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

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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.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 <u>greater than</u> $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 <u>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</u>.

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.

<u>Section 6(1)</u>

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) <u>obtain from the client and record, with the applicable date, information about the source of funds described in section 4, and</u>
> (b) verify the identity of the client, including the individual(s) described in section 3, clause (~~1~~)b,(~~ii~~v), and, where appropriate, the third party, using ~~what the lawyer reasonably considers to be~~ <u>documents or information from a</u> 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 clarify 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, *supr*a 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 (~~c~~)(f), the lawyer shall ~~make reasonable efforts to~~ obtain, and ~~if obtained~~, record, with the applicable date,
>
> (a) the name<u>s</u> ~~and occupation~~ of all directors of the organization, other than an organization that is a securities dealer, ~~and~~
> (b) the name~~s~~ <u>and</u> address<u>es</u> ~~and occupation~~ of all persons who own<u>, directly or indirectly</u>, 25 percent or more of the organization or shares of the organization, and
> (c) <u>the names and addresses of all trustees and all known beneficiaries and settlors of the trust, and</u>
> (d) <u>in all cases, information establishing the ownership, control and structure of the entity</u>.
>
> <u>(4) A lawyer shall take reasonable measures to confirm the accuracy of the information obtained under subsection (3).</u>

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 clarify 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).

<u>6(4) – Client Identity and Verification in Non Face to Face Transactions</u>

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) <u>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</u>.

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

> (8) <u>A lawyer who enters into an agreement or arrangement referred to in subsection (7) shall</u>
>
> > <u>(a) obtain from the agent the information obtained by the agent under that agreement or arrangement; and</u>

(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:

(~~11~~12) 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.