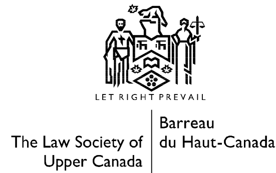

TAB 4

Report to Convocation
December 1, 2017

Professional Regulation Committee

Committee Members
William C. McDowell (Chair)
Malcolm Mercer (Vice-Chair)
Jonathan Rosenthal (Vice-Chair)
Fred Bickford
John Callaghan
Gisèle Chrétien
Suzanne Clément
David Howell
Seymour Epstein
Carol Hartman
Michael Lerner
Brian Lawrie
Virginia MacLean
Susan Richer
Raj Sharda
Jerry Udell

Purpose of Report: Decision and Information

Prepared by the Professional Regulation Division
Margaret Drent (416-947-7613)

TABLE OF CONTENTS

For Decision

Advertising and Referral Arrangements Issues Working Group

Seventh Report - Contingency Fees .... **TAB 4.1**

Supplementary Report to the Seventh Report……………………………………..**TAB 4.2**

For Information

Consultation Paper - Proposed Amendment Anti-Money Laundering Model Rules…**TAB 4.3**

COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on November 9, 2017. In attendance were William C. McDowell (Chair), Malcolm Mercer (Vice-Chair), Jonathan Rosenthal (Vice-Chair), Fred Bickford, Gisèle Chrétien, Suzanne Clément, David Howell, Michael Lerner (by telephone), Brian Lawrie, Virginia MacLean, Susan Richer, and Jerry Udell. The Treasurer, Paul B. Schabas, and bencher Michelle Haigh also attended the meeting.

2. Law Society staff members Juda Strawczynski and Margaret Drent participated in the meeting.

FOR DECISION

SEVENTH REPORT OF THE ADVERTISING & FEE ARRANGEMENTS ISSUES WORKING GROUP

INTRODUCTION: SEEKING ACCESS TO JUSTICE, FAIRNESS AND REASONABLENESS

1. In this seventh report to Convocation, the Advertising and Fee Arrangements Issues Working Group ("Working Group")[1] reports its recommendations to date to enhance the operation of contingency fees in Ontario.[2]

2. The Working Group recommendations in the motion below (at paragraph 13) are rooted in the Law Society's statutory duties, including its duties to act to "facilitate access to justice for the people of Ontario"[3], "maintain and advance the cause of justice and the rule of law"[4] and act in a manner that protects the public interest.[5]

3. Until 2002, the law in Ontario prohibited contingency fees. This changed with the decision of the Court of Appeal in *McIntyre Estate* which was followed by amendments to the *Solicitors Act*.[6]

4. The Court of Appeal in *McIntyre Estate* made clear that the reason for the change permitting contingency fees was the need for access to justice. As the Court said at para. 55, "**many individuals with meritorious claims are simply not able to pay for legal representation unless they are successful in the litigation.**"[7]

---

[1] The Advertising & Fee Arrangements Issues Working Group is providing this interim report on its work. Since it was established in February 2016, the Working Group has been studying current advertising, referral fee and contingency fee practices in a range of practice settings, including real estate, personal injury, criminal law and paralegal practices, to determine whether any regulatory responses are required with respect to them. The history of the Working Group can be found on the Law Society's website at https://www.lsuc.on.ca/advertising-fee-arrangements/. The Working Group is chaired by Malcolm Mercer. Working Group members include Jack Braithwaite, Paul Cooper, Jacqueline Horvat, Michael Lerner, Marian Lippa, Virginia Maclean, Jan Richardson, Jonathan Rosenthal, Andrew Spurgeon and Jerry Udell. Benchers Robert Burd and Carol Hartman served on the Working Group until August, 2016.

[2] As noted in the Next Steps section below, there are certain remaining areas related to the operation of contingency fees in Ontario that the Working Group continues to explore.

[3] *Law Society Act,* R.S.O. 1990, c.L.8, s.4.2(2).

[4] *Ibid.* s.4.2(1).

[5] *Ibid.* at s.4.2(3).

[6] *McIntyre Estate v. Ontario (Attorney General)*, 61 OR (3d) 257; 218 DLR (4th) 193; [2002] O.J. No. 3417. The *Solicitors Act* was amended in 2002. The amendments came into effect in 2004.

[7] Emphasis added.

5. The Court of Appeal quoted with approval the earlier decision of Justice Cory[8]:

> **The concept of contingency fees** is well established in the United States although it is a recent arrival in Canada. Its aim **is to make court proceedings available to people who could not otherwise afford to have their legal rights determined.** This is indeed a commendable goal that should be encouraged. . . . Truly litigation can only be undertaken by the very rich or the legally aided. **Legal rights are illusory and no more than a source of frustration if they cannot be recognized and enforced. This suggests that a flexible approach should be taken to problems arising from contingency fee arrangements, if only to facilitate access to the courts for more Canadians. Anything less would be to preserve the courts facilities in civil matters for the wealthy and powerful.**

6. In deciding to permit contingency fees, the Court of Appeal concluded that fees which were unfair or unreasonable were not legally permitted.[9]

7. In *Raphael Partners*, the Court of Appeal elaborated the requirement that contingency fees be fair and reasonable. As the Court said in para. 37, "[t]he fairness requirement … is concerned with the circumstances surrounding the making of the agreement and whether the client fully understands and appreciates the nature of the agreement that he or she executed". The fairness requirement addresses the situation when a contingency fee agreement is entered into.[10]

8. As to reasonableness, the Court of Appeal said at para. 50 that "[t]he factors relevant to an evaluation of the reasonableness of fees charged by a solicitor are well established. They include the time expended by the solicitor, the legal complexity of the matter at issue, the results achieved and the risk assumed by the solicitor …". The reasonableness requirement addresses whether the fee charged is reasonable knowing how the case has turned out.

9. Of course, fairness and reasonableness will never be assessed unless the client has obtained recovery. That assessment necessarily considers the risk that recovery might not have been achieved or not to the same extent. Assessing the original risk of non-recovery can be difficult when it is being viewed after the fact when ultimately there has been a recovery.

---

[8] *Coronation Insurance Co. v. Florence*, [1994] S.C.J. No. 116 at para. 14 (emphasis added). Justice Cory was then a trial judge. He was subsequently appointed to the Court of Appeal and ultimately to the Supreme Court of Canada.

[9] Section 24 of the *Solicitors Act* expressly authorizes the court to declare contingency fee agreements to be void if not fair and reasonable.

[10] *Raphael Partners v. Lam* (2002), 61 OR (3d) 417; 218 DLR (4th) 701 ["*Raphael Partners v. Lam*"].

10. The Working Group proposes reforms that are grounded in the underlying principles of access to justice, fairness and reasonableness. The proposed reforms are designed to achieve better transparency so that fairness and reasonableness are better achieved. The proposed reforms are designed to ensure that access to justice is not obstructed.

11. After significant consultation and deliberation, the proposed reforms do not include caps on contingency fees. Caps are not an effective way of better ensuring fairness and reasonableness. Available empirical evidence indicates that caps cause lawyers who rely on contingency fees to stop representing certain clients and to handle fewer cases generally. The principal effect of caps is to limit access to justice. There are better ways to address excessive contingency fees as the proposed reforms demonstrate.

12. The Working Group proposed reforms, described below:

    a. Regulate in a manner that facilitates access to justice, which is the underlying rationale for permitting contingency fees in Ontario;

    b. Safeguard to ensure that fees are clear, fair and reasonable by introducing new transparency measures at the outset of the retainer and in the final reporting to the client;

    c. Enhance the transparency of contingency fees to facilitate consumer searches for contingency fee arrangements;

    d. Enhance public and client understanding of contingency fee arrangements; and

    e. Simplify the calculation of contingency fees to enhance consumer protection.

MOTION

13. **That Convocation approve the following reforms for contingency fees in order to facilitate access to justice while ensuring that contingency fees paid are fair and reasonable:**

    a. **Scope of Contingency Fee Reforms**

    Any changes to the contingency fee regime should not apply in all contexts. They should apply to individuals and small businesses. They should not apply:

    i) In the class action context;

    ii) When the client is a sophisticated entity (such as a sizeable corporation); or

    iii) Where the court has approved the contingency fee agreement ("CFA") or the ultimate contingency fee.

    b. **Transparency Requirements**

    In cases involving individuals and small businesses, a series of transparency and reporting measures to be implemented, comprised of the following requirements:

    i) Disclosing the maximum percentage charged: Licensees charging contingency fees will be required to post the maximum percentages that they charge on their website or, if they do not have a website, otherwise disclose this maximum to potential clients when they first contact the licensee.

    ii) A mandatory standard form contingency fee agreement;

    iii) A mandatory client "Know Your Rights" document, which must be provided to the consumer by licensees prior to the client entering into a contingency fee agreement, and which will inform consumers of their rights and responsibilities; and;

    iv) Mandatory disclosure requirements when the contingency fee is ultimately charged to the client, comprised of:

    A. A clear breakdown of the total amount of a settlement or award, the net amount that will actually be received by the client, itemized and clearly identified disbursement costs, legal fees and taxes;

    B. A statement explaining the reasonableness of the fee in light of the requirement in the *Solicitors Act* that fees be reasonable and the factors established by the Court of Appeal in determining whether contingency fees are reasonable, namely the time expended working

on the matter, the legal complexity of the matter, the results achieved and the risk assumed by the licensee including the risk that the matter would not have been successful.[11]; and

C. **A statement that the client has the right to assess the account.**

c. **Recommend amendments to the *Solicitors Act* regarding Contingency Fees**

i) **Amend section 28.1 of the *Solicitors Act* as follows:**

A. **A CFA may provide that an award of costs or costs obtained as part of a settlement[12] may be included together with all other amounts recovered by the client in the total amount based on which the contingency fee is calculated; and**

B. **A CFA may provide that for matters where the merits of the matter are adjudicated[13], the licensee can elect between receiving either:**

I. **The agreed CFA amount; or**

II. **An amount equal to full indemnity determined based on the amount awarded by the court against the defendant for legal costs. Where only partial indemnity costs are awarded, full indemnity costs would be deemed to equal the partial indemnity costs awarded together with a gross-up equal to two-thirds of the partial indemnity costs awarded. The gross-up shall not exceed one-half of the contingency fee that the licensee would otherwise be able to charge under their CFA.**

ii) **Contingency fees for paralegals should be regulated under the *Solicitors Act* in the same way as for lawyers.**

d. **Licensees should be asked on their Annual Reports for information on the average contingency fees actually charged by area of practice (or other questions as may be determined to be appropriate) which information would then be aggregated and publicly disclosed.**

---

[11] *Henricks-Hunter v. 814888 Ontario Inc. (Phoenix Concert Theatre)*, 2012 ONCA 496, *Raphael Partners v. Lam* at para. 50, citing *Cohen v. Kealey & Blaney* (1985), 10 O.A.C. 344; *Desmoulin v. Blair* (1994), 1994 CanLII 333 (ON CA), 21 O.R. (3d) 217, 120 D.L.R. (4th) 700 (C.A.).

[12] Excluding amounts recovered which properly reimburse amounts paid by the licensee.

[13] This option is only feasible in courts which award costs on the basis of partial, substantial and full indemnity and would accordingly not apply to Small Claims Court matters and Tribunals that do not award costs on this basis.

BACKGROUND

14. The Working Group's recommendations are based on in-depth consideration of contingency fees and the complexity of the *Solicitors Act* that governs their operation.

15. The Working Group has been considering contingency fees, together with related advertising and referral fee issues since February 2016. To date, based on the Working Group's initiatives, Convocation has adopted amendments to the lawyer and paralegal professional conduct rules to protect against misleading advertising, and has introduced new referral fee regulations. These measures were adopted to increase transparency, consumer choice and public protection.

16. As part of its ongoing review of contingency fees, the Working Group's activities have included:

Spring 2016	Holding a series of meetings with plaintiff and defence side personal injury lawyers, which provided invaluable insights into advertising, referral fee and contingency fee practices.
June 2016	Reporting to Convocation with a summary of the spring 2016 meetings and initial findings [14]
July 2016 to September 2016	Issuing a Call for Feedback to seek further input regarding advertising, referral fee and contingency fee issues.
February 2017	Reporting to Convocation with a summary of feedback received.[15]
June 2017	Reporting to Convocation finding that with respect to the operation of contingency fees in Ontario "change is necessary in order to protect consumers."[16] The Working Group also presented initial recommendations and the announcement of a Call for Feedback with respect to the Working Group's initial recommendations.
July 2017 to September 2017	Consulting on potential recommended changes to the operation of contingency fees in Ontario ("2017 CFA Consultation").
Fall 2017	Refining recommendations regarding contingency fees.

[14] The June 2016 Report to Convocation can also be found online at https://www.lsuc.on.ca/advertising-fee-arrangements/.
[15] Summary of Feedback Received in Response to the Advertising and Fee Issues Working Group July 2016 Call for Feedback ("Summary"), February 2017 Convocation – Professional Regulation Committee Report, pages 119-136, online at: www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2017/2017-Feb-Convocation-Professional-Regulation-Committee-Report.pdf.
[16] Fifth Report of the Advertising & Fee Arrangements Issues Working Group, Tab 4.6 of the Professional Regulation Committee Report to Convocation, at Tab 4.6, online at http://lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2017/Convocation-June2017-Professional-Regulation-Committee-Report.pdf ["June 2017 Report"].

17. The Working Group has heard from lawyers and paralegals, insurers, motor vehicle accident victims, academics and government. It again thanks all those who have participated in its process and shared their expertise.

18. As noted in its June 2017 Report, in the course of its deliberations, the Working Group has carefully reviewed and considered recent developments relating to contingency fees in Ontario, including recent private members' bills addressing contingency fees,[17] the Insurance Bureau of Canada's report, *A Study of the Costs of Legal Services in Personal Injury Litigation in Ontario,* by Professor Allan C. Hutchinson ("Hutchinson Study"),[18] the report *Fair Benefits Fairly Delivered,* prepared by David Marshall, Ontario's advisor on auto insurance (the "Marshall Report"),[19] recent cases addressing contingency fee costs, and the Court of Appeal for Ontario's decision in *Hodge v. Neinstein,* a class action regarding fees charged by a personal injury law firm.[20]

19. As noted in the June 2017 Report, the Working Group has also reviewed the extensive academic literature on the subject, media reports, and different types of contingency fee models, notably the United States, English and Australian approaches.

20. The Working Group's consideration of contingency fees has excluded the current operation of contingency fees in class actions. As the Working Group has previously explained, this was a deliberate choice given the "material differences between class actions, including the representative nature of class actions and judicial approval of fees paid to plaintiff's counsel."[21]

DISCUSSION

(1) Ontario's Contingency Fee Regime

21. Contingency fees were introduced over a decade ago to provide injured Ontarians with

[17] Bill 103, *Personal Injury and Accident Victims Protection Act, 2017,* introduced March 8, 2017 by Mike Colle, MPP, Legislative Assembly of Ontario online at: www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4614; Bill 12, *Protection for Motor Vehicle Accident Victims and Other Consumers from Unfair Legal Practices Act, 2016,* introduced September 14, 2016 by Tim Hudak, MPP, Legislative Assembly of Ontario online at www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4123.

[18] Allan C. Hutchinson, "A Study of the Costs of Legal Services in Personal Injury Litigation in Ontario" Final Report ("Hutchinson Study"), Insurance Bureau of Canada, online at: http://assets.ibc.ca/Documents/Studies/Study-of-the-Costs-of-Legal-Services-in-Personal-Injury-Litigation-Allan-C-Hutchinson.pdf.

[19] David Marshall, *Fair Benefits Fairly Delivered, A Review of the Auto Insurance System in Ontario,* Final Report, April 11, 2017, online at http://www.fin.gov.on.ca/en/autoinsurance/fair-benefits.html.

[20] *Hodge v. Neinstein,* 2017 ONCA 494, online at www.ontariocourts.ca/decisions/2017/2017ONCA0494.htm ["*Neinstein*"].

[21] June 2017 Report to Convocation at footnote 12.

access to justice. Most people cannot pay for the legal assistance that they need unless and until they obtain recovery whether by settlement or after trial.

22. Ontario's CFA regime is set out in the *Solicitors Act* and O Reg 195 /04 (the "Regulation"), which came into force on October 1, 2004. Under the *Solicitors Act* and the Regulation:

    a. CFAs must be in writing.[22] The Regulation sets out several details which must be included in any CFA.[23]

    b. CFAs are available for any matter except for criminal or quasi-criminal proceedings or family law matters.[24]

    c. Fees may not be more than the client recovers as damages or receives by way of settlement, unless, within 90 days of the CFA being executed, the lawyer and client bring an application to have the agreement approved by the Superior Court of Justice.[25]

    d. A contingency fee may not be taken on the amount recovered for costs. Most contingency fees are determined based on the amount recovered on account of damages but not on the amount recovered on account of costs. However, the lawyer and client may jointly apply for court approval otherwise in "exceptional circumstances".[26]

23. Courts play an important role in regulating the operation of contingency fees. Court approval is required for any settlement involving a person under disability. Clients can also have their lawyer's contingency fee assessed on application to the Superior Court of Justice.[27]

24. The Court of Appeal has set clear, well established factors to consider whether fees are

---

[22] *Solicitors Act* at s. 28.1(4).

[23] The Regulation provides, for example, that the CFA must include, among other information, statements:

a) of the type of matter in respect of which services are being provided (Regulation, at s.2.2);
b) indicating that the client and solicitor have discussed options for retaining the solicitor other than by contingency fee agreement, including by doing so by hourly rate (*Ibid.*, at s.2.3);
c) setting out how the fee is to be determined, and a simple example of how the contingency fee is calculated (*Ibid.* at *s.*2.3-2.4);
d) outlining how the client or solicitor may terminate the contingency fee agreement, the consequences of termination and the manner in which the solicitor's fee is to be determined if the agreement is terminated (*Ibid.* at s.2.9);
e) informing the client of the right to ask the Superior Court of Justice to review and approve of the solicitor's bill (*Ibid.* at s.2.8);
f) if the client is a plaintiff, that the solicitor shall not recover more in fees than the client recovers (*Ibid.* at s.3).

[24] *Solicitors Act,* at s.28.1(3).

[25] *Ibid.* at s.28.1(6).

[26] *Ibid.* at s.28.1(8).

[27] *Ibid.* at s.28.1(11).

fair and reasonable in the circumstances. Fairness depends on how the CFA was entered into and is prospective in nature. Reasonableness depends on the ultimate result and is retrospective in nature. The Court of Appeal has determined that reasonableness depends on the time expended working on the matter, the legal complexity, the results achieved and the risk assumed, including the risk that the matter would not have been successful.[28] This flexible approach recognizes that there are differences in cases advanced on a contingency fee basis, and that a contingency fee rate that might be reasonable in the context of one case but may not be in the context of another case.

25. The Law Society lawyer and paralegal conduct rules also regulate licensees providing services pursuant to contingency fee agreements. The Law Society has instituted both general rules requiring that fees must be fair, reasonable, and disclosed in a timely fashion,[29] and rules specifically relating to contingency fees and contingency fee agreements.[30]

(2) Issues in the Operation of CFAs in Ontario

26. The Working Group has found the following issues in the operation of contingency fees in Ontario:

    a. **Transparency**

    The Working Group has repeatedly expressed concern that “contingency fee pricing is not currently sufficiently transparent at the outset to consumers” and that “it is difficult to determine whether a competitive fee structure is being proposed”.[31]

    b. **Complexity**

    The *Solicitors Act* requirements are unduly complex and unclear. As the Court of Appeal stated in *Neinstein*, the *Solicitors Act* language “has created difficulties for lawyers and clients for many years”, and that “much in the Act is not clear […] This case before this court represents another struggle to make sense of the Act.”[32]

    c. **Non-compliance**

[28] *Raphael Partners v. Lam, supra* note 10.
[29] Rule 3.6-1, Rules of Professional Conduct and Paralegal Rules of Conduct Rule 5.01.
[30] Rule 3.6-2, Rules of Professional Conduct, Paralegal Rules of Conduct Rules 5.01(7) to (9). Note that the *Solicitors Act* and the Regulation do not apply to paralegals; however, the Paralegal Rules of Conduct govern paralegal contingency fees.
[31] June 2017 Report to Convocation, at para 181, citing the Working Group’s June 2016 Report to Convocation at para. 61.
[32] *Neinstein* at para 12.

In June 2017 the Working Group identified non-compliance with the current requirements as a concern, noting that "Lawyers and paralegals are expected to adhere to the current requirements. Lawyers and paralegals must follow the *Solicitors Act,* the Regulation and the professional conduct requirements; failure to do so erodes the public's respect for the administration of justice."[33]

d. **The Calculation of Contingency Fees**

The Working Group has described the calculation of contingency fees as "the single greatest issue in the operation of contingency fee arrangements."[34]

In its June 2017 Report, the Working Group summarized its concerns with the current contingency fee rules as follows:

> "a. Clients often do not have a full understanding of contingent fees;
>
> b. The current requirement that costs belong to the client creates inherent conflicts of interest for licensees;
>
> c. The current requirements misalign the interests of licensees and clients;
>
> d. There is unnecessary risk that fees will not be fair and reasonable, unfairly compensating a licensee at the expense of the net amount recoverable by a client; and
>
> e. There is also an unnecessary risk that a client may receive a windfall amount for legal costs reflecting work performed by a licensee."[35]

The Working Group also expressed concern that while clients may apply to have their lawyer's contingency fee assessed, there are insufficient checks on legal fees that do not settle before trial, and which are not subject to mandatory Court approval.[36]

The Working Group also recognizes that there are certain cases, such as those "where there is a high likelihood of requiring a trial, but relatively low to mid value compensatory damages" which present particular challenges.[37] As the Working Group has previously reported, "Under the current regime, where the client receives all of the costs, the limit on compensation may prevent licensees from

[33] June 2017 Report at para. 197.
[34] *Ibid.* at para. 191.
[35] *Ibid*. at para. 216.
[36] *Ibid*. at para. 217.
[37] *Ibid*. at para. 220.

taking the case to trial."[38] This raises significant access to justice concerns.

(3) Recommendations: Facilitating Access to Justice at Fair and Reasonable Cost

i) Regulated Contingency Fees to Facilitate Access to Justice

27. The Law Society has a statutory responsibility to regulate lawyers and paralegals which requires it, in carrying out its functions, to act to "facilitate access to justice for the people of Ontario",[39] "maintain and advance the cause of justice and the rule of law"[40] and act in a manner that protects the public interest.[41] The Working Group's recommendations are rooted in these duties.

28. The Working Group supports properly regulated contingency fee agreements as a means of facilitating access to justice. As it stated in June 2017:

> Given the Law Society's statutory responsibility, the continued access to justice crisis, the vital access to justice role played by contingency fees to advance both class action and individual claims, and the related benefits that access to justice brings to the administration of justice, the Working Group continues to support the availability of contingency fees in Ontario.
>
> The Working Group also reaffirms that contingency fees must be properly regulated. Contingency fees must be regulated in a way that protects consumers, so that consumers understand contingency fee arrangements, and consumer protections are in place to ensure that contingency fees are transparent, fair and reasonable.[42]

29. The access to justice benefits of contingency fees are well recognized. Contingency fees provide a way for clients to access our justice system without facing upfront costs and risks. For personal plight cases, such as motor vehicle accident cases, the contingency fee provides an option that assists particularly vulnerable clients who otherwise may be deprived of their ability to advance their claims.

ii) Scope of Contingency Fee Reforms

30. Contingency fees are used by a broad range of clients for a broad range of legal services. Vulnerable individuals and sophisticated businesses retain lawyers and paralegals based on contingency fees.

31. Contingency fees are often used by individuals as a means of facilitating access to

---

[38] *Ibid.* at para. 220.
[39] *Law Society Act,* R.S.O. 1990, c.L.8, s.4.2(2).
[40] *Ibid.* s.4.2(1).
[41] *Ibid.* at s.4.2(3).
[42] June 2017 Report at para. 178.

justice. They are perhaps best known for personal injury claims, where they are the standard fee arrangement. However, contingency fees are also available in other "personal plight" circumstances, such as for employment law matters. In these circumstances, clients are frequently vulnerable and unable to afford legal services but for the availability of contingency fee arrangements.

32. Contingency fees can also be attractive even where the claimant has an ability to pay, but access to justice is not necessarily a factor in the same way in those cases. For example, in its 2017 CFA Consultation, the Working Group learned about the operation of contingency fee arrangements between insurers and lawyers with respect to subrogation claims, and contingency fee arrangements for corporate commercial litigation.

33. Contingency fees also operate in the class action arena. As previously noted, the Working Group has not engaged in a review of contingency fees in the class action setting given the very different context for contingency fees. Class actions are subject to judicial review of proposed legal fees and related third party funding. Any changes in this area require further separate consideration.

34. In addition, on October 2, 2017 the Law Commission of Ontario, which is funded by the Law Society and the Ministry of the Attorney General, among others, announced its *Class Actions: Objectives, Experience and Reforms* project, which will research Ontario's experiences with class actions to date, and report in late 2018.[43]

35. The Working Group's proposals for changes to the contingency fee regime should not apply in all contexts. They should only apply when the client is an individual or a small business. However, as the Working Group has not focused on class actions, courts already directly supervise class actions, and the operation of class actions will be the subject of a full review by the Law Commission of Ontario, the changes should not apply in the class action context. Nor should any changes apply to sophisticated entities, such as large corporations, which are generally able to negotiate the terms of service delivery with licensees, and who may decide to proceed by way of contingency fee but otherwise still would have been able to access legal services.

[43] "LCO Launches Project: Class Actions: Objectives, Experience, and Reforms", Law Commission of Ontario, October 2, 2017, online at: www.lco-cdo.org/project-launch-class-actions-objectives-experience-and-reforms/.

iii) Transparency to Enhance the Operation of Contingency Fees

36. The Working Group has focused on transparency in its recommendations to date regarding advertising and referral fees, and is also committed to the principle of transparency for the operation of contingency fees. As the Working Group stated in June 2016, contingency fee structures "should be transparent and that the total costs associated with contingent fees should be clear to the consumer at the outset. Consumers should be able to evaluate proposed fees against the fees being offered by others."[44] Furthermore, "fees should be on an agreed upon and transparent basis."[45] Based on these principles, and the feedback it has received, the Working Group recommends a series of transparency measures.

37. As described in detail below, the Working Group makes recommendations to enhance transparency when consumers are searching for legal services delivered through a contingency fee arrangement, when they are considering entering into a contingency fee agreement, and with respect to fees and disbursements at the conclusion of a contingency fee matter (if a payment is made).

(a) Enhancing the Client Search for Legal Services: Disclosure of the maximum percentage charged

38. The Working Group recognizes that "contingency fee pricing is not currently sufficiently transparent at the outset to consumers" and that although "the contingency fee model facilitates access to legal services, it reduces the perceived importance at the outset of the basis on which the fees will eventually be charged."[46]

39. The Working Group has considered a range of ways to facilitate transparency and means for consumers to determine whether services being offered are competitive.

40. It expressed the preliminary view that licensees should disclose their "usual contingent rates" and disbursements on their websites.[47] However, upon further reflecting on this based on the input received, the Working Group recognized that this would not be an appropriate recommendation because licensees and law firms do not generally have a "standard" contingency fee rate, but rather the "rate will depend on a range of factors specific to the particular case."[48]

41. The Working Group considered other potential price indicators. It considered, for

---

[44] June 2016 Report to Convocation at para. 60.
[45] *Ibid*. at para. 102.
[46] *Ibid*. at para. 61.
[47] *Ibid*. at para. 62.
[48] June 2017 Report, at para. 185. The Working Group also recognized at para. 185 that publishing a "standard rate" could have several drawbacks, including that it could lead to licensees limiting the types of cases they accept, charging a higher standard rate in order to cover higher-risk cases, or being unduly constrained in their ability to tailor their fees to the particular case.

example, requiring posting of the general "range" of contingency fee rates or the average percentage that a licensee or firm charges, but was concerned that this would likely be of limited value and potentially problematic.

42. Ultimately the Working Group recommends that licensees be required to disclose their "personal cap", that is, the maximum amount they charge for services on a contingency fee basis. Under this proposal, maximum rates should be posted on the licensee's website or the law firm's website. If the licensee (or the licensee's firm) does not have a website, the maximum rate should be disclosed to potential clients when they first contact the licensee.

43. In order to account for different practice areas, the Working Group recommends that licensees disclose their maximum rates for all prescribed practice areas to be developed by the Law Society.[49] There should be the ability to compare fees as one factor for prospective clients to consider while shopping for legal services. This measure enhances transparency.

44. Licensees would be able to charge above their "personal cap" in a particular case. This would require them to disclose this as their new cap rate unless judicially approved as being exceptional.

45. If adopted by Convocation, the Working Group would return to Convocation with specific proposed professional conduct rules.

(b) A mandatory standard contingency fee agreement

46. In June 2017, the Working Group recommended a mandatory standard form CFA, subject to receiving further input. It noted the numerous benefits of such a form, including that:

    a. This would provide the opportunity to develop a simplified agreement, one that could highlight key consumer rights and responsibilities;

    b. A standard form CFA would facilitate consumer comparison of the cost of legal services between providers;

    c. A standard form would ensure that all CFAs are compliant with all requirements under the *Solicitors Act* and its Regulation.[50]

47. The input that the Working Group has received has generally recognized throughout that there is a need for enhanced transparency and simplicity. In its 2017 CFA Consultation, there were mixed views regarding the development of a standard form CFA. A few submissions were opposed to standard form agreements on the basis of concerns that

---

[49] Practice areas could include, for example, Statutory Accident Benefits Scheme, motor vehicle – tort, long term disability claim, medical malpractice, other personal injury, employment matters, municipal assessment appeal and tax disputes.
[50] June 2017 Report, at para. 189.

this would unnecessarily interfere with private contract. Some expressed the concern that an unduly restrictive CFA would restrict the types of cases that could be accepted on a contingency fee basis. Some suggested that rather than a standard CFA there should be standard clauses to be used. Some suggested that there should be different mandatory standard form agreements across different practice areas, while others suggested that perhaps a standard form agreement should only be required in personal injury law.

48. The Working Group considered the wide ranging feedback it received on this point. While a standard form agreement would need to be carefully drafted, the Working Group believes that one can be developed that would:

    a. Simplify the contract for consumers;

    b. Comply with all of the requirements under the *Solicitors Act* and the Regulation; and

    c. Provide sufficient flexibility around how licensees design their contingency fees to facilitate innovative solutions to meet clients' needs and foster competition.

49. The Working Group notes that the current issues with respect to the complex, technical requirements of the *Solicitors Act,* and the unavailability of a standard form agreement are issues that apply to all areas where individuals obtain legal services pursuant to a CFA. The Working Group therefore recommends that the mandatory standard form CFA be applicable to all contingency fee matters regardless of practice area.

50. The Working Group proposes that the Law Society promptly develop and recommend a standard form CFA to the Attorney General to be prescribed by regulation under the *Solicitors Act*.

(c) Mandatory client "Know Your Rights" document

51. The Working Group believes that, in addition to a mandatory standard form CFA, a mandatory, plain language client "Know Your Rights" document will enhance consumer awareness and transparency. In April 2017, the Working Group recommended, and the Law Society approved a document titled "Law Society Requirements for Referral Fees – What Clients Need to Know,"[51] and the Working Group recommends the development of a similar document for clients with respect to contingency fee agreements.

52. The intent of the "Know Your Rights" document is to inform consumers of their rights and responsibilities with respect to contingency fee agreements. The Working Group recommends that this document must be provided to the consumer by licensees prior to the client entering into a contingency fee agreement. The document will inform consumers of their rights and responsibilities.

53. If adopted by Convocation, the Working Group would return to Convocation with specific

[51] April 2017 Report at para. 46 and at Tab 4.2.10.

proposed professional conduct rules, and staff will develop this document for approval by the Professional Regulation and Paralegal Standing Committees. Amendments to the "Know Your Rights" document would require the approval of the Professional Regulation and Paralegal Standing Committees. The document, and any amendments, would be reported to Convocation for its information.

(d) Mandatory disclosure requirements in the final client reporting letter

54. In the June 2017 Report, the Working Group noted that it was considering a range of enhanced client reporting requirements which would "ensure that clients have a sense of the cost of the services provided, and may act as a further check on the reasonableness of fees."[52] The Working Group invited input regarding a range of regulatory options to apply at the final client reporting stage to "enhance transparency and client understanding of fees and their rights."[53]

55. In order to provide clients with a more transparent and complete account for the fee, and to protect consumers from the risk of unreasonable fees, the Working Group recommends that the Law Society introduce the following mandatory disclosure requirements in the final reporting letter to clients:

    i. A clear breakdown of the total amount of a settlement or award, the net amount actually going to the client, itemized and clearly identified disbursement costs, legal fees and taxes;
    ii. A statement explaining the reasonableness of the fee in light of the factors established by the Court of Appeal, including the time expended working on the matter, the legal complexity, the results achieved and the risk assumed including the risk that the matter would not have been successful.[54]; and
    iii. A statement that the client has the right to assess the account.

56. The Working Group has noted that there can be confusion regarding the breakdown of the total amount of a settlement or award. The Law Society already requires that fees and disbursements be disclosed in a timely fashion.[55] The mandatory breakdown of the settlement or award extends this general requirement and is intended to provide clients with a full and clear account of all amounts.

57. The Working Group recommends that licensees be required to provide a statement explaining the reasonableness of the fee in light of the factors established by the Court of Appeal as a further means of providing clients with full information regarding the reasonableness of the legal fee being charged for the services provided.

58. The Working Group has reached this recommendation after hearing significant

[52] June 2017 Report at para. 228.
[53] *Ibid*. at para. 228.
[54] *Raphael Partners v. Lam, supra*.
[55] Rules of Professional Conduct Rules 3.6-1 and 3.6-2; Paralegal Rules of Conduct Rule 5.01.

opposition through its 2017 CFA Consultation to the idea that licensees be required to disclose and report on the time spent on a matter without necessarily providing any further information. The feedback noted that time is not the sole factor to consider whether a fee is reasonable. The Working Group agrees, and recommends that all of the relevant factors be addressed in the reporting letter, which will provide clients with a more complete understanding of the basis for the final account.

59. The Working Group also received feedback expressing concerns about adding administrative burden to licensees practicing pursuant to contingency fees. The Working Group is satisfied that requiring accurate records of time spent for the purpose of disclosure to clients is a reasonable requirement inherent in the requirement of reasonableness. Moreover, reporting to clients why a fee is reasonable based on a consideration of the time spent on the matter, the legal complexity, the results achieves and the risks assumed by the licensee should be a relatively straight forward exercise. The Working Group has concluded that clients, and their independent advisors where applicable, should be entitled to know and to consider the very information that the Court of Appeal has determined is necessary in the determination of the reasonableness of a contingency fee.

60. Finally, the Working Group recommends requiring that the final reporting letter include a statement that the client has the right to assess the account.

61. If the recommended mandatory elements to the client final reporting letter are adopted by Convocation, the Working Group would return to Convocation with specific proposed professional conduct rules.[56]

iv) Amending the *Solicitors Act* to Promote Fair and Reasonable Contingency Fees

62. The Working Group recommends amendments to the *Solicitors Act* to address the significant issues that arise due to the current prescribed method of calculating contingency fees.

63. Simply put, the *Solicitors Act* fee calculation needs to be changed in the public interest. The changes to the *Solicitors Act* proposed by the Working Group are intended to facilitate access to justice, and ensure, together with its related recommendations, that fees are fair and reasonable.

64. The numerous and significant issues with the current method of calculating contingency

[56] The Working Group also considered requiring independent legal advice (“ILA”) before a client agrees to the payment of legal fees in certain circumstances. The Working Group asked for input regarding this option through its 2017 CFA Consultation. Most responses were opposed, noting that it was not clear when ILA would be required, the parameters of the ILA, that ILA requirements could add cost and delay, and that the ILA requirement could significantly interfere with opportunities for settlement such as mediations. It was also noted that this measure is unnecessary given the existing right for a client to have a lawyer account assessed. The Working Group determined based on this input that the ILA option should not be further explored.

fees are described above. The Working Group proposes that the current requirement, that contingency fees may not reflect recovery on account of legal costs, be replaced such that recovered legal costs may be included together with all amounts recovered in the total amount based on which the contingency fee is calculated. In addition, the Working Group proposes that a new provision be added to address the unique cost issues that arise when a matter requires adjudication, in order to protect access to justice in such instances.

(a) Recovered legal costs may be included together with all other amounts recovered in the total amount based on which the contingency fee is calculated

65. In its June 2017 Report, the Working Group proposed that generally fees be calculated based on "a percentage of the total amount offered on settlement or awarded at trial, less disbursement."[57] It also invited the public to provide input as to what types of safeguards should be recommended to ensure that fees are fair and reasonable.

66. The vast majority of those who have provided input to the Working Group on the issue of the current fee requirements have indicated that change is necessary. In response to its 2017 CFA Consultation, the Working Group received a wide range of proposed options. Many submissions supported amending the calculation of fees as proposed by the Working Group in June 2017.

67. Ultimately the Working Group recommends calculating contingency fees by including recovered legal costs together with all other amounts recovered when calculating the contingency fee. This approach presents significant key advantages to the current rule. It is a straight-forward calculation. The calculation aligns the interest of client and licensee in most cases, rather than creating conflicts as has been the unintended consequence of the current rule.

Consideration of Fee Caps

68. In its 2017 CFA Consultation, the Working Group expressly sought input to consider the option of capping contingency fees as a way to ensure that fees are reasonable under its proposed new calculation. The Working Group has carefully considered the strengths and risks created by caps. The Working Group ultimately is opposed to caps on the basis that they can, and in some instances clearly have, created significant barriers to the justice system, particularly for some of society's most vulnerable people.

69. The Working Group considered the arguments in favour of a cap, and the input from those who recommend a cap for Ontario's contingency fee system.

70. Proponents of a cap presented a range of caps. At the lower end, insurers recommended a cap on contingency fees of 25% or lower, and even lower amounts for legal fees related to Statutory Accident Benefits Schedule matters. Others suggested

[57] June 2017 Report, at para. 219.

higher caps. Insurers also supported capping on the basis of a sliding scale.

71. The Working Group considered the strengths of introducing a cap or sliding caps, including the following:

- Caps provide a ceiling against which consumers can consider legal fees when shopping for legal services provided pursuant to a contingency fee arrangement.
- Consumers may be able to negotiate for rates below the cap.
- They provide a check to reduce the risk that clients pay unreasonable legal fees where the unreasonableness arises from an overly "high" percentage.
- They are simple to administer.

72. Certain proponents of caps also submit that this is a way of ensuring, particularly in areas such as Ontario's motor vehicle insurance system, that the total costs to administer the system are reduced, and that more money is going to the hands of injured parties instead of their legal representatives.

73. The Working Group weighted these considerations against the risks of introducing a cap or sliding caps, such as the following:

- The cap or sliding caps being set at a level such that some or many cases become economically unviable and injured people lose access to justice in those cases.
- The cap or sliding caps being set high enough that they do not really protect consumers from unreasonable fees.
- A cap or caps failing to actually address the problem of unreasonable fees as the amount recovered, the risk of non-recovery and the cost of attaining recovery are irrelevant to percentage caps.
- The cap or sliding caps practically becoming the new "floor" or tariff, such that some consumers would pay more for legal services than when there was no cap[58].

74. To assist the Working Group in its deliberations, benchers met on October 24th to consider the Law Society's approach to contingency fee caps. After discussion and debate, benchers expressed near unanimous opposition to capping contingency fees. Benchers expressed strong opposition to capping contingency fees because of the risks that such caps could have on access to justice.

75. Studies have shown that caps that limit contingency fees negatively impact access to justice. The empirical data is limited in Canada. However, in the United States, the evidence from jurisdictions where various types of caps have been introduced indicates that the caps cause lawyers who rely on contingency fees to stop representing certain clients and to handle fewer cases generally. This is because, as the title to one leading study on the topic puts it, "It is No Longer Viable from a Practical and Business

[58] Even if a judicial process is made available to lift or vary the cap where the client agrees, this adds transaction costs, and the Court may not correctly assess risk/reward at the outset of a case when the CFA is being negotiated.

Standpoint" to advance certain types of claims, such as those from lower income groups when there is an effective cap on the contingency fee.[59]

76. The Working Group heard repeatedly that a contingency fee cap would have an adverse effect on access to justice. Certain types of claims, such as lower to medium value claims, would no longer be economically viable to be advanced under a contingency fee arrangement. This would deny victims the ability to pursue the necessary compensation to which they may be entitled at law, and which they may require to move on with their lives. While it would reduce the costs of insuring various losses it would do so by denying victims access to justice.

77. The Working Group concluded that while caps may be simple, they are actually simplistic, and will not address the issue of unreasonable fees. Depending on the context, a low percentage may result in an entirely unreasonable fee while in other circumstances a high percentage may be entirely reasonable. There is simply no principled basis by which a cap can be set that distinguishes reasonable fees from unreasonable fees. Inevitably, a generic cap will impair access to justice for injured people with higher risk/complexity or lower value claims while failing to guard against unreasonable fees where claims are lower risk/complexity or higher value. Caps advantage defendants over plaintiffs in avoiding claims and by incenting unfair settlements.

78. The Working Group is of the strong view that replacing the Court of Appeal's reasonableness approach with a cap would remove fairness from the system, and ultimately would not provide Ontario's contingency fee system with an evidence-based basis for what would constitute a reasonable legal fee.

79. Ultimately contingency fee caps risk eroding access to justice by making certain higher risk and/or lower value cases economically unviable. This must be avoided, and the Working Group recommends maintaining a more flexible approach to legal fees in order to ensure that contingency fees are able to promote access to justice.

80. As noted above, Cory J. stated with respect to contingency fees:

> The concept of contingency fees is well established in the United States although it is a recent arrival in Canada. Its aim is to make court proceedings available to people who could not otherwise afford to have their legal rights determined. This is indeed a commendable goal that should be encouraged. . . . **Truly litigation can only be undertaken by the very rich or the legally aided. Legal rights are illusory and no more than a source of frustration if they cannot be recognized and enforced. This suggests that a flexible approach should be taken to**

[59] Stephen Daniels & Joanne Martin, "It is No Longer Viable from a Practical and Business Standpoint": Damage Caps, "Hidden Victims," and the Declining Interest in Medical Malpractice Cases, 17 INT'L J. LEGAL PROF. 59 (2010).

> **problems arising from contingency fee arrangements, if only to facilitate access to the courts for more Canadians.** Anything less would be to preserve the courts facilities in civil matters for the wealthy and powerful.[60]

81. In short, the Working Group recommends transparency and disclosure as proposed and opposes a cap, so that the contingency fee system can retain a flexible approach that facilitates access to justice.

(b) Costs for adjudicated matters

82. The Working Group recommends amendments to the *Solicitors Act* to address legal fees when a matter goes to trial. As noted above, there are certain cases, such as lower value cases and cases where there is a higher likelihood of requiring a trial, where the current rule that costs may not be reflected in the contingency fee can prevent licensees from taking such cases to trial. While the Working Group's proposed calculation realigns the client and licensee in most cases, there is a significant risk that this approach would not sufficiently address the risk of such claims being economically unviable to advance.

83. In adjudicated matters such as this, both under the current *Solicitors Act* calculation and the proposed amendment, there is significant risk of the interests of the client becoming misaligned with the interest of counsel. Of greater concern, however, is the real risk that injured individuals in this situation will not be able to seek restitution because it makes no economic sense for counsel to take on their cases.

84. The Working Group therefore recommends that for matters that are adjudicated, in order to balance client and licensee interests, the *Solicitors Act* should be amended to permit the licensee to elect between receiving the agreed CFA amount, and legal costs determined as follows. Where costs are awarded on a full or substantial indemnity basis, legal costs would be in that amount. Where only partial indemnity costs are awarded, legal costs would be deemed to equal the costs awarded together with a gross-up equal to two-thirds of the partial indemnity costs awarded.[61] This gross-up could not exceed one-half of the contingency fee that the licensee would otherwise have been able to charge under their CFA.

85. This approach is reasonable because the fee is based on a contested judicial determination that results in payment by the defendant on account of costs. Where full indemnity costs are recovered and paid to counsel, the client receives full recovery of his or her legal entitlements. Where partial indemnity costs are recovered and paid to

[60] *Coronation Insurance Co. v. Florence*, [1994] S.C.J. No. 116, at para. 14, cited in *McIntyre Estate, v. Ontario (Attorney General),* 2002 CanLII 4506 (ON CA), http://canlii.ca/t/1fzl2 at para. 55 (emphasis added).

[61] Partial indemnity costs are generally understood to equal 60% of full indemnity costs. Accordingly, full indemnity equals 167% of partial indemnity costs.

counsel, the contribution of the client to costs from the recovery is limited to half of the agreed percentage.

86. This approach seeks to ensure that legal rights do not become illusory for those with higher risk/complexity and lower value claims that may require adjudication, and that successful plaintiffs in those circumstances receive a reasonable payment based on the value of the assessed damages.

Safeguards to Ensure that Fees are Fair and Reasonable

87. The Working Group maintains its view, expressed in its June 2017 Report, that its proposed amendment to simplify the calculation of contingency fees must be accompanied by new safeguards to ensure that fees are fair and reasonable.

88. As noted above, the Working Group recommends a suite of market transparency measures to protect consumers and better safeguard against unreasonable fees, including the posting of licensees' maximum rates, a new standard form contingency fee agreement and related "Know Your Rights" document, and new final client reporting requirements which would provide a clear breakdown of the total amount of the settlement or award and the net amount going to the client, a brief statement explaining the reasonableness of the fee in light of the Court of Appeal factors, and a statement that the client has the right to assess the account.

89. In addition, the Working Group strongly supports the existing safeguards that the client has a right to assess a lawyer's fee, and that settlements involving a party under disability require Court approval.

v) Data Collection Through the Member Annual Report

90. The Working Group has previously noted the lack of available data with respect to the operation of contingency fees.[62] There is a consensus that there are gaps in available data. The Marshall Report, legal organizations, the Ministry of Finance, the Insurance Bureau of Canada and legal academics all note gaps in the available data with respect to the operation of contingency fees.

91. The Working Group recommends that the Law Society collect more data through the Lawyer Annual Report and Paralegal Annual Report to assist in closing these data gaps.

92. The Law Society, as the regulator of lawyers and paralegals, is uniquely positioned to collect data from licensees. It is also uniquely positioned to protect information which is subject to solicitor-client privilege.

93. The Working Group therefore recommends that the Law Society ask licensees on their Annual Reports for information as to average contingency fees by area of practice, or other questions as may be determined to be appropriate, with the data then shared on

[62] See for example June 2016 Report at para. 107.

an aggregate basis with the public.

94. Data collection has several potential benefits. It may:

- Assist the Law Society in identifying outlier cases and outlier licensees, which may assist the Law Society to proactively identify regulatory risks;
- Assist the Law Society and others in understanding the operation of contingency fees and give better insight as to how to regulate contingency fee markets to protect the public; and
- Disclosure to consumers may serve as a check to ensure that fees are fair and reasonable.

95. As indicated in its response to the Marshall Report, the Law Society opposes any requirement that CFAs be filed with the government or another regulator in light of the inherent breach of solicitor-client and litigation privilege and potential for misuse by defendants. The proposal for standard form CFAs and other recommendations in this report obviate the basis for this proposal.

NEXT STEPS

96. The Working Group continues to consider other contingency fee issues and potential amendments to the *Solicitors Act* raised in the course of its 2017 CFA Consultation. This includes, for example:

a. Concerns that additional guidance is necessary regarding how costs submissions should be made when a licensee is retained pursuant to a CFA given the requirement that counsel submit a Bill of Costs when they seek costs;
b. How to address interlocutory costs / costs of an appeal awarded to a party operating under a CFA;
c. Issues related to disbursements;
d. Issues related to after-the-event insurance and third party litigation funding.

97. The Working Group also recognizes that the government is interested in potential changes to Ontario's motor vehicle Statutory Accident Benefits Schedule. The Working Group continues to explore potential changes from an access to justice perspective, and recommends that the Law Society continue to offer its expertise to government.

98. The Working Group also continues to explore issues regarding lawyers receiving compensation or other benefits and related practices with respect to title insurance and other services, and will report to Convocation regarding this issue.

FOR DECISION

SUPPLEMENTARY REPORT TO THE SEVENTH REPORT OF THE ADVERTISING & FEE ARRANGEMENTS ISSUES WORKING GROUP

MOTION

1. **That Convocation approve the following recommendations of the Advertising and Fee Arrangements Issues Working Group ("Working Group"):**

   a. ***Partial Contingency Fees*: The proposed reforms to contingency fees described in its Seventh Report to Convocation should apply to partial contingency fee arrangements.**

   b. ***Interim/Interlocutory Costs*: If interim or interlocutory costs ("interlocutory costs") are awarded to a party operating under a contingency fee agreement ("CFA"):**

      i. **Interlocutory costs received on account of fees should be paid to the licensee in order to facilitate prosecution of the matter, but such payments should be treated as advance payments against the ultimate contingent fee with such payments being included in the total recovery. Interlocutory costs received on account of disbursements should be paid to whoever is responsible for paying disbursements, thereby reducing the amount ultimately payable in respect of disbursements;**

      ii. **If the matter is adjudicated on the merits and costs are determined by the court and awarded in favour of the client, the interlocutory costs should be included in the calculation of the total costs awarded; and**

      iii. **Subject to the CFA providing otherwise, payments on account of interlocutory costs should be repaid to the client to the extent that such payments are greater than the amount to which the licensee is ultimately entitled as the final contingent fee.**

   c. ***Appeals*: Costs of an appeal should be addressed in the mandatory standard form CFA and the CFA:**

      i. **may provide for an increased contingent fee in the event of an appeal;**

      ii. **will provide that, if there is an appeal, the licensee will act as**

appellate counsel, or the licensee and the client will agree who to retain as appellate counsel; and

iii. **will provide, where new appellate counsel is retained, that in the event of recovery after an appeal the ultimate contingent fee is to be shared between counsel on the basis agreed between them when appellate counsel was retained.**

d. ***Costs Submissions*: Costs submissions as to partial indemnity, substantial or full indemnity costs should be made based on the hourly rate set out in the CFA as being the licensee's hourly rate and without reference to the fact that the licensee is retained pursuant to a CFA.**

e. ***Disbursements*: The mandatory standard form CFA should provide that disbursements chargeable to the client:**

   i. **may only be in respect of amounts actually paid as disbursements to arms-length third parties; and**

   ii. **may not be in respect of goods or services that are ordinarily provided by firms themselves in the delivery of legal services including, for example and without limitation, the costs of photocopying, binding, scanning, telephone and fax costs, or the costs of other licensees, law clerks and secretaries and overtime.**

f. ***Insurance and Third Party Litigation Funding*: The Working Group recommends further consideration be given to the impact of legal expense insurance and third party litigation and other third party funding on legal fees, including contingency fees. The Working Group proposes that the Law Society consider bringing together experts on relevant issues, in a symposium or otherwise, to assist the Law Society in considering the ethical and regulatory issues that are raised by these products.**

g. ***SABS*: The Law Society continues to welcome the opportunity to work with the Ontario government with respect to any proposed changes to the Statutory Accident Benefits Schedule.**

SUMMARY OF THE ISSUE UNDER CONSIDERATION

2. In this supplementary report to its Seventh Report to Convocation, the Working Group[1] reports further recommendations to enhance the operation of contingency fees in Ontario regarding:

   a. Partial contingency fees;
   b. Interlocutory costs;
   c. Costs of an appeal;
   d. Costs submissions;
   e. Disbursements; and
   f. Legal expense insurance and third party funding.

BACKGROUND

3. The Working Group has considered the operation of contingency fees in Ontario since February 2016.[2] In the Working Group's Seventh Report to Convocation, it recommended a "series of reforms for contingency fees in order to facilitate access to justice while ensuring that contingency fees paid are fair and reasonable".[3]

4. As paragraph 12 of the Seventh Report to Convocation states, the proposed reforms:

   a. Regulate in a manner that facilitates access to justice, which is the underlying rationale for permitting contingency fees in Ontario;

   b. Safeguard to ensure that fees are clear, fair and reasonable by introducing new transparency measures at the outset of the retainer and in the final reporting to the client;

   c. Enhance the transparency of contingency fees to facilitate consumer searches for contingency fee arrangements;

   d. Enhance public and client understanding of contingency fee arrangements; and

   e. Simplify the calculation of contingency fees to enhance

---

[1] The Advertising & Fee Arrangements Issues Working Group is providing this interim report on its work. Since it was established in February 2016, the Working Group has been studying current advertising, referral fee and contingency fee practices in a range of practice settings, including real estate, personal injury, criminal law and paralegal practices, to determine whether any regulatory responses are required with respect to them. The history of the Working Group can be found on the Law Society's website at https://www.lsuc.on.ca/advertising-fee-arrangements/. The Working Group is chaired by Malcolm Mercer. Working Group members include Jack Braithwaite, Paul Cooper, Jacqueline Horvat, Michael Lerner, Marian Lippa, Virginia Maclean, Jan Richardson, Jonathan Rosenthal, Andrew Spurgeon and Jerry Udell. Benchers Robert Burd and Carol Hartman served on the Working Group until August, 2016.

[2] The Working Group's Seventh Report to Convocation, Background section provides the detailed review of the Working Group's efforts to date.

[3] Seventh Report to Convocation at Motion, paragraph 13.

consumer protection.[4]

5. The Working Group noted that there are certain remaining areas that it was continuing to explore.[5] In this supplementary report to the Working Group's Seventh Report to Convocation, the Working Group provides its analysis and recommendations regarding these remaining areas.

DISCUSSION

a. Partial contingency fees

6. From July to September 2017 the Working Group consulted on potential recommended changes to the operation of contingency fees in Ontario ("2017 CFA Consultation"). It heard that it should consider whether partial contingency fees should be subject to reforms.

7. Partial contingency fee agreements are contingency fee agreements where part of the fee is contingent on the result. For example, some clients may enter into agreements with licensees to agree to pay a discounted hourly rate for legal services regardless of the success or failure of the matter, and a contingent or success fee based on the outcome of the matter.

8. The Working Group considered whether its recommended changes to the operation of contingency fees should apply to partial contingency fees. It concluded that a partial contingency fee should be regulated in the same manner as a full contingency fee. Partial contingency fees should, for example, be governed by the Working Group's proposed mandatory standard form CFA, with the parties' negotiated fee arrangement to be included within the CFA just as the percentage or other payment measure would be included within the CFA for a full contingency fee arrangement.

9. The Working Group therefore recommends that its proposed reforms to contingency fees should apply to partial contingency fee arrangements.

b. Interlocutory costs awarded to a party operating under a CFA

10. The Working Group was asked in its 2017 CFA Consultation how interlocutory costs (i.e. costs awarded in respect of steps taken during a proceeding such as, for example, motions costs) should be treated when they are awarded and made payable by the opposite party immediately.

11. Currently under the *Solicitors Act*, all legal costs are excluded from the calculation of the

[4] Seventh Report to Convocation at para. 12. For the motion to Convocation, see the Seventh Report to Convocation paragraph 13.
[5] Seventh Report to Convocation at footnote 2 and paragraph 96.

contingent fee. However, the Working Group recommends amendments to the *Solicitors Act* so that "an award of costs or costs obtained as part of a settlement may be included together with all other amounts recovered by the client in the total amount based on which the contingency fee is calculated".[6]

12. The Working Group considered how to treat interlocutory costs payable to a party operating under a CFA. Consistent with the principles of facilitating access to justice, maintaining transparency, aligning licensee and client interests and ensuring that fees are both fair and reasonable, the Working Group determined that when interlocutory costs are awarded to a party operating under a CFA:
    a. Interlocutory costs received on account of fees should be paid to the licensee in order to facilitate prosecution of the matter, but such payments should be treated as advance payments against the ultimate contingent fee with such payments being included in the total recovery. Interlocutory costs received on account of disbursements should be paid to whoever is responsible for paying disbursements, thereby reducing the amount ultimately payable in respect of disbursements;
    b. If the matter is adjudicated on the merits and costs are determined by the court and awarded in favour of the client, the interlocutory costs should be included in the calculation of the total costs awarded; and
    c. Subject to the CFA providing otherwise, payments on account of interlocutory costs should be repaid to the client to the extent that such payments are greater than the amount to which the licensee is ultimately entitled as the final contingent fee.

c. Costs of an appeal awarded to a party operating under a CFA

13. CFAs should address the possibility that there may be an appeal whether by the client or the opposing party. Unless and until a judgment is final, there is no basis to calculate a fee that is contingent on the judgment.

14. A first question is who will act on behalf of the client on the appeal. In some cases, the licensee who acted at first instance will continue to represent the client on the appeal. In other cases, appellate counsel may be retained.

15. The Working Group is of the view that there should be transparency as to effect of an appeal on the contingent fee at the outset of the initial retainer, and that flexibility should be permitted with respect to how the licensee and client wish to approach the appeal.

16. The Working Group therefore recommends that:
    a. The CFA may provide for an increased contingent fee in the event of an appeal.

---

[6] Seventh Report to Convocation, Motion, footnote omitted.

b. Costs of an appeal should be addressed in the mandatory standard form CFA.

c. The CFA will provide that, if there is an appeal, the licensee will act as appellate counsel, or the licensee and the client will agree who to retain as appellate counsel.

d. In the event of recovery after an appeal, the ultimate contingent fee is to be shared between counsel on the basis agreed between them when appellate counsel was retained.

d. Costs submissions when a licensee is retained pursuant to a CFA

17. In the course of the 2017 CFA Consultations, questions were raised as to how costs submissions should be made when a retainer is pursuant to a CFA. Courts often require disclosure of hourly rates together with the time spent on the matter for which costs are being sought. However, counsel retained pursuant to a CFA do not bill their clients on an hourly rate.

18. The fact that counsel is retained pursuant to a CFA and the substance of a CFA is privileged and confidential. Disclosure to the court should not be required in the course of costs submissions.

19. Hourly rates for all professionals are necessarily agreed to in CFAs in order to address the prospect of termination of the CFA before completion of the matter.

20. The Working Group recommends that costs submissions should be on the basis of the hourly rate provided for in the CFA.

e. Issues related to disbursements

21. The Working Group considered issues related to disbursements. It is aware of cases where there have been issues regarding disbursements payable by clients pursuant to a CFA.[7] Further guidance is necessary to regulate what may be treated as a disbursement payable by a client under a CFA.

22. The professional conduct rules already require that disbursements are fair, reasonable and disclosed in a timely fashion.[8]

23. The Working Group is of the view that in the context of contingency fees, where the licensee and client share risk and there are different approaches as to who assumes the

[7] See, for example, *Hodge v. Neinstein,* 2017 ONCA 494, online at www.ontariocourts.ca/decisions/2017/2017ONCA0494.htm.

[8] Rule 3.6-1, Rules of Professional Conduct and Paralegal Rules of Conduct Rule 5.01.

cost of disbursements,[9] transparency as to what will be accepted as a disbursement properly payable by the client is paramount.

24. The Working Group therefore recommends that **t**he mandatory standard form CFA should be drafted to expressly state that disbursements may only relate to amounts actually paid to arms-length third parties, and that such third party disbursements may not include costs which relate to the ordinary delivery of legal services.

25. For example, payment to a health clinic to obtain a copy of medical records, and expert reports would be permitted disbursements. Costs related to photocopying or faxing would not be permitted, for example, as these costs relate to general overhead. Similarly, the costs of hiring a third party document reviewer, law clerk or a virtual associate, while all potentially efficient means for a licensee to staff a file, would not be expenses which could be treated as disbursements as they relate to the delivery of legal services, which is the very service for which the client has entered into a CFA.

f. Issues related to legal expense insurance and third party funding

26. The legal services market is rapidly changing, and so are the means of financing these services.

27. Legal expense insurance products can provide people with access to counsel in the event that they need to commence a claim and/or cover the risk of having to pay the other side's costs and disbursements. Legal expense insurance products may also protect the client from paying disbursements if the case is unsuccessful. There are differences between legal expense insurance products, different costs associated with them, and different models of marketing these products to the public, some of which involves licensees providing information or advice regarding the availability of such products.

28. Third party litigation funding is available to cover part or all legal costs, and protect against adverse cost awards, in exchange for a percentage of any settlement or adjudicated award. Litigation financing is being offered both where matters are being pursued pursuant to contingency fee agreements, including with respect to personal plight matters, class action and commercial litigation matters, and in traditional hourly rate or block fee arrangements.

29. The emergence of legal expense insurance and litigation financing operating in tandem with CFAs presents a further layer of risk sharing and costs. While these tools can

[9] Disbursement costs are addressed in a range of ways. For example, they may be assumed by the licensee, by the client, or split between them. Disbursement costs are typically repaid from the proceeds of a settlement when a claim is successful. When a matter is unsuccessful, or where the recovery is less than the cost of disbursements, a CFA may provide that outstanding disbursement costs are to be assumed by the client, the licensee, or by a third party such as a legal expense insurer.

enhance client choice, protect clients from risk, and potentially even lower the cost of litigation, they may present new challenges for licensees and clients and it is unclear how these products are impacting the operation of contingency fees at this time.

30. The Working Group recommends that these areas are considered further.

31. The Working Group recommends further consideration be given to the impact of legal expense insurance and third party litigation and other third party funding on legal fees, including contingency fees. The Working Group proposes that the Law Society consider bringing together experts on relevant issues, in a symposium or otherwise, to assist the Law Society in considering the ethical and regulatory issues that are raised by these products.

NEXT STEPS

32. The Working Group reiterates that the Law Society is available and interested in sharing its expertise with the Ontario government with respect to potential changes to Ontario's motor vehicle Statutory Accident Benefits Schedule.

33. The Working Group also continues to explore issues regarding lawyers receiving compensation or other benefits and related practices with respect to title insurance and other services, and will report to Convocation regarding this issue.

Tab 4.3

FOR INFORMATION

ANTI MONEY-LAUNDERING MODEL RULES CONSULTATION PAPER

1. At its November 9 meeting, the Committee reviewed proposed amendments to the Model Rules of the Federation of Law Societies of Canada (FLSC) regarding anti-money laundering and terrorist financing. The Paralegal Standing Committee also reviewed the proposed changes at its November 8 meeting. Materials from the FLSC explaining these amendments are attached as **Tab 4.3.1.**

2. The Model Rule amendments are being proposed by a Working Group of the FLSC established in 2016 to review the Model Rules in this area. The FLSC has requested comments on the proposed changes by March 15, 2018. Amendments to the Model Rules would require approval by the FLSC Council.

3. In the event that changes are made to the Model Rules in this area, the amendments would then be forwarded to Law Societies for adoption. Any changes to the Law Society's Rules of Professional Conduct, Paralegal Rules of Conduct, or By-Laws would require approval by Convocation.

3. The Committee encourages lawyers, paralegals and legal organizations to provide comments on the proposed Model Rule amendments. These comments would be taken into consideration by the Committee preparing its response to the FLSC. The Committee has prepared a consultation paper, attached as **Tab 4.3.2**, explaining the proposed changes. The paper will be made available on the Law Society's website and sent to legal organizations. Details regarding how to participate in the consultation are provided in the paper.

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

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

Submissions will be provided to the Law Society's Professional Regulation 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 in an aggregate amount of $7500 Canadian dollars in respect of any one client matter or transaction".

[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 the consultation report, the FLSC indicates that the Working Group is of the view that the $7500 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 $7500 or more, or amounts over and above $7500 (i.e. $7501 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 $7500. 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 $7500 ~~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 greater than $7500 for professional fees, disbursements, expenses or bail, provided that any refund out of such receipt 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

   (a) from a financial institution or public body; or

[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.

(b) in an amount greater than $7500 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. 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.

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

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,(~~ii~~v), 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 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 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 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, comply with this requirement, 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 the shares of the corporation 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”. It 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).

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. Is it 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 about 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) 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 engaged 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:

<u>Rule</u>

1. <u>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.</u>
2. <u>Money held in a trust account must be paid out as soon as practical upon the completion of the transaction or other matter.</u>

   <u>Commentary</u>

   <u>[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.</u>

Issues for Consideration

---

[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.

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

World Exchange Plaza 1810 - 45 O'Connor Street Ottawa Ontario K1P 1A4
Tel: 613.236.7250 Fax: 613.236.7233 www.flsc.ca

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 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.

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/lsbc/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.

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

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.

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

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

Fédération des ordres professionnels de juristes du Canada

Appendix "C"

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

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

(d) (e) a financial services cooperative,

(f) a credit union central,

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

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

(fi) 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) 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~~ persons and ~~or~~ entit~~y~~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) orto (fb) 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~~

(~~f~~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, ~~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 (~~f~~b)(~~ii~~v), 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 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.

(~~b~~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

(~~c~~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~~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 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 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 (~~f~~b)(~~ii~~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~~, 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 (~~4~~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

(~~9~~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.

(~~10~~11) 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

(~~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.

(~~12~~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

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

1011. (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

Fédération des ordres professionnels de juristes du Canada

Appendix "D"

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.

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

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.