

LAW SOCIETY OF UPPER CANADA
PROFESSIONAL REGULATION COMMITTEE

CALL FOR INPUT – PROPOSED AMENDMENTS TO ANTI-MONEY LAUNDERING MODEL RULES

The Law Society’s Professional Regulation Committee is seeking input from the professions on a number of proposed amendments to the Model Rules of the Federation of Law Societies of Canada (FLSC), discussed in this document. This document includes an explanation of the proposed amendments. The consultation materials prepared by the FLSC, together with a blackline version of the Model Rules prepared by the FLSC, are attached to this paper. The FLSC has asked Law Societies to provide comments by March 15, 2018. The Committee is seeking comments from the professions, including comment on specific issues identified in this document, which would be taken into consideration in providing feedback to the FLSC.

Changes to the Model Rules would require approval by FLSC Council. Amendments would then be forwarded to Law Societies for adoption. Any changes to Law Society Rules of Professional Conduct, Paralegal Rules of Conduct, or Law Society By-Laws would require approval by Convocation. Amendments to the Paralegal Rules of Conduct are recommended to Convocation by the Paralegal Standing Committee.

In order to enable timely consideration of all of the responses received, the Committee asks that comments be submitted in writing to the Law Society by February 15, 2018 to the following address:

Call for Input – Anti Money Laundering Model Rule Amendments

Policy Division
Law Society of Upper Canada
Osgoode Hall
130 Queen Street West
Toronto, Ontario M5H 2N6
Or by email to submissions@lsuc.on.ca

Submissions will be provided to the Law Society’s Professional Regulation Committee, Paralegal Standing Committee and Convocation, and may be reproduced, and/or made publicly available by the Law Society with attribution. The Law Society reserves the right to redact submissions at its discretion, for reasons including the protection of confidentiality, copyright, and brevity.

PROPOSED AMENDMENTS TO THE MODEL RULES OF PROFESSIONAL CONDUCT OF THE FEDERATION OF LAW SOCIETIES OF CANADA – ANTI-MONEY LAUNDERING

Introduction

One of the strategic priorities of the Federation of Law Societies of Canada (FLSC) is to ensure effective anti-money laundering and terrorist financing rules for the legal professions. To this end, the FLSC Anti-Money Laundering and Terrorist Financing Working Group (FLSC Working Group) began meeting in 2016 to review the Model Rules in this area, as well as their enforcement by Law Societies.

The FLSC's work in this area is informed by the following three developments:

- i) amendments to regulations under federal legislation (the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA));¹
- ii) the Mutual Evaluation Report of the Financial Action Task Force (FATF), an international organization created to combat money laundering, regarding Canada's anti-money laundering and terrorist financing regime;² and
- iii) the possibility of a renewed effort by the federal government to extend the PCMLTFA to members of the legal profession.

Overview of Proposed Amendments

The proposed amendments relate to the following key areas:

- i) the "No Cash" Model Rule;
- ii) client identification and verification requirements; and
- iii) trust accounting provisions.

"No Cash" Model Rule

Regulations under the PCMLTFA (SOR/2002-184) require entities such as banks, securities dealers, accountants, and real estate brokers to report cash payments of \$10,000 or more in a single transaction or two or more transactions received during a 24 hour period to the Financial Transaction and Reports Analysis Centre of Canada (FINTRAC). As a result of a successful legal challenge by the FLSC, lawyers, Ontario paralegals and Quebec notaries are exempt from these requirements.³

The "No Cash" Model Rule was initially adopted by Federation Council and by the Law Society in By-Law 9 in 2004. The Model Rule currently provides "a lawyer shall not receive or accept from a person, cash

¹ *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, online at <http://laws-lois.justice.gc.ca/eng/acts/P-24.501/>.

² FATF, *Anti-money laundering and counter-terrorist financing measures – Canada, Mutual Evaluation Report*, September 2016, online at <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4?MER-Canada>.

³ *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, online at [https://scc-csc-csc.lexum.com/scc-csc/scc-csc/en/item/14639/index.do](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14639/index.do).

in an aggregate amount of \$7,500 or more Canadian dollars in respect of any one client matter or transaction”.

In the consultation report, the FLSC indicates that the Working Group is of the view that the \$7,500 cash threshold remains appropriate. However, according to the report, there is confusion about whether the rule prohibits lawyers and paralegals from accepting cash in amounts of \$7,500 or more, or amounts over and above \$7,500 (i.e. \$7,501 and over). To ensure a consistent understanding of the requirements, the FLSC Working Group is proposing the amendment of the Model Rule to clarify that lawyers may not accept cash in an amount greater than \$7,500. As amended, the Model Rule would provide:

1. A lawyer shall not receive or accept from a person, cash in an aggregate amount of greater than \$7,500 ~~or more~~ Canadian dollars in respect of any one client matter or transaction.

The Model Rule establishes a number of exceptions that permit lawyers and paralegals to accept cash in certain circumstances. The current exceptions are listed below.

3. Paragraph 1 [the “No Cash” Rule] 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.
4. Despite paragraph 3, paragraph 1 does not apply when the lawyer receives cash
 - (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) pursuant to a court order, or to pay a fine or penalty, or
 - (d) in an amount of \$7,500 or more for professional fees, disbursements, expenses or bail, provided that any refund out of such receipts is also made in cash.

The exceptions to the receipt of cash payments are set out in section 6 of Law Society By-Law 9.⁴

The FLSC Working Group is seeking feedback about the following proposed changes:

- i) The exceptions to the “No Cash” Rule would apply only when the lawyer or law firm is providing legal services.
- ii) Exceptions “b” and “c” in the Model Rules would be deleted, as, according to the Working Group, they are seldom used.

As amended, paragraph 4 of the Model Rule would provide:

4. Despite paragraph 3, paragraph 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

⁴ By-Law 9 under the *Law Society Act* may be accessed online at <http://www.lsuc.on.ca/uploadedFiles/By-Law-9-Financial-Transactions-Records-April-27-2017.pdf>.

- (a) from a financial institution or public body; or
- (b) in an amount greater than \$7,500 for professional fees, disbursements, expenses or bail, provided that any refund out of such receipts is also made in cash.

The FLSC Working Group is also suggesting that definitions of the terms “disbursements”, “expenses”, “financial institution”, and “professional fees” would be added to the Model Rule. The proposed new definitions are reproduced in the FLSC consultation paper, attached to this document.

Issues for Consideration

The exception in Model Rule paragraph “b” regarding the receipt of cash from a peace officer, law enforcement agency, or other agent of the Crown acting in an official capacity facilitates the return of client property from the police. The Committee is interested in receiving comments regarding whether the removal of this exemption would have an adverse impact on criminal lawyers.

Further, the exception in paragraph “c” of the Model Rule (“pursuant to a court order, or to pay a fine or penalty”) may assist defence counsel in dealing with the Crown and the court by ensuring that restitution is paid on behalf of their clients. The Committee is seeking feedback from the professions on this issue.

Client Identification and Verification

As part of its efforts to combat money laundering and terrorist financing, rules regarding client identification and verification were adopted by Federation Council in March 2008. Convocation approved amendment to the Law Society’s By-Laws in April of that year.

As explained on the Law Society’s website, there is a distinction between client identification and client verification. Lawyers and paralegals are required to identify a client, or obtain certain basic information about them, whenever they are retained to provide legal services.

In contrast, verifying the identity of a client involves actually looking at the original identifying document from an independent source to ensure that the client or any third party is who they say they are.⁵ It is necessary to verify the identity of the client when the lawyer or paralegal deals with funds. Model Rule 6(1) provides that a lawyer shall verify the identity of a client when the lawyer is engaged in or gives instructions in respect of any of the activities described in section 4. The activities described in section 4 include giving instructions in respect of the receiving, paying or transferring of funds, other than an electronic funds transfer.

The FLSC consultation paper notes that although there have been a number of amendments to the identification provisions in the Regulations under the PCMLTFA, prior to the review by the Working Group, the Model Rule on Client Identification and Verification had not been revisited since it was first adopted.

The FLSC Working Group is proposing a number of amendments to the definitions set out in paragraph 1 of the Client Identification Rule to reflect changes in the corresponding definitions in federal regulations.

⁵ See “Client Identification and Verification Requirements for Lawyers”, online at <http://www.lsuc.on.ca/printversion.aspx?id=2147499242>.

New definitions of “disbursements”, “expenses”, and “professional fees” have been added. An amended definition of “financial institution” is also proposed that incorporates changes in federal regulations.

The introductory section of the Model Rule regarding the obligation to know the client’s identity would be amended as follows (the proposed additions are underlined):

2. (1) Subject to subsection (3), a lawyer who is retained by a client to provide legal services must comply with the requirements in 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.

Issues for Consideration

The Committee seeks feedback about whether the marginal note above Model Rule 4 (“Client Identity and Verification”) should be amended to refer to verification only, in order to ensure clarity with respect to the distinction between client identification and verification. The Committee notes that the subject matter of the Rule relates to verification rather than to identification.

Section 6(1)

One of the amendments made to the PCMLTFA Regulations is the removal of the “reasonable measures” standard regarding client identification and verification, which is no longer used. The Working Group notes that this is a significant change and recommends the removal of the words “take reasonable steps” from the Model Rule to ensure consistency with the Regulations. The opening paragraph of the Model Rule would provide:

- 6(1) When a lawyer is engaged in or gives instructions in respect of any of the activities described in section 4, ~~including non face to face transactions~~, the lawyer shall ~~take reasonable steps to~~
- (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 section 3, clause (1)b,(iiiv), and, where appropriate, the third party, using ~~what the lawyer reasonably considers to be~~ documents or information from a reliable, independent source ~~documents, data or information.~~

Issues for Consideration

The Committee is seeking comments about whether the “reasonable” requirement should remain, unless it is absolutely necessary to remove it in order to ensure a more robust standard that is consistent with federal regulations. Further, the Committee requests feedback about whether there is sufficient clarity about the meaning of “source of funds”.

The Committee notes that currently, there is no reference to risk factors of which lawyers and paralegals should be aware when verifying a client’s identity. If the source of funds is an organization that is subject to the PCMLTFA, additional inquiries may not be necessary. However, if the origin of the source of funds is uncertain, the lawyer or paralegal should be aware that there is a possibility of money laundering or

terrorist financing and should make additional inquiries if the client. The Committee is seeking feedback about whether additional Commentary should be added to clarify these issues.

Section 6(2) – Examples of Independent Source Documents

The FLSC Working Group is recommending changes to paragraph 6(2) of the Client Identification Rule to specify the documents and information that may be relied upon to verify an individual's identity. These proposed changes reflect amendments to the PCMLTFA Regulations.

The PCMLTFA regulations incorporate two methods to verify the identity of an individual that have been identified by the FATF. The methods are:

- i. Lawyers and paralegals may verify identity using government-issued (federal, provincial or territorial) photo identification. A foreign-issued photo identification document may be used if it is equivalent to an acceptable Canadian-issued photo identification document such as a passport, a residency card, driver's licence or a provincial/territorial identity card. The original document must be viewed by the lawyer or paralegal while in the presence of the client in order to compare the person with the photograph. The photo identification method must indicate the individual's name, include a photo, and a unique identifier number.
- ii. Lawyers and paralegals may refer to a Canadian credit file that has been in existence for at least three years. The credit file must match the name, date of birth, and address provided by the individual. However, the lawyer or paralegal may not rely on the client to provide the lawyer or paralegal with their credit file. The lawyer or paralegal must obtain this information directly from a Canadian credit bureau. The credit file search must be done at the time of verification of the individual's identity.

Section 6(2)(c)

The Working Group proposes extensive amendments to the Model Rule regarding examples of independent source documents. A new s. 6(2)(c) would be added to provide, "in verifying the identity of an individual who is under 12 years of age, the lawyer shall verify the identity of one of their parents or their guardian".

Issues for Consideration

The Committee asks whether there is sufficient clarity about whether there is a requirement to verify the identity of the parent instead of, or in addition to, identifying the child. Does the wording of proposed s. 6(2)(c) require clarification?

Sections 6(3), (4) and (5) – Identifying Directors, Shareholders and Owners

Since 2014, provisions in the PCMLTFA setting out obligations for financial institutions to obtain ownership information from customers and beneficiaries that are legal entities have been strengthened.⁶ To this end, the phrase "reasonable measures" was removed from the federal regulations. The FLSC Working Group proposes the amendment of Model Rule 6(3) to reflect this

⁶ Financial Action Task Force, *Anti-money laundering and counter-terrorist financing measures – Canada, Mutual Evaluation Report*, September 2016, *supra* note 2 at p. 164.

change. With respect to the obligation to verify the identity of directors, shareholders and owners of an organization (additions are shown with underlining), the Model Rule would provide as follows:

6(3) 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 paragraphs ~~subsection (2)(b)(e) or (e)(f)~~, the lawyer shall ~~make reasonable efforts to obtain, and if obtained,~~ record, with the applicable date,

- (a) the names and occupation of all directors of the organization, other than an organization that is a securities dealer, ~~and~~
- (b) the names and addresses and occupation of all persons who own, directly or indirectly, 25 percent or more of the organization or shares of the organization, and
- (c) the names and addresses of all trustees and all known beneficiaries and settlors of the trust, and
- (d) in all cases, information establishing the ownership, control and structure of the entity.

(4) A lawyer shall take reasonable measures to confirm the accuracy of the information obtained under subsection (3).

The FLSC consultation paper acknowledges that, in the absence of a robust corporate registry system that includes beneficial ownership information, complying with this requirement may sometimes be difficult.

When the required information cannot be obtained, the lawyer would be required to take reasonable measures to identify the most senior managing officer of the entity and treat the entity as high risk. Model Code Rule 6(6) would provide:

- (6) if a lawyer is not able to obtain the information referred to in subsection (3) or to confirm that information in accordance with subsection (4), the lawyer shall
 - (a) take reasonable measures to ascertain the identity of the most senior managing officer of the entity; and
 - (b) treat the activities in respect of that entity as requiring ongoing monitoring and if necessary take the steps such monitoring may require, as described in sections 9 and 10 of this rule.

The proposed new Rules regarding Ongoing Monitoring are addressed later in this document.

Issues for Consideration

The Committee seeks input from the professions regarding the following:

- i) Should the obligation to make reasonable efforts to identify directors, shareholders and owners remain, unless it is absolutely necessary to remove it in order to create a more robust requirement that would be consistent with federal regulations?
- ii) Would the requirement to obtain the names and addresses of all persons who “directly or indirectly” own 25 percent or more of the organization or of the shares of the organization impose a significant responsibility on the lawyer to ask about and document corporate and other ownership structures that could be very complex?

- iii) Is there sufficient clarity as to whether the 25 percent requirement refers to votes, equity ownership, or both? With respect to equity, does this mean entitlement to income or capital? Is clarification needed in order to ensure compliance with this requirement?
- iv) Proposed paragraph “d” would require a lawyer to obtain and record “in all cases, information establishing the ownership, control and structure of the entity”. Is there sufficient clarity about whether the word “control” means *de facto* control as well as *de jure* control? If *de facto* control is what is intended, the lawyer will be required to make inquiries about shareholders or other agreements or circumstances which might provide a person or group with direct or indirect influence which could result in control in fact of the entity. The Committee seeks feedback about whether this requirement would impose an onerous due diligence obligation.
- v) The Committee also seeks comments about whether a lawyer should be entitled to rely on the certificate of a senior officer of the entity to satisfy the requirements in section 6(3)(b) and 6(4).

6(4) – Client Identity and Verification in Non Face to Face Transactions

Federal regulations under the PCMLTFA have been amended to replace particular provisions for verifying identity in the case of non face-to-face transactions (using a guarantor in Canada and an attestation method elsewhere) with methods in the general verification section that can be used when the client is not present. The references to attestation have been removed from the Regulations in an effort to modernize the requirements.

The FLSC Working Group is recommending that the Client Identification Rule be amended to remain consistent with the federal scheme. Model Rule 6(4) currently provides that if a client is not physically present before the lawyer but is present elsewhere in Canada, the lawyer shall verify a client’s identity by obtaining an attestation from a Commissioner of Oaths in Canada or a guarantor. The FLSC Working Group is proposing to delete Model Rule 6(4).

Model Rule 6(7) permits a lawyer to use an agent to obtain necessary information to verify the identity of a client if an individual client, third party or individual is not physically present in and is outside of Canada. The Working Group is proposing that the reference to an attestation in Model Rule 6(7) would be removed. As amended, Model Rule 6(7) would provide:

(7) A lawyer may, and where an individual client, third party or individual described in section 3 clause (b)(v) is not physically present in and is outside Canada, shall rely on an agent to obtain the information described in subsection (2) to verify the person’s identity provided the lawyer and the agent have an agreement or arrangement in writing for this purpose.

Model Rule 6(8)(b) is new. If approved, Model Rule 6(8) would therefore provide:

(8) A lawyer who enters into an agreement or arrangement referred to in subsection (7) shall
(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 (2).

Model Rule 6(9), which is also new, would allow a lawyer to rely on the agent's previous verification of an individual.

Issues for Consideration

Proposed Rule 6(9) does not require a lawyer to satisfy themselves that the information is valid and that the agent verified identity. If it is assumed that the two sections will be read together, it may not be necessary to insert this language. If not, the Committee is considering whether such language should be incorporated into the Rule.

Law Society By-Laws – Ascertaining Identity in Non Face to Face Transactions

Section 23(8)-(11) of Law Society By-Law 7.1 sets out current requirements for verifying a client's identity in the case of a non face-to-face transaction. If the client whose identity is being verified is present in Canada, the lawyer or paralegal may obtain an attestation from a person entitled to administer oaths and affirmations in Canada. In the alternative, an attestation may be obtained from another person listed in the By-Law. If the client whose identity is being verified is not present in Canada, a person acting on behalf of the lawyer or paralegal may verify the client's identity. In this circumstance, prior to the individual acting on behalf of the lawyer or paralegal there must be a written agreement specifying the steps that the individual will be taking on behalf of the lawyer or paralegal to comply with the requirements.

Section 6(5)

Proposed Model Code Rule 6(5) would provide:

(5) A lawyer shall 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.

The proposed Rule suggests that a lawyer has two obligations. First, the lawyer is required to obtain and record the information obtained. Second, the lawyer shall take measures to confirm the accuracy of that information. The second requirement presumably means that the lawyer is required to take additional steps beyond making inquiries to obtain information. It is not clear whether the lawyer is required to have two sources for each item of information. If this is the case, it is not clear from whom the lawyer should obtain the confirming information. The Committee suggests that the provision be amended to provide that the lawyer should obtain the information from sources that the lawyer reasonably believes to be reliable and keep a record of the sources consulted.

Section 6(12) – Timing of Verification for Organizations

According to the FLSC consultation paper, Law Societies expressed concerns to the FLSC Working Group that a transaction could be completed before the 60 day time period during which a lawyer is required to verify the identity of an organizational client, thus undermining the purpose of this requirement. To address this concern, the FLSC consultation paper proposes that the permitted time to verify the identity of an organization should be reduced to 30 days, consistent with the PCMLTFA Regulations.

Model Rule 6(12) would accordingly provide:

~~(1112)~~ A lawyer shall verify the identity of a client that is an organization ~~within 60 days of~~ 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.

Issues for Consideration

The Committee is seeking feedback about whether the time period to verify the identity of an organizational client should be reduced. The Committee also requests comments about whether the Model Rule should be amended to require the lawyer to verify the organizational client's identity within 30 days of being engaged or receiving instructions in respect of the activities described in section 4, or the transaction completion date, whichever is sooner.

Section 10 Monitoring

According to the FLSC consultation paper, the FLSC Working Group is recommending the addition of a new provision in the Client Identification and Verification Requirements regarding ongoing monitoring of clients. This requirement would reflect changes to the PCMLTFA Regulations. As a result of these amendments, entities that are subject to the legislation are required to perform ongoing monitoring of business relationships to mitigate the risk of facilitating money laundering or terrorist financing.

The proposed Model Rule would provide:

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 shall

(a) monitor on a periodic basis the professional business relationship with the client for the purposes of:

i. determining whether

(A) the client's information in respect of their 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

are consistent with the purpose of the retainer and the information obtained about the client as required by this Rule, and

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

(b) keep a record, with the applicable date of the measures taken and the information obtained with respect to the requirements of (a) above.

Issues for Consideration

The Committee is seeking input about whether the nature of the obligation to "monitor" under the Rule is sufficiently clear. Does the obligation to monitor apply only to high risk clients (such as clients from a

jurisdiction where the production of drugs, drug trafficking, terrorism or corruption is prevalent), or to all situations in which a lawyer is engaged or gives instructions with respect to the activities listed in section 4?⁷

The Committee notes that that large institutional clients will have ongoing relationships with law firms involving a variety of matters and different lawyers who are working on these matters. The Committee is also requesting comments about whether the Rule, as drafted, is sufficiently clear as to whether the requirement to monitor extends throughout the entire lawyer-client relationship, or only for the duration of the matter for which the verification was completed.

The Committee is also seeking comments about whether the new Model Rule regarding monitoring should be amended to incorporate a reference to “red flags” in order to emphasize that a lawyer should be mindful of the possibility that their client may be engaged in money laundering and terrorist financing. In the alternative, Commentary could be drafted to address this point. Paragraph 3.1 of the Commentary to Law Society Rule 3.2-7 reminds lawyers to be vigilant in identifying the presence of “red flags” in their areas of practice and of the need to make inquiries to determine whether a proposed retainer relates to a *bona fide* transaction. Paragraph 4.1 of the Commentary describes red flags in real estate transactions. The Committee asks whether a reference to “red flags” that may indicate money-laundering activity should be considered in the Model Rule or Commentary.⁸

The Committee also seeks comments about whether proposed paragraph 10(b) should be removed, since the act of watching for red flags may be an ongoing process rather than a measure that can be periodically recorded, as contemplated in the Rule.

Section 11(1)

A proposed amendment to Model Rule 11(1) would incorporate a reference to the monitoring obligation in section 10. Amended Model Rule 11(1) would provide:

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 would be assisting the client in fraud or other illegal conduct, the lawyer must withdraw from representation of the client.

The Committee notes that section 24 of Law Society By-Law 7.1 already requires a lawyer or a paralegal to withdraw from representation of a client if, once retained, they become aware that they would be assisting the client in fraud or other illegal conduct. Section 24 currently provides:

⁷ Section 4 provides, “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, other than an electronic funds transfer”.

⁸ Rule 3.2-7 of the Rules of Professional Conduct may be accessed online at <http://www.lsuc.on.ca/with.aspx?id=2147502071#ch3-sec2-7-dishonesty-fraud>.

24. If a licensee, in the course of complying with the client identification and verification requirements set out in section 23, knows or ought to know that he or she is or would be assisting a client in fraud or other illegal conduct, the licensee shall,

(a) immediately cease to and not further engage in any activities that would assist the client in fraud or other illegal conduct; and

(b) if the licensee is unable to comply with clause (a), withdraw from the provision of the licensee's professional services to the client.⁹

Trust Accounting

The use of a trust account for purposes that are unrelated to the provision of legal services is prohibited in Ontario, since such activities can be used to launder funds or to facilitate other illegal activity. The prohibition in the Law Society's Rules was approved by Convocation in April 2011. Law Society Rule 3.2-7.3 currently provides, "a lawyer shall not use their trust account for purposes not related to the provision of legal services". Rule 3.02(6) of the Paralegal Rules of Conduct contains a similar prohibition.

The Barreau du Québec and the Law Society of Alberta also have rules that restrict the use of lawyer trust accounts to purposes that are related to the provision of legal services. Other Canadian Law Societies have adopted a different approach. The Model Rules do not currently address this issue. The FLSC consultation paper notes that the Working Group is of the view that this restriction assists in reducing the risk of lawyers' trust accounts being used for purposes related to money laundering or the financing of terrorist activities. The Working Group is proposing a new Model Rule as follows:

Rule

1. All deposits or transfers into, and withdrawals or transfers from a trust account must be directly related to an underlying transaction or matter for which the lawyer or the lawyer's law firm is providing legal services.
2. Money held in a trust account must be paid out as soon as practical upon the completion of the transaction or other matter.

Commentary

[1] Even when the use of a trust account is related to the provision of legal services, the lawyer should consider whether it is appropriate in all the circumstances. Where, for example, a lawyer provides legal services in connection with a transaction that does not involve any escrow or trust conditions the deposit or transfer of money into and the withdrawal or transfer from the trust account may be mere banking services and so prohibited.

⁹ By-Law 7.1 under the *Law Society Act* may be accessed online at <http://www.lsuc.on.ca/uploadedFiles/By-Law-7.1-Operational-Obligations-03-02-17.pdf>.

Issues for Consideration

The Committee notes that paragraph 2 of the proposed Model Rule is similar to current subrule 3.5-6 of the Rules of Professional Conduct and Rule 3.07(5) of the Paralegal Rules of Conduct. Rule 3.5-6 of the Rules of Professional Conduct provides, “a lawyer shall account promptly for a client’s property that is in the lawyer’s custody and upon request shall deliver it to the order of the client or, if appropriate, at the conclusion of the retainer”.

The Committee is seeking feedback about the reference to escrow or trust conditions in the Commentary to the Model Rule. As currently drafted, the Commentary could be interpreted to refer to situations in which a lawyer receives funds from a client in order to complete an acquisition where the funds are merely received and then immediately paid to the lawyer acting for the other party. Further, the Commentary could also be interpreted to refer to the use of a trust fund to receive client funds in order to pay disbursements. The Committee requests comments from the professions about whether this wording should be revisited or removed.

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

Consultation Report

Anti-Money Laundering and Terrorist Financing Working Group

October 2, 2017

INTRODUCTION

1. The Federation of Law Societies of Canada (the “Federation”) and its member law societies have been actively engaged in the fight against money laundering and the financing of terrorist activities for more than 15 years, when work began on the first of two model rules addressing the risk that legal counsel might be used to facilitate these illegal activities. The “No Cash” and “Client Identification and Verification” Model Rules (the “Model Rules”) were adopted in 2004 and 2008 respectively and have since been implemented by all Canadian law societies. They exist as part of law societies’ regulatory regimes that are in keeping with important constitutional principles, as affirmed by the Supreme Court of Canada. The Model Rules have not been reviewed in the intervening years.

2. Ensuring effective anti-money laundering and terrorist financing rules and regulations for the legal profession remains a strategic priority of the Federation. In October 2016 the Federation Council asked the CEOs Forum to establish a working group of senior staff to review the Model Rules and their enforcement. This decision was made in response to a number of important developments on the anti-money laundering and counter-terrorist financing landscape. These include amendments to federal anti-money laundering and terrorist financing regulations, the mutual evaluation report of the Financial Action Task Force (“FATF”) on Canada’s anti-money laundering and terrorist financing regime, and the possibility of a renewed effort by the government to extend the federal regime to members of the legal profession.

3. The Anti-Money Laundering and Terrorist Financing Working Group (the “Working Group”) is co-chaired by Jim Varro, Director, Office of the CEO at the Law Society of Upper Canada and Frederica Wilson, Senior Director, Regulatory and Public Affairs at the Federation. The other members of the Working Group are:

- Susan Robinson – Executive Director, Law Society of Prince Edward Island
- Chioma Ufodike – Manager, Trust Safety, Law Society of Alberta
- Elaine Cumming – Professional Responsibility Counsel, Nova Scotia Barristers’ Society
- Deb Armour – Chief Legal Officer, Law Society of British Columbia
- Jeanette McPhee – CFO and Director of Trust Regulation, Law Society of British Columbia
- Leah Kosokowsky – Director, Regulation, Law Society of Manitoba
- Anthony Gonsalves – Team Manager, Professional Regulation, Law Society of Upper Canada
- Sylvie Champagne – Secrétaire de l’Ordre et Directrice du contentieux, Barreau du Québec
- Nathalie Parent – Directrice générale adjointe Direction des services juridiques, Chambre des notaires de Québec
- Brenda Grimes – Executive Director, Law Society of Newfoundland and Labrador

4. Over the past six months members of the Working Group have reviewed the Model Rules and the law society rules and regulations based on them, as well as related trust account rules. The Working Group has also carefully reviewed the report of the FATF’s mutual evaluation of Canada, released in September 2016. This review has led to the conclusion that amendments are required to ensure that the Model Rules remain as robust and effective as possible. The proposed amendments are described below.

5. An examination of how the No Cash Model Rule is interpreted and applied has led the Working Group to conclude that additional regulation of the use of trust accounts is needed. To that end, the Working Group is proposing a new model trust accounting rule, based on existing rules of some law societies that restrict the circumstances in which trust accounts may be used.

6. The Working Group is now seeking law society feedback on the proposed amendments and new model rule. Law societies are invited to provide any written comments or suggestions they may have by March 15, 2018. Submissions may be sent to fwilson@flsc.ca.

PROPOSED AMENDMENTS TO THE MODEL RULES

No Cash Model Rule

7. The No-Cash Rule was developed as part of a two-pronged response to the introduction of federal legislation purporting to require lawyers and Quebec notaries to make secret reports to a government agency on any suspicious financial transactions by their clients. While challenging the legislation in court, the law societies, through the Federation, drafted the No-Cash Rule as an alternative approach to managing the risks that clients might try to use legal counsel to facilitate money laundering or the financing of terrorist activities. The rule prohibits legal counsel from receiving \$7,500 or more (in the aggregate) in respect of any one client matter or transaction, subject to limited exceptions including cash received for legal fees or disbursements. The exceptions in the rule mirror exceptions in the federal regulations.

8. The review involved consideration of the \$7,500 threshold, the exceptions and the definitions in the rule.

9. To better understand both the use made of the existing exceptions and specific practices related to trust account management (including who can make a deposit to a trust account) the Working Group sought input from members of the criminal bar and from representatives of three major banks – CIBC, TD and RBC. The law society rules and regulations based on the No Cash Rule and the general trust accounting rules and regulations of the law societies were also reviewed.

10. The review of the law society rules confirmed that all have implemented the No Cash Model Rule and that the rules across the country are consistent in all essential ways. It also revealed that some law societies, but not all, have regulations or bylaws restricting the use of lawyer trust accounts to purposes related to their legal practice.

11. The Working Group has concluded that the \$7,500 threshold remains appropriate. Information from the law societies suggests, however, that there is some confusion in the profession about precisely where the cut off is, with some interpreting the rule as prohibiting lawyers from accepting cash in amounts greater than \$7,500 and others understanding the rule as prohibiting lawyers from accepting cash in amounts of \$7,500 or more. To ensure a consistent understanding the Working Group is proposing that the rule be amended to clarify that legal counsel may not accept cash in an amount *greater than \$7,500*.

12. The Working Group is recommending that the rule be amended to specify that the exceptions to the cash limit apply only where the lawyer or law firm is providing legal services. This flows from law society experience revealing that lawyers sometimes rely on the exceptions to justify accepting large amounts of cash even though it is not related to the provision of legal services. In the view of the Working Group this interpretation is inconsistent with the letter and spirit of the rule.

13. In reviewing the exceptions to the cash limit, the Working Group concluded that the exceptions should be maintained only where they are required for the proper functioning of the lawyer-client relationship and do not interfere with the rule's effectiveness in managing the risk that legal counsel might be used to launder funds or facilitate the financing of terrorist activities. In this regard, the Working Group concluded that the fact that an exemption was modeled on provisions in the federal anti-money laundering regulations ought not to be determinative of whether it should be included in an amended No Cash Rule.

14. The Working Group has concluded that while there is a limited risk that the exemption for cash received "from a peace officer, law enforcement agency or other agent of the Crown acting in his or her official capacity" (paragraph 4(b)) could be used to launder money or finance terrorism, the exemption is seldom used and as such is of limited value. The Working Group is therefore recommending its deletion from the rule.

15. The Working Group concluded that the exemption for cash received "pursuant to a court order, or to pay a fine or penalty" (paragraph 4(c)) is similarly of limited value and may present a risk of money laundering and terrorist financing. The Working Group is recommending the deletion of this exemption as well.

16. To provide greater clarity, the Working Group is also recommending the addition of definitions of four terms used in the rule: disbursements, expenses, financial institution, and professional fees.

17. The proposed amendments to the No Cash Rule are shown in a tracked changes version attached as Appendix "A". A clean version of the proposed amended rule is attached as Appendix "B".

Model Rule on Client Identification and Verification

18. The Model Rule on Client Identification and Verification ("Client Identification Rule") was developed by the Federation in response to the federal government's announced intention to subject legal counsel to regulations requiring them to collect information about their clients and make it available to law enforcement agencies on demand.

19. Although developed as an independent initiative of the Federation to promote the public interest in ensuring that lawyers conduct appropriate due diligence on their clients, the rule closely mirrored the provisions of the federal regulations. The rule was first adopted by the Council of the Federation in March 2008, and an amended version was adopted in December of the same year. Although there have been a number of amendments to the federal regulations in recent years, the Model Rule on Client Identification and Verification has not been reviewed since December 2008.

20. In light of the decision of the drafters of the original rule to mirror, as much as possible, the provisions in the federal client identification and verification regulations, the Working Group took particular note of recent amendments to the regulations. The findings of the FATF in its mutual evaluation of Canada, in particular criticisms of the regulatory scheme as it applies to beneficial owners, were also considered.

21. The proposed amendments to the Client Identification Rule are described below. The complete amendments are shown in a tracked changes version attached as Appendix "C". A clean version of the proposed amended rule is attached as Appendix "D".

Definitions

22. The Working Group is proposing a number of amendments to the definitions set out in paragraph 1 of the Client Identification Rule reflecting changes to the corresponding definitions in the federal regulations. To ensure consistency between the two Model Rules new definitions of "disbursements", "expenses" and "professional fees" as they appear in the amended "No Cash" Model Rule have also been added.

23. An amended definition of "financial institution" is proposed that incorporates changes in the federal regulations (referred to there as "financial entity") including the addition of references to a "financial services cooperative" and a "credit union central." Definitions of those two terms have also been added to the Client Identification Rule. Minor amendments to the definitions of "funds", "public body" and "securities dealer" are also proposed to maintain consistency with the government regulations.

24. The Working Group discussed whether a band defined under the *Indian Act* (Canada) should be added to the definition of "public body" although the federal regulations do not include Indian bands in the definition of public body. This issue first arose some years ago and was the subject of research by the Federation, but no determination was made at that time. The Working Group considers this an important issue and to ensure that it is carefully considered will be conducting additional research before reporting on it at a later date.

Requirements

Introductory Amendments

25. As a reminder to legal professionals that the client identity and verification rules are part of the general obligation to know a client and understand the nature of the retainer, additional language is proposed to the introductory section of the rule as follows (new wording is underlined):

Client Identity

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.

Clarification of Information Required for Individuals

26. In the course of its review, the Working Group learned that some law societies are receiving inquiries from lawyers on the correct interpretation of the requirements in paragraph 3 of the Client Identification Rule for identifying individuals. In particular it was suggested that there is confusion over whether both home and employment information must be obtained for all individuals. To clarify the intent of the provision the Working Group is recommending re-organization and wording changes to paragraph 3.

Exemptions Provisions

27. To be consistent with proposed amendments to the No Cash Model Rule, the Working Group is recommending the deletion of three exemptions set out in paragraph 5 of the rule as shown below:

5. (1) Section 6 does not apply where the client is a financial institution, public body or reporting issuer.

(2) Section 6 does not apply 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;

~~or (c) received from a peace officer, law enforcement agency or other public official acting in their official capacity;~~

~~(d) paid or received pursuant to a court order or to pay a fine or penalty;~~

~~(e) paid or received as a settlement of any legal or administrative proceedings; or~~

(c) paid or received for professional fees, disbursements, expenses or bail.

Methods of Verification

28. A number of amendments are proposed to the provisions relating to the requirement to verify identity and the methods that may be used to do so. Most of the amendments reflect changes to the federal regulations. One reflects the Working Group's view that due diligence in knowing the client, their business, and how it intersects with the lawyer's services, should include an inquiry into the source of funds involved in a transaction.

29. Following recent amendments, the federal regulations on ascertaining identity no longer use a "reasonable measures" standard. This is a significant change that the Working Group has concluded should be reflected in the Client Identification Rule. The Working Group is therefore recommending the deletion of the words "take reasonable steps to" from paragraph 6(1). Additional amendments to paragraph 6 are made for consistency with later amendments. The amended provision would now read

6. (1) When a lawyer is engaged in or gives instructions in respect of any of the activities described in section 4, the lawyer shall

- (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 section 3, clause (b)(v), and, where appropriate, the third party, using documents or information from a reliable, independent source.

30. The Working Group is proposing amendments to the provisions of the Client Identification Rule (paragraph 6(2)) that specify the documents and information that may be relied upon to verify an individual's identity. These changes reflect extensive amendments to the federal regulations. The federal scheme also has replaced the particular provisions for verifying identity in non-face-to-face transactions (using a guarantor in Canada and the attestation method elsewhere) with methods in the general verification section that can be used when the client is not present. The existing Client Identification Rule mirrored the non-face-to-face provisions in the federal regulations. The Working Group is recommending that the Client Identification Rule be amended to remain consistent with the federal scheme. This involves deleting the non-face-to-face verification provisions in paragraph 6(4).

31. Guidance from the Financial Transactions and Reports Analysis Centre ("FINTRAC") the government agency responsible for monitoring compliance with the federal anti-money laundering and terrorist financing regulations, identifies two single process methods that may be used to verify the identity of an individual, both of which are reflected in the proposed amendments to the Client Identification Rule.

32. The first is the government-issued photo identification method, by which valid, current and original photo identification issued by a federal, provincial or territorial government is used to verify the identify an individual. A foreign issued photo identification document may be used if it is equivalent to an acceptable Canadian issued photo identification document such as a passport, residency card, driver's license or provincial/territorial identity card. The original document must be viewed by the lawyer while in the presence of the individual in order to compare them with their photo. The photo identification document must indicate the individual's name, a photo of the individual and a unique identifier number.

33. The second is the credit file method, by which lawyers can by refer to a Canadian credit file that has been in existence for at least three years. To be acceptable, the credit file details must match the name, date of birth and address provided by the individual.

34. Under this method, the individual cannot provide the lawyer with a copy of their credit file. The lawyer must obtain the information directly from a Canadian credit bureau. It is acceptable, however, to use an automated system to match the individual's information with the credit file information. A lawyer may also rely on a third party vendor that can provide an original and valid Canadian credit file. A third party vendor is an entity that is authorized by a Canadian credit bureau to provide Canadian credit information.

35. The credit file search must be conducted at the time of verification of the individual's identity. For example, a previous credit file would not be acceptable. The

individual does not need to be physically present at the time identity is verified by this method.

36. Tracking the federal regulations (and the FINTRAC Guidance) the Working group is proposing amendments to the Client Identification Rule to specify that the identity of an individual may also be verified using a dual process method. This method involves referring to information from two different and reliable, independent sources. The information may be found in documents from these sources or may be information that these sources are able to provide. The individual does not need to be physically present at the time their identity is verified.

37. If the lawyer refers to a document, they must view the original, valid and current document. Original documents do not include those that have been photocopied, faxed or digitally scanned. If the lawyer refers to information, it must be valid and current. Information found through social media is not acceptable.

38. A reliable source is an originator or issuer of information that is trusted to verify the identity of the client. The source providing the information cannot be the lawyer or the individual whose identity is being verified; it must be independent. Examples of reliable sources include the federal, provincial, territorial and municipal levels of government, crown corporations, financial entities or utility providers.

39. To use this method, the lawyer is required to refer to any two of the following:

- a. documents or information from a reliable source that contain the individual's name and date of birth;
- b. documents or information from a reliable source that contain the individual's name and address; or
- c. documents or information that contain the individual's name and confirms that they have a deposit, credit card or other loan account with a financial entity.

40. Additional amendments to the rule are proposed to incorporate new provisions in the regulations on the verification of the identity of children.

41. The proposed amended subsection 6(2) is as follows:

Examples of independent source documents

6. ...

(2) For the purposes of paragraph (1)(b), the client's identity shall 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 their 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 to verify that the name and photograph are those of the individual;

ii. information that is in their 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 their 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 their 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 their 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; or

iv. confirmation in writing from a legal firm that is a member of an affiliation or alliance of legal firms of which the lawyer's legal firm is a member and which conduct professional business in Canada or outside of Canada that it has previously verified the individual's identity in accordance with subparagraphs i. to iii. and using that information to verify the name, address and date of birth of the individual.

(b) For the purposes of clauses (2)(a)iii(A) to (C), the information referred to shall be from different sources, and the individual and lawyer cannot be a source.

(c) In verifying the identity of an individual who is under 12 years of age, the lawyer shall verify the identity of one of their parents or their guardian;

(d) In verifying the identity of an individual who is at least 12 years of age but not more than 15 years of age, the lawyer may refer under clause (2)(a)iii(A) to information that contains the name and address of one of the individual's parents or their guardian in order to verify 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.

Verification of Identity of Organizational Clients

42. The amendment to the federal regulations removing the “reasonable measures” language (discussed above) also applies to the verification of the identity of directors, shareholders and owners of organizations. To maintain consistency, the Working Group is proposing to remove the corresponding reference from paragraph 6(3) of the Client Identification Rule. This amendment would create a requirement to *obtain*, rather than simply to *make reasonable efforts to obtain*, the names of all directors of an organization, and the names and addresses of the owners of the organization. Tracking the changes to the federal regulations, the amended rule would also introduce a requirement to “take reasonable measures to confirm the accuracy of the information obtained.”

43. Amendments are also proposed to paragraph 6(3)(b) to require legal counsel to obtain information on beneficial owners of an organization. This change addresses a specific criticism of the law society anti-money laundering and terrorist financing rules that has been raised by the government and the FATF. The Working Group recognizes that in the absence of a robust corporate registry system that includes beneficial ownership information, complying with this requirement may sometimes be difficult. Additional amendments address the possibility that information may not be obtained and prescribe the steps that must be taken in such cases. Pursuant to those proposed changes, when the required information cannot be obtained the lawyer must take reasonable measures to identify the most senior managing officer of the entity and must treat the entity as high risk.

44. Additional proposed amendments reflect requirements in the federal regulations to obtain information about trustees and beneficiaries and settlors of the trust, and “in all cases, information establishing the ownership, control and structure of the entity”. The federal regulations also include new subsections that create a “reasonable measures” requirement to confirm the accuracy of the verification information and additional record keeping requirements for those measures. The Working group is proposing that those requirements also be incorporated into the Client Identification Rule.

45. The draft below reflects the proposed amendments. Draft language to address “high risk” clients through ongoing monitoring is discussed below.

Identifying Directors, Shareholders and Owners

6. ...

(3) 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 paragraphs (2)(e) or (f), the lawyer shall obtain and record, with the applicable date,

- (a) the names of all directors of the organization, other than an organization that is a securities dealer,
- (b) 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,
- (c) the names and addresses of all trustees and all known beneficiaries and settlors of the trust, and
- (d) in all cases, information establishing the ownership, control and structure of the entity.

(4) A lawyer shall take reasonable measures to confirm the accuracy of the information obtained under subsection (3).

(5) A lawyer shall 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.

(6) If a lawyer is not able to obtain the information referred to in subsection (3) or to confirm that information in accordance with subsection (4), the lawyer shall

- (a) take reasonable measures to ascertain the identity of the most senior managing officer of the entity; and
- (b) treat the activities in respect of that entity as requiring ongoing monitoring and if necessary take the steps such monitoring may require, as described in sections 9 and 10 of this Rule.

Use of an Agent

46. The federal regulations with respect to the use of an agent to verify identity have been amended, and the Working Group is proposing amendments to the Client Identification Rule to incorporate those changes. The rule continues to permit the use of an agent and to require it when the individual whose identity must be verified is outside of Canada. Key changes proposed include

- a. a requirement to satisfy oneself that the information obtained through an agent is valid,
- b. the ability to rely on an agent’s previous verification in the circumstances set

- out, and
- c. no requirement for subsequent verification unless there are doubts about the information related to the original verification (the test before was 'if the lawyer recognizes the person').

Timing of verification

47. Concerns were raised by some law societies about the length of time permitted in the Client Identification Rule for verifying the identity of an organization after engaging in or giving instructions in the matter. It was suggested that a transaction could be completed before the expiration of the 60-day deadline for verification, thus undermining the purpose of the requirement. To address this concern, the Working Group is proposing to reduce the allowed time to 30 days, which is in keeping with the federal regulations.

Ongoing Monitoring

48. The Working Group is of the view that a new provision requiring ongoing monitoring of clients should be added to the Client Identification Rule. Such a requirement is included in the revised federal regulations. In addition, the Working Group is proposing to add a reference to ongoing monitoring to the provision requiring a lawyer to withdraw from representation of the client if, once retained, the lawyer becomes aware that they would be assisting the client in fraud or other illegal conduct.

49. The proposed additions to the rule would read

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 shall:

(a) monitor on a periodic basis the professional business relationship with the client for the purposes of:

i. determining whether

(A) the client's information in respect of their 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

are consistent with the purpose of the retainer and the information obtained about the client as required by this Rule, and

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

(b) keep a record, with the applicable date, of the measures taken and the information obtained with respect to the requirements of (a) above.

...

Criminal activity, duty to withdraw after being retained

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.

NEW TRUST ACCOUNTING MODEL RULE

50. In the course of its review of the Model Rules, the Working Group learned that members of the profession may sometimes use their trust accounts for purposes unrelated to the provision of legal services. In the view of the Working Group this unnecessarily increases the risk of money laundering or other illegal activity even when the money in question is not cash.

51. A recent discipline decision from the Law Society of British Columbia illustrates the practice and the risks it presents.¹ The case involved a lawyer using his trust account to receive and disburse almost \$26 million on behalf of a client in connection with four line of credit agreements in which the client was the borrower. The lawyer's services consisted solely of receiving and disbursing the funds.

52. The hearing panel dismissed the lawyer's argument that as he had complied with the law society's no-cash, client identification and verification and trust accounting rules he had fulfilled his obligations. The panel accepted the position of the law society that the *Code of Professional Conduct for British Columbia*, in particular provisions requiring lawyers to carry out all duties honourably and with integrity and prohibiting lawyers from engaging in conduct that the lawyer knows or ought to know assists in or encourages unlawful conduct, also imposes duties on lawyers with regards to the use of their trust accounts. The panel found that the lawyer had breached these duties by failing to make reasonable inquiries about the transactions and using his trust account as a conduit for funds notwithstanding "the series of transactions being objectively suspicious".²

53. Several law societies, including the Barreau du Québec, the Law Society of Upper Canada and the Law Society of Alberta, have rules that restrict the use of lawyer trust accounts. While the wording differs, each rule prohibits the use of a lawyer's trust account for a purpose unrelated to the provision of legal services. The Working Group concluded that such rules provide valuable clarity and, by restricting use of trust accounts, assist in reducing the risk of lawyers' trust accounts being used for purposes related to money laundering or the financing of terrorist activities.

¹ LSBC v. Donald Franklin Gurney, available at <https://www.lawsociety.bc.ca/labc/apps/hearings/decisions.cfm>

² Ibid, At paragraph 81.

54. The Working Group is proposing a new model rule and accompanying commentary as follows (also attached as Appendix “E”):

Rule:

1. All deposits or transfers into, and withdrawals or transfers from a trust account must be directly related to an underlying transaction or matter for which the lawyer or the lawyer’s law firm is providing legal services.
2. Money held in a trust account must be paid out as soon as practical upon the completion of the transaction or other matter.

Commentary:

[1] Even when the use of a trust account is related to the provision of legal services, the lawyer should consider whether it is appropriate in all the circumstances. Where, for example, a lawyer provides legal services in connection with a transaction that does not involve any escrow or trust conditions the deposit or transfer of money into and the withdrawal or transfer from the trust account may be mere banking services and so prohibited.

INVITATION TO PROVIDE FEEDBACK

55. The consultation on the proposed amendments to the Model Rules and the proposed new trust accounting rule will run until March 15, 2018. Written feedback is welcome on any or all of the proposals and may be sent to fwilson@flsc.ca.



Appendix “A”

Model Rule on 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;

“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 bank that is regulated by the Bank Act, an authorized foreign bank, as defined in section 2 of that Act, in respect of its business in Canada, a cooperative credit society, savings and credit Union or caisse populaire that is regulated by a provincial Act, an association that is regulated by the Cooperative Credit Associations Act, a financial services cooperative, a credit union central, a company that is regulated by the Trust and Loan Companies Act and a trust company or loan company that is regulated by a provincial Act, and a department or entity that is an agent of Her Majesty in right of Canada or of a province when it accepts deposit liabilities in the course of providing financial services to the public;

“funds” means cash, currency, securities and negotiable instruments or other financial instruments that indicate the person’s title 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,
- (b) an incorporated city, town, village, metropolitan authority, township, district, county, rural municipality or other incorporated municipal body or an agent of any of them, or
- (c) an organization that operates a public hospital and that is designated by the Minister of National Revenue as a hospital under the *Excise Tax Act* or an agent of the organization.

1. A lawyer shall not receive or accept from a person, cash in an aggregate amount ~~of~~ greater than \$7,500 ~~or more~~ Canadian dollars in respect of any one client matter or transaction.

2. For the purposes of this rule, when a lawyer receives or accepts cash in a foreign currency from a person the lawyer shall 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. Paragraph 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.

4. Despite paragraph 3, paragraph 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, or
- ~~(b) from a peace officer, law enforcement agency or other agent of the Crown acting in his or her official capacity,~~
- ~~(c) pursuant to a court order, or to pay a fine or penalty, or~~
- ~~(d)~~ (b) in an amount of greater than \$7,500 ~~or more~~ for professional fees, disbursements, expenses or bail, provided that any refund out of such receipts is also made in cash.



Appendix “B”

Model Rule on 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;

“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 bank that is regulated by the Bank Act, an authorized foreign bank, as defined in section 2 of that Act, in respect of its business in Canada, a cooperative credit society, savings and credit Union or caisse populaire that is regulated by a provincial Act, an association that is regulated by the Cooperative Credit Associations Act, a financial services cooperative, a credit union central, a company that is regulated by the Trust and Loan Companies Act and a trust company or loan company that is regulated by a provincial Act, and a department or entity that is an agent of Her Majesty in right of Canada or of a province when it accepts deposit liabilities in the course of providing financial services to the public;

“funds” means cash, currency, securities and negotiable instruments or other financial instruments that indicate the person’s title 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,
- (b) an incorporated city, town, village, metropolitan authority, township, district, county, rural municipality or other incorporated municipal body or an agent of any of them, or
- (c) an organization that operates a public hospital and that is designated by the Minister of National Revenue as a hospital under the *Excise Tax Act* or an agent of the organization.

1. A lawyer shall not receive or accept from a person, cash in an aggregate amount greater than \$7,500 Canadian dollars in respect of any one client matter or transaction.

2. For the purposes of this rule, when a lawyer receives or accepts cash in a foreign currency from a person the lawyer shall 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. Paragraph 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.

4. Despite paragraph 3, paragraph 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, or
 - (b) in an amount greater than \$7,500 for professional fees, disbursements, expenses or bail, provided that any refund out of such receipts is also made in cash.





Federation of Law Societies of Canada

Model Rule on Client Identification and Verification Requirements

*Adopted by Council of the Federation of Law Societies of Canada
March 20, 2008 and modified on December 12, 2008*

Definitions

1. ~~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 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~~or a bank to which the *Bank Act* applies,~~

~~(bc)~~ (c) a cooperative credit society, savings and credit union or caisse populaire that is regulated by a provincial Act,

~~(ed)~~ (d) an association that is regulated by the *Cooperative Credit Associations Act* (Canada),

~~(e)~~ (e) a financial services cooperative,

(f) a credit union central,

(g) a company that is regulated by~~to which~~ the *Trust and Loan Companies Act* (Canada) ~~applies,~~

~~(eh)~~ (h) a trust company or loan company that is regulated by a provincial Act;

~~(fi)~~ (i) a department or an entity that is an agent of Her Majesty in right of Canada or of a province when it~~where the department or agent~~ accepts deposit liabilities in the course of providing financial services to the public; or

~~(gj)~~ (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, a barrister or solicitor;

“organization” means a body corporate, partnership, fund, trust, co-operative or an unincorporated association;

“proceedings” means a legal action, application or other proceeding commenced before a court of any level, a statutory tribunal in Canada or an arbitration panel or arbitrator established pursuant to provincial, federal or foreign legislation and includes proceedings before foreign courts.

“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,
- (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 ~~a person~~ s and-or ~~entity~~ ies that is authorized under

provincial 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.

Client Identity

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 9 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 9, 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) shall obtain and record, with the applicable date, the following information:

- (a) for individuals:
- (i) the client's full name,
 - (ii) the client's home address and home telephone number,
 - (iii) the client's occupation or occupations, and
 - (i)(iv) the address and telephone number of the client's place of work or employment, where applicable;
- (b) for organizations:
- (i) the client's full name,
 - (ii) the client's business address and business telephone number, if applicable,
 - ~~(c) — if the client is an individual, the client's home address and home telephone number,~~
 - ~~(d) — (iii) if the client is an organization,~~ 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,
 - ~~(e) — if the client is an individual, the client's occupation or occupations,~~
 - ~~(f) — if the client is an organization,~~
 - ~~(i) — (iv)~~ 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
 - ~~(ii) — (v)~~ 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,
 - ~~(g) — (c)~~ if the client is acting for or representing a third party, information about the third party as set out in paragraphs (a) ~~or~~ ~~(f)~~ as applicable.

Client Identity and Verification

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, other than an electronic

funds transfer.

Exemptions re: certain funds

5. (1) Section 6 does not apply where the client is a financial institution, public body or reporting issuer.

(2) Section 6 does not apply 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; or

~~(c) — received from a peace officer, law enforcement agency or other public official acting in their official capacity;_~~

~~(d) — paid or received pursuant to a court order or to pay a fine or penalty;_~~

~~(e) — paid or received as a settlement of any legal or administrative proceedings;_ or~~

(fc) paid or received for professional fees, disbursements, expenses or bail.

6. (1) When a lawyer is engaged in or gives instructions in respect of any of the activities described in section 4, ~~including non-face-to-face transactions,~~ the lawyer shall ~~take reasonable steps to~~

(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 section 3, clause (fb)(iv), and, where appropriate, the third party, using what the lawyer reasonably considers to be documents or information from a reliable, independent source. ~~documents, data or information.~~

Examples of independent source documents

(2) For the purposes of ~~paragraph subsection (1)(b),~~ the client's identity shall be verified by referring to the following documents independent source 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 may include:

- (a) if the client or third party is an individual,
- i. an ~~valid original government issued~~ identification document containing their name and photograph that is, ~~issued by the federal government, a provincial or territorial government or a foreign government, other than a municipal government, including a driver's licence, birth certificate, provincial or territorial health insurance card [if such use of the card is not prohibited by the applicable provincial or territorial law], passport or similar record~~ that is used to verify that the name and photograph are those of the individual;
 - ii. information that is in their 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 their 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 their 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 their 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; or
 - iv. confirmation in writing from a legal firm that is a member of an affiliation or alliance of legal firms of which the lawyer's legal firm is a member and which conduct professional business in Canada or outside of Canada that it has previously verified the individual's identity in accordance with subparagraphs i. to iii. and using that information to verify the name, address and date of birth of the individual;

(b) For the purposes of clauses 2(a)(iii)(A) to (C), the information

referred to shall be from different sources, and the individual and lawyer cannot be a source.

(c) In verifying the identity of an individual who is under 12 years of age, the lawyer shall verify the identity of one of their parents or their guardian.

(d) In verifying the identity of an individual who is at least 12 years of age but not more than 15 years of age, the lawyer may refer under clause 2(a)iii(A) to information that contains the name and address of one of the individual's parents or their guardian in order to verify that the address is that of the individual.

- (be) 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
- (ef) 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.

Identifying Directors, Shareholders and Owners

(3) 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 ~~paragraphs~~subsection (2)(~~be~~) or (~~ef~~), the lawyer shall ~~make reasonable efforts to obtain, and if obtained,~~ record, with the applicable date,

- (a) the names s ~~and occupation~~ of all directors of the organization, other than an organization that is a securities dealer, ~~and~~
- (b) the names s ~~and,~~ addresses es ~~and occupation~~ of all persons who own, directly or indirectly, 25 per cent or more of the organization or of the shares of the organization, ~~and~~
- (c) ~~the names and addresses of all trustees and all known beneficiaries and settlors of the trust, and~~
- (d) in all cases, information establishing the ownership, control and structure of the entity.

(4) A lawyer shall take reasonable measures to confirm the accuracy of the information obtained under subsection (3).

(5) A lawyer shall 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.

(6) If a lawyer is not able to obtain the information referred to in subsection (3) or to confirm that information in accordance with subsection (4), the lawyer shall

(a) take reasonable measures to ascertain the identity of the most senior managing officer of the entity; and

(b) treat the activities in respect of that entity as requiring ongoing monitoring and if necessary take the steps such monitoring may require, as described in sections 9 and 10 of this Rule.

~~Client Identity and Verification in Non-Face-to-Face Transactions~~

~~(4) (a) When a lawyer engages in or gives instructions in respect of any~~

~~of the activities in section 4 for a client or third party who is an individual who is not physically present before the lawyer but is present elsewhere in Canada, the lawyer shall verify the client's identity by obtaining an attestation from a commissioner of oaths in Canada, or a guarantor in Canada, that the commissioner or guarantor has seen one of the documents referred to in subsection (2)(a).~~

~~(b) When a lawyer who engages in or gives instructions in respect of any of the activities in section 4 for a client that is an organization is instructed by an individual described in section 3, clause (f)(ii) who is not physically present before the lawyer but is present elsewhere in Canada, the lawyer shall verify the individual's identity by obtaining an attestation from a commissioner of oaths in Canada, or a guarantor in Canada, that the commissioner or guarantor has seen one of the documents referred to in subsection (2)(a).~~

~~(5) — For the purpose of subsection (4), an attestation shall be produced on a legible photocopy of the document and shall include~~

- ~~(a) — the name, profession and address of the person providing the attestation;~~
- ~~(b) — the signature of the person providing the attestation; and~~
- ~~(c) — the type and number of the identifying document provided by the client, third party or instructing individual(s).~~

~~(6) — For the purpose of subsection (4), a guarantor must be a person employed in one of the following occupations in Canada:~~

- ~~(a) — dentist;~~
- ~~(b) — medical doctor;~~
- ~~(c) — chiropractor;~~
- ~~(d) — judge;~~
- ~~(e) magistrate;~~
- ~~(f) — lawyer;~~
- ~~(g) — notary (in Quebec);~~
- ~~(h) — notary public;~~
- ~~(i) — optometrist;~~
- ~~(j) — pharmacist;~~

- ~~(k) — professional accountant (APA [Accredited Public Accountant], CA [Chartered Accountant], CGA [Certified General Accountant], CMA [Certified Management Accountant], PA [Public Accountant] or RPA [Registered Public Accountant]);~~
- ~~(l) — professional engineer (P.Eng. [Professional Engineer, in a province other than Quebec] or Eng. [Engineer, in Quebec]);~~
- ~~(m) — veterinarian;~~
- ~~(n) — peace officer;~~
- ~~(o) — paralegal licensee in Ontario; (p) — nurse; or~~
- ~~(q) — school principal.~~

Use of Agent

(7) A lawyer may, and where an individual client, third party or individual described in section- 3 clause ~~(fb)~~(iv) is not physically present in and is outside of Canada, shall, ~~rely~~ on an agent to obtain the information described in subsection (2) to verify the person's identity, ~~which may include, where applicable, an attestation described in this section,~~ provided the lawyer and the agent have an agreement or arrangement in writing for this purpose.

(8) A lawyer who enters into an agreement or arrangement referred to in subsection ~~(47)~~ shall:

- (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 (2).

(9) A lawyer may rely on the agent's previous verification of an individual client, third party or an individual described in section 3 clause (b)(v) 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 (2).

Timing of Verification for Individuals

(910) A lawyer shall 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.

(4011) Where a lawyer has verified the identity of an individual, the lawyer is not required to subsequently verify that same identity ~~if the lawyer recognizes that person unless they have doubts about the information that was used for that purpose.~~

Timing of Verification for Organizations

(4412) A lawyer shall verify the identity of a client that is an organization ~~within 60 days of~~ 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.

(4213) Where the lawyer has verified the identity of a client that is an organization and obtained information pursuant to subsection 6(3), the lawyer is not required to subsequently verify that identity or obtain that information, unless they have doubts about the information that was used for that purpose.

Record keeping and retention

7. (1) A lawyer shall obtain and retain a copy of every document used to verify the identity of any individual or organization for the purposes of section 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 shall retain a record of the information, with the applicable date, and any documents obtained for the purposes of sections 3 and subsection 6(3) 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 sections 3 and subsections 6(1) or (3), 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.

Application

(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 shall:

(a) monitor on a periodic basis the professional business relationship with the client for the purposes of:

i. determining whether

(A) the client's information in respect of their 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

are consistent with the purpose of the retainer and the information obtained about the client as required by this Rule, and

i.ii. ensuring that the lawyer is not assisting in or encouraging dishonesty, fraud, crime or illegal conduct; and

(b) keep a record, with the applicable date, of the measures taken and the information obtained with respect to the requirements of (a) above.

Criminal activity, duty to withdraw after being retained, including monitoring

~~4011.~~ (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.



Federation of Law Societies of Canada

Model Rule on Client Identification and Verification Requirements

*Adopted by Council of the Federation of Law Societies of Canada
March 20, 2008 and modified on December 12, 2008*

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 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 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 Act;
- (i) a department or an entity that is an agent of Her Majesty in right of Canada or of a province 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, a barrister or solicitor;

“organization” means a body corporate, partnership, fund, trust, co-operative or an unincorporated association;

“proceedings” means a legal action, application or other proceeding commenced before a court of any level, a statutory tribunal in Canada or an arbitration panel or arbitrator established pursuant to provincial, federal or foreign legislation and includes proceedings before foreign courts.

“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,
- (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 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.

Client Identity

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 9 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 9,
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) shall obtain and record, with the applicable date, the following information:

(a) for individuals:

- (i) the client's full name,
 - (ii) the client's home address and home telephone number,
 - (iii) the client's occupation or occupations, and
 - (iv) the address and telephone number of the client's place of work or employment, where applicable;
- (b) for organizations:
- (i) the client's full name,
 - (ii) the client's business address and business telephone number,
 - (iii) 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,
 - (iv) 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
 - (v) 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,
- (c) if the client is acting for or representing a third party, information about the third party as set out in paragraphs (a) or (b) as applicable.

Client Identity and Verification

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, other than an electronic funds transfer.

Exemptions re: certain funds

5. (1) Section 6 does not apply where the client is a financial institution, public

body or reporting issuer.

(2) Section 6 does not apply 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; or
- (c) paid or received for professional fees, disbursements, expenses or bail.

6. (1) When a lawyer is engaged in or gives instructions in respect of any of the activities described in section 4, the lawyer shall

- (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 section 3, clause (b)(v), and, where appropriate, the third party, using documents or information from a reliable, independent source.

Examples of independent source documents

(2) For the purposes of paragraph (1)(b), the client's identity shall 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 their 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 to verify that the name and photograph are those of the individual;
 - ii. information that is in their 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 their 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 their 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 their 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; or

iv. confirmation in writing from a legal firm that is a member of an affiliation or alliance of legal firms of which the lawyer's legal firm is a member and which conduct professional business in Canada or outside of Canada that it has previously verified the individual's identity in accordance with subparagraphs i. to iii. and using that information to verify the name, address and date of birth of the individual;

- (b) For the purposes of clauses 2(a)(iii)(A) to (C), the information referred to shall be from different sources, and the individual and lawyer cannot be a source.
- (c) In verifying the identity of an individual who is under 12 years of age, the lawyer shall verify the identity of one of their parents or their guardian.
- (d) In verifying 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 under clause 2(a)iii(A) to information that contains the name and address of one of the individual's parents or their guardian in order to verify 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.

Identifying Directors, Shareholders and Owners

(3) 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 paragraphs (2)(e) or (f), the lawyer shall obtain and record, with the applicable date,

- (a) the names of all directors of the organization, other than an organization that is a securities dealer,
- (b) 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,
- (c) the names and addresses of all trustees and all known beneficiaries and settlors of the trust, and
- (d) in all cases, information establishing the ownership, control and structure of the entity.

(4) A lawyer shall take reasonable measures to confirm the accuracy of the information obtained under subsection (3).

(5) A lawyer shall 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.

(6) If a lawyer is not able to obtain the information referred to in subsection (3) or to confirm that information in accordance with subsection (4), the lawyer shall

- (a) take reasonable measures to ascertain the identity of the most senior managing officer of the entity; and
- (b) treat the activities in respect of that entity as requiring ongoing monitoring and if necessary take the steps such monitoring may require, as described in sections 9 and 10 of this Rule.

Use of Agent

(7) A lawyer may, and where an individual client, third party or individual described in section 3 clause (b)(v) is not physically present in and is outside of Canada, shall rely on an agent to obtain the information described in subsection (2) to verify the person's identity provided the lawyer and the agent have an agreement or arrangement in writing for this purpose.

(8) A lawyer who enters into an agreement or arrangement referred to in subsection (7) shall:

- (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 (2).

(9) A lawyer may rely on the agent's previous verification of an individual client, third party or an individual described in section 3 clause (b)(v) 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 (2).

Timing of Verification for Individuals

- (10) A lawyer shall 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.

(11) Where a lawyer has verified the identity of an individual, the lawyer is not required to subsequently verify that same identity unless they have doubts about the information that was used for that purpose.

Timing of Verification for Organizations

(12) A lawyer shall 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.

(13) Where the lawyer has verified the identity of a client that is an organization and obtained information pursuant to subsection 6(3), the lawyer is not required to subsequently verify that identity or obtain that information, unless they have doubts about the information that was used for that purpose.

Record keeping and retention

7. (1) A lawyer shall obtain and retain a copy of every document used to verify the identity of any individual or organization for the purposes of section 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 shall retain a record of the information, with the

applicable date, and any documents obtained for the purposes of sections 3 and subsection 6(3) and copies of all documents received for the purposes of subsection section 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 sections 3 and subsections 6(1) or (3), 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.

Application

(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 shall:

- (a) monitor on a periodic basis the professional business relationship with the client for the purposes of:
 - i. determining whether
 - (A) the client's information in respect of their 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

are consistent with the purpose of the retainer and the
information obtained about the client as required by this Rule,
and

- ii. ensuring that the lawyer is not assisting in or encouraging
dishonesty, fraud, crime or illegal conduct; and
- (b) keep a record, with the applicable date, of the measures taken and
the information obtained with respect to the requirements of (a)
above.

Criminal activity, duty to withdraw after being retained, including monitoring

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.



Appendix “E”

MODEL TRUST ACCOUNTING RULE

Rule:

1. All deposits or transfers into, and withdrawals or transfers from a trust account must be directly related to an underlying transaction or matter for which the lawyer or the lawyer’s law firm is providing legal services.
2. Money held in a trust account must be paid out as soon as practical upon the completion of the transaction or other matter.

Commentary:

[1] Even when the use of a trust account is related to the provision of legal services, the lawyer should consider whether it is appropriate in all the circumstances. Where, for example, a lawyer provides legal services in connection with a transaction that does not involve any escrow or trust conditions the deposit or transfer of money into and the withdrawal or transfer from the trust account may be mere banking services and so prohibited.