relevance of the 10% shareholder rule under the *Income Tax Act*. A tax-free dividend may be paid from a lawyer's trust account if the recipient organization (corporation) owns at least 10% of the votes and equity of the payer organization (corporation), but establishing the identity of the recipient only comes into effect at 25%. (CBA Submission)

Should permit lawyers to rely on certificates of a senior officer (e.g. general counsel and/or corporate secretary) to satisfy these requirements (Norton Rose letter)

Monitoring beneficiaries of a trust (who are often children and generally quite mobile) requires more guidance than "lawyer shall take reasonable measures to confirm the accuracy of the information obtained under section 3". It is not clear if the initial information collected about the beneficiaries will meet the requirement and, if not, what is reasonable in keeping track of beneficiaries of all trusts administered by the lawyer. (OBA Submission)

If the monitoring requirements in section 10 are intended to apply to all clients and not just those deemed high risk, paragraph 6(6)(b) appears to be redundant. If it is only intended to apply to high risk clients, that should be clarified. (CBA Submission)

Clarify the scope of the continuing monitoring obligation (Chambre des Notaires)

Meaning of control

Clarify meaning of "control" (Norton Rose letter)

Use of agent

We read this section to mean the following: where an individual client, third party or individual is outside of Canada, the firm shall rely on an agent to obtain the information to verify the person's identity. If this is the case, this is rather unrealistic. What if the foreign individual is able to attend the firm's premises? We suggest an exception be made for these circumstances. The rule should also confirm if an agent can be another lawyer. (Norton Rose letter)

Does an oral agreement with an agent suffice? If so, what is the relevance of the agreement or arrangement? (Individual feedback from New Brunswick)

In the absence of a reasonable efforts standard, does the lawyer who relies on incorrect information from an agent lawyer incur strict liability? (McCuaig Desrochers LLP letter)

The use of "their" and "they" in 6(9)(a) makes the text ambiguous and un-translate-able. (Individual feedback from New Brunswick)

We are of the opinion that the verification must be done prior to the execution of a service contract or the receipt of sums (Chambre des Notaires)

Non-face-to-face verification in Canada

It is unclear what is intended where it reads: "…is not physically present in and is outside of Canada…" Is it intended to include all Non-Face-to-Face Transactions, as this section has been deleted? (Law Society of New Brunswick)

What steps is a lawyer to follow for a non-face-to-face client who is in Canada? (Manitoba feedback)

The deletion of the non-face-to-face verification provisions are unacceptable to the Law Society of the Northwest Territories. In this jurisdiction, where fully 50% of clients reside in communities other than those of their lawyers, it is impossible to conduct face to face verification. The existing provisions, which provided for designated occupations to be guarantors, worked well, as there would be, in every community, at least a school principal and an RCMP officer. Should the proposed rules be adopted as drafted, there is a strong possibility it will not be

adopted by NWT, as this proposal is not reflective of the realities of practicing in the north. Further, this process puts the onus of verification squarely on the lawyer to determine who are "reliable sources." (Law Society of NWT)

See also OBA feedback above

Timing of verifying identity of individuals

From Law Society of NWT - the clause should read:

> A lawyer shall, upon engaging in or giving instructions in respect of any of the activities described in section 4, verify the identity of
>
> (a) a client who is an individual; and
>
> (b) an individual authorized to provide and give instruction on behalf of an organization with respect to the matter for which the lawyer is retained.

Wouldn't it be clearer to say that the lawyer is not required to subsequently verify "unless the lawyer has doubts?" (Individual feedback from New Brunswick)

We are of the opinion that the verification must be done prior to the execution of a service contract or the receipt of sums (Chambre des Notaires)

Timing of verifying identity of organizations

This appears to mean that the directors and shareholders of a corporation could change following the initial identification, and the lawyer would have no requirement to follow-up unless they learned of such changes. Arguably, this language does not trigger any follow-up (even if the lawyer suspects changes have occurred) as long as they don't have suspicions that the information provided at the time of identification was incorrect. We suggest amending subsection 6(13), for example by adding the words "including as to whether it remains current" (CBA Submission)

We suggest the rule be amended to require verification prior to conducting the financial transaction or, perhaps, to verify the client "as soon as practical" and at no event later than 30 days after the completion of the transaction. (Law Society of B.C.)

The provision should read that a lawyer should verify the identity of the organizational client "not later than 30 days." (Law Society of NWT)

Perhaps the requirement should be to complete verification the sooner of 30 days or before any money is received in trust for the matter. (Manitoba feedback)

As a general rule, the LSO agrees with the Working Group's proposed amendment to reduce the time within which a lawyer must verify the identity of an organization from 60 to 30 days in section 6(12), but does suggest that the Working Group consider adding an additional triggering event so that the requirement would be to verify the organizational client's identity within 30 days of being engaged or giving instructions in respect of any of the activities described in section 4, or the transaction completion date, whichever is sooner. The LSO does note, however, that feedback we received expressed concern that neither 30 or 60 days would be sufficient in circumstances where a lawyer was attempting to verify the identity of complex organizations or entities. Therefore, if the proposed amendments to the client identification and verification rule are adopted, the Working Group should consider whether the rule can be amended to allow flexibility in certain circumstances. (Law Society of Ontario)

Is this time frame also applicable to verifying the source of funds? (Law Society of Saskatchewan)

We are of the opinion that the verification must be done prior to the execution of a service contract or the receipt of sums (Chambre des Notaires)

Record keeping and retention

The words "at least" should be deleted. (Law Society of NWT)

Monitoring

We suggest corporate ownership transparency could be partially remediated by adding a client identification provision to the monitoring requirement, i.e. a new paragraph 10(a)(iii), to the effect of "ensuring the currency of the lawyer's knowledge and records with respect to the client's identity, which may require repeating the measures conducted in section 6." (CBA Submission)

What is the meaning of "requiring ongoing monitoring"? (Manitoba feedback)

It should be clarified if the requirement to monitor the client extends throughout the entire lawyer-client relationship, or only for the duration of the matter. In any event, if the retainer from the client is a one-off transaction then the requirement to monitor the client should be limited to the duration of the one-off transaction. (Norton Rose letter)

It is unclear whether the source of funds must be verified multiple times for the same client with different matters, or just once per client. (Law Society of Saskatchewan)

The comments to the rule should specify that high risk clients should be monitored to a higher degree. (Norton Rose letter)

The rule should also clarify expectations in terms of recording monitoring activities (Norton Rose letter)

"Periodic" is too vague a term; please clarify. (McCuaig Desrochers LLP letter)

Please clarify the scope and extent of monitoring required. (Chambre des Notaires)

The requirement should read that a lawyer "attempt to ensure that they are not assisting in or encouraging dishonesty, fraud, crime or illegal conduct" rather than "ensuring that the lawyer is not assisting in or encouraging dishonesty, fraud, crime or illegal conduct." (Law Society of Ontario)

Clarification will be required about whether the obligation applies only to high risk clients or to all situations, and whether the obligation extends throughout the entire lawyer client relationship or only for the duration of the matter for which the verification was completed. Consideration should also be given to whether the section should reference "red flags" for lawyers. (Law Society of Ontario)

We recommend against the provision that lawyers keep a record of measures taken, and information obtained while monitoring, as it is likely an ongoing process that is difficult to record periodically. (Law Society of Ontario)

From the Law Society of NWT: paragraph 10(a) is recommended to be changed to read:

> ...monitor on a periodic basis the professional business relationship with the client for the purposes of

(i) determining whether the following are consistent with the purpose of the retainer and the information obtained about the client as required by this Rule:

(A) the client's information in respect of his or her activities,

(B) the client's information in respect of the source of the funds described in section 4, and

(C) the client's instructions in respect of transactions;

and

(ii) ensuring that the lawyer is not assisting in or encouraging dishonesty, fraud, crime or illegal conduct.

This requirement does not translate well to a service relationship where a client is not entering into transactions on a daily, weekly or hourly basis. A more appropriate approach would be to require lawyers to: 1. use best efforts to keep information up to date in respect of clients; and, 2. use best efforts to ensure a lawyer is not assisting or encouraging a client with fraud, crime, dishonesty or illegal conduct. Lawyers do not have any obligations to "manage risk". Our obligation is instead to ensure that we are not assisting clients in illegal activity. In our view, this is another example of a rule designed for other institutions (like banks) being inappropriately applied to lawyers and law firms without appropriate tailoring. (OBA Submission)

Duty to withdraw (paragraph 11)

When a lawyer determines that he/she must withdraw, there is no guidance for what should happen with any funds that are held in trust. (Manitoba feedback)

A comment should be included to protect lawyers from potential action brought by the client if the firm should have to withdraw from representation of the client under these circumstances. (Norton Rose letter)

From the Law Society of NWT: The Committee proposes that paragraph 11 of the model rule be deleted, and that paragraph 9(1) be amended to cover paragraph 10:

> In the course of obtaining the information and taking the steps required in sections 3 or subsections 6(1) or 6(3) or section 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 shall ~~must~~ withdraw from representation of the client.

TRUST ACCOUNTING RULE

Legal services definition

Define what is or is not legal services (Alberta feedback)

The CBA submits that some law societies permit their members to use trust accounts while acting in a representational capacity and have rules to support this practice. They thus recommend that Rule 1 include the following provision: "or to the provision of representative capacity services, where the fiduciary property will be placed into a trust account." (CBA submission)

Some law societies (BC, MB, NS) have rules that would appear to directly conflict with this proposed rule, i.e. situations where lawyers are acting in a representative capacity. (Manitoba feedback)

Should there be any consideration as to the source of funds being transferred into a trust account? (Manitoba feedback)

Transactions vs acts

The rule should regulate the *act* rather than the *transaction*, and the requirement should be placed on the lawyer rather than on the deposits and transfers. The wording of Rule 1 does not require a sufficient connection between the legal services and the trust matter. (Law Society of B.C.)

The word "practical" should more properly be "practicable." (Law Society of NWT)

The new rule would require that new matters be opened up as new transactions are undertaken, whereas currently, some lawyers use general matters files (annual) in some cases rather than opening up new matters as additional legal tasks are undertaken (Manitoba feedback)

What is meant by "transaction or other matter"? Perhaps it should read "transaction or matter" (Manitoba feedback)

Link to legal services

Should there be any consideration as to what a lawyer should do if a client request is determined to be an unauthorized / unusual transaction, and/or if the

lawyer notices any unauthorized / unusual transactions by colleagues in the lawyer's law firm? (Manitoba feedback)

Commentary

The second sentence in the rule commentary (with the reference to escrow or trust conditions) should be removed; it leaves uncertainty with respect to how monies flow through trust accounts as part of work on client transactions. It is typical for lawyers to receive money into trust on a transaction or financing with no formal trust or escrow conditions attached, but with the understanding that the lawyer holds the money pending closing or further instructions from the client. (Norton Rose letter)

The CBA finds Commentary 1 to be confusing. They believe the obligation to avoid "mere banking services" is the essence of the commentary, and recommend it be stated as a rule, i.e. Rule 3: The lawyer must ensure that a trust account is not used for mere banking purposes. If adopted, the CBA notes that a commensurate adjustment to the definition of professional fees, currently found in the Model Rule on Client Identification and Verification, may be required. (CBA Submission)

The proposed commentary does not make enough of a connection between the legal services and the trust matter. It should use a hard rule instead of the language of "appropriate," and by appearing to create a distinct "prohibition" in the Commentary that is on its face different from the requirement of Rule 1, the Commentary implicitly reinforces the limitations of Rule 1. (Law Society of B.C.)

The LSO has concerns about the reference to escrow and trust conditions in the proposed commentary, which could be interpreted to refer to situations in which a lawyer receives funds from a client in order to complete an acquisition and the funds are immediately paid to the lawyer representing the other party. The commentary could also be interpreted to prohibit the use of a trust account to receive client funds in order to pay a disbursement. (Law Society of Ontario)

Paying out and return of trust monies

We agree that money held in a trust account must be paid out as soon as practical upon the completion of the transaction or other matter but it is not clear what "completion of the transaction or other matter" means which renders the rule ambiguous. For example, sometimes lawyers hold money after closing of an

acquisition as part of a holdback (which would be contemplated in the acquisition agreement wherein part of the sale proceeds are held back for some period before being released to the sellers). What if the client instructs the lawyer to retain the money held in trust account? For example, the client may be traveling or needs to make certain other arrangements or for a specific reason does not want the funds on completion of the transaction. Perhaps the client is undertaking a second transaction that will close shortly and would like to retain the money in our trust account pending closing of the second transaction. The rule as drafted leaves no room for such flexibility. (Norton Rose letter)

We recommend a requirement that where a transaction is cancelled, the funds must be returned to the person who provided them to the lawyer in the form that they were received by the lawyer. (Law Society of B.C.)

ADDITIONAL RULES/REQUIREMENTS

What about digital currency, bitcoin, blockchain?? (Alberta feedback)

What about cryptocurrencies? (Manitoba feedback)

What about lawyers receiving barter – jewellery, cars, land, etc. – from clients? And/or an offence for lawyers taking money then issuing bank drafts for the hiring of another lawyer? (re: Blair case in the US) (Alberta feedback)

GUIDANCE

Include examples of direct and indirect ownership of an organization

The Federation could propose common enforcement standards (Law Society of B.C.)