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# Professional Legal Training Course 2024

Practice Material

# Professionalism: Practice Management

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# PROFESSIONALISM: PRACTICE MANAGEMENT

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***Trust Accounting Handbook***

**The *Trust Accounting Handbook* is reproduced in its entirety, and contains its own Table of Contents and internal pagination. The regular pagination of the *Practice Material* resumes in Chapter 7 on page 70.**

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# Chapter 1

## Practice Management<sup>1</sup>

### [§1.01] Introduction to These Materials

This part of the *Practice Material on Professionalism: Practice Management* addresses practical realities of the business of law. Topics covered range from basic law firm requirements and processes to sophisticated scams and cybercrime. This is an overview of the topics covered:

1. This chapter starts with basic lawyer and staff responsibilities, including how those roles are evolving.
2. Chapter 2 covers the basic requirements of a practice, including different ways a law practice could be structured.
3. Chapter 3 goes into detail on some essential law firm systems and procedures, including the importance of practices such as performing careful conflicts checks.
4. Chapter 4 discusses file management, including opening and closing files, file retention, and who owns documents in a lawyer's file.
5. Chapter 5 considers client relations, including fees, retainers and non-engagement letters, and provides some precedents.
6. Chapter 6 covers trust accounting, and includes the Law Society's *Trust Accounting Handbook*.
7. Chapter 7 is on anti-money laundering measures. It covers how lawyers are targeted by money-laundering schemes and what to watch out for. It also includes some articles from recent issues of the *Benchers' Bulletin* on measures the Law Society is taking to address money laundering, and what you should do in your practice.

### [§1.02] Evolving Practice

A law practice must be properly organized in order to ensure that client files are handled appropriately and practice obligations are met. Managing one's practice effectively is a component of competence, as set out in the *Code of Professional Conduct for BC* (the "*BC Code*"), rule 3.1-1(i). Being properly organized involves efficient use of office systems and productivity tools, as well as careful and consistent practices in client file man-

agement, timekeeping, trust accounting and financial management.

Law offices vary in terms of their composition, structure, systems and procedures, as well as the responsibilities assigned to personnel. In order to enhance the public's access to competent and affordable legal services, and in response to recommendations by the Delivery of Legal Services Task Force, the Benchers approved a plan in 2011 to increase the services that paralegals and articulated students can perform under the supervision of a lawyer. Since then, the Benchers have studied the role of non-lawyer legal service providers, including in the Alternate Legal Service Providers Task Force and in the Licensed Paralegal Task Force (discussed in §1.04).

In establishing guidance for competent practice, the Law Society has also taken a role in regulating law firms. The Law Society Rules and *Legal Profession Act* were amended in 2018 to give the Law Society authority to regulate law firms and set standards for ethical, professional law firm practice. Law firm registration began in May 2018. In October 2019, the Benchers approved the implementation of self-assessment requirements for all law firms in BC. Using tools developed by the Law Society, all firms will assess their own practice management systems, policies, and procedures, to help flag problems and issues before they affect clients or lead to complaints. Implementation will be rolled out in phases.

The Law Society has also recently amended the Law Society Rules to reduce the risk that money laundering will take place through the use of a lawyer. Changes to the trust accounts and cash transactions rules took effect July 12, 2019, and changes to the client identification and verification rules took effect on January 1, 2020. These rules are discussed in Chapters 6 and 7.

A lawyer must continually assess and respond to changing technology, evolving practice areas, varying personnel resources, and any other factors that may affect the effectiveness of systems and procedures used in the firm. For further guidance, see "Practice Resources" on the Law Society of BC website.

### [§1.03] Loss Prevention

The term "loss prevention" refers specifically to insurance losses. In addition, the term is commonly used to describe the systems, procedures and practices necessary to ensure that client matters are competently and completely addressed. It involves the effective management of all aspects of the law practice.

Most insurance claims arise from inadequate office systems and file-management errors, not from a lawyer's failure to know the law or poor legal judgment. For lawyers to continue to obtain affordable errors and omissions coverage, lawyers must do better in increasing their awareness of common practice pitfalls and in

<sup>1</sup> This chapter is regularly updated by staff and lawyers of the Law Society of British Columbia. It was last updated in February 2023.

recognizing the need to organize, document and improve procedural aspects of delivering legal services.

Another growing source of loss is fraud. This is discussed in detail later in this chapter, in §1.06.

Lawyers must assess their own practice management on an ongoing basis. It is in their own interests to identify practice problems and improve office procedures wherever possible. To assist, the Law Society makes practice advisory services available to members. The Law Society's practice advisors give confidential advice concerning a wide variety of practice management and ethics issues, including undertakings, confidentiality and privilege, conflicts, client identification and verification, courtroom and tribunal conduct and responsibility, withdrawal, solicitors' liens, client relationships and lawyer-lawyer relationships. Contact information for practice advisors, as well as additional resource material, is available on the Law Society of BC website.

## [§1.04] Lawyer and Staff Responsibilities

Managing a law practice includes effectively delegating and dividing duties among personnel. The following outline of the lawyer's responsibilities and suitable support systems sets out one way to divide law office responsibilities where the law office includes a lawyer, an articulated student, a paralegal and a legal administrative assistant.

### 1. The Lawyer's Responsibilities

Lawyers are responsible for legal services. As set out in rule 6.1-1 of the *Code of Professional Conduct for BC* (the "BC Code"):

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

Law Society Rule 2-60(1) permits articulated students to provide all the legal services that a lawyer is permitted to provide (subject to certain exceptions), so long as the lawyer ensures that the student is:

- (a) competent to provide the services offered,
- (b) supervised to the extent necessary in the circumstances, and
- (c) properly prepared before acting in any proceeding or other matter.

Articled students may appear unsupervised as counsel in Provincial Court, or on some preliminary matters in proceedings by way of indictment: Rule 2-60(3). However, according to Rule 2-60(2), articulated students are not permitted to appear as counsel in certain proceedings unless they are being supervised by a practising lawyer. Those proceedings include appeals, jury trials, and proceedings by way of indictment. Appearances by temporary arti-

cled students are subject to stricter limitations, as set out in Rule 2-71.

Articled students cannot give or accept undertakings unless the principal also gives or accepts the undertaking, in keeping with the limitations of Rule 2-60. Under an amendment to s. 60 of the *Evidence Act*, R.S.B.C. 1996, c. 124, effective September 1, 2015, articulated students, including temporary articulated students, are allowed to act as commissioners for taking affidavits.

With respect to the other tasks articling students may perform, see the "Articling" section of the *Member's Manual* and the Law Society Rules.

Non-lawyers, as defined in *BC Code* rule 6.1-2, are neither lawyers nor articulated students. *BC Code* rule 6.1-3 says that a lawyer must not permit a non-lawyer to provide the following services:

- (a) accept new matters on behalf of the lawyer, except that a non-lawyer may receive instructions from established clients if the supervising lawyer approves before any work commences;
- (b) give legal advice;
- (c) give or accept undertakings or accept trust conditions, except at the direction of and under the supervision of a lawyer responsible for the legal matter, providing that, in any communications, the fact that the person giving or accepting the undertaking or accepting the trust condition is a non-lawyer is disclosed, the capacity of the person is indicated and the lawyer who is responsible for the legal matter is identified;
- (d) act finally without reference to the lawyer in matters involving professional legal judgment;
- (e) be held out as a lawyer;
- (f) appear in court or actively participate in formal legal proceedings on behalf of a client except as set forth above or except in a supporting role to the lawyer appearing in such proceedings;
- (g) be named in association with the lawyer in any pleading, written argument or other like document submitted to the court;
- (h) be remunerated on a sliding scale related to the earnings of the lawyer or the lawyer's firm, unless the non-lawyer is an employee of the lawyer or the law firm;
- (i) conduct negotiations with third parties, other than routine negotiations if the client consents and the results of the negotiation are approved by the supervising lawyer before action is taken;
- (j) take instructions from clients, unless the supervising lawyer has directed the client to the non-lawyer for that purpose and the instructions are relayed to the lawyer as soon as reasonably possible;

- (k) sign correspondence containing a legal opinion;
- (l) sign correspondence, unless:
  - (i) it is of a routine administrative nature,
  - (ii) the non-lawyer has been specifically directed to sign the correspondence by the supervising lawyer,
  - (iii) the fact the person is a non-lawyer is disclosed, and
  - (iv) the capacity in which the person signs the correspondence is indicated;
- (m) forward to a client or third party any documents, other than routine, standard form documents, except with the lawyer's knowledge and direction;
- (n) perform any of the duties that only lawyers may perform or do things that lawyers themselves may not do; or
- (o) issue statements of account.

However, rule 6.1-3.1 provides that these limitations do not apply when a non-lawyer is:

- (a) a community advocate funded and designated by the Law Foundation;
- (b) a student engaged in a legal advice program or clinical law program run by, associated with or housed by a law school in British Columbia; and
- (c) with the approval of the Executive Committee, a person employed by or volunteering with a non-profit organization providing free legal services.

As well, rule 6.1-3.3 (discussed in the next section) sets out exceptions with respect to designated paralegals.

## 2. The Paralegal's Responsibilities

Paralegals have legal training and knowledge of the substantive and procedural aspects of law. A paralegal can perform a range of tasks, but the lawyer has full professional responsibility for the paralegal's work.

### (a) Designated Paralegal

The *BC Code* defines a paralegal as "a non-lawyer who is a trained professional working under the supervision of a lawyer" (*BC Code* rule 6.1-2). A lawyer may also determine whether a paralegal is suitable to be a "designated paralegal": a paralegal who has the necessary skill and experience to give legal advice and represent clients before a court or tribunal as permitted, or at family law mediations (*BC Code* rules 6.1-2 and 6.1-3). A lawyer may supervise no more than two designated paralegals at a time (Law Society Rule 2-13). Appendix E to the *BC*

*Code* provides further guidance with respect to the supervision of paralegals.

A lawyer has a duty to ensure that paralegals employed by that lawyer are competent, under *BC Code* rule 6.1-3.2:

A lawyer may employ as a paralegal a person who

- (a) possesses adequate knowledge of substantive and procedural law relevant to the work delegated by the supervising lawyer;
- (b) possesses the practical and analytic skills necessary to carry out the work delegated by the supervising lawyer; and
- (c) carries out his or her work in a competent and ethical manner.

The commentary to rule 6.1-3.2 provides:

[1] A lawyer must not delegate work to a paralegal, nor may a lawyer hold a person out as a paralegal, unless the lawyer is satisfied that the person has sufficient knowledge, skill, training and experience and is of sufficiently good character to perform the tasks delegated by the lawyer in a competent and ethical manner.

[2] In arriving at this determination, lawyers should be guided by Appendix E.

[3] Lawyers are professionally and legally responsible for all work delegated to paralegals. Lawyers must ensure that the paralegal is adequately trained and supervised to carry out each function the paralegal performs, with due regard to the complexity and importance of the matter.

The additional services that designated paralegals may provide are set out in *BC Code* rule 6.1-3.3:

Despite rule 6.1-3, where a designated paralegal has the necessary skill and experience, a lawyer may permit the designated paralegal

- (a) to give legal advice;
- (b) to represent clients before a court or tribunal, other than a family law arbitration, as permitted by the court or tribunal;<sup>2</sup> or
- (c) to represent clients at a family law mediation.

The commentary to *BC Code* rule 6.1-3.3 notes that a lawyer can supervise a limited number of designated paralegals under Law Society Rule 2-13, and provides:

[2] Where a designated paralegal performs the services in rule 6.1-3.3, the supervising lawyer must

<sup>2</sup> For the limitations and process for designated paralegals and certain other non-lawyers to request to appear for clients in Provincial Court, see Practice Direction *GEN 05 Non-Lawyers Appearing for Clients in Court* (effective November 17, 2023).

be available by telephone or other electronic means, and any agreement arising from a family law mediation must be subject to final review by the supervising lawyer.

Within this framework, here are some examples of duties a paralegal may carry out:

- (a) interviewing clients and witnesses (the lawyer must advise and take instructions from clients on substantive issues);
- (b) collecting information from other sources (e.g. the Land Title Office);
- (c) conducting correspondence relating to routine administration;
- (d) preparing draft pleadings and other court forms;
- (e) researching the law and preparing legal memoranda;
- (f) organizing documents;
- (g) drafting statements of account; and
- (h) if the paralegal is a designated paralegal with the necessary skill and experience, the additional duties set out in rule 6.1-3.3.

(b) Innovation Sandbox

The Law Society continues to consider ways to address unmet need in the legal services market, and the Benchers established the Licensed Paralegal Task Force to explore the potential for licensing paralegals to provide limited legal services. In September 2020, the Benchers approved the Licensed Paralegal Task Force’s proposal to adopt a grassroots approach to advance the licensed paralegal initiative within an “Innovation Sandbox.” The Innovation Sandbox allows alternate legal service providers to apply to the Law Society, describing the services they propose to provide. The Law Society assesses if it is in the public interest to permit those services to be provided by the applicant, and if so, issues a no-action agreement, which sets out the terms and conditions on the limited scope of legal services the applicant can perform. Additions to the Innovation Sandbox in 2021 are described on the Law Society’s website, and include providers preparing documents for filing with the Provincial Court (Small Claims) and with tribunals.

3. The Legal Administrative Assistant’s Responsibilities

The legal administrative assistant works under the supervision of the lawyer or paralegal. The legal administrative assistant’s tasks include routine office procedures and clerical tasks:

- (a) organizing files, including:
  - (i) opening files,
  - (ii) organizing components of files, and
  - (iii) securing file contents with fasteners and ensuring that files remain organized (see also Chapter 4);
- (b) making appointments for the lawyer and referring potentially urgent matters to the lawyer for assessment;
- (c) preparing correspondence that does not involve legal expertise;
- (d) sending copies of relevant file material to clients;
- (e) taking telephone calls when the lawyer is unavailable and providing non-legal help to the client where possible;
- (f) maintaining bring-forward and diary systems (see Chapter 4);
- (g) screening incoming mail, including:
  - (i) highlighting areas of urgency,
  - (ii) dealing with routine items, and
  - (iii) noting dates for bring-forward and diary systems;
- (h) arranging examinations for discovery, by:
  - (i) preparing and sending out appropriate demands,
  - (ii) taking out appointments, and
  - (iii) taking care of conduct money;
- (i) arranging trials, by:
  - (i) setting trial dates,
  - (ii) preparing trial records, and
  - (iii) arranging for attendance of witnesses;
- (j) preparing standard form legal documents for the lawyer’s review; and
- (k) organizing the lawyer’s trial briefs, books of documents, and books of authorities.

**[§1.05] Lawyer Training**

Most lawyers recognize the need for continuing lawyer training. Traditional views such as “sink or swim” have yielded to a more positive and realistic view that better training creates better lawyers. Law school, PLTC, and CLE courses are only part of the answer. The other part is the commitment of senior lawyers and partners to train and mentor junior lawyers, and the commitment of junior lawyers to devote the necessary time to learning.

All lawyers need continuing skills training in the areas of effective legal analysis, professional responsibility, negotiation and dispute resolution, and legal writing and drafting. Most in-house training programs involve substantive law issues (such as new legislation) and practice issues. Skills training may include formal seminars, webinars and workshops organized in-house or through outside organizations, or informal mentoring when lawyers are working together on files, teaching and learning by example.

Lawyers also need ongoing training in leadership and managing staff, cultural competence, time management and the use of technology, and business development.

To develop a continuing training program for yourself or your firm, follow these steps:

- (a) plan your personal training objectives carefully;
- (b) budget the time and money you plan to spend;
- (c) identify realistic and appropriate priorities;
- (d) survey available resources—you may be pleasantly surprised by the expertise at your firm, or the free resources available from BC Courthouse Libraries or the Law Society ([learnlsbc.ca](http://learnlsbc.ca)); and
- (e) evaluate your program critically over time.

The Law Society requires that all practising lawyers in BC complete 12 hours of continuing professional development per year, including at least two hours pertaining to any combination of practice management, professional responsibility and ethics. See the Law Society website for details about approved educational activities.

In December 2019, the Benchers approved a new requirement for all full-time and part-time practising lawyers in BC to complete a course to address core aspects of Indigenous intercultural competence and Call to Action 27 of the Truth and Reconciliation Commission. The course was piloted in 2021 and was officially launched in January 2022. The online course is constructed in modules and is eligible for continuing professional development credit. (See also the discussion of this topic in *Practice Material: Professionalism: Ethics*.)

The next section of this chapter, §1.06, begins on the following page.



PRACTICE ADVICE, by Barbara Buchanan, QC, Practice Advisor

## Fraud 101 for lawyers

FRAUD IS A serious risk in every type of practice, regardless of firm size, a lawyer's year of call or practice area. Lawyers, lenders, insurers, clients and other parties can all be victims. The impacts of the pandemic only add to the potential risk. Lawyers who are isolated, are struggling in their practice or have serious financial issues may be especially vulnerable to manipulation by fraudsters.

There are many types of fraud that can affect lawyers. This article discusses the more common frauds and provides tips to help you recognize them.

### COMMON FRAUDS AND ILLEGAL ACTIVITY

Lawyers should guard against the following common frauds and illegal activity:

- social engineering scams;
- ransomware attacks and data breaches;
- law firm employee theft;
- investment and banking scams; and
- real estate fraud.

First are social engineering scams, such as the bad cheque scam, a phony change in

payment instructions or a phony direction to pay. With these scams, the lawyer or law firm is usually the target of a fraudulent diversion of funds to the scammer.

Second are ransomware attacks, a frequent and successful cyber crime. With these scams, the lawyer or law firm's computer systems are hacked and confidential data is held for ransom by the criminal.

Third is law firm employee theft. In this case, the employee is usually stealing money from the law firm.

Fourth are situations where the scammer (who may be your client) often intends to scam an innocent third party on the other side of a transaction or claim and involve you in the scheme (however, in some situations a third party is part of the scam in cahoots with your client). These include investment and banking scams or real estate fraud. The scammer may want to involve you to lend credibility to their scheme or because they actually need legal services for some aspects of their plan.

For criminals, coming up with new schemes and looking for unsuspecting victims and vulnerabilities to exploit is a full-time job. They are willing to target anyone, including lawyers they can dupe

into becoming unwittingly involved in a dishonest, illegal or fraudulent scheme. Take care to comply with the law and your other professional responsibility obligations.

Here is some information about each of these scams to help you identify them.

### SOCIAL ENGINEERING SCAMS: THE LAWYER AS VICTIM

#### The bad cheque scam

In this scam, a scammer pretends to be a new client who needs legal services that lawyers commonly provide. In reality, they do not actually require legal services, and they are not who they say they are. Their goal is to have a lawyer deposit a phony certified cheque, bank draft, credit union official cheque or money order into a trust account, and then trick the lawyer into electronically transferring the funds to the scammer before the lawyer finds out that the instrument was worthless.

The scammer may use the same name as a real person (whether posing as an individual client or as an individual providing instructions on behalf of a company) or a legitimate organization that is not

part of the wrongdoing. They may present government-issued photo ID that may be stolen, altered or fake. The documents that scammers use to support a ruse may include collaborative divorce agreements, settlement agreements, pleadings, court orders, invoices, bills of lading, loan documents, promissory notes, contracts, letters and photos of injuries or damage.

This scam came to BC around 2012 and remains very active. Examples of some ruses that scammers have used to try to fool BC lawyers are:

- collecting on amounts owed pursuant to a collaborative divorce agreement, a private loan, an unpaid invoice or a settlement agreement;
- purchase and sale of a business;
- purchase and sale or lease of large equipment or vessels;
- wrongful dismissal claim;
- dog bite or slip-and-fall claim;
- breach of a licence agreement;
- private mortgage;
- real estate conveyance;
- retainer overpayment and refund.

### The bad cheque scam: Red flags

Some phony clients provide convincing documents. They may portray themselves as sophisticated business professionals (sometimes as an officer of a well-known company) or as beleaguered victims. Here are some characteristics that can act as red flags:

- The initial contact with you is often by email and the individual may use a free web-based address (e.g., Gmail, Hotmail, Yahoo).
- Sometimes your name is in the salutation; however, because the message is commonly crafted to cast a wide net, you may receive an email addressing you more generally, such as “Dear Counsel,” “Good day” or “Dear Attorney” (they often use the American term *Attorney*, sending the emails to lawyers in the United States too).
- The individual usually claims to reside in another jurisdiction, sometimes temporarily (e.g., “on assignment” or tending to a sick relative).
- The initial email often says that a person who owes them money “resides

in your jurisdiction” (again using a generic term to cast a wide net, because they may be sending the same email to lawyers in Canada, the United States, Australia, England, etc.).

- The individual usually requires simple services — often just a demand letter — and the money arrives quickly, sometimes before you have received a retainer and verified the client’s identity.
- The individual may try to elude the verification process and try to convince you to accept a scan of a government-issued photo ID.
- The individual may be overly familiar with the need to check for conflicts, verify identity and provide a retainer.
- The individual may be willing to pay you too much for little work.
- You receive a realistic looking but phony certified cheque (or other instrument that you believe is secure) from the opposite party in an envelope with no return address or one that doesn’t make sense.
- After you receive the money in trust (usually six figures or more), the client wants you to send the funds quickly, before you learn the instrument is no good. They tell you to pay your account out of the funds in trust.

### Avoid becoming a bad cheque scam victim

How do you protect yourself from the bad cheque scam?

- Learn to identify the scam by becoming familiar with the ruses and red flags.
- Review the [bad cheque scam names page](#) to see some of the many names and ruses that scammers have used to try to trick BC lawyers (includes an A to Z alphabetical list).
- If you take on a new client and there is a financial transaction, identify and verify the client’s identity and obtain information about the source of money for the transaction in accordance with [Part 3, Division 11](#) of the Law Society Rules. Ask questions if there is anything unusual or suspicious and record the answers to your inquiries with the applicable date (*BC Code* rule

3.2-7 and commentary). If you are not satisfied with the results, withdraw (Rule 3-109).

### Phony direction to pay: Change in payment instructions

Another social engineering scam that may target you and your trust account is a phony change in payment instructions scam with respect to an existing file. In this situation, unlike the bad cheque scam, the client is who they say they are, at least in the beginning. However, along the way, a scammer learns about the timing of an expected payment to your client, and sends you a convincing email redirecting the funds to them. Believing the email is from your client, you transfer funds to the scammer and create a trust shortage. Below are some examples of how this can happen:

- You act for a client with respect to a wrongful dismissal claim. You receive legitimate funds in trust from your client’s former employer for settlement of a claim. The scammer, assuming your client’s identity, instructs you via email to wire the settlement funds to an account that the scammer will access. Further emails from you go to the scammer instead of your client. Often your client’s email address and the scammer’s email address are similar but with one small change that could easily be missed (e.g., one letter or number different). The scammer may set up email rules so that all emails between you and the client (even with the client’s correct email address) are redirected to the scammer. The scammer may also telephone your firm or invite the firm to call the number in the scammer’s email.
- On the other hand, a scammer may assume your identity. The client or a third party (e.g., a solicitor acting for another party to the transaction) who is sending you money for a matter (e.g., money for a conveyance) receives an email that tells them to wire the funds to the scammer’s account, rather than to your trust account. By the time you find out that you never received the funds, the money is long gone.

BC law firms have fallen victim to phony change in payment instructions scams and

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faced hundreds of thousands of dollars in trust shortages, which they are professionally obligated to replace. If you are about to pay out trust funds and you receive new or changed payment instructions electronically from your client, assume that a hacker is impersonating your client behind the scenes. *Stop*, and ensure that the new or changed instructions are legitimate by making in-person or phone contact with your client. Remember to use the number that your client or the third party initially provided to you, not a number provided in the email, for any telephone contact, and follow the tips found [here](#). Not only will this help you to avoid a trust shortage, but it is also a condition of your firm's new cyber coverage.

### Phony direction to pay from within your law firm

This social engineering scam is similar to the phony change in payment instructions scam. In this scheme, scammers usually pose as individuals working in your own law firm. The scammer "spoofs" another lawyer's or staff member's email address (may be senior accounting staff), to make it appear that the email was from the individual whose name is displayed in the "From" line. Sometimes an imposter, knowing a lawyer is on vacation, uses the information on the pretext that the vacationing lawyer is unable to perform the task while away. The ruses vary, but commonly the scammer asks the recipient of the email (usually a more junior lawyer or other staff member) to transfer funds from trust to a client or to purchase gift cards for a client from the firm's general account. Conversely, in some cases, scammers pose as clients who are away on holidays and who ask lawyers or staff to purchase a series of gift cards as a favour and email the gift card information to the scammer.

If you receive an email direction to pay from someone at your law firm, double-check by speaking with the individual. Contact the staff member or other lawyer in person or by phone to confirm that they actually sent the direction. Do not rely on the telephone number in the email. Consult your staff directory. If your accounting staff's names and contact information are on your website, consider removing them from public view. Once a scammer knows a staff member's name, it is easy to figure

out their email address, because every address will presumably have the same domain name (e.g., @buchananandco.com).

### General tips to protect yourself from social engineering scams

In addition to the information above about protecting yourself from the bad cheque scam, a phony change in payment instructions or a phony direction to pay, consider these additional general tips:

- Be on high alert for scams during holiday periods or at other times when your full complement of staff may not be in their normal office routine (like during a pandemic). These times provide opportunities for criminals to take advantage.
- If you have doubts about the client or the subject matter of the retainer, obtain more information until you are satisfied that you can accept money in trust and that you can act in the circumstances. Make reasonable inquiries and record the results in the face of unusual or suspicious circumstances (*BC Code* rule 3.2-7 and commentary). If you are not satisfied with the results, withdraw (Rule 3-109).
- Establish firm-wide protocols for transferring money out of your accounts and adhere to them. Empower lawyers and staff to resist a request to bypass the protocols on the basis of urgent circumstances (urgency can be a red flag).
- Implement a policy of refusing to accept payment instructions by email. Require instructions and changes to be given in person or, at a minimum, telephone the sender of the email to verify the instructions or any changes, and be sure to use a telephone number that's been previously provided and independently verified (not the telephone number in the email that may be from a scammer).
- Protect the records relating to your practice and the information contained in them by making reasonable security arrangements against all risks of loss, destruction and unauthorized access, use or disclosure (Rule 10-4(1)). Train your staff not to open suspicious emails and attachments. Obtain professional technical expertise

to help you protect confidential information through security measures, including antivirus software and strong passwords, and to detect potential security breaches.

- Review Law Society publications and the Lawyers Indemnity Fund's (LIF) [fraud prevention information and videos](#).
- Report actual or possible trust fund shortages. See [Law Society Rule 3-74](#).
- Trust shortage liability may be covered for up to \$500,000 under LIF's cyber insurance program underwritten by Coalition, Inc. or Part C of the BC Lawyers Professional Liability Indemnification Policy. A claim may be excluded if a lawyer fails to comply with [Law Society Rule 3-74\(1\)](#) (trust shortage reporting), or to confirm new or changed fund transfer instructions directly from the lawyer's client by telephone or in person.
- Review your insurance and indemnity coverage with your broker and determine whether you should purchase [excess insurance coverage](#).

### RANSOMWARE ATTACKS AND DATA BREACHES

Ransomware attacks — perhaps the most common cyber crime — occur when a fraudster takes an organization hostage by encrypting and disabling access to business-critical systems and data and threatening to publish confidential information until a ransom payment is made, often in Bitcoin.

Data breaches occur when sensitive information from a law firm is provided unwittingly to a third party (e.g., through cyber crime, car and office break-ins, or by simply emailing client information to an unintended recipient).

A breach can be particularly costly and operationally devastating for lawyers who are responsible for maintaining privilege over client information. Firms can also be subject to regulatory fines and reputational damage on top of other claim costs.

How recently have you conducted a security assessment? Do your policies and procedures need updating? See the Office of the Information & Privacy Commissioner's publication, [Securing personal information: A self-assessment for public](#)

bodies and organizations (October 2020). It provides helpful guidance and checklists to assess security (e.g., including physical security, human resource security, systems security, mobile and portable devices, network security, transmission security, access controls) as well as assessing wireless network technology, audit process design, incident management and business continuity planning.

Any business that stores data on a network is at risk for a cyber attack.

With many lawyers now working remotely, the increase in virtual access to work servers requires extra vigilance. Be alert and take the following precautions:

- Always think before you click.
- Never open a link or attachment in an email or text message from someone you do not know.
- If you receive a link or attachment that you are not expecting — even if it is from someone you know — call the sender using the telephone number you have on file (not the number listed in the message) to confirm that the message is legitimate.
- If you open a link or attachment that you should have avoided, and a box opens that asks for your password or other information — *Stop*. Close out. Immediately call your IT department to run a scan on your device(s).
- Train your staff on the above, and talk to your IT professional about the simple steps you can take to protect your system found [here](#).
- Note your reporting obligations to the Law Society, LIF and Coalition, Inc. (see sidebar on page 14).

### LAW FIRM EMPLOYEE THEFT

When you hire new lawyers and support staff, are you thoroughly checking their references? Are their references real? Do you perform a criminal records check? You may do all of these things with new employees; however, in a number of cases, it is a long-term faithful employee, one who is familiar with your accounts, systems, passwords and signature, who ends up stealing. Employee theft may include stealing cash, issuing phony invoices, forging cheques, helping themselves to business equipment and data theft (e.g., theft of credit card

information, client contact and identity information, social insurance numbers). The following tips can help protect you and your firm from inside threats:

- Establish a policy that blank trust cheques must not be signed and store trust cheques securely. See discipline decision [2020 LSBC 52](#) regarding a lawyer who left a series of signed blank cheques with her bookkeeper. The hearing panel found, among other things, that she failed to properly supervise her bookkeeper and improperly delegated her trust accounting responsibilities. A massive theft occurred.
- Separate office functions so that the same employee is not responsible for opening the mail as well as for all accounting, bookkeeping and banking functions. See the Law Society's [Sample Checklist of Internal Controls](#) with respect to the segregation of staff duties, staffing policies and procedures and other measures to help safeguard your practice.
- With existing lawyers and staff, be alert to changes in lifestyle or behaviour (e.g., if an employee seems to be living beyond their means).
- Maintain direct supervision of your non-lawyer staff and proper delegation. Train your staff to recognize issues and bring them to your attention in a timely manner. You remain responsible to exercise your professional judgment. See [BC Code section 6.1](#) with respect to work that must not be delegated.
- Do not disclose your Juricert password to anyone, including an employee at your firm, and do not permit anyone else to affix your digital signature (Rule 3-96.1 and [BC Code rule 6.1-5](#)). A Law Society hearing panel found that, by disclosing his password to his staff and permitting them to affix his electronic signature to documents filed with the Land Title Office for over three years, a lawyer had committed professional misconduct. The lawyer was suspended for four months and was ordered to pay costs ([2020 LSBC 13](#)).
- The LIF policy does not cover theft by non-lawyer staff. As the partners and

## Services for lawyers

### Law Society Practice Advisors

Barbara Buchanan, QC  
Brian Evans  
Claire Marchant  
Jeff Rose, QC  
Sarah Sharp  
Edith Szilagy

Practice advisors assist BC lawyers seeking help with:

- Law Society Rules
- *Code of Professional Conduct for British Columbia*
- practice management
- practice and ethics advice
- client identification and verification
- client relationships and lawyer-lawyer relationships
- enquiries to the Ethics Committee
- scams and fraud alerts

Tel: 604.669.2533 or 1.800.903.5300

*All communications with Law Society practice advisors are strictly confidential, except in cases of trust fund shortages.*

◆  
**LifeWorks** – Confidential counselling and referral services by professional counsellors on a wide range of personal, family and work-related concerns. Services are funded by, but completely independent of, the Law Society and provided at no cost to individual BC lawyers and articled students and their immediate families.

Tel: 1.888.307.0590

◆  
**Lawyers Assistance Program (LAP)** – Confidential peer support, counselling, referrals and interventions for lawyers, their families, support staff and articled students suffering from alcohol or chemical dependencies, stress, depression or other personal problems. Based on the concept of “lawyers helping lawyers,” LAP’s services are funded by, but completely independent of, the Law Society and provided at no additional cost to lawyers.

Tel: 604.685.2171 or 1.888.685.2171

◆  
**Equity Ombudsperson** – Confidential assistance with the resolution of harassment and discrimination concerns of lawyers, articled students, law students and support staff of legal employers.

Contact Equity Ombudsperson **Claire Marchant** at 604.605.5303 or [equity@lsbc.org](mailto:equity@lsbc.org).

## PRACTICE

firm are liable for losses, consider purchasing commercial insurance to protect yourself from employee theft or other wrongful or unlawful conduct of an employee.

### INVESTMENT AND BANKING SCAMS

There are many variations of investment and banking scams that crooks may concoct to trick naive investors and lawyers. One example is the so-called “prime bank scheme.” Characteristically, the scammer tells a potential investor that they are being invited into the world of “big money” through a tremendous investment opportunity that will generate incredible returns. The opportunity often involves the financing of large, sometimes foreign and usually credible “prime” financial institutions such as the national banks, the World Bank, the International Monetary Fund (IMF) or the International Chamber of Commerce (ICC). The institutions may be prime, but the promoters are not.

Another example of an investment

scam is the Ponzi or pyramid scheme. Investors are convinced to put their money into a project that sounds good but is not specific. Scammers use terms such as “global currency arbitrage,” “hedge futures trading,” “high yield investment properties” and “exceptional mortgage opportunities.” For a time, some investors do receive returns, but not because the scheme has access to any exceptional investments. Rather, it is because the first wave of investors is paid using money from the second wave, and so on. Eventually the scheme gets top-heavy and collapses. The scammers disappear, and the lawyers and investors are left to cope on their own.

Scammers want to use lawyers to add legitimacy to these types of schemes. The mere presence of a lawyer in the scheme can make naive investors believe the scheme is legitimate and their money protected, especially if it is in a lawyer’s trust account. Scammers may try to convince lawyers to give so-called independent legal advice or signing officer certifications pursuant to Part 5 of the *Land Title Act*.

Also, having the funds in a lawyer’s trust account may provide another benefit to the scammer: confidentiality. Once the funds are gathered, the scammer’s next step may be to instruct the lawyer to wire it into an account that is difficult to trace and the money is never seen again.

### Common characteristics of investment scams

Here are some common characteristics of investment scams:

- The scammer is not registered to trade securities or other investment products.
- The scammer claims that their business includes negotiating loans, letters of credit or promissory notes with a foreign financial institution or a “prime” bank that is supposedly affiliated with a reputable international organization (e.g., the World Bank, IMF, ICC).
- The scheme is cloaked in confidentiality. Paradoxically the exception to the

## Reporting obligations

### To the Law Society

Note the reporting obligations in Law Society Rules 3-74 (Trust shortage), 3-96 (Report of failure to cancel mortgage), 3-97 (Reporting criminal charges) and 10-4 (Security of records). Also see *BC Code* rules 7.1-3 (Duty to report) and 7.8-2 (Notice of claim).

A lawyer who discovers a trust shortage must immediately pay enough funds into the account to eliminate the shortage and, with some limited exceptions, make a written report to the executive director, including all relevant facts and circumstances (Rule 3-74). If there has been a security breach, you will want to ensure that it is safe to use your email, computer system or fax machine. Your report may be sent by email to the Trust Assurance department at [trustaccounting@lsbc.org](mailto:trustaccounting@lsbc.org). You can also report by fax (604.646.5917) or by mail to the Law Society of BC, Attention: Trust Accounting.

Lawyers are required to take reasonable security measures to protect their

records against the risk of loss, destruction and unauthorized access. If you have lost custody or control of your records for any reason, you have an obligation to immediately report to the executive director. This includes if you have been a victim of ransomware or a data or privacy breach. See the Discipline Advisory, [Rule 10-4 Reports](#). If it is safe to use your email, you may send your report to Professional Conduct at [professionalconduct@lsbc.org](mailto:professionalconduct@lsbc.org). You also have the option to send it by fax (604.605.5399) or report by mail to the Law Society of BC, Attention: Intake Officer, Professional Conduct.

### To the Lawyers Indemnity Fund

The BC Lawyers Professional Liability Indemnification Policy requires you to report to the Lawyers Indemnity Fund (LIF) in writing immediately if you become aware of an error or any circumstances that could reasonably be expected to be the basis of a claim, however unmeritorious (Condition 4.1 of the policy). LIF’s website includes

detailed [reporting guidelines](#).

If you suspect that you have been involved or may be involved in a cyber claim, immediately report the matter following the detailed reporting requirements set out [here](#). LIF’s indemnification program includes cyber coverage for qualifying law firms operating in BC through underwriter Coalition, Inc. Coverage is claims-made and applies to third-party liability claims, first-party losses and cyber crime claims, and the most common cyber risks — social engineering fraud (including the bad certified cheque scam), ransomware and data or privacy breaches. If you do not do your due diligence to properly authenticate payment instructions received electronically, you may not have coverage if there is a theft of client funds.

If you have insurance in the private market that might respond to your claim, you will want to notify that insurer separately. Contact your insurance broker to make that report.

“little in writing” rule is that there is often a confidentiality agreement that the investors, and sometimes lawyers, are asked to sign.

- The scammer may say that the investment is only offered to a select few.
- The investment is baffling, may be complex and includes investment terms and concepts that people, including lawyers, think they should understand.
- Very little concrete detail is provided.
- Most of the income seems to be generated from the number of people recruited into the scheme and not from the product or investment opportunity itself.
- The profits offered are high and seem too good to be true.
- The typical investor is unsophisticated.

Here are some common features of the scammer’s relationship with their lawyer. Not all of these features may be present at the same time.

- You are promised big money, a retainer and fees that are not in keeping with the legal services to be provided.
- Any money that the scammer pays you is for a retainer (which may be significant) and perhaps for some small legal service, such as incorporating a company, that may be unconnected to the investment.
- Very little of what the scammer asks you to do amounts to the practice of law. Often the only real service the client requests is access to your trust account (i.e., to receive funds from investors).
- You may be offered a percentage of every dollar that passes through your trust account or a finder’s fee for each new investor that you bring through the door or that you sign up by giving independent legal advice or certifying for *Land Title Act* purposes.
- You may be pressured to release money, often in breach of trust conditions that investors have placed on it, with assurances that the investment is about to pay off and you are the only one holding things up.
- You have difficulty obtaining reliable information about the client’s source

of money for the project.

- No financial institution that you have heard of is involved with the project or, if you have heard of the institution, you are not given information on how to contact anyone in a position of authority, and the scammer controls all contacts.
- You don’t really understand how the investment works.
- The client may ask you about your lawyer’s indemnity coverage under the compulsory policy.

### What to do if you suspect an investment scam

If you suspect a scam, take the following important steps before accepting any money in trust, especially money from third-party investors. Receiving money in trust from investors can be a critical turning point after which withdrawing your services becomes more complicated.

Ask yourself these questions:

- If this is such a powerful and unique opportunity, why was I picked as the lawyer for the project?
- Is this work outside of my practice area?
- What real legal services am I being asked to perform, and how do they relate to the project?
- If I am asked to receive funds in trust, would I be in compliance with Rule 3-58.1? Would I be providing legal services *directly* related to those particular funds?
- Have I made reasonable inquiries about the client, the subject matter and objectives of the retainer, and the client’s source of money for the project? Have I made a record of the results of my inquiries? See the [source of money FAQs](#) on the Law Society website and *BC Code* rule 3.2-7 and commentary.
- Do I understand the deal? Does it make sense? Do I need more information, including more supporting documents? Have I made a record of my inquiries?
- How is this investment meant to generate a profit beyond simply generating further investment money?

- Why can’t I communicate with the individual from the financial institution or why does my client control all my communications with them?
- Who are some other lawyers who represented this client in the past, and may I contact them? If not, why not?
- Am I in a position to provide assurances of the nature that I am being asked to give?
- Is this individual on the BC Securities Commission’s [Disciplined List](#) or the subject of a [Notice of Hearing or Temporary Order](#)?

For more information on investment scams, see Discipline Advisory [Micro-cap stocks](#) (June 1, 2020), [Fraudulent Investment Schemes](#) and the BC Security Commission’s [investment fraud warning signs](#) and other resources, including [Investor Alerts](#).

Consider whether you need to seek your own counsel before acting or taking further steps. Run the scenario by a trusted lawyer or a Law Society practice advisor.

If you suspect a scam, withdraw from acting for the client (Law Society Rule 3-109 and *BC Code* rules 3.2-7 to 3.2-8 and section 3.7). Again, seek assistance from counsel if necessary, or a Law Society practice advisor if you have issues with withdrawal and especially if you have received money from third parties.

Consider whether you need to make a report to LIF or your commercial insurer or both. Note that the mandatory policy does not respond to situations where you have merely acted as a conduit for funds without providing professional services (i.e., performing an activity that is the “practice of law”).

### REAL ESTATE FRAUDS

Although new fraud schemes can appear at any time, the preponderance of real estate frauds involving lawyers generally fall into two main categories: value fraud and identity fraud. In addition, criminals who have already committed a crime (e.g., drug trafficking, human trafficking, fraudulent transactions) may try to launder their ill-gotten gains in real estate.

Indicators of fraud and indicators of money laundering in real estate frequently overlap. You may see some of these examples in connection with both fraud and

## PRACTICE

money laundering:

- You have difficulty obtaining information to identify and verify the client's identity.
- The client refuses to provide their own name on documents or uses different names on offers to purchase, closing documents or deposit receipts.
- The client does not care about the property, price, mortgage interest rate, legal fees or brokerage fees.
- The client offers to pay higher than usual fees for the legal services.
- The client is out of sync with the property (occupation, personal wealth, level of sophistication).
- A stranger who appears to control the client attends to sign documents.
- Your contact with the client is only or primarily by email.
- The head office of a corporate client has recently been changed to an address that does not make sense.
- The client who is purchasing property has been named in the media as being involved in a criminal organization.
- The purchase and sale is presented as a private agreement — no realtor is involved or the named realtor has no knowledge of the transaction.
- The transaction involves a power of attorney.
- The transaction includes a large vendor take-back mortgage.

### Value fraud – inflating the property's price to obtain a large loan

Watch out for fraud attempts on lenders. Although variations exist, one typical value fraud scenario involves a flip to an accomplice at an inflated price. The arrangement initially involves a sale (possibly from a legitimate seller), with a subsequent fraudulent flip for a higher amount to establish a falsely high property value. That higher value is then used as the basis for obtaining an inflated loan. For example, the dishonest buyer negotiates a property purchase from a legitimate seller for a market value of \$500,000. The dishonest buyer then flips the property to an accomplice, or in some cases a dupe, for \$650,000. The purchase and sale agreement is used to obtain a high ratio loan for \$585,000, \$85,000

above market value. The scammers then disappear with the excess value, leaving the bank holding a property worth less than the mortgage.

The scammers take their chances that the lender will not do a proper appraisal. Although lenders are responsible for their own decisions on whether to loan money and how much, you can assist in fighting fraud if you think a value fraud is being perpetrated.

### Common characteristics of value fraud

Here are some common characteristics of value fraud. You may not see all of these features in a particular file.

- The original contract allows for a nominee or an assignment, and a flip occurs, often with both deals closing on the same day.
- The lender only knows about the second contract with the higher value.
- No realtor is involved, especially in the flip, or if there is a purported realtor, real estate commissions are rebated to one of the parties.
- The lender has not done an appraisal or independent valuation.
- You are asked to act for the lender, the nominee buyer (a fraudster or dupe) and the original fraudster buyer, but the lender does not know you are acting for the original fraudster buyer, as the lender does not even know about the original contract.
- You are asked to complete the transaction by preparing documents so that the property transfers from an innocent seller to the nominee buyer at the lower price set out in the original contract.
- The high ratio mortgage amount above the original contract price is paid into your trust account, and you are asked to pay out the excess funds to the original fraudster buyer, the nominee buyer or some other seemingly unconnected person.
- The nominee buyer may sign a power of attorney in favour of the original fraudster buyer (attempting to avoid attending your office).
- You may be offered higher than usual fees.

### Tips for guarding against value fraud

In addition to recognizing some of the common characteristics of value fraud, below are some general tips for guarding against these schemes:

- Be cautious about flips. Many are legitimate, but in any situation where the seller on the contract is not the same as the registered owner, ask questions to find out the background to the transaction and assess its legitimacy. Make a record of your inquiries and the results.
- Insist on the documentation and evidence you need to be satisfied about the legitimacy of the transaction and the parties. Such evidence may include obtaining cancelled charges from the Land Title Office if you suspect a large number of background transactions have occurred, such as a rapid turnover of mortgage financings with the amounts rising in each case. If you suspect that the flips have been happening on separate occasions using different lawyers each time, consider doing historical searches to see if there have been repeated sales at progressively higher prices over a short period of time.
- Verify your clients' identities in accordance with the Law Society Rules, Part 3, Division 11 – Client Identification and Verification. Note the wide definition of "client" in Rule 3-98. If you are acting for an attorney appointed under a power of attorney, verify the identity of both the donor and the donee.
- Follow the *BC Code* rules respecting joint retainers.

When acting under a joint retainer, the *BC Code* requires that you reasonably believe that you are able to represent each client without having a material adverse effect on the representation of, or loyalty to, the other client. This precludes you from acting for parties to a transaction who have different interests, except where joint representation is permitted by the *BC Code* (rules 3.4-5 to 3.4-7 and Appendix C). In situations permitted by the *BC Code* where you are being asked to represent more than one party (e.g., a buyer and an institutional lender), you should review the joint

retainer rules with the clients and follow Appendix C so the parties are aware that nothing can be kept in confidence between them. You will have advised the clients as provided under rules 3.4-5 and 3.4-6 and have confirmation in writing that the parties are content that you act. *BC Code* rule 3.4-7 provides:

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

#### Commentary

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

Note that you should have either the clients' consent in writing or a record of the consent in a separate letter to each client. Documenting your advice respecting rules 3.4-5 and 3.4-6 will allow you to tell both clients all salient information. You can then advise the lender of the unusual features of the transaction without fear of breaching client confidentiality, such as telling the lender that the transaction involves a flip, that there are two contracts and one has a much lower price, that there have been a number of rapid turnovers of ownership with prices rising in each case, that a power of attorney is being used to execute the mortgage, and so on. After advising the lender, obtain and confirm further instructions in writing before proceeding with an advance under the mortgage. If you feel that you may be compromised in your ability to be forthright with the lender, contact a Law Society practice advisor or senior real estate practitioner to discuss how to proceed.

#### Identity fraud – impersonating an owner

In an identity fraud, a scammer poses as a property's owner or as an attorney acting under a power of attorney. Also, two scammers working together may impersonate both individuals. Generally, a scammer, posing as an owner, either secures

mortgage financing or sells the property and pockets the proceeds. In either case, the scammer usually asks you to wire the funds. Once the scammer receives the mortgage funds or proceeds of sale, they disappear.

There are also reports of MLS-listed properties where a scammer, posing as an owner, creates a separate, fraudulent advertisement to sell the same property and be paid with virtual currency such as Bitcoin. Unwary potential buyers may see the MLS listing and think that the fraudulent listing is just another way of marketing the property. Be cautious of transactions in which a purported owner will accept virtual currency for the purchase price. In addition to ensuring that the seller is the actual owner, such a transaction will have unique legal issues that are not dealt with in common standard contract of purchase and sale agreements.

#### FRAUD VERSUS MONEY LAUNDERING

Fraud and money laundering are different; however, the indicators of fraud and the indicators of money laundering and the associated professional obligations often overlap. Money laundering is the process that criminals use to disguise the source of money or assets that they derived from criminal activity. Money laundering can occur without cash being involved; however, it has often been associated with cash (hence the strict provisions regarding cash in Law Society Rules 3-59 and 3-70). For example, a criminal may make money from selling illegal drugs for cash. They purchase a luxury car with the dirty money. Then they sell the car to obtain money for a deposit on a condo. The purchaser wires the money for the car to the criminal. The criminal then purchases a condo. The new condo is purchased, indirectly, by the commission of an offence.

Laundering the proceeds of crime is a criminal offence (*Criminal Code* section 462.31). In order for money laundering to occur, there must first be a designated offence (e.g., fraud, extortion, human trafficking, robbery, illegal drug trafficking, being an accessory after the fact). Criminals then attempt to cover up the source of their ill-gotten gains by placing the funds into the financial system, moving the funds around to make it difficult to trace by

investigators and auditors, and ultimately integrating the funds into the legitimate economy (e.g., by purchasing real estate, luxury vehicles, vessels, art, or jewellery). Criminals try to retain lawyers to provide traditional legal services in which lawyers may accept money into trust and unknowingly assist in laundering the proceeds of crime. Examples of such legal services might include the creation of legal structures (companies, trusts) and real estate transactions.

Using a lawyer can lend legitimacy to a criminal's transaction and provide confidentiality and the opportunity to deposit their money in a lawyer's trust account. Lawyers, as gatekeepers to their trust accounts, should ensure that they do not recklessly accept dirty money into their trust accounts. Recklessness was added as a form of mens rea to section 462.31 of the *Criminal Code* in 2019. Lawyers should make inquiries about the client's source of money for the matter for which they have been retained.

#### KNOW WHERE TO GET HELP

If you experience a potential fraud, help is available. Contact a senior lawyer that you trust, a [Law Society practice advisor](#) or a [Lawyers Indemnity Fund claims counsel](#).

In the extreme, if a matter has gone too far before you realize that you have been duped, contact your insurer immediately. To continue to deal with a fraudster on your own out of fear of exposure or reprisal is unlikely to come to a good end. A fraud left unchecked may lead to discipline by the Law Society, denial of insurance, personal financial loss and, in some situations, criminal law sanctions. If you find you do not have coverage for the matter, consider retaining counsel to advise you.

For questions regarding the Law Society Rules in Part 3, Division 11 – Client Identification and Verification, or ethical questions, contact a Law Society practice advisor ([practiceadvice@lsbc.org](mailto:practiceadvice@lsbc.org) or 604.443.5797). If you have any questions about cash or trust reporting, contact a Law Society trust auditor ([trustaccounting@lsbc.org](mailto:trustaccounting@lsbc.org) or 604.697.5810). To report a potential claim or speak with a claims counsel, contact the [Lawyers Indemnity Fund](#). If you have additional insurance through the commercial market, you may need to contact that insurer too. ❖



## Chapter 2

### Opening a Law Practice<sup>1</sup>

#### [§2.01] Overview

This chapter reviews some basic considerations that apply to opening a law practice.

BC lawyers who enter into a solo or small firm practice are required to complete the “Practice Management Course.” This course is offered free of charge to all BC lawyers. Under the Law Society Rules, the course is also mandatory for all articulated students and for lawyers who have been ordered to complete the course by the Practice Standards Committee.

The Practice Management Course covers the essentials of operating a practice. Lawyers can complete it at their own pace and measure their own progress in understanding key practice issues. A lawyer completes each self-testing component of the course before moving to the next. The entire course takes six to eight hours to complete.

The Law Society also offers a practice resource called “Opening Your Law Office” on its website.

Registration and Licensee Services at the Law Society offers forms and general information on incorporating a law practice (phone: 604.605.5311).

Incorporation precedents are provided in the Support and Resources for Lawyers area of the Law Society website. Consult the Law Society’s *Practice Checklists Manual* for a checklist on incorporation under the *BC Corporations Act*.

#### 1. Choosing a Form of Practice

Before establishing a law practice, a lawyer should consider what form the practice will take. The following are the most common types of arrangement.

##### (a) Sole Practitioner

One lawyer, often working with support staff.

##### (b) Informal Association or Group Practice

Many group arrangements exist. They range from a sole practitioner assisted by one or more salaried lawyers to a group of lawyers associated together. Arrangements for remuneration range from a fixed salary to a percentage of billings.

#### (c) Space-Sharing Arrangements

This arrangement consists of two or more lawyers practising within one suite of offices, but carefully maintaining separate identities as sole practitioners. Note the distinction between this type of practice and an informal association. See rules 3.4-42 and 3.4-43 of the *BC Code*, and the practice resource “Lawyers Sharing Space” on the Law Society website.

#### (d) Partnerships and Limited Liability Partnerships

A partnership consists of two or more lawyers practising under a common firm name and bound together by either an informal arrangement or a formal partnership agreement (see §2.06). Partnership means a sharing of responsibilities, expenses and profits.

A limited liability partnership (“LLP”) is a modified form of general partnership. LLPs have many of the same advantages as limited partnerships. The added benefit is that the members of an LLP can take an active role in the business of the partnership without exposing themselves to personal liability for the acts of their other partners, above the amount of their investment in the partnership (See §2.07).

#### (e) Multi-Disciplinary Partnership

Lawyers may form partnerships with non-lawyers in limited circumstances. Lawyers must have actual control over the delivery of legal services, and the services provided by non-lawyers must support or supplement the delivery of legal services to clients of the law partnership. See the *BC Code*, Chapter 3, rules 3.4-17, 3.6-7 and 3.6-8; Chapter 6, rules 6.1-1, 6.1-3, 6.1-3.1, 6.1-3.2, 6.1-3.3, and 6.1-4; and Chapter 4, rules 4.2-8, 4.3-3 and 4.3-4.

#### 2. Factors in Selecting the Arrangement

A number of business factors must be taken into account when selecting the appropriate form of business organization, to avoid regulatory and client difficulties. These factors are beyond the scope of these materials, but they include considerations such as income tax factors and client perceptions (e.g. some institutional clients will not deal with sole practitioners).

The most appropriate form of business for a particular lawyer may also be influenced by personal factors, such as preferred areas of interest, preferred hours or location of practice, and preferred salary arrangements.

<sup>1</sup> This chapter was prepared and is regularly updated by staff lawyers and accountants or auditors of the Law Society of British Columbia. It was last updated in February 2023.

### 3. Lawyer Incorporation

Part 9, ss. 80–84 of the *Legal Profession Act* (the “Act”) permits the incorporation of law practices. Authorization to practise is by way of permit issued by the Executive Director (Act, s. 82 and Rule 9-4).

A law corporation that has a single shareholder is analogous to a sole proprietorship, and one with two or more shareholders is analogous to a partnership. The corporation’s name must include the words “law corporation,” and all the voting shares must be legally and beneficially owned by practising lawyers or by law corporations.

All directors must be practising lawyers. All the non-voting shares must be legally and beneficially owned by persons specified in s. 82(d) of the Act (specified individuals include practising lawyers, law corporations that are voting shareholders, and certain persons defined in the legislation (usually relatives of shareholders)) (Act, s. 82).

Incorporation may be beneficial for many reasons. Generally, there will be income tax advantages that will be more significant for the individual or small firm. Tax considerations include the potential for income splitting and advantages for longer-term estate planning and succession planning. For more information, see the incorporation agreements and other resources about law corporations by David G. Thompson of Thorsteinssons LLP, published on the “Law Corporations” web page on the Law Society website.

### 4. Starting a Practice

These are the most common approaches to getting started in the practice of law:

- (a) acquiring or earning an interest in a practice over time, by working as an associate with an established practitioner;
- (b) acquiring an established practice (opportunities arise upon the death, retirement or disbarment of a practitioner); or
- (c) establishing a practice of your own.

#### [§2.02] Pre-Opening Checklist

- (a) Order telephone, voicemail, fax and internet installation and service. Consider how your telephone answering system will protect confidential messages.
- (b) Consider reserving a website name and designing a website for your law practice. Consider your presence on social media, including Twitter or blogging.
- (c) Consult Chapter 4 of the *BC Code* regarding marketing of legal services.

The Law Society strongly recommends that you carefully review all written advertisements that you prepare, to ensure that they comply with Chapter 4. You may wish to ask someone else to read your advertisement before it is published to get further thoughts on its suitability.

- (d) Advise the Law Society (Registration and Licensee Services) in writing of the firm name, names of firm members, business address, telephone and fax numbers, email address, and date of opening.
- (e) Select an accounting system and a timekeeping system. Be alert to technical considerations such as the capacity and features you need, as well as legal and jurisdictional considerations around software licensing and whether files are stored in the cloud.
- (f) Open a trust account and a general account at one or more appropriate savings institutions, and order cheques. In opening the trust account, confirm instructions in writing with the savings institution and the Law Foundation. Refer to Chapter 6 on trust accounting.
- (g) Obtain a local business licence (if necessary, depending on applicable bylaws).
- (h) Obtain a GST number from the Canada Revenue Agency (CRA) for remitting taxes collected on legal fees. To set up an account call 1.800.959.5525.
- (i) Register with the provincial Registrar of Companies if you are going to operate under a business name as a sole proprietor, partnership or limited company.
- (j) Register with service providers. If you will be filing land title documents electronically, you must register with Juricert. If you will be accessing or filing some provincial government documents online, you may need a Business BCeID. If you will be filing court documents electronically, you may need an account with Court Services Online.
- (k) Obtain an employer account number for remitting employer’s federal and provincial income tax deductions, employment insurance premiums and CPP contributions. Contact the CRA and ask for an Employer’s Kit.
- (l) Determine the fiscal year-end date for the practice. Note the advantages of ending in the first quarter of the calendar year.
- (m) Determine and advise the Law Society of the year-end date for Trust Report filing purposes. Remember that your practice and insurance fees are payable in November and June.
- (n) Consider obtaining excess liability insurance and any optional coverage (see also *Practice Material: Professionalism: Ethics*, for a discussion of what is covered by the BC Lawyers Compulsory Professional Liability Indemnification Policy).

- (o) Adopt privacy policies to comply with privacy legislation (see a model privacy policy on the Law Society website at [www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/PrivacyPolicy-gen.pdf](http://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/PrivacyPolicy-gen.pdf)).

## [§2.03] Opening Checklist

### 1. Firm Name

Your firm name must not mislead or communicate false impressions to clients or the general public. You may give your firm a name such as “The XYZ Street Law Group,” as long as the name does not offend Chapter 4 of the *BC Code*. Only members in good standing may be included on the firm letterhead. The firm name is not required to be the surname of the sole proprietor or partners.

If you intend to incorporate, you must comply with the Law Society Rules with respect to corporate names (see Part 9, Division 1 – Law Corporations). A lawyer may apply to the Law Society for a certificate that the Society does not object to the proposed corporate name (Rule 9-2).

The Ethics Committee has said a lawyer will be prohibited from using a law corporation name that refers to a geographic location within British Columbia if the name refers to the member’s geographical area.

A sole practitioner should refer to the annotations to rule 4.2-5 of the *BC Code* regarding restrictions on the firm name.

### 2. Financing

It is common to obtain financing to run your office. Before approaching potential lenders you should prepare a budget and a business plan, have an office location in mind, and meet with an accountant.

A business plan contains these elements:

- (a) your short- and long-term practice goals;
- (b) the type of law you plan to practise;
- (c) the kind of clients you hope to attract;
- (d) the sources from which you expect to attract those clients, and
- (e) the expected time-frames within which you intend to achieve these goals.

For more information about business plans, see the practice resource called “Opening Your Law Office” on the Law Society website.

Be as precise as possible when drafting the financial part of your plan, including your budget. Prepare a detailed monthly budget for at least the initial year. Include all known or anticipated expenses, and when they will come due. Factor in a margin for

unexpected expenses (anywhere from 10 to 20 percent, according to Dave Bilinsky and Laura Callo-way in “Six Steps to Improve Your Practice Profitability,” published in *Benchers’ Bulletin* (2006: No. 1 January-February)). Build in marketing time and expenses as well, and do not forget to pay yourself.

Remember that you will need at least two accounts at a financial institution: a general account and a trust account. The general account is your account for money belonging to your practice, and the trust account is for money belonging to your clients and directly related to the legal services you provide.

Your choice of lender may have a significant impact on where you place your accounts. You may borrow from any lender you choose, including a bank, trust company, credit union or your family. A general account may be placed with any bank, trust company or credit union; however, your lender will usually expect your general account to be kept at the lending institution.

Your trust account *must* be placed only in a designated savings institution. For convenience, you may choose a designated savings institution as your lender, so that you can keep your accounts in the same place.

The lender will expect you to provide, in addition to your budget proposal, a statement of your assets and liabilities. If you have no assets, the lender may require a guarantor before agreeing to lend you any money.

### 3. Work Space

Your decision about where to work will be related to your type of practice, as well as potential arrangements for rent or space-sharing. You must ensure that, whatever arrangements you make, you maintain the supervisory role over your staff and do not compromise the confidential environment you must maintain for clients.

#### (a) Location

What type of practice will you have? Should you be near a courthouse or a Land Title Office, in the business district, or in the suburbs? Or do you intend to dedicate a part of your living space to your work, and rent boardroom space for meetings?

#### (b) Office Size and Layout

How many people will you have in your firm? What will be the ratio of support staff to lawyers? How much space will you need? Will you need space for meeting clients that is separate from where you store confidential documents? When you plan your layout, consider using an

architect or a design consultant. Keep in mind the potential for future growth.

(c) Negotiating the Lease

You will want to consider the following:

- Will the lessee be the partnership or a management company?
- Will the landlord construct leasehold improvements to minimize your initial outlay? What services will the landlord provide?
- What building security is provided, and during what hours? Know who is able to access your office when you are not there.
- Are there proper connections with sufficient capacity for telephones and other electrical equipment (e.g. computers, copiers, printers)?

(d) Consider the *BC Code*

If you are offered space in a client's premises or by a landlord who wants to make an arrangement that includes referrals, be careful. If there is any potential impact on rent payments as a result of the referrals, you may offend the *BC Code*.

Rule 3.6-7 provides that a lawyer must not:

- (a) directly or indirectly share, split or divide his or her fees with any person other than another lawyer; or
- (b) give any financial or other reward for the referral of clients or client matters to any person other than another lawyer.

Note the exception in rule 3.6-8 for multi-disciplinary practices:

3.6-8 Despite rule 3.6-7, a lawyer permitted to practise in a multi-disciplinary practice (MDP) under the Law Society Rules may share fees, profits or revenue from the practice of law in the MDP with a non-lawyer member of the MDP only if all the owners of the MDP are individuals or professional corporations actively involved in the MDP's delivery of legal services to clients or in the management of the MDP.

Be careful also if a client offers you use of an office with secretarial or receptionist services. Note that rule 6.1-1 says:

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

4. Staff

Determine what staff you will require. Do you need a receptionist, legal assistant, paralegal, and accounting staff, or will you start out with just one assistant, or even a virtual office?

If your practice is growing, consider the benefits of delegating law-office administration and freeing yourself to look after your clients and your billable work. The paper "Law Firm Management – How to Think Big,"<sup>2</sup> presented at the Continuing Legal Education Society of BC's *Solo and Small Firm Conference-2011*, discusses the benefits of having an office administrator and how to know when your firm has reached the point where it will benefit from having one.

If your practice is small, consider ways to leverage the resources available to you. For example, the CBA operates SoloLink ([www.cbabc.org/Our-Work/Initiatives/SoloLink](http://www.cbabc.org/Our-Work/Initiatives/SoloLink)) as an online information network and support resource. It lets practitioners share questions and answers with other practitioners, as well as with the CBA practice advisory panel, online in real time.

Also consider whether you have the capacity to hire an articulated student. Note the provisions of the Law Society Rules, especially Rule 2-58, on hiring articulated students.

Organize a payment system for your staff. Remember that you will be responsible for deductions such as income tax. When you plan your budget, consider your obligations to pay EI, CPP, Workers' Compensation premiums, and vacation pay.

5. Legal Administrative Assistants and Paralegals

Consider whether you will have the type of practice in which legal assistants and paralegals can be useful (e.g. conveyancing, litigation). Many lawyers use legal administrative assistants and paralegals to help with procedural and administrative aspects of client matters. The lawyer is ultimately responsible for the work performed by the law practice, regardless of whether part of it was delegated to non-lawyers. See also §1.03.

Chapter 6 of the *BC Code* indicates the types of functions that may be performed in part by a non-lawyer.

When delegating work to a paralegal, use a checklist of procedures. Since the lawyer is ultimately accountable for the quality and completeness of the work, a properly completed checklist can provide the best evidence that the particular tasks were delegated and have been performed.

<sup>2</sup> J. Robert Waterman, Kim A. Karras, Colleen Chapman, David J. Bilinsky and John B. Smiley. Presented in March 2011.

Note that “designated paralegals” can perform some legal services, under the supervision of a lawyer.

Lawyers must give proper direction to clients, both as a matter of liability and as a matter of client service. If clients feel that they are dealing solely with assistants, they may be unsatisfied or reluctant to pay your legal fees.

Also, ensure that you train your staff and keep that training current. Each year the Continuing Legal Education Society of BC offers courses and publishes guides aimed at developing the professional skills of legal support staff.

## 6. Furniture and Equipment

Office security and protection of confidential information are critical concerns. Depending on your practice and your client needs, you might need to invest in safes, fireproof filing cabinets securely bolted in place, or alarm and security systems. You must protect confidential information both physically and electronically.

### (a) Hardware, Software, Wireless Environment

Technology is essential to the practice of law. Swift advances in technology provide increased opportunities for practice flexibility but also increased dangers for data security.

A computer with internet access is of course essential for performing electronic legal research, completing online forms, and accessing government registries and services. You will also need to purchase software suited to your practice.

If you are using multiple pieces of equipment or software, be alert to issues of compatibility and network configuration, so that data collected in one device can be seamlessly transmitted to another and stored securely. For example, all your in-office equipment should be able to access the same system, and any technology you use on the go (outside the office) should also be compatible or at least allow you to upload information.

Be mindful of your software’s terms of use. These terms may specify that data is transmitted to servers outside of Canada, which could have privacy implications.

To better familiarize yourself with relevant advances in technology, consider attending annual seminars by the Continuing Legal Education Society or hiring a technology consultant who specializes in law office systems.

### (b) Paper, Printing and Fax

Your printing needs (and document storage needs) will depend on how paper-intensive your practice is, or what your ambitions are in terms of going “paperless.” Always consider compatibility issues and networking issues when selecting devices. Create protocols for confidential shredding and destruction for disposing of printed material.

### (c) Telecommunications System

Be sure your equipment is reliable. If you are travelling, consider whether your cell phone service or internet coverage might be interrupted.

Also consider if you are crossing borders where your telephone or electronic equipment might be subject to scrutiny by border officials, and plan accordingly.

If your messaging system might receive confidential voice messages, perhaps after normal business hours, be sure that you have a way to keep the messages confidential.

You might also consider a system for videoconferencing or live webinars, or a system that allows staff in different locations to use the same phone line and system.

## 7. Announcements

Announce your new practice to other lawyers and potential clients. Consider publishing listings in the CBA’s *BC Legal Directory*, as well as in national lists such as Carswell’s *Canadian Law List*. Consider announcing your new practice in *The Advocate*, the “Bar Moves” section of *BarTalk*, and on social media.

## 8. Library

Should you start to develop a paper-based library, combine some paper resources with electronic subscription services, or dispense with a paper-based library? Consider the nature of your practice, as well as your proximity to a branch of the BC Courthouse Libraries. Note that the BC Courthouse Libraries provide free in-person access to computers equipped with research resources and free online access to some subscription databases.

The cost of establishing and maintaining your own law library can be high. Consider alternatives such as sharing use with other firms, or using BC Courthouse Libraries facilities and online services. However, *do* consider buying traditional or online texts and practice manuals that are key to your practice area.

Consider what is available for free on CanLII and how best to supplement it, according to your expected needs, with suitable resources from services such as CLE Online, Quicklaw and Westlaw.

## 9. Filing and Accounting Systems

What filing, accounting, and timekeeping systems will you use? Consider practice and document management software, which helps you manage the information, people, schedules, communications, and documents on your client files. Further information on filing and bring-forward (BF) systems is in Chapter 4. In selecting a timekeeping system, consider whether it includes software to centrally manage billing.

Note the accounting requirements under Part 3, Division 7 of the Law Society Rules. Determine the fiscal year for the partnership and appoint auditors. Seriously consider using a professional accountant. Accounting functions can also be contracted out to a bookkeeping organization. For more information on accounting and bookkeeping, see §3.01 and Chapter 6.

## 10. Budgeting

A budget is a financial forecast that guides a business into the future and makes it possible to establish hourly rates. It will set the tone for the whole financial operation of the firm. Compare actual monthly income and expenses against the budgeted projections.

The start-up capital budget will be as important as the yearly budget. The start-up of a law practice involves commitments to a number of capital expenditures. This budget will be used to determine the amount and type of financing that is required.

Prepare a budget for the first year of operation. Set billing goals for lawyers and legal assistants based on required income, and establish billing policies for the firm. Determine the contribution by each partner and the extent to which bank financing will be required.

For a sample worksheet, see the Law Society publication “Twelve-Month Law Practice Cash Flow Budget Worksheet” in the “Practice Resources” section of the on the Law Society website.

## 11. Indemnification Coverage and Additional Insurance

Indemnification coverage for errors and omissions is compulsory (see *Practice Material: Professionalism: Ethics*).

Consider also obtaining the following types of insurance:

- (a) special riders to cover loss or damage to valuable papers and corporate records;
- (b) public liability insurance;
- (c) tenant’s liability insurance;
- (d) life insurance for lawyers and other staff;
- (e) disability insurance to cover continuing overhead and loss of income; and
- (f) additional medical and dental coverage.

## [§2.04] Cost-Sharing or Space-Sharing Arrangements

Before entering into a cost-sharing or space-sharing arrangement, or a partnership or association, there must be a full and frank discussion among the participants concerning all the issues, rights and duties. In particular, all of the potentially contentious issues should be addressed and policies should be defined. Individual philosophies on firm style, work habits, and expenses are often the most contentious items.

The parties will want to do the following before entering into the arrangement:

- (a) Define common expenses and individual expenses, and how to deal with them.
- (b) Define how to build working-capital cash and how to pay out surplus cash.
- (c) Agree on office protocols, such as telephone answering and message-taking arrangements.
- (d) Make an inventory of all assets of each party at the inception of the arrangement.
- (e) Formally agree on some key terms:
  - review the main lease to determine term, restrictions, and so on;
  - define the duration of the agreement, and its renewal and cancellation provisions; and
  - consider a first-refusal clause or buy-out provision on termination of one of the parties.
- (f) Define policies and responsibilities for referred work and billing procedures.
- (g) Define policies on administrative duties, such as arranging maintenance and repairs, hiring staff and supervising staff.
- (h) Consider whether the lawyer participants should have consistent levels of errors and omissions insurance coverage.
- (i) Clarify a public relations policy. Avoid activities that suggest lawyers are practising in partnership

or association with each other if that is not the arrangement.

- (j) Define precisely what amenities are included, for example:
- space for lawyers and support staff;
  - reception, photocopying, file storage, and boardroom services; and
  - telecommunications services.
- (k) Optional items to include in a cost-sharing agreement would include the following:
- whether the sharers are co-guarantors on equipment leases;
  - periodic bookkeeping services; and
  - arrangements for petty cash or credit cards to cover common expenses like office supplies, couriers, etc.

Refer to rules 3.4-42 and 3.4-43 of the *BC Code*, and see the practice resource “Lawyers Sharing Space” on the Law Society website ([www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/SharingSpace.pdf](http://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/SharingSpace.pdf)).

## [§2.05] Virtual Firm

As an alternative to the traditional office, you may consider a virtual firm.

Lawyers face the same types of risks in managing a virtual practice as in managing a traditional practice. For example, lawyers must always follow the client identification and verification rules (Law Society Rules 3-98 to 3-110), and client information must be kept confidential pursuant to *BC Code* rule 3.3-1.

In a virtual firm, lawyers might manage some risks differently. Maintaining client confidentiality in a virtual office could include all of these things:

- scrutinizing terms of use set by online service providers;
- keeping the server in the lawyer’s office, or if that is not possible, using a service provider who maintains a server in Canada and offers strong data backup and protection, to avoid concerns about data being subject to disclosure under foreign laws such as the US *Patriot Act*;
- maintaining firewall and network security, including training staff not to click on links that could expose the system to phishing or hackers;
- encrypting data before transmitting it over the internet, and upgrading encryption standards;
- considering ongoing upgrades and changes that would impact your data security, such as allowing

clients to access the firm’s website through a password-protected environment; or

- reviewing the viability and security of artificial intelligence services such as chatbots, and automated legal services like smart contracts (see §3.06).

## [§2.06] Partnership

If you choose to practise in a partnership, a number of considerations follow. You might want to incorporate a management company to lease the space, so as to protect tangible assets of the law practice, such as computers and furniture, from the claims of potential creditors, and to split income with family members. Consult your accountant about whether a management company would be beneficial. Also consider whether partners should create a management company or a partnership of management companies.

These are relevant considerations:

- (a) whether share ownership should be equal or in proportion to partnership interest;
- (b) how you will pay support staff;
- (c) who will be the lessee of office space, or the lessee or owner of office equipment or vehicles;
- (d) what the banking arrangements will be;
- (e) how to document the role of the management company or partnership of management companies;
- (f) whether you need a shareholders’ agreement to establish principles of profit distribution, admission of new shareholders and the management contract with the firm; and
- (g) whether to appoint a lawyer as managing partner.

Note that in most firms the items in this section are continually re-examined. Answers given in the initial months of the practice will be modified as time passes.

## [§2.07] Limited Liability Partnership

BC lawyers and law corporations may participate in limited liability partnerships (“LLPs”); see the *Partnership Amendment Act, 2004*, ss. 30, 83.1 and 84 of the *Legal Profession Act* and Rules 9-12 through 9-20 of the Law Society Rules.

A limited liability partnership structure shields an individual partner from personal liability for the debts of the partnership or for negligence and wrongdoing of other partners, except to the extent of the partner’s share in the partnership’s assets. Individual partners continue to incur personal liability for their own negligence or wrongful acts, and for the negligence or wrongful acts of persons they directly supervise or control.

Before applying to register as an LLP under the *Partnership Act*, law firms must apply and be approved by the Law Society. To receive a statement of approval, the firm must satisfy the Law Society that the intended name of the LLP complies with Chapter 4, section 4.2 of the *BC Code* (marketing provisions) and that all partners of the partnership are members of the Law Society or a recognized legal profession in another jurisdiction (Rule 9-15(3)).

There is an exception for multi-disciplinary partnerships (“MDPs”) under Rule 9-15(14):

Despite subrule (3), an LLP that is an MDP in which a lawyer has permission to practise law under Rules 2-38 to 2-49 may include non-lawyer members as permitted by those Rules.

When a law firm offers services as an LLP it must ensure that all of its advertising shows that it is offering legal services through a limited liability partnership. The firm must also take reasonable steps to notify existing clients in writing that it has registered as an LLP and that there are resulting changes in the liability of the partners. To guide firms in meeting this disclosure requirement, Law Society Rule 9-17 sets out a sample notification statement.

The partners of an LLP are personally liable for a partnership obligation if and to the same extent that they would be liable if the obligation was an obligation of a corporation and they were directors of that corporation (*Partnership Act*, s. 105(1)); however, the partners are not subject to the duties imposed on directors of a corporation by common law or under s. 142 of the *Business Corporations Act*.

## [§2.08] Terminating Practice

Part 3, Division 7, Rule 3-87 of the Law Society Rules governs withdrawal from practice.

A lawyer must advise the Law Society in writing of the lawyer’s intention to withdraw from practice and of how the lawyer intends to dispose of the following:

- (a) open and closed files;
- (b) wills and wills indices;
- (c) important documents and records;
- (d) other valuables;
- (e) trust accounts and trust funds; and
- (f) fiduciary property.

Fiduciary property is addressed in Law Society Rule 3-55. Fiduciary property means funds, other than trust funds, and valuables for which a lawyer is responsible in a representative capacity or as a trustee, if the lawyer’s appointment is derived from a solicitor-client relationship.

A lawyer who is terminating practice must also file the final Trust Report for the period from the date of the last Trust Report to the date of termination (see Rule 3-84).

Finally, the lawyer must advise the Law Society, within three months of termination, of the disposition of any trust balances existing at the date of termination.

See the Law Society’s online manual *Closed Files: Retention and Disposition* and the checklist *Winding Up Practice*, available on the Law Society website.

## [§2.09] Terminating Employment

If an employed lawyer leaves a law firm to practise independently or to join a firm, the lawyer should carefully review rules 3.3-1, 3.3-7, 3.5-1 to 3.5-5, 3.7-1 (especially commentaries [4] to [10]), 3.7-7 to 3.7-9, 3.4-17 to 3.4-23, 3.4-26.1 and 7.2-11. The rules require both the lawyer and the firm the lawyer is leaving to inform clients for whom the departing lawyer is primarily responsible (as soon as practicable) that the client has the right to choose which lawyer will continue the matter. However, the duty to inform the client does not arise if the lawyers affected by the changes, acting reasonably, conclude the circumstances make it obvious that the client will continue as a client of a particular lawyer or law firm (rule 3.7-1, commentary [5]). See “Ethical considerations when a lawyer moves on” in the Summer 2017 *Bencher’s Bulletin* and “The departing lawyer in the age of Covid-19 — Ethical, legal and practical guidance” in the Summer 2020 *Bencher’s Bulletin*.

Precedent letters to a client on withdrawal from representation when departing a law firm appear on the Law Society website ([www.lawsociety.bc.ca/support-and-resources-for-lawyers/law-office-administration/lawyer-leaving-law-firm/](http://www.lawsociety.bc.ca/support-and-resources-for-lawyers/law-office-administration/lawyer-leaving-law-firm/)).

A departing lawyer has a duty, upon receiving client authorization to take a file, to deliver a copy of the authorization to the firm, arrange security for outstanding fees and disbursements on the file, and abstain from removing the file until reasonable attempts to fulfill these duties have been made (*Anderson v. Nelford*, 1992 CanLII 715 (B.C.C.A.)).

## Chapter 3

# Law Office Systems and Procedures<sup>1</sup>

### [§3.01] General Office Procedures

Office systems keep the work in a law office organized, timely and consistent. Efficient systems promote effective work. Since many important functions and tasks are delegated to non-legal staff, establishing and maintaining office systems and procedures assists staff and lawyers alike.

You must delegate responsibly and supervise each system in your office. Often, a system is successfully implemented but ultimately breaks down because no one is ensuring that lawyers and staff understand its purpose, or that they follow it, or that they update it.

As a lawyer you must also ensure that new or temporary employees are properly instructed. Periodic internal review and testing of the operation of systems is necessary to reveal any breakdowns.

For further details on topics related to law office management, and for the *Loss Prevention Planning Checklist*, see the Law Society website.

#### 1. Office Manual

It is important to take the time to establish an office policy, procedure, and system manual. A well-documented manual promotes consistency, ensures that systems operate predictably, clarifies roles, and enables everyone to use time more effectively.

In addition to outlining firm policy matters, the manual should explain office systems and how to perform particular procedures. It should include copies of any applicable forms or documents, annotated to show how to use them. Lawyers and staff should be required to familiarize themselves with the documents, systems, and procedures and to review them again when the manual is updated.

Many firms have electronic manuals and forms. Delegate one person to edit and update the master copy, and set an annual review date.

#### 2. Filing System for Open Files

Create a system for opening, closing, storing and destroying files. Keep active files separate from

closed files and “non-client” files. Use another file to keep track of one-time consultations in a given year. Explore the possibility of using a storage firm to store and retrieve old files.

Record storage must comply with Law Society Rules 10-3 and 10-4. If the lawyer holds fiduciary property, records must also comply with Rule 3-55(3).

Most firms have both paper and electronic files. Consider how they should be arranged and where they should be located in the office. Paper files are commonly arranged alphabetically, numerically or alpha-numerically, often by area of law and by responsible lawyer. They may be colour-coded by practice area. Files can be located centrally within the office or near the responsible lawyer or legal administrative assistant. The least desirable location is inside a lawyer’s office (support staff cannot access them), unless there are security or confidentiality concerns (for instance, where there is a space-sharing arrangement). Consider creating a system for keeping track of files if they are temporarily removed for use by lawyers and other staff.

Consider also how you will store electronic files. Systems vary—from storing documents in specific electronic folders by client, to using case management software, to creating a system within which all incoming and outgoing documents are scanned, digitized, and filed electronically.

As a lawyer, you must consider individual and network security in order to protect client confidentiality. Use adequate network access protections and update these as more advanced technologies become available. The time spent upfront should enhance your efficiency and ability to protect clients.

An article in the Canadian Bar Association’s *National* magazine (“Why Law Firms Need to Worry About Quantum Computing,” by Agnese Smith, December 7, 2018) noted that current data encryption and security protocols are inadequate to address security in the future: “Anyone who needs to keep data protected for more than a decade should start thinking beyond today’s common encryption standards.” The concern is that current security protocols are based upon algorithms that are vulnerable to being hacked by increasingly fast computers with increasing computing capacity. James Kosa, a lawyer and past president of the Canadian Technology Law Association, says that law firms, as part of their data retention policies, need to think about why data is being kept, and why it is kept accessible (and therefore vulnerable).

<sup>1</sup> This chapter was prepared and is reviewed regularly by staff lawyers at the Law Society of British Columbia, most recently in February 2023.

If you are storing files in the cloud, investigate cloud-computing platforms designed for lawyers with lawyers' ethical and privacy responsibilities in mind. Also consider keeping a contingency copy of your data: in other words, if you are storing it in the cloud, then also store it somewhere else. This practice guards against data loss or the possibility that the provider might go out of business.

The Law Society has prepared a Cloud Computing Checklist, available on the Law Society website.

### 3. Closed File System

Keep closed files stored separately from active files and "non-client" files. Usually a minimum of two years of closed files are stored at a firm, with the older files stored off-site. The best organization is to assign and store by a new closed-file number.

See *Closed Files: Retention and Disposition* for more details on closed-file procedures and suggested file destruction dates, available on the Law Society website.

### 4. Accounting System

The level and scope of technology used to manage accounting, office, billing and file systems in firms varies widely. These systems are critical to the reliable and efficient operation of a law firm, not only for accounting and case management but also for legal research, legal drafting, and document production. In addition, different types of practice demand different approaches. Lawyers who are not knowledgeable in these areas should consult with experts and experienced colleagues before instituting an accounting system or selecting file, office and case management software and systems.

Contact a practice advisor at the Law Society for guidance and direction on practice management, case management and accounting issues. Some accounting functions might be contracted out to a bookkeeper. Ensure that your accountant or bookkeeper is familiar with the Law Society accounting procedures. Review Part 3, Division 7 of the *Law Society Rules*: "Trust Accounts and Other Client Property."

You need to consider two basic types of accounts: general accounts and trust accounts. The general account is the basic operating account for the law firm business. The trust accounts include both a pooled trust account and separate trust accounts. Funds received from a client in trust will usually be placed in a pooled trust account. For some clients, the firm will set up a separate trust account so that the clients may earn interest on those funds.

Since all withdrawals from trust accounts to pay your fees must be by way of trust cheques or electronic transfers to your general account, you will need to develop a policy relating to withdrawals from trust and the use of trust cheques.

Accounting records should be established for each client matter when the file is opened, whether or not a monetary retainer has been or will be received.

Ask yourself how you will follow up on overdue accounts. At what point should you send out reminders? At what point should you send the matter to a collection agency or commence an action to recover your fees? Arrange a system to standardize these practices.

For more detailed information regarding trust accounting, see Chapter 6.

### 5. Timekeeping Systems

Consider the various timekeeping systems for lawyers. Most lawyers use software that tracks billing and time.

Also consider the merits of integrated accounting and practice management software for preparing the following statements monthly:

- (a) accounts receivable (classified by age);
- (b) fees billed by individual lawyers;
- (c) work-in-progress summary;
- (d) summary of cash received and cash disbursed;
- (e) reconciliation of trust accounts; and
- (f) reconciliation of the general account.

For more information on accounting see Chapter 6.

### 6. Handling Incoming Messages

Many complaints to the Law Society arise because the client is unhappy about the lawyer's failure to communicate. Among other things, a failure to communicate may give the client a false impression that the lawyer has been inactive or has done inadequate work, which may compound the effect of some other lawyer default, such as a failure to act promptly or a clerical error.

You are required to serve your clients in a conscientious, timely, diligent, efficient and civil manner (*BC Code* rule 3.2-1). Achieving this quality of service includes keeping your clients reasonably informed.

All staff must be familiar with the email and voicemail tools used in the office. They also need to appreciate the confidentiality and privacy risks that attach to each form of technology in use.

Here are some suggestions for handling incoming telephone communications:

- (a) if you are unavailable, the receptionist could forward your calls to your assistant (even if you have voicemail), who will usually be familiar with the client and may be able to help;
- (b) your assistant must be instructed to make a note of each incoming phone call;
- (c) your assistant should have the authority to book your appointments;
- (d) tell your clients that if they leave messages it helps if they mention the purpose of the call, so you can be prepared when you call them back;
- (e) encourage clients to indicate when they would be available for a return call in their message;
- (f) if you cannot call as promised, have your staff call and explain why; and
- (g) re-record your voicemail message often, so clients know where you are and when you will return.

## 7. Handling Mail

Use separate physical filing baskets for incoming mail, outgoing mail and mail for pick-up. Separate baskets can avoid confusion.

### (a) Incoming Print Mail

Set aside a specific time each day to deal with the mail—both print and email. Some lawyers review mail daily with their assistants, because much can be delegated and this is a good opportunity to coordinate the workload.

Follow these practices:

- (i) establish office procedures for managing and filing incoming mail and enclosed documents;
- (ii) date/time stamp all incoming print mail and documents, to show when they were received;
- (iii) do not stamp original documents, but affix a slip for stamping, or stamp on the back;
- (iv) attach incoming print mail to the front of the appropriate file for review by the lawyer;
- (v) diarize all items that need follow-up, including items that do not need immediate action but should be noted in the bring-forward system;

- (vi) delegate tasks to the assistant such as drafting replies, making copies, and filing documents.

### (b) Outgoing Print Mail

Usually, the lawyer should sign letters. If staff are authorized to sign certain correspondence, they should sign either with their own names or per the lawyer or firm. Note rule 6.1-3 of the *BC Code*, which states, in part:

A lawyer must not permit a non-lawyer to:

[...]

- (k) sign correspondence containing a legal opinion;
- (l) sign correspondence, unless
  - (i) it is of a routine administrative nature,
  - (ii) the non-lawyer has been specifically directed to sign the correspondence by a supervising lawyer,
  - (iii) the fact the person is a non-lawyer is disclosed, and
  - (iv) the capacity in which the person signs the correspondence is indicated[.]

Ensure that “Encl.” is included on letters whenever there is an enclosure. Staff responsible for mail preparation must then ensure that documents are actually enclosed before mailing.

Make a copy of all outgoing correspondence to be retained in the appropriate file. Make an entry for follow-up in a bring-forward system, if necessary. Clients should be copied with relevant documents (and “copy” should be noted on the documents).

### (c) Email and Electronic Messaging

Many of the same considerations that apply to print correspondence apply to electronic communications. For example, you must develop systems to manage the flow of email (who receives, has access, has authority to reply, etc.) and how you will store and retrieve email and attachments (e.g. print and file, store electronically using file-management software).

You also want to consider managing client expectations given the near-instantaneous nature of email. It may not be practical or efficient to respond to mail as you receive it, since it can seriously interrupt your work flow.

Standardize your approach so that it best suits your practice and work style. Perhaps most critically, electronic systems raise security issues that you need to appreciate and deal with.

Email offers benefits such as speed and ease of reply, but it can also create problems.

## (i) Manage your email:

- Ensure that your clients provide informed consent as to whether or not you can deal with them by email and at what addresses. Deal with it in your retainer.
- Advise your clients that they may wish to set up private email addresses to which only they — not, for instance, employers or family members — have access.
- Before you send email, ensure that the address you have is current. If you have more than one address for a recipient, ensure that you are sending to the proper address. If you are unsure, phone first to check. You do not want to send a sensitive message to the wrong person.
- Add a signature line containing your contact information and asserting that the information in the message is privileged.
- If you do not get a response to your email, follow up with a phone call. If your email is urgent, ensure that you or your assistant follows up on it.
- Create a protocol to handle email when you are out of the office or unable to address urgent matters. Either have a colleague monitor your email or use an automated message that gives details as to whom to contact in case of an emergency.

## (ii) Manage your message:

- Be wary of responding when angry or upset. You might make it a habit to always pause when you are upset, or type a draft message with the address field blank. Reconsider before addressing the message and hitting “send.” Remember that a lawyer has a duty under *BC Code* rule 5.1-5 to be courteous and civil to all persons with whom the lawyer has dealings.
- Take the time to consider your response. Don’t respond before you have fully read the message or the relevant documents, or before you have considered the matter.
- Draft your email carefully. Be wary of giving less attention to drafting email than you give to other legal correspondence. For example, one lawyer who made a claim with the Lawyers Indemnity Fund forgot to add “without prejudice” to an offer sent too hurriedly by email.
- Spell-check your messages.
- Communicate clearly and effectively. Avoid legalese or complex sentences that the other party might misunderstand.

Sometimes a phone call, virtual meeting, or face-to-face meeting is better.

## (iii) Manage your information:

- Gather relevant email in one place. It may be that a client has sent some documents to you and some to your assistant’s account.
- Ensure that you have a record of important messages. If you are using instant messaging, create a copy that you can store and retrieve.
- Back up data stored on all of your devices.
- Periodically clean out your inbox by saving email in folders and deleting email that has no business value.
- Establish policies in your office for email or internet use, as well as for information management.

## (iv) Manage your security:

- Train yourself and employees on phishing scams. Avoid clicking suspicious links in email or giving out personal information.
- Maintain current software for firewalls, anti-virus scanning and malware detection. Guard against threats to your system, and prevent your system from transmitting malware to your clients.
- Use strong passwords and change them regularly. Guard against the possibility that hackers or even former employees could access office networks remotely and disturb data on the system.
- Encrypt especially sensitive email and send it with a generic subject line such as “For your consideration.” Ensure that the recipient can unencrypt it.
- Install software so that you can remotely wipe data in the event that a device is lost or stolen.
- Consider where metadata may be stored in a document, and remove it before transmitting that document outside your office. Particularly if you are using documents as precedents for work on other files, you do not want a client to see the names of those other clients, or the substance of your advice to them. Nor do you want a client to feel that you overbilled for time spent on a file where you copied a document that you had used for another file.
- Before you dispose of hardware, securely delete all data.

## [§3.02] Confidentiality and Security

### 1. Confidential Information

Read section 3.3 of the *BC Code* (also discussed in the *Practice Material: Professionalism: Ethics*). Note particularly rule 3.3-1 and commentary [8] to that rule: a lawyer should avoid indiscreet conversations and other communications, even with the lawyer's spouse or family, about a client's affairs and should shun any gossip about such things even though the client is not named or otherwise identified. Similarly, a lawyer should not repeat any gossip or information about the client's business or affairs that is overheard by or recounted to the lawyer.

Aside from ethical considerations or questions of professionalism generally, indiscreet shoptalk among lawyers, if overheard by third parties who can identify the matter being discussed, could result in prejudice to the client. Moreover, gossip or indiscreet talk by lawyers that is overheard by non-lawyers would tend to lessen the respect for lawyers and the legal profession.

You must also instruct your staff to maintain client privilege and confidentiality. Some staff may be unaware that the client's name, or the fact that the client has retained the firm, is confidential. Remind staff not to discuss client matters outside the office, as they may be overheard. Include this reminder in your office manual.

### 2. Office Security

Office security is often overlooked or presumed. It deserves attention and a defined policy. The Law Society receives a number of errors and omissions claims relating to lost or missing documents. Remember there is always a danger of sensitive documents coming into the wrong hands.

#### (a) Physical Security

Access by the public to your office must be restricted or supervised. Fire exits should not give unsupervised access to file storage or other critical areas.

Where space-sharing arrangements exist with other tenants, ensure that files are secured and maintain locked filing cabinets.

Firms need to be familiar with all electronic privacy issues and need to install and implement systems for maintaining security of the office network, computers and remote access capabilities. Accounting records, precedents, work in progress, and other material stored in electronic systems should be backed up daily, if possible, and the backup copy stored off-site.

The off-site copies will prove invaluable if the computers are stolen or destroyed by fire.

Be careful not to throw away entire legible documents at the photocopier or in recycling boxes. Use a paper shredder.

#### (b) Custody of Valuable Documents

Lawyers often have temporary or permanent custody of valuable documents (e.g. wills, security certificates, bonds, etc.). Ensure that a "Valuable Property Record" for such items is kept in a permanent bound book. Physically verify the existence of these items from time to time.

Keep these documents in a fire-proof locked safe or filing cabinet, or in a safety deposit box.

No document should be released to a client or others without the lawyer's specific knowledge and approval.

Develop a special policy that provides for valuable documents to be stored in a locked place. A list of the materials stored should be maintained, and a lawyer's signature should be required before a document can be released.

#### (c) Security of Corporate Records

Corporate records, agreements, and other documents are often filed together in one binder. For this reason, from time to time, unauthorized parties may inadvertently gain access to privileged information. Section 42 of the *Business Corporations Act* lists documents to be retained at the company records office. Some documents are not available to the public or even to shareholders. Lawyers must be careful that people who want to review corporate records are only able to access those records they are entitled to. Lawyers must remove all privileged, restricted, and excluded documents from view by people who are not entitled to see them.

## [§3.03] Conflicts System

Lawyers must understand how to recognize conflicts of interest, how to prevent them from occurring, and what might happen if they do occur.

A conflict of interest is a situation that impedes the lawyer or firm's ability to serve a client with undivided loyalty. Each law firm must have a system for determining whether there is a conflict of interest before starting to act for a client. Whether manual or electronic, the system requires a centralized index, book, or database. A conflict check should be performed a minimum of twice during the course of a file: first when a potential client contacts the firm, and again after the first interview.

For the first check, your assistant or receptionist should, at a minimum, obtain the client's and opposing party's names (and any former names) when a potential client contacts you initially. This check is done to eliminate a potential client *before* that person discloses any confidential information. Once a client discloses confidential information, you and the whole firm may be unable to act for anyone in the matter.

The second check is much more detailed and occurs after you interview the client about all relevant parties and witnesses. Check again whenever a new party enters the case, such as when a new defendant is added.

Each conflict index should contain the following (provided the information exists):

- the client's name (including any aliases);
- current and former clients;
- affiliates or partners of the client;
- directors or officers of the client;
- affiliated corporations/entities of a corporate client;
- adverse parties;
- co-plaintiffs or co-defendants;
- known relatives of the client as well as other parties;
- common-law spouses of the client and others;
- one-time consultations;
- names of counsel representing any party to the matter; and
- names of lawyers and staff in the firm.

Remember that clients for whom a lawyer provides one-time services, such as notarizing services or independent legal advice, also need to be recorded in the conflicts system.

There are several different conflict systems available. The most reliable method is an integrated electronic accounting and case-management system with a conflict-checking component. Failing that, the following procedures will assist in checking for conflicts:

- (a) completing the file opening sheet including identifying your client, the opposing party (or parties) and any other interested person(s);
- (b) circulating (weekly) the file opening sheet to all lawyers in the firm, or circulating a list of new clients and other related parties; and
- (c) checking the names of clients, opposing parties and interested parties periodically in the alphabetical indexes.

Remember that you are responsible for identifying conflicts between multiple clients on the same file. This identification requires a review of the ethical issues and often of the substantive law.

Assign someone to check for conflicts, and establish a method for recording that the checks are completed. Record whatever procedure you are using in your office manual. For a system to work, everyone in the firm must understand how the system operates and participate in its operation.

You should also develop a policy for what actions to take when a conflict arises. Include that policy in your office manual and ensure that staff understand what steps to take.

A model conflicts of interest checklist is available on the Law Society website ([www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/checklist-conflicts.pdf](http://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/checklist-conflicts.pdf)).

### [§3.04] Use of Checklists

Checklists are useful for dealing with administrative procedures in a law practice and also for substantive client matters. For many procedures, it is useful to create separate checklists for lawyers and non-lawyer staff.

Detailed checklists for opening and closing a file and substantive client matters such as for real estate, civil litigation, personal injury, wills and family law may be found in the Law Society's *Practice Checklists Manual*, updated annually and available on the Law Society website. These may be used as a basis for creating checklists in your firm.

Checklists serve three main purposes:

- (a) they identify required procedures and ensure they are performed consistently, systematically and completely;
- (b) they promote efficiency in handling routine tasks; and
- (c) they confirm for the lawyer that work delegated has been performed.

### [§3.05] Creating a Precedent System

Lawyers use precedents all the time. It is important to spend adequate time setting up a good precedent system and establishing procedures to ensure it is updated and maintained. The precedents and the precedent index may be stored in print or digital versions, or both.

Sometimes a firm develops a standard set of precedents in a particular area of law, then supplements those standard precedents with optional clauses for use in particular situations.

Sometimes a firm establishes a set of precedents that have been approved by senior lawyers for quality and appropriateness. In such a case, an "approval" and "date" stamp (or electronic equivalent) should be put on the precedent before it is added to the precedent system, to validate that it has been approved and to determine how current it is.

A document used as a precedent should be purged of specific names, dates, amounts, and other information that is unique to the original file (including metadata – see the following section). The user will need to be instructed where to input what information, so flags such as “Set out names of parties here in full” are useful.

Ensure that only one master copy of each precedent and precedent index is in circulation, to prevent unauthorized variations. Ensure that the precedents are updated as required, and control who is authorized to update them.

A comprehensive precedent index might be arranged by title, by practice area, by type (e.g. all “directors’ resolutions”), or by transaction (e.g. foreclosure precedents in the sequence in which they are usually required). If the database is maintained electronically, the precedents can be retrieved by keyword searching.

In some firms, frequently used precedents are made part of a document production system or expert system. In an expert system, the user creates the first draft of a document or set of documents by responding to a series of questions about the client and the file, and the software program then completes the draft precedent using the answers.

It may be desirable to create a drafting style guide for documents produced by the firm to ensure consistency of style and to enhance the document quality.

## [§3.06] Document Drafting and Production

### 1. Document Production

#### (a) Using Forms and Precedents

Ensure that personnel are trained on the use of forms and precedents, and that they are used consistently.

When using a precedent, keep in mind that it will need to be adapted.

- The original might have been created at a time before a change in the law, so might need to be updated for legal substance.
- The original might have sequential numbering (e.g. numbered paragraphs). If you add or delete text that affects the numbering, then you will need to check that it is still sequential (and correct any cross-references that rely on the original numbering).
- The original might have been drafted for a singular grammatical subject (perhaps Company B was buying shares, or Person A was suing the defendant). If you want to use it for multiple subjects, you must change the grammar throughout the document.

When creating and revising electronic documents, lawyers and non-lawyer staff need to

guard against the inadvertent exchange of confidential information. Remember that when you create an electronic document you are also creating metadata, some of which you may not see on your monitor. That metadata can include previous versions of a document, and even the names of client files where the document was used. This is even more critical when documents are being exchanged outside the firm. Make sure you understand the metadata in your software and how to remove it from documents.

#### (b) Smart Contracts and Blockchain

In “smart” contracts, parties come to an agreement simply by inserting an electronic signature in a digital document. Once the electronic contract is “signed” in this way, payments can be generated automatically. Smart contracts are also capable of enforcing themselves when specific conditions are met. Typically, smart contracts are implemented over a blockchain, and payments are in cryptocurrency. It is also possible to have digital “smart” contracts that are not linked to blockchain for execution and enforcement.

“Smart Contracts: Coming Soon to a Law Firm Near You,” (Ann Macaulay, *PracticeLink*, February 26, 2018, published by the Canadian Bar Association) describes the future of smart contracts. Usman Sheikh, head of a national law firm’s Blockchain & Smart Contracts Group, says that smart contracts will usher in a new business model for law firms. The new model will include multidisciplinary teams where lawyers work alongside software coders, or must themselves understand coding:

Lawyers will have to understand not only how to read and probably prepare written contracts but also be able to understand the coding that is affecting those contracts and make sure they are expressing the black and white text of the written contract itself.

In a post on *Slaw* (January 3, 2019), Jason Morris, an Alberta lawyer, agrees that “Smart contracts really will impact the future of the legal profession,” but Morris says that whether the contracts are implemented over a blockchain or not is a separate question. They need not be, Morris says, adding that blockchain is a benefit where trust is an issue between the parties.

According to Xavier Beauchamp-Tremblay, CEO of CanLII (cited by Macaulay in the *PracticeLink* article), blockchain’s biggest advantage is that it is “trustless.” In other words,

you don’t need to trust or know the other party, there’s no centralized player that actually handles all of the payments between the players. This is where the magic is.

Conveyancing is one area where use is growing, according to Sheikh, who notes that there are “smart real-estate lawyers” using smart contracts.

Beauchamp-Tremblay does not foresee smart contracts and blockchain creating radical changes in the legal profession in the short term, but agrees that lawyers should learn as much as they can about this technology, because change is coming.

freshers. Identify one person in the office with authority to enforce adherence to a system.

- (d) Lawyers or staff may feel too flustered or busy to diligently follow procedures, or they may feel that no one else needs to know what they are doing. Ensure that all staff (and lawyers) take the time to follow and document proper procedures.

## 2. Proofreading

Documents should be proofread, not just spell-checked by software. The final draft should be read in its entirety—not just where it has been changed or updated—since changes to one part often affect other parts.

When documents include accounting information, ensure that a calculator is used to re-add amounts to supplement proofreading and identify errors (such as transposition of numbers, which can occur in the case of manual calculations).

Once a document is finalized, consider making it “read only” to prevent it being further modified.

## 3. Off-Premises Storage

When backup copies are stored off the premises, ensure that there is a procedure for having them periodically updated. If there is a fire in the office, it will be crucial that the off-premises backup is current. Similarly, if documents that are stored in the cloud are lost, it will be critical to have other copies that are current. When considering off-site storage, consider Law Society Rules 10-3 and 10-4 and, if applicable, consult the Cloud Computing Checklist on the Law Society website.

## [§3.07] Breakdown of Office Systems

Too often an office system or procedure is implemented but later abandoned for the following reasons:

- (a) A key employee may depart without passing their knowledge to other employees. Ensure that knowledge is maintained and is passed to new employees. Keep written policies and instructions about office systems in your office manual for ongoing reference.
- (b) The system may not have been followed by staff or lawyers who felt it was inefficient or ineffective. Develop feedback loops to improve and upgrade systems on an ongoing basis.
- (c) People may fall out of practice in using office systems and procedures. Ensure that office systems and procedures are supported with training and re-

compliant with Law Society standards. If you have questions about relevant Law Society requirements, contact a practice advisor.

## Chapter 4

# Client File Management and Timekeeping<sup>1</sup>

### [§4.01] The Importance of Systems

#### 1. What Systems Do You Need

Good file management allows lawyers to provide reliable professional services to clients. (See Chapter 5 for more on client relations.) Maintaining careful file management procedures, document practices, and diary systems is critical to ensuring that you deliver the quality of service expected of a lawyer.

Maintain these important systems and procedures:

- (a) file opening procedure (§4.02);
- (b) file organization protocols (§4.03);
- (c) limitation reminder or bring-forward (“BF”) system (§4.04);
- (d) time recording and billing systems (§4.05);
- (e) retainer protocols (Chapter 5 at §5.05); and
- (f) file closing procedure (§4.07).

Ideally, compile information about these systems in an office manual. Keep the manual updated and review it periodically to ensure that it accurately reflects your office’s current and proper practices, and is being followed by all personnel.

#### 2. Integrated Client File Management, Timekeeping, Billing and Accounting Systems

This chapter discusses the systems for file management and timekeeping. While some firms still use manual systems, many lawyers recognize the benefits and economies of automated systems. Lawyers need to be alert to technology that can improve the efficiency and accuracy of practice.

Most case management software integrates with numerous other office systems. An integrated accounting and case management system can include calendaring, contact management and communications, document management, conflict searches and research, as well as other features. Examples of integrated accounting and practice management software packages include PCLaw, Clio, and ProLaw. Lawyers are responsible for performing their own due diligence to ensure their software of choice is

### [§4.02] File Opening

#### 1. Basic Information and Client Identification

##### (a) Basic Client Information

A carefully designed file opening sheet gathers all the information on critical questions. It is a starting point in providing quality representation on the file, and is the origin for all the incidental and administrative procedures involved in file opening. However, it does **not** take the place of a comprehensive client interview, which is documented in a different form.

File opening sheets should include basic data:

- the client’s name (and any previous names);
- home and business contact information that is relevant (addresses, cell phone, email);
- client’s occupation;
- opposing party and lawyer name(s), as well as information on other possible conflicts;
- subject matter of the file;
- date the file is opened, and referral sources;
- applicable deadlines and limitation dates;
- billing information; and
- file closing date and file destruction date.

The file opening sheet reflects special instructions and proper diligence:

- (i) it records special promises and instructions, such as not to give out the client’s address;
- (ii) it records critical limitation dates or closing and destruction dates on the file;
- (iii) it enables the lawyer to check or confirm that there is no conflict of interest; and
- (iv) it provides evidence that these procedures have been completed and recorded.

The responsible lawyer should complete the file opening sheet at the initial client interview. The staff member responsible for opening files will use the information to record entries in other administrative systems such as a client index, the accounting system, and the BF system (for limitation dates). If a conflicts check has not already been performed, the staff member will perform it.

A sample file opening sheet is provided on the next page.

<sup>1</sup> Reviewed regularly by staff lawyers at the Law Society of British Columbia, most recently in February 2023.

Sample File Opening Sheet<sup>2</sup>

Note that lawyers may be required to obtain and retain additional documents and information in order to comply with the client identification and verification rules (Rules 3-98 to 3-110). See Chapter 7 and the *Client Identification, Verification and Source of Money Checklist* at [www.lawsociety.bc.ca](http://www.lawsociety.bc.ca).

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**FILE OPENING INFORMATION**


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File opening date: \_\_\_\_\_ Limitation date: \_\_\_\_\_

---

**CLIENT INFORMATION**

Client's Email: \_\_\_\_\_

New Client? YES  or NO  If NO, existing Client #: \_\_\_\_\_

Client Full Name: \_\_\_\_\_

Client Home Address: \_\_\_\_\_

Client Business Address \_\_\_\_\_

Telephone Numbers Business local: \_\_\_\_\_ Home: \_\_\_\_\_

Cell: \_\_\_\_\_ Cell: \_\_\_\_\_

Pager: \_\_\_\_\_

Fax: \_\_\_\_\_

Assistant's name: \_\_\_\_\_

Company YES  or NO  Business Type: \_\_\_\_\_

Web Page: \_\_\_\_\_

Individual YES  or NO  Occupation: \_\_\_\_\_

Employer: \_\_\_\_\_

Spouse's Name: \_\_\_\_\_

---

**MATTER INFORMATION**

Brief Description: \_\_\_\_\_

Opposite Party: \_\_\_\_\_

Address: \_\_\_\_\_

Postal Code: \_\_\_\_\_ Telephone: \_\_\_\_\_

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<sup>2</sup> ©The Continuing Legal Education Society of British Columbia. This form appears as [§16.67] in the *Managing Your Law Firm Practice Manual* and is reprinted and modified here with permission. All rights reserved.



## (b) Client Identification and Verification

In completing the file opening, remember that you may be required to obtain and retain (or copy) documents to fulfill your obligations under Law Society Rules 3-98 to 3-110 on client identification and verification.

The point of client *identification* is to require lawyers to obtain basic identification information about clients, including (for individuals) name, address, telephone number and occupation. The client *verification* rules require lawyers to confirm that the client is who they say they are, using reliable, independent source documents or information (for instance, government-issued identification such as a driver's licence). The identification and verification requirements vary according to the type of matter and the type of client.

Changes to the client identification and verification rules took effect on January 1, 2020. These changes are based on the Federation of Law Societies' model rules on anti-money laundering. These changes include stricter requirements for verifying a client's identity, more options for confirming a client's identity, and requirements that lawyers obtain additional information about the client's source of money.

Lawyers must retain the client identification and verification documents in the form and for the duration required under Rule 3-107.

The Law Society has produced extensive materials on this topic, available on the "Client Identification & Verification" page and through the Advice Decision-Making Assistant (ADMA), both available from the homepage of the Law Society website. See Chapter 7 for more on the client identification and verification requirements.

## 2. File Opening Book/Record

The file opening "book" provides a chronological record of all files opened. It should contain the following information:

- (a) a sequential file number;
- (b) the file name;
- (c) the date the file is opened;
- (d) the responsible lawyer's name;
- (e) the client's name and contact details;
- (f) the reference or subject matter; and
- (g) the opposing party name(s).

It will likely also include blank spaces for the date the file is closed and for the file destruction date.

The file opening book provides valuable management information:

- (a) the number of files being opened per month, and per lawyer or per area of law;
- (b) the number of files any given client has with the firm; and
- (c) the files still open beyond a reasonable time (particularly those with limitation dates).

Each new client should have a separate file, except for clients who came in once only. One-time clients might be seeking independent legal advice, powers of attorney, or notarizing. Paperwork for those one-time clients may be filed together in an annual folder, provided these files are indexed and closed at the end of each year and the client names are entered into the conflicts system.

## 3. File Management Index Systems

The type of index system used will depend in part on the size and diversity of the law practice. Use naming conventions that are compatible with your accounting system or case management software. Files are typically indexed (or searchable) in one or more of the following ways:

- (a) alphabetical by client surname;
- (b) alphabetical by opposing party name;
- (c) chronological; or
- (d) by custodial inventory, showing files that contain inventory such as wills or fiduciary property in the custody of the firm.

## 4. Accounting Records

Accounting records should be established for each new file matter when the file is opened, even if no retainer or other trust money has yet been received from the client. The records are:

- (a) individual client trust ledger;
- (b) individual client accounts receivable/disbursement ledger; and
- (c) individual client time billing record.

The initial information to be recorded would include the following:

- (a) name of client;
- (b) address and contact information;
- (c) file number; and
- (d) matter; and
- (e) responsible lawyer.

See Chapter 6 for trust accounting requirements.

## [§4.03] File Organization

### 1. Making Files Easy to Find

Creating and maintaining protocols for information management makes locating files swift and reliable. The procedures must be easy to use, and you should ensure that everyone in your office knows where to file documents and where to find them.

Staff lawyers of the Law Society who conduct practice reviews under s.37 of the *Legal Profession Act* occasionally find that a lawyer's files are a jumble of notes, correspondence, documents and pleadings. This problem is often one of the underlying triggers for a practice review. On rare occasions, lawyers fail to establish a proper file storage system.

Active client files may be in paper or digital format, or both. Content of electronic files ranges from storing client documents on specific files, to adopting a case management program, to complete electronic filing of all incoming and outgoing documents, emails, negotiations, communications, etc. in the "paperless office."

### 2. Organizing the File Folder

Even if you maintain primarily digital files, you will likely still generate paper files. In either case, create a file folder for each new matter.

In a paper file, documents should be securely fastened to keep the documents in order and to stop them from falling out (and getting lost).

The remainder of this section illustrates how some paper files may be organized. Obviously, the software you use will determine how electronic files might be organized in a standardized way.

### 3. Organizing Simple Files

The left-hand side of a file is typically used for billing and communications (chronological order):

- file opening sheet;
- retainer letter or contingency fee agreement;
- client information checklist;
- dated notes of conversations; and
- other correspondence and memos to file.

The right-hand side is typically used for all other documents (chronological, if possible):

- searches (e.g. for real estate files or corporate/commercial files); and
- top document—procedural checklist or current file status report.

Additional documents such as expert reports or appraisals may be fastened to a separate sub-file and ordered chronologically.

### 4. Organizing Complex Files

Organize complex files as appropriate for the particular area of law. A main file and sub-files should be prepared. The main file will contain all the **communications** contents described above.

Sub-files might be gathered in a multi-file folder or a concertina file. Use divider tabs or file flags to make the division clear and to assist in retrieving documents. You might use a detailed index.

#### (a) Commercial Files

Sub-files commonly used in commercial files are "searches" (including letters to and from registrars and record-keeping authorities) and both "drafts" and "final documents" (if there are numerous documents). This "final documents" sub-file is useful in preparing the brief of documents for the client after the transaction closes.

#### (b) Family Files

These files commonly have sub-files labelled "client documents," "opposing party documents," "pleadings" (if litigation is commenced) and "agreements" (if any). You might add further sub-files such as "assets," "liabilities," "support," and "case law."

#### (c) Civil Litigation Files

Litigation files often contain standard sub-files: "pleadings," "client documents," "opposing party documents" and "case law." Other sub-files might include "medical evidence," "wage loss evidence" and "expert reports."

## [§4.04] Tracking Dates in BF Systems

### 1. Do Not Miss Limitation Dates

It is critical to maintain a suitable reminder system for limitation dates and routine bring-forward (BF) matters. The importance of a formal reminder system cannot be overemphasized; it is a key to a well-organized office and less stressful practice.

**Limitation dates** are those for which you or your client are statutorily, contractually or otherwise committed. A high proportion of claims under the Lawyers Indemnity Fund arise from alleged missed limitation dates. For more on the Lawyers Indemnity Fund, see *Practice Material: Professionalism: Ethics*. That material also includes the Law Society publication, "Limitations and Deadlines Quick Reference List," which lists commonly missed lim-

itations in each area of practice and the statutes where they are found.

Very few claims arise from ignorance of the law. Rather, they tend to be systems failures and slips. “Systems failures” include ignoring or failing to maintain the office systems that have been put in place. These systems failures are most often to blame in failing to meet shorter limitation periods, such as notices to admit under the Supreme Court Rules and notice requirements under the *Local Government Act*. “Slips” include simple mistakes, such as paper notices being buried under piles of documents, or communication problems, such as people misunderstanding who was to do what.

Law firms are extremely vulnerable to limitation errors when lawyers or legal assistants in the firm depart or arrive, as the people responsible for overseeing these systems leave and new people are being trained.

**Bring-forward dates** are specific dates planned for contact or review. They might relate to specific matters such as responding to correspondence or taking steps, etc. Alternatively, they may simply identify when it is time for a routine check on the file. To make sure that no files are neglected indefinitely, always make sure to schedule at least a periodic file review for each file. **Every file should have at least one bring-forward notice scheduled in the system, in order to ensure that no file is neglected.**

Over 50% of complaints made to the Law Society each year directly or indirectly relate to failures of reminder systems, including failure by lawyers to schedule periodic reminders or act on those reminders.

## 2. Characteristics of Good Reminder Systems

There are many reminder systems. Your reminder system might include alerts in your case management software or flags in your calendar. It should be designed so that reminders are not only brought to the lawyer’s attention but are active until someone takes a step confirming that they have taken the necessary step or have reviewed whether it is necessary to schedule further steps. Further, the reminder date should give sufficient time so that any legal work required can be completed before the final deadline.

A general rule is that each reminder date or limitation date should be noted three or four times before the ultimate date. To ensure that no file “slips through the cracks,” make it a rule that no file is put away in the filing cabinet without a reminder in the system, even if it is only to ask if the file can

now be closed. **Each file should be brought forward at least once every month.**

The coordinated efforts of the lawyer and administrative legal assistant are normally required to make a system work. While lawyers make most decisions about which dates to note in the calendar, the legal administrative assistant’s attention to detail in entering and checking entries is integral to most systems. Accordingly, a “double” reminder system involving both lawyer and assistant is strongly recommended. (If no assistant is available, the lawyer should ensure that each limitation date is recorded in two different places.) Because the costs of missing even one limitation date can be devastating, it is best to implement a “double” reminder system for limitation dates.

Reviewing and following up on reminders should become a critical daily routine in a lawyer’s practice. The day’s reminders should be reviewed each morning. Then at the end of each day they should be reviewed to confirm that necessary steps were taken.

Initially the reminder system with critical BF dates specific to the file should be populated using information from the file-opening sheet. Those dates should be integrated with other procedures for handling client files, which might include scheduling time for preparation and other steps in advance of those dates. For example, if the date of the next client meeting is in the system, the lawyer and staff might plan their next steps in making progress on the file in order to report to the client. The system should also be flexible enough to respond to later changes, such as rescheduled appointments or new priorities.

If the reminder system is paper-based, it should be kept in a central location and secured at night. Whether it is paper-based or digital, the system should be periodically reviewed to ensure that erroneous reminders are removed or corrected.

## 3. Calendar or Desk Diary System

There are a number of automated BF systems. These features are typically incorporated into legal accounting packages and case management software. You should be able to use the system for both general BFs and reminders of limitation dates. The system will not work unless it is properly maintained and staff all know how to use it.

Designate someone to enter the relevant information into the system: the client name, file number, reminder dates, dates leading up to the reminder date and the reason for the reminder. Reports should be run daily, weekly and monthly.

When the lawyer opens a file having a limitation date, the lawyer should make (or check that it has been made) an entry under the appropriate date in the lawyer's calendar or desk diary, recording the file number, client name and action required.

Generally, the lawyer then records at least three early warning reminders at intervals of six months, two months and two weeks ahead of the limitation date. In some cases, time might be shorter. If there is a paper file, the lawyer notes the actual limitation date prominently on the cover.

Corresponding entries should be made in the legal administrative assistant's calendar or desk diary, unless a shared calendar system is used.

Each time an early-warning reminder is triggered, the administrative assistant checks on the file progress and determines whether it needs to go to the lawyer's attention. Then the assistant annotates the reminder to say that the step was taken. Similarly, each time the lawyer receives the file in response to an early-warning reminder, the lawyer makes a note that the file was reviewed.

#### 4. Sample Dates to Note in BF Systems

##### (a) Client Services

###### (i) Dates tasks are due:

- commencing an action, taking steps, filing and serving court documents or reports;
- corporate or securities meetings or registry filings; or
- following up on demands.

###### (ii) Dates for renewals:

- licences, leases, or trademarks; or
- notices of claim, judgments.

###### (iii) Dates of appearances:

- chambers, trial, discoveries or other proceedings.

###### (iv) Dates to perform updates:

- wills and trusts; or
- buy/sell business valuations.

###### (v) Expiration dates for limitation periods.

###### (vi) Closing dates for real estate transactions.

###### (vii) Responses to correspondence and settlement offers, receipt of retainers or instructions, reminders to do particular work.

##### (b) Office Management

###### (i) Due dates:

- for payments, such as tax returns, GST and PST remittances; and
- for accounts receivable.

###### (ii) Renewal dates:

- office lease, insurance; and
- practice licences, memberships.

#### 5. Review Procedures

Management should review procedures to ensure staff are complying with them and that they are as effective as possible to prevent errors and omissions. For example, it is important to have a back-up system to detect neglected files, especially those with no fixed deadlines and those orphaned (through some miscommunication) with no supervising lawyer. Management review procedures vary between firms. This list contains examples.

##### *Daily*

Review the current day's diary and to-do list and the preceding and succeeding pages of the diary for matters to be done or followed up. Review and assess files and diary. Meet and coordinate work with your staff.

##### *Weekly*

Systematically review open client files to detect overlooked matters.

Hold staff discussions to discuss the status of particular files, client complaints, unresolved issues, backlogs, and other concerns.

##### *Periodically*

Review the client file opening book for open files to identify any that have been misfiled or classified improperly.

Review the accuracy of the limitation reminder system to ensure that reminders are not being misfiled or misrecorded, that reminders relating to closed files are being purged, and that files needing action are being identified as planned.

##### *Monthly*

Review the monthly listing of trust balances. This should identify trust balances that have not changed for 30 days (indicating possible attention required to client file) and balances relating to files with limitation dates.

Review work-in-progress reports (see §4.05(4) below) to identify files that need to be billed and files with little recent activity.

## [§4.05] Managing Time

The lawyer's time is the most important asset of the law practice. Lawyers who fail to manage time effectively might spend too long on some matters, resulting in unhappy clients or lost income. It might even result in missing other deadlines, or not having time for matters that warrant full attention.

Lawyers should develop time-management skills at an early stage in their practice careers. Your law-office software can show you where your time is going, and alert you to how you could reallocate it. Most law-office software allows lawyers to keep track of billable time, maintain limitation dates and BF dates, keep to-do lists, do conflicts checks, and track other work.

Tasks must be organized and priorities identified. Keep organized by dedicating time for routine tasks:

- planning the day, week, month;
- dealing with mail and communications;
- meeting with clients;
- prioritizing and performing legal work;
- ensuring compliance with legislative and regulatory matters such as accounting records, taxes, etc.; and
- marketing, networking and continuing professional development.

Ultimately, ensure that you follow through and complete the tasks you have identified.

### 1. Recording Time

Statistical data, accumulated by every bar association that addresses law office economics and management, has proven that lawyers who keep time records earn more than those who do not.

Timekeeping is not only about billing. It also provides information about the practice:

- (a) dividing time by type of work—criminal law, real estate transactions, corporate work and so on—forms a basis for eliminating unprofitable or undesired work;
- (b) in reviewing time records, lawyers can identify tasks that occupy large proportions of time, which encourages the lawyer to seek ways to automate those processes or reduce time spent on repetitive work;
- (c) time records promote efficiency;
- (d) time records constitute a basis for supporting any fee challenged by a client;
- (e) solicitor–client rapport is enhanced when a client receives not only a statement but also a

detailed description of the work done on the client's behalf; and

- (f) time records are an excellent basis for monitoring the efforts of new associates.

In *Merle Campbell Law Offices v. Pattinier*, 2002 BCSC 978, a client complained about a lawyer's bill where the fees alone exceeded \$206,000. The Master found that the lawyer had failed to record time effectively or accurately, and provided no adequate explanation for what was clearly improperly recorded time. The Master considered evidence from other lawyers as to what would have been a reasonable hourly rate and time to complete the legal services, and allowed the lawyer \$135,000 in fees, a reduction of nearly \$80,000.

In summary, there are many reasons for a lawyer in private practice to keep accurate time records.

### 2. Timekeeping Systems Generally

A progressive system will automatically render a statement to the client at the end of the billing period. It compiles the data into monthly, quarterly and annual reports rendered to lawyers, and might also remind lawyers to record time.

Lawyers must record time as it is spent, because they may forget it, or estimate it inaccurately, if they record it later.

The timekeeping system must distinguish time spent for different purposes:

- (a) time chargeable to each individual client;
- (b) time expended by each lawyer but not chargeable to any client; and
- (c) total daily time expended by each lawyer.

The timekeeping system must:

- (a) explain each service performed, in a format suitable for billing purposes;
- (b) accumulate the total time expended on each client by all lawyers of the firm; and
- (c) provide comparative information on time charged and time billed for each client.

With automated time recording, lawyers record their time directly into the system, adding a narrative describing the lawyer's activities or selecting established codes for various services. The time is charged and calculated at the specified lawyer rates. Most automated systems permit more than one billing rate for each lawyer, based on the type of work. In addition, fixed fees may be specified instead of an hourly rate.

The time remains on the system until it is billed. When billing time comes, automated disburse-

ments can be added. Expenses such as long-distance charges, courier fees, court reporter fees and photocopy fees are input on a daily basis.

With an automated system, each lawyer is provided with a regular work-in-progress (often called a pre-bill report) that indicates, for each client:

- unbilled time and disbursements;
- accounts receivable; and
- trust balances.

Documenting unbilled time and disbursements acts as a reminder to lawyers to bill regularly. It can also show progress toward billable targets. A report that includes trust balances reminds a lawyer, at least, to bill the trust balance in order to transfer funds into law firm accounts.

More frequent billing can improve cash flow and client relations. Clients will be aware on an ongoing basis of the fees and disbursements, which reduces the potential for disputes, and helps to identify billing problems at an early stage.

Some firms use manual timekeeping and billing instead of automated systems. A simple manual recording system is as follows:

- (a) each lawyer records time expended on each client, using a daily sheet;
- (b) the legal administrative assistant maintains a summary record for each client;
- (c) at the end of each day, the legal administrative assistant transfers each individual time entry from the day's sheet to the appropriate client summary record;
- (d) any time not chargeable to clients is transferred to separate records for each category (business development, education, etc.);
- (e) the total charged to all clients for the day is recorded on a monthly summary with separate columns for each lawyer, and the daily totals of non-chargeable time are transferred to a separate monthly summary sheet for management information; and
- (f) at billing time, the client summary record is pulled and the time is totalled.

### 3. Work-in-Progress

Work-in-progress ("WIP") represents the unbilled hours accumulated on client files, usually valued at the standard hourly rate charged by the lawyer. Sometimes this is referred to as the unbilled value of time. It represents an inventory of lawyers' time, which increases each time a charge is recorded on a file. Each time a client is billed, the time relating

to that billing is reduced from the work-in-progress inventory.

Remember that the work-in-progress record is for information purposes only. The value of your work-in-progress has to be realized, that is, converted to billings and collected from the client.

Certain controls should be implemented over unbilled time to ensure that it stays manageable:

- (a) time records must be submitted promptly;
- (b) time for each client must be summarized and billed regularly; and
- (c) accumulated unbilled time for each client should be reported to the lawyer regularly.

Billing policies based on accumulated unbilled time should be established for the firm. An example of such a policy is to bill at the earlier of

- (a) completion of the client matter;
- (b) monthly; or
- (c) when the value of unbilled time exceeds \$ \_\_\_\_.

## [§4.06] Improving Productivity

### 1. Lawyer's Handbook

This section has been adapted from material in *The Lawyer's Handbook*, published by the American Bar Association.

Lawyers must develop good work habits and use time profitably. These are some guidelines.

- (a) Establish and maintain regular office hours.
- (b) Set aside time at the beginning of the day to think and to plan your work.
- (c) Establish regular times for particular tasks, such as handling correspondence in the morning and meeting clients in the afternoon.
- (d) Delegate as much as possible, and give clear instructions to minimize time spent correcting.
- (e) Keep accurate written records of every working hour in the day (not just billable time, but all time available for work). Most lawyers are astonished to learn how few hours are actually spent in billable legal work in the average day.

### 2. Technology and AI

- (a) This section is adapted from "Technology and Legal Services" by the Solicitors Regulation Authority in the UK (November 2018), ([www.sra.org.uk/risk/risk-resources/technology-legal-services/](http://www.sra.org.uk/risk/risk-resources/technology-legal-services/)).

### *General Benefits of Legal Technology*

Increasing use of technology can benefit the legal market by improving access to legal services, driving competition in the market, and improving service standards.

If firms can increase their efficiency and productivity, they can reduce costs to meet the needs of those who would not otherwise be able to afford legal services. Also, remote legal systems and services accessible via phone or online help to deliver legal services to those who may be able to afford legal services but cannot physically access them.

There is an increasing demand for online legal services and service via email. Firms are working to meet that demand and so are court services. Online claims resolution is now working in the UK and in Canada (including at BC's Civil Resolution Tribunal).

Technology helps firms compete. It helps firms work more quickly and accurately, especially with AI (artificial intelligence) applications that automate routine processing work.

That efficiency frees up lawyers' time to focus on offering better value and more engagement with clients. Those improved standards of service promise greater client satisfaction.

### *Specific Productivity Opportunities*

The legal services marketplace is innovating to improve existing processes:

- online document portals improve communication within firms or with clients and remote users;
- unbundling allows legal services to be broken down into components, many routine parts of which can be automated;
- electronic documents can be completed with digital signatures;
- using AI in document management improves the speed and accuracy of legal opinions, document disclosure and regulatory compliance;
- virtual firms offer services at lower cost due to lower overhead; and
- chatbots offer clients interactive self-service legal advice.

In one example, a law firm introduced a chatbot to do routine tasks. It could tell telephone callers which lawyers were available, carry out conflicts checks, and book appointments with particular lawyers. The firm was able to reduce hours for all its staff without reducing pay.

In another example, a legal technology company held a competition between its AI software and 20 experienced lawyers to detect issues in contract clauses. Both humans and AI were highly accurate, but the humans took an average of 92 minutes while the AI took 26 seconds.

In another example, two opposing parties were able to work together with a chatbot facilitating their negotiation to come to an agreement.

- (b) This section is adapted from "AI and the Future of the Legal Profession" by Suzanne Dansereau, published by the Canadian Bar Association in *National* (Spring 2018).

Xavier Beauchamp-Tremblay (CEO of CanLII) and Kang Lee (in-house counsel at an international company) discussed AI, and agreed that AI offers significant benefits to lawyers, but warn that it might mean job losses, too.

We will be able to have a more complete picture of a case in less time [...] the rigorous verification, analysis and collection of evidence will all become less time-consuming and costly. [...] The automation of repetitive tasks will enable lawyers to focus more on reflection and strategy.

Nevertheless, they point to an American bank that recently replaced about 60 lawyers with software programs.

### 3. Improve Your Practice Profitability

This section has been adapted and updated from "Top 10 Tech Tips" by David Bilinsky in *Benchers' Bulletin* (2010: No. 4, Winter) and "Six Steps to Improve Your Practice Profitability" by David Bilinsky and Laura Calloway, in *Benchers' Bulletin* (2006: No. 1, January–February).

Improving productivity involves both using new tools and developing strategies for working smarter. Here are some examples.

#### *Tools: Voice Recognition*

Voice recognition software translates speech to text on the computer. The productivity gains that can be realized are wonderful. It can transcribe dictated correspondence or notes, transcribe voicemail messages, transcribe recorded proceedings, and even authenticate voices for biometric identification.

#### *Tools: Cloud Storage*

Need to send a big file but the recipient's email inbox is too small? There are many storage and transmission options. Review the Cloud Computing Checklist on the Law Society website.

### *Strategy: Implement a Financial Reporting System*

You need to implement a system that can deliver financial information. To determine whether you are meeting your targets, you need sufficiently detailed and timely reports:

- a statement comparing actual income and expense numbers against your budget, for both the current month and the year to date;
- a statement showing worked but unbilled hours (WIP) for every lawyer, for both the current month and the year to date;
- a statement showing billings by lawyer for the current month and the year to date; and
- a statement showing funds in trust by client and whether those funds are retainers or funds held on behalf of clients.

### *Strategy: Assess Your Cash Flow*

Even if you use accrual-based bookkeeping (based on amounts payable, as opposed to cash accounting, which is based on amounts paid), your firm will still live or die by its cash flow. Accordingly, your accounting system has to forecast cash flow needs and compare them with expected cash inflows. Any cash shortages must be covered either by the lawyers (by way of lowered draws or capital contributions) or by increasing the firm's debt (usually by increasing the line of credit). Long-term chronic cash deficits usually herald problems.

One cash flow item many lawyers fail to monitor and anticipate is taxes. Amounts to be remitted to the government—whether they are collected taxes or employee withholdings—are deemed to be trust funds, and failure to pay those charges in a timely manner could have dire consequences.

### *Strategy: Track Your Time*

Many lawyers do not track their time. They give various reasons, including, “I only handle matters on a contingency basis, so the hours I put in don't really matter,” or “Tracking billable hours just takes away from the time that I can be doing legal work.” For the individual lawyer, financial performance really comes down to two measures:

1. effective hourly rate (EHR), and
2. total billings.

Determine your effective hourly rate on a file by taking your fees billed and dividing them by the total hours put into a client's file (not just the hours billed but all the time worked, billed or not). Measure the EHR for all your files and rank the results from largest to smallest, to see which clients and files generate high dollars for the time spent.

After you've determined your EHR, calculate total collections per lawyer, per file, per month. When you look at total collections, you see which files generate large bottom-line results.

Now—to work smarter and not harder—concentrate on clients and case types that are at the top of the list for both EHR and total collections.

## [§4.07] File Closing

The last acts you will need to perform for most files are to properly close, store and eventually destroy the file. Use a file closing sheet for this process.

A file closing sheet should contain this information:

- the name of the file;
- the date the file was closed;
- who closed the file;
- file stripping checklist indicating what, if anything, was removed from the file and where it was sent or placed; and
- instructions about storage and eventual destruction of the file.

The responsible lawyer should review the file to be certain that no outstanding matters remain (such as undertakings). The responsible lawyer should then sign off that the file has been reviewed and is ready to close.

Next the lawyer should send a closing letter to the client and return whatever documents should be returned from the file, carefully documenting what has been sent. The client should acknowledge receipt of those file contents before the file is closed.

Bill the client for the final time, ensuring that the bill and disbursements have been paid before the file is closed.

All proper storage and retention dates need to be entered in the file and in the office storage system.

On closing, strip the file. Follow the suggestions in *Closed Files: Retention and Disposition*, on the Law Society website. This article provides excellent tips on things such as what materials should go to the client, what material should be destroyed, what material you should keep, etc. The article also includes a checklist. Using a checklist, or incorporating a checklist as part of the file closing sheet, can help ensure that the essential steps and procedures are performed before the file is closed.

Ultimately, make sure the file is properly coded and filed within your system as a **closed file**.

## [§4.08] Ownership of Documents in a Client's File

*This article was authored in June 2015 by Barbara Buchanan, Practice Advisor, and Chris Canning, Summer Law Student, relying in part on Jacqueline Morris, Felicia Folk, and John Vamplew's article "Whose File is it Anyway?," published in The Advocate 87 (Vol 52 Part 1 January 1994). This article has been updated to July 2017. © Law Society of British Columbia. See lawso-ciety.bc.ca > Terms of use.*

### Ownership of Documents in a Client's File

Who owns the documents in a client's file? The client? The lawyer? The ownership of documents arising out of a lawyer-client relationship is a matter of law, not a subject determined by the Law Society; however, the Law Society Rules and the BC Code include professional responsibility requirements for lawyers in relation to a client's file documents and property. Document ownership has not received much attention in Canadian jurisprudence but is something that lawyers deal with regularly. For example, ownership is relevant to the distribution of documents and property when closing a file, transferring a file to a successor lawyer, undergoing discovery of documents, asserting a lien, and other situations. Some of the issues around ownership of documents are as commonplace as whether it is proper to charge clients for photocopying.

While this article provides guidance to assist lawyers, lawyers will ultimately have to do their own research to determine document ownership and to ensure that they meet their professional responsibilities. Note that this article does not deal with copyright. Lawyers (or their firm) generally have copyright in their work product. An exception is where the retainer agreement provides that copyright in the work product goes to the client. Lawyers are allowed to use documents they have prepared for an earlier client as precedents or templates as long as the earlier client's confidential information is not disclosed.<sup>1</sup>

If you are asked to produce your file in a situation where you think that a client or former client might make a claim against you, you should consult the Lawyers Insurance Fund for guidance as to what you should disclose.

#### Professional responsibility rules

Who owns a client's file documents is a matter of substantive law; however, the Code sets out ethical guidelines for lawyers to take into consideration as well. For example, rule 3.5-6 provides that lawyers must account for clients' property that is in the lawyer's custody and deliver it upon request or, if appropriate, at the conclusion of the retainer. When a lawyer withdraws, the lawyer must try to minimize expense and avoid prejudice to the client and must do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor lawyer (rule 3.7-8). Code rule 3.7-9 requires that, on discharge or withdrawal, a lawyer must, subject to the lawyer's right to a lien, deliver all papers and property to which the client is entitled. Law Society Rule 3-54(1) requires a lawyer to account in writing to a client for all funds and valuables (as defined in Rule 1) received on behalf of the client.

When closing or transferring a file, lawyers should be aware that they have an ethical duty, upon request, to make reasonable efforts to provide a client with electronic copies of documents in the same form in which the lawyer holds them at the time of the request.

If a client requests copies of documents that the lawyer has previously provided to the client, the client is generally entitled to receive the same copies again, however, a lawyer is entitled to bill a fair and reasonable amount for the time and cost of providing the documents a second time. In the case of electronic documents, a lawyer may bill a reasonable amount for providing the documents and for the cost of materials (e.g. a memory stick or disk). For more information on electronic documents and billing for their production and billing for photocopies see "*Ethical considerations when a lawyer moves on*" in the Summer 2017 Benchers' Bulletin.

If documents are delivered to the client on file closing, it is important for the lawyer to retain copies, made at his or her expense, of all relevant documents in order to defend against negligence claims or complaints. See *Closed Files: Retention and Disposition*<sup>2</sup> for more information, as well as for information regarding other ethical requirements, e.g. in relation to retention, disposition, confidentiality and security. For information on solicitors' retaining liens, see the practice resource, *Solicitors' Liens and Charging Orders – Your Fees and Your Clients*, July 2013.<sup>3</sup>

### **The law**

Neither the Code nor the Law Society Rules outline how to determine what documents are the client's property. The remainder of this article provides guidance to determine ownership of client file documents. The primary position of Canadian courts at the time of writing this article has been to follow the English authorities and *Cordery's Law Relating to Solicitors*.<sup>4</sup> Document ownership is determined by legal principles, not by ethics.<sup>5</sup> There are two broad categories to consider:

- documents created before the retainer;
- documents created during the retainer.

#### **Documents created before the retainer**

Documents created before the retainer generally belong to the client or a third party. These might include documents from a previous lawyer-client relationship or documents sent to the lawyer by a third party. As outlined in *Cordery*, such documents are held by the lawyer as agent for either the client or third party, and as such the lawyer does not own them.<sup>6</sup> At the conclusion of the retainer these documents should, as directed by the client, be returned or disposed of.

#### **Documents created during the retainer**

Documents created during the retainer make up the primary area of contention. As noted above, the courts have generally chosen to adopt the approach in *Cordery* in determining document ownership. In *Cordery*, the basis for a determination lies in payment: if a client pays for a document, then it belongs to the client. *Cordery* classifies documents created during the retainer into four broad categories:

- Documents prepared by the lawyer for the client's benefit or protection and paid for by the client, belong to the client.
- Documents prepared by the lawyer for the lawyer's benefit or protection, at the lawyer's expense, belong to the lawyer.
- Documents sent by the client to the lawyer, the property in which was intended to pass from the client to the lawyer, belong to the lawyer.
- Documents prepared by a third party and sent to the lawyer (other than at the lawyer's expense), belong to the client.<sup>7</sup>

#### **Documents prepared for the client's benefit and paid for by the client**

The client generally owns documents created by the lawyer for the client and paid for by the client. Examples of documents in this category include:

- memoranda of law;
- documents created for use in court;
- witness statements;
- notes on attendances for the client's benefit.

Generally, as long as the primary purpose underlying the creation of a document is to benefit the client, it falls under this category. Such documents are necessary for the client's case and would be expected to be transferred to a successor lawyer if the client switched firms.

#### **Documents prepared for the lawyer's benefit at the lawyer's expense**

The lawyer generally owns documents created for the lawyer's benefit at the lawyer's expense. In *Chantrey Martin & Co v Martin*, a case concerning chartered accountants, the English Court of Appeal noted that "even in the case of a solicitor there must, we should have thought, be instances of memoranda, notes, etc., made by him for his own information in the course of his business which remain his property, although brought into existence in connexion with work done for clients."<sup>8</sup> This principle applying to lawyers was adopted into both Nova Scotia and Ontario law.<sup>9</sup> Examples of documents in this category include:

- inter-office memoranda;
- internal notes or communications (including conflicts checks);
- lawyer's working notes meant to aid memory;
- internal requisition forms;
- ethics consultation notes.

In *Cordery*, entries of attendances belong to this category, but in practice these documents are more difficult to categorize.<sup>10</sup> Notes of meetings with witnesses or officers of the court, for example, will likely be made primarily for the client's benefit. Hope JA of the New Zealand Court of Appeal criticized the *Cordery* categories at pages 358-359 in *Wentworth v de Montfort* where he found

The notes made by a solicitor of telephone conversations with persons other than his client, but relating to the client's affairs, may obviously fall into an almost indefinite number of classes. . . . As I have indicated *Cordery* suggests that both "entries of attendance" and "proofs of evidence" are the property of the solicitor. No authority is cited for these suggestions, and I would have thought that they each both fell squarely within the first of the four categories described in *Cordery* and that they each belonged to the client. "*The Guide to the Professional Conduct of Solicitors*" issued by the (English) Council of the Law Society (1974) states (at 39) that a memorandum of a telephone conversation with a third party made by a solicitor is the property of the client, and is accordingly to be handed over on a change of solicitors. On the other hand, a solicitor may well make a note of a telephone conversation which he has with a person relating to the work he is doing for a client, but the conversation may be solely for the benefit of the solicitor and not be chargeable to the client.<sup>11</sup>

Determining who owns a lawyer's entries of attendances and notes requires an examination of who the third party was and the content of the notes or recordings.

#### **Documents sent to the lawyer by the client**

Documents sent to the lawyer by the client generally belong to the lawyer. These include instructions and other correspondence. In the same way, letters and correspondence sent by the lawyer to the client belong to the client.

#### **Documents sent to the lawyer by third parties**

Documents sent to the lawyer by third parties belong to the client. The lawyer receives them as the client's agent. Examples of such documents include letters, receipts, vouchers for disbursements, or expert witness reports.<sup>12</sup>

#### **Documents that do not appear to fit into one of the four categories**

If a document does not seem to fit into any of the four categories, consider the principles that appear to underlie the *Cordery* categories to make a determination.

1. If a lawyer comes to control a document through his or her role as the client's agent, the client owns the document.<sup>13</sup>
2. If a document is created for the client's benefit, it likely belongs to the client; and if the document is created for the lawyer's benefit, it likely belongs to the lawyer.
3. If the client paid for the document, it likely belongs to the client.

Once ownership has been established, a lawyer can refer to the Law Society's practice resource article, *Closed Files – Retention and Disposition*, July 2015 to review document retention and disposition considerations. This article includes discussion of statutory, regulatory, ethical and practical reasons for retention (defending against claims and complaints) and a suggested minimum retention and disposition schedule for specific records and files.

### **Summary**

The following is a non-exhaustive list based on the above principles of ownership. It is meant as a guide and is not definitive.

#### **The client owns:**

- documents in existence before the retainer;
- correspondence from the lawyer or third parties;
- expert reports;
- client's medical records;
- examination for discovery transcripts;
- trial transcripts;
- notes or recordings of conversations with witnesses or officers of the court;
- documents for use in court (case law, briefs, pleadings, factums);
- memoranda of law;
- originals, copies and drafts of wills, powers of attorney, representation agreements, contracts;
- receipts for disbursements;
- corporate seals.

#### **The lawyer owns:**

- correspondence from client;
- time entry records;
- inter-office memoranda and other internal communications (including conflicts checks);
- internal requisition forms;
- calendar entries;
- accounting records;
- cash receipt book of duplicate receipts;
- notes prepared for lawyer's benefit or protection at the lawyer's expense;
- ethics consultation notes.

## Conclusion

While this article provides guidance to assist lawyers, lawyers will ultimately have to do their own research to determine document ownership and to ensure that they meet their professional and legal obligations. To help prevent issues, lawyers should consider how they will respond to document requests and develop a law firm policy for the organization, retention, and disposition of client files (see *Closed Files: Retention and Disposition*). Also, lawyers may wish to include wording in their retainer agreements as to how file documents and property will be managed during the course of the lawyer-client relationship and when transferring or closing the file. As part of a lawyer's duty to provide courteous, thorough and prompt service to clients (Code rule 3.2-1), providing a client with correspondence and copies of documents regularly during the course of the engagement may lessen the likelihood that a client will request the same information again later. However, the fact that a lawyer has already provided the information to the client once does not mean the client is not entitled to receive the same information again.

## Endnotes

- 1 3464920 *Canada Inc v Robert C Strother, Davis & Company, et al*, 2002 BCSC 1179 at para 153.
- 2 [www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/ClosedFiles.pdf](http://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/ClosedFiles.pdf).
- 3 [www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/solicitors-liens.pdf](http://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/solicitors-liens.pdf)
- 4 FT Horne, *Cordery's Law Relating to Solicitors*, 8th ed. (London: Butterworths, 1988) ("*Cordery*"). Mentioned in *Davis v Canada (Attorney General)*, 1997 CarswellBC 3181 (BCSC) at para 35; *Bank of Nova Scotia v Imperial Developments (Can) Ltd*, [1987] CLD 1454 (MBCA); adopted in *Price v Lambrinos* 2012 ONSC 4856 at para 18 quoting from *Aggio v Rosenberg* (1981) 24 CPC 7 (ONSCM) ("*Aggio*").
- 5 *Aggio*, at para 17. See note 4.
- 6 *Cordery*, at 89. See note 4.
- 7 *Ibid*, at 89.
- 8 *Chantrey Martin & Co v Martin*, [1953] 2 QB 286 (Eng CA) at 695.
- 9 *Spencer v Crowe*, 1986 CarswellNS 251 (NSSC) at para 20; *Bowman v Rainy River (Town)*, 2007 CarswellOnt 1053 (ONSC) at para 14.
- 10 *Cordery*, at 90. See note 4.
- 11 *Wentworth v de Montfort*, (1988) 15 NSWLR 348 (NSWCA) at 359.
- 12 *Re Ellis & Ellis*, [1908] WN 215 (Ch D).
- 13 *Leicestershire County Council v Michael Faraday & Partners Ltd*, [1941] 2 KB 205 (Eng CA) at 215.

## Chapter 5

### Client Relations<sup>1</sup>

#### [§5.01] Clients Are Consumers<sup>2</sup>

Consumer expectations around legal services have become increasingly focused on client satisfaction. Clients have learned to hold their lawyers accountable for the work they do and the fees they charge. The “mystique” of legal services is gone. When we purchase other services such as dental work or auto repairs, we are impressed if the service meets our expectations. Typically, we expect the service provider to identify the problem, specify the work to be done, estimate the price, commit to when the work will be done, meet that commitment, explain any problems that arise, and provide a readable itemized bill. When our expectations are not met, we become dissatisfied customers.

Our response varies according to our level of dissatisfaction and our individual propensity to complain. We might not return to the same establishment in the future; we might complain to friends, particularly the friend who gave us the referral. Some might complain to management or to a consumer protection group, or even threaten litigation.

Consumers of legal services react as consumers generally do when dissatisfied with goods or services they have purchased. We have to learn how to satisfy the customers we serve and how to effectively deal with customer dissatisfaction when it occurs.

#### [§5.02] Ten Guidelines of Good Practice<sup>3</sup>

This article recommends ten guidelines for lawyers to help them avoid professional liability claims by clients.

1. Sell your firm and your services fairly. It can be dangerous to use superlatives when describing your firm in websites and publications. Clients may later refer to these pieces when a problem arises in the services performed. Be careful that you do not “oversell” your professional services.

Review the rules on marketing contained in Chapter 4 of the *BC Code*. Note also that rule 2.1-3(a) of

the *Code* advises lawyers to “be wary of bold and confident assurances to the client.”

2. Educate your clients on the nature and extent of your professional services and the details of your retainer. Clients tend to have optimistic views of what you can provide, and often it is not until a problem arises that you and your client discuss your actual mandate. Claims sometimes arise against lawyers as a result of time or cost estimates being exceeded, where the client misunderstood that the estimates were “guaranteed.” A client who understands that many factors affect the timing and costs of your services will be less likely to complain.
3. Insist on a written retainer letter. You can expect that if a client claims against you, the client had a different idea of what services should, or should not, have been performed.
4. Avoid performing services outside your capacity as a lawyer. For example, business investment advice may fall outside the common description of professional services rendered by a lawyer. Giving business investment advice may jeopardize your coverage under the BC Lawyers Professional Liability Indemnification Policy.
5. Develop a specific plan for performing professional services. It is important that personnel assigned to new files be identified and advised as soon as possible. The team should be briefed with regard to the overall plan, and then be instructed to study the details of the retainer.
6. Keep your client informed. The more informed the client, the less chance of surprises and claims that you have not properly carried out your engagement.
7. Deal promptly with problems. When a problem arises, discuss it with your client and explain the consequences. If you hide it, that invites problems, including explaining why you failed to disclose it.
8. Keep written records of conversations with your client. Many professional liability claims emerge from a breakdown in communications. The retainer letter sets out your mandate, but it is equally important to keep notes of meetings with your client because the notes can be vital written evidence.
9. Communicate your efforts on your client’s behalf so as not to create an impression of inattention and neglect. Let your client know what work you have done by providing the client with copies of letters and pleadings you have drafted.
10. Think carefully before suing for fees. Lawyers are entitled to fees for services rendered, but a suit for unpaid fees usually results in a counterclaim alleging professional negligence, often for a much higher amount. There are a number of possible reasons for non-payment of your account, including

<sup>1</sup> Reviewed regularly by staff and lawyers of the Law Society of British Columbia, most recently in February 2023.

<sup>2</sup> Based on material prepared by J. Cameron Mowatt of PLI Claims Management Inc. for the Law Society/CLE seminar, *Loss Prevention—1992*. Reviewed annually by PLTC.

<sup>3</sup> Prepared for PLTC by Donald R. Cherry, March 1990. Reviewed regularly by PLTC.

the client's inability to pay and dissatisfaction with your services. You must weigh the amount of the outstanding fee against the time spent pursuing it plus any liability you might face in a counterclaim.

## [§5.03] Screening the Client

### 1. Where Do Clients Come From?

Clients might find your name in a directory, on a website, or in your advertising. Note the *BC Code* rules 4.2 and 4.3 on marketing and advertising legal services.

Clients might be referred to you by other lawyers or other businesspeople, or by other clients. Under *BC Code* rule 3.6-6, a lawyer may accept a referral fee for referring a client to another lawyer because of the expertise and ability of the other lawyer, where the referral was not made because of a conflict of interest, provided that the fee is reasonable and does not increase the total amount of the fee charged to the client, and the client is informed and consents. Under *BC Code* rule 3.6-7, however, a lawyer must not give any reward for referrals to any person other than a lawyer.

You might also register with referral sources, such as Legal Aid BC (Legal Services Society). For further information or to register online as a vendor, visit [www.lss.bc.ca/lawyers/newLawyers.php](http://www.lss.bc.ca/lawyers/newLawyers.php).

Another referral source is the Access Pro Bono Society of BC's Lawyer Referral Service. The service helps members of the public locate lawyers practising in particular fields. Any British Columbian may access this service by calling 604.687.3221 (in Metro Vancouver) or toll free at 1.800.663.1919, from Monday to Friday, 8:30 a.m. to 5:00 p.m. Clients can also email (see the APB website). APB's Lawyer Referral Service operator provides the client with the name and phone number of a suitable lawyer. The client can then call the lawyer directly and arrange for up to half an hour of initial consultation free of charge. After the initial interview, the client can decide whether to hire the lawyer, and the lawyer is free to decide whether to accept instructions.

A referral should be treated in the same manner as any other professional conversation with a client. Open a file with complete information, as described in Chapter 4, §4.02.

### 2. Screening

There are many reasons to screen a client before agreeing to take on the case. For example, you want to determine conflicts, avoid taking on difficult clients, avoid taking on clients who are fraudsters, and stay within your areas of experience and capability.

Sometimes a claim or a complaint, whether valid or not, could have been prevented by the lawyer exercising better judgment when deciding whether to accept a case or a client. There are unpleasant side effects of accepting the wrong case or client: it detracts from the enjoyment of practising law; it can cause frustration or anxiety over uncollected fees; it leaves less time for other files; and it produces disappointing results for both you and the client.

These may be warning signs in screening clients:

- the client has had more than one other lawyer, or has contacted multiple representatives;
- the client's expectations are unrealistic;
- the client insists on proceeding with the case because of principle and regardless of cost;
- the client expresses distrust of you or seems unwilling to fully co-operate;
- the client and you cannot agree on the fee and retainer, or the client insists on a contingency fee arrangement that you are uncomfortable with;
- the client is insisting you proceed urgently when the matter does not appear to be that urgent, or the case really is so urgent that you could not adequately prepare;
- the case requires more fees and costs than you anticipate will be recovered, or the outcome is doubtful and the client could not pay if the case did not succeed;
- the case is outside your expertise, or would over-extend your time or staffing capacity; or
- the case has a potential conflict of interest.

You should keep in mind your ethical duties under the *BC Code*, including your duty under rule 2.1-1(c) to "accept without hesitation, and if need be without fee or reward, the cause of any person assigned to the lawyer by the court." Also, you need to weigh your obligations to the administration of justice, such as doing *pro bono* work or taking on just causes, against your time and ability to give proper representation.

In the Law Society's *Benchers' Bulletin* (Winter 2018, p. 4), Practice Advisor Barbara Buchanan commented on being aware of unsavoury clients. She spoke about the importance of following proper client identification and verification procedures, and how that is a solid start in avoiding becoming the dupe or victim of a scam (also see "Fraud 101" in Chapter 1, §1.06).

Good client identification and verification practice consists of more than simply complying with the basic technical requirements of the rules and retaining records for the requisite period. Knowing one's client goes beyond this. Keep informed about common and new money laundering or ter-

rorist financing schemes to prevent being duped. Unsavory clients may try to involve lawyers in sham litigation, improper real estate transactions, phony loans, and creating companies, trusts and charities for the purpose of money laundering or terrorist financing. Red flags may include the client's choice of lawyer (e.g., frequent change of lawyer, engaging an inexperienced lawyer, engaging a lawyer from an unrelated jurisdiction). The client may be willing to pay higher fees than normal for little or no substantive legal services. Obtain information about the amount and source of funds related to the retainer (e.g., third-party funding; funds from high-risk countries; a large transaction, especially if involving a recently created entity).

Other things to consider include who the client is (e.g., whether the client is a politically exposed person, either domestically or for a foreign government). The definition of "client" is broad. Consider the type of service requested and whether the transaction involves a tax haven, high-risk jurisdiction or sanctioned country. Further federal legislation and regulations may also need to be considered. For example, might this involve a person whose assets are subject to regulations under the *Freezing Assets of Corrupt Foreign Officials Act*? Is the person's name (individual or entity) on the Lists of Names subject to the Regulations Establishing a List of Entities made under subsection 83.05(1) of the *Criminal Code*? Does the Canadian government have sanctions against the client under the regulations to the *Special Economic Measures Act*? The regulations impose various sanctions against designated individuals and entities. Is the individual a listed foreign national in the schedule to the regulations to the *Justice for Victims of Corrupt Foreign Officials Act* (Sergei Magnitsky Law)? You may be restricted or prohibited from providing some legal services (e.g., facilitating, directly or indirectly, a financial transaction related to property, wherever situated, of the sanctioned client).

Lawyers must assess whether they could be knowingly or unknowingly assisting a client in dishonesty, fraud or other illegal conduct. This is an ongoing professional responsibility and, where there are signs of dishonesty, fraud or other illegal conduct, the lawyer should not act or withdraw from representation (Law Society Rule 3-109 and *BC Code* rules 3.2-7 to 3.2-8).

If you decide, after careful consideration, to take on a difficult client or case, strive to maintain a good relationship with the client. Ensure that you protect yourself by keeping good records of your conversations with the client and all the steps you take on the file. If you decide not to take it on, write a clear and polite non-engagement letter. (See §5.05(7) and the sample non-engagement letters at the end of this chapter.)

## §5.04 Maintaining Communications

### 1. General

From the outset of your practice, establish and maintain an approach that ensures that full and proper communications are maintained between lawyer, staff and clients. It is not always easy to maintain optimal communication when you are extremely busy, but some simple policies and procedures can be adopted to facilitate communication.

At a minimum, you must establish a policy that you and your staff take and file **dated notes of all conversations** (initial and ongoing). The outcome of many legal actions turns on who said what to whom, often over the telephone. Furthermore, adequate records of what was said by whom to whom and when will prevent disputes from ever starting.

Clients naturally want to stay on top of their legal affairs and to know what is happening at each stage. Their legal issues loom large in their lives. Our difficulty as lawyers is that we perform most of our work out of the client's view. With little effort, lawyers can keep clients informed as work progresses. The attention is worthwhile: a well-informed client will feel the lawyer genuinely cares about the case, and will come away happier. That is good for the lawyer, as satisfied clients tend to pay their bills and refer work back.

Note the following passage from the Canadian Lawyers Insurance Association publication, *Safe and Effective Practice* (4th ed., 2018, p. 60):

Most people who sue their lawyers do so because they feel their lawyer has not tried very hard for them. Usually they have no idea of all the things the lawyer has done for them or of the obstacles met, because their lawyer has not told them . . . Most claims against lawyers are motivated (even if not founded) on lack of information.

Therefore, follow these guidelines:

- (a) Confirm all instructions in writing and adopt a comprehensive form of retainer agreement (as discussed in detail in §5.05).
- (b) Use plain language when explaining what you will do, when, and how long it will take. Every time you see your client, ask if the client has any questions.
- (c) Copy your client automatically with important correspondence and documents received or sent. You don't even need to use a cover letter to the client; many lawyers stamp the copies with a note to the effect "Copy for your information only—no response required." If the client complains about the cost of copying and instructs you not to send material, confirm those instructions in a letter to the client.

- (d) When a step is completed or a new development is pending, take a minute to prepare a brief letter explaining its general significance. Many lawyers keep precedent letters of explanation for matters that arise frequently in their practice.
- (e) Tell clients when things are not happening. When you call to report that you have done what you can and are waiting for others to do their part in the transaction or lawsuit, your client knows you are staying on top of the case. Your assistant might make these calls for you. The client appreciates being updated and saving on your time charges.
- (f) Allow enough time to send your client drafts of any agreements, pleadings or other important documents. Most clients appreciate a chance to review drafts. Any client with questions or suggestions can then speak with you before things are finalized. From a loss prevention perspective, sharing drafts may shift some risk. It may be harder for the client later to complain or claim against you in connection with the document where they participated to a significant degree in preparing it.
- (g) In a lengthy case, take the time and summarize progress and reconfirm instructions in writing at important junctures.
- (h) In litigation matters, send at least one assessment letter when evidence has become clear to advise the client on the strengths and weaknesses of each major aspect of the case (i.e. liability and quantum in personal injury cases), your assessment of relevant case law and opinion on quantum. This letter should help clients to be realistic and facilitate settlement or mediation.

## 2. Keeping Written Notes of Conversations

When a complaint or an insurance claim is lodged against a lawyer, often the lawyer has insufficient notes documenting the client matter to defend against the client's allegation. Many lawyers having competency problems do not take or keep any notes at all. Even the fact that a conversation or meeting was held can be important.

Notes of conversations form the basis of remembering what happened on a file and what the lawyer agreed to do in the future. Some lawyers think they can keep this all in their heads. This is, of course, impossible, and one of the reasons why a complaint or claim has been made. Certainly, without notes, the lawyer has no evidence to back up an assertion or denial. The lawyer is frequently forced into the position of having to state that: "In this situation my usual practice would be to. . ." Also, any lawyer

who must take over the management of a file will not have the benefit of the original lawyer's memory of what was done or agreed.

Most case-management programs allow you to make a time entry to the file and also note a conversation, meeting, telephone call, or other communication. Remember to add sufficient detail to your notes, including the date and time of the call or meeting, who called or attended, what information or instructions were received; **and what advice was given**. Using this method, the lawyer can easily consult the file history and notes in one place. All notes, like other entries, should be backed up.

If you are using a paper filing system, create a systematic written record of all advice given to a client. All handwritten notes (or print copies from computer recordings) should be dated and placed in chronological order and fastened in the communication section of the paper file.

Important instructions, information, or advice should be followed up by an email, fax or letter to the person spoken to, with copies to the relevant other people.

## [§5.05] Retainers and Retainer Letters

### 1. Meaning of "Retainer"

"Retainer" has several meanings. It may denote the mere act of hiring a lawyer or refer to a money payment, or both. If referring to a money payment, it may be a specific payment for a specific future task, or, less frequently, the general retainer of a solicitor for whatever tasks may arise in future.

From the client's point of view, to retain means to "keep," even temporarily. Once a lawyer is retained, the client will expect the lawyer to pay full attention to the file. One key to good client relations is not just working on the file but keeping the client advised of its progress.

### 2. When to Discuss the Retainer

The matter of retainer, both in terms of money payment and the scope of the work you will do for the client, must be canvassed early—preferably at the first meeting. There is no reason to be reluctant to discuss either the method and amount of payment required or the work to be done. The client wants to know what to expect, how much it will cost, when to pay, and what the lawyer is authorized to do. It may be that a fee cannot be set without further investigation, but the subject should at least be raised, even if only in general terms (you should make it clear that you are providing only an estimate). Otherwise, the client cannot make an informed decision on whether to proceed.

The client may be nervous about approaching a lawyer if they have not dealt with one before. Therefore, a lawyer must not only inform the client of what the services will cost but also explain what assistance the client requires. Often a client comes into the office with only a vague idea of having a problem that a lawyer can solve. It is the lawyer's job to separate the issues and determine, for example, whether it is something that is suitable for litigation and, if so, the manner of proceeding, the cause of action, the likely amount of damages, the possible cost of each stage, and other similar information.

### 3. Money Retainer

With some clients or types of files the lawyer will not require a money retainer. This is especially true of regular clients or for wills, real estate or estate files. With most other first-time clients, however, the lawyer may wish to ask the client to pay a retainer (like a down payment) before proceeding with the matter. Not only does this protect the lawyer's fees, but it forces the client to face, at the outset, the actual cost of the work.

In any event, the client should clearly understand what work the retainer covers and whether a further retainer might be required. This should be confirmed in writing in the retainer letter.

### 4. Scope of the Retainer

It is important to establish, at the outset, the scope of the services the lawyer will be providing to the client *and to confirm those services in writing*. The retainer defines the extent of a lawyer's duties.

Not only will defining terms in writing prevent any misunderstanding from arising, but it may protect the lawyer if the client later sues for negligence. Any implied duty of care must be related to what the lawyer is instructed to do: *Shiokawa v. Tohyama*, 2005 BCCA 95, at para. 32. For example, in *Cox v. Pemberton Holmes Ltd.*, 1993 CanLII 227 (B.C.C.A.), sophisticated parties lost money on a real estate deal. The properties in issue were subject to a restrictive covenant, and the plaintiff investors said they never would have bought had they known. The lawyer who completed the property sale was named as a third party. The claim was that the lawyer had been negligent or had breached a fiduciary duty owed to the clients. The Court of Appeal found that the retainer was narrow in scope and did not give the lawyer discretion to advise the parties. It covered only drawing up documents and disbursing funds. So the lawyer was not negligent. As the parties were themselves sophisticated, no fiduciary duty was owed.

If the terms of the retainer are unclear, the terms of the actual bargain may be implied from the parties' conduct. This matter was discussed in *Freeman v. Sanofsky*, 2013 BCSC 245. In that case, a lawyer was retained to obtain some documents that would help an elderly client prove she was capable of making decisions, including deciding to move out of her care facility. The retainer "morphed" from simple document-gathering to assessing the client's competency and assisting in the move. Master Bouck, sitting as registrar, said that "the terms of the retainer need not all be in writing; the expanded scope of the retainer can be implied from the conduct" of the parties.

When discussing the scope of the retainer with the client, the lawyer must also cover disbursements. To incur disbursements on the client's behalf, the lawyer must obtain the client's authorization to do so. It may be that the client does not wish to incur certain expenses, in which case the lawyer may wish to place some limits on the retainer.

Note that a lawyer can be retained to perform legal services for only part of the client's legal matter. This type of retainer—a "limited scope retainer"—is defined in the *BC Code* at rule 1.1-1 and governed by specific rules.

In considering whether to provide services under a limited scope retainer, the lawyer must assess whether it is possible to provide the limited services competently (commentary [7.1] to rule 3.1-2). Before undertaking a limited scope retainer, the lawyer must advise the client about the nature, extent and scope of the services that the lawyer can provide, and must confirm in writing to the client as soon as practicable what services will be provided (rule 3.2-1.1). The lawyer must ensure the client appreciates the limited nature of the retainer, understands the risks involved, and enters into the limited scope retainer with informed consent. Further, a lawyer acting for a client in only a limited capacity must promptly disclose the limited scope retainer to the court and any other interested person in the proceeding, if failure to disclose would mislead the court or that other person (see commentary to rule 3.2-1.1, and "Managing the Risks of a Limited Scope Retainer" on the Lawyers Indemnity Fund website ([www.lif.ca](http://www.lif.ca))).

Lawyers must be aware of the risks associated with limited scope retainers. A lawyer cannot contract out of liability for negligence, and a provision in the agreement purporting to exempt the lawyer from liability for negligence or relieve the lawyer from regular responsibilities is void (see *Legal Profession Act*, s. 65(3) and Law Society Rule 8-3(c)).

Finally, a lawyer should always identify exactly who the client is. Anyone else who might be seen to

have a “relationship of proximity” to the lawyer should be clearly advised in writing that the lawyer does not act for them and that they should seek the advice of another lawyer to protect their interest. See the discussion of unrepresented parties in *Practice Material: Professionalism: Ethics*.

## 5. Retainer Letter or Agreement

It is important to have a *written* retainer letter or agreement with every client. Setting out the scope and amount of the retainer, as well as the billing practices, clarifies the important issues for clients and provides useful documentary evidence for lawyers, if problems arise with the client later.

There may be situations where the terms are set out in writing after steps have been taken. This might occur with simple real estate transactions (where purchasing clients should be provided with an interim reporting letter on title, which will cover the points such as fees and billing) and simple wills (where a final letter confirms these same points).

If a retainer is not written, and if there is any disagreement, the onus will be on the lawyer to prove that the terms are as the lawyer says. If there is any doubt, it is often resolved against the lawyer: *Johnson v. G.E. Greene Law*, 2011 BCSC 1444.

Generally, the retainer agreement has these goals:

- (a) confirm key instructions, such as the legal services to be provided and any restrictions on those services;
- (b) identify the specific work that will be done to accomplish instructions;
- (c) confirm and clarify billing practices; and
- (d) obtain the client’s commitment to the terms of the retainer by having the client sign the letter or agreement.

Retainers should not be lengthy or intimidating, but should clearly set out the following matters:

- (a) an outline of the client’s instructions;
- (b) the lawyer’s authority to act (it is good practice to identify the lawyers who will be performing the services) and to incur disbursements (including, where appropriate, authority to employ agents and/or experts);
- (c) the services to be performed and, where necessary to clarify the retainer, the services the lawyer will *not* be performing, such as matters being handled by the client or third parties;
- (d) the manner of remuneration (including the amount of the retainer and the basis for calculating fees), an explanation of the disburse-

ments, and the billing arrangements (including frequency of payments and interest); and

- (e) the terms under which the whole retainer will be terminated.

Note that you are entitled to charge interest on unpaid accounts only if you entered into an express agreement about interest at the time the client entered into the contract for services.

There are many other topics you should include, such as PST and GST, and whether any trust funds held will earn interest.

The wording and length of the retainer agreement will depend upon the task to be performed and the clients. For example, when a banker asks a lawyer to act on behalf of the bank in collecting a simple debt, a simple letter from you to the bank confirming your retainer should suffice.

If you act for clients who have trouble with written English, the letter should be written in simple terms that can be translated easily.

Retainer agreements often describe how the lawyer will respond to client telephone calls or messages. Explain to the client how the nature of your practice often makes it difficult to respond immediately (e.g. you are often in court or in lengthy client meetings). Tell the client you will always do your best to answer calls within 24 hours. Tell the client to expect to speak to your assistant unless the matter is urgent, in which case the client should make that clear, and you will respond as soon as you can that day.

Also, if you are billing on the basis of time spent, tell your client you charge for time devoted to telephone or email communications with the client and others connected with the case, and that the billing will include time spent on any necessary review of file material before the call and making a note of the contents of the call.

At the end of this chapter there is a plain language retainer letter. As with other precedents, this standard form letter should not be used without exercising your own judgment. There may be sections that you will add and others you will delete, to fit the circumstances of each situation and client.

## 6. Contingent Fee Agreements

A contingency agreement, or contingent fee agreement, is one that provides that a lawyer’s fee is contingent, in whole or in part, on an event (*Legal Profession Act*, Part 8, s. 64).

Law Society Rule 8-2(2) provides that a lawyer and the client may enter into a contingent fee agreement in which the lawyer may elect to forego any remuneration based on a proportion of the amount recov-

ered and receive instead an amount equal to any costs awarded by order of the court.

A contingent fee agreement must be written (*Legal Profession Act*, ss. 65, 66 and Law Society Rule 8-3). It is important that the terms of such an agreement are clear. The terms should explicitly identify work contracted for and exclude work not to be done by the lawyer. It should clarify whose responsibility it is to pay for disbursements and whether a separate retainer for disbursements is required. It should also provide for getting off the record and terminating the solicitor-client relationship. If the contingency agreement does not provide for getting off the record, and the lawyer determines that it is necessary to do so anyway, the lawyer may still be entitled to fees for work done on the basis of *quantum meruit* (see *Maillot v. Murray Lott Law Corp.*, 2002 BSCS 343 and *Green v. John M. Richter Law Corporation*, 2018 BCSC 1840).

When entering into a contingent fee agreement, the client is entitled to independent advice as to its terms. As a matter of practice, the lawyer should require the client to review the contingent fee agreement at the client's leisure and not in the lawyer's presence. However, ensure the agreement is signed and returned together with the retainer (if any) before or very soon after you start work.

Law Society Rule 8-3 requires that a contingency fee agreement state that the person who entered into the agreement with the lawyer may, within three months after the agreement was made or the retainer between the lawyer and client was terminated by either party, apply to a registrar of the Supreme Court of British Columbia to have the agreement examined (under s. 68 of the *Legal Profession Act*), even if the person has paid the lawyer under the agreement.

A lawyer has an overriding duty to ensure that a contingent fee agreement is fair and that the remuneration charged is reasonable in the circumstances (Law Society Rule 8-1). Thus, if a registrar ultimately reviews the agreement under s. 68 of the *Legal Profession Act*, the registrar may modify or cancel the agreement if the registrar considers it unfair or unreasonable. As to what is fair and reasonable, the BC courts have held that s. 68 contemplates a two-step inquiry: the first step looks at "fairness" and asks whether the client understood the agreement. The second step is to look at the "reasonableness" of the fee. (See *Commonwealth Investors v. Laxton*, 1990 CanLII 608 (BC CA), and *Randall & Co. v. Hope* (1996), 13 E.T.R. (2d) 257 (B.C.S.C.).)

In deciding whether an agreement is fair and reasonable, the registrar or court may look at the percentage charged and may modify it. In *Mide-Wilson v. Hungerford Tomy Lawrenson and Nichols*, 2013

BCCA 559, the firm initially billed the client \$16 million for resolving her claim to estate assets worth \$100 million. The registrar determined that the fee agreement was fair and reasonable, but lowered the fee to \$9 million. On appeal to the Supreme Court, the judge agreed that the agreement was fair and reasonable, but found that a \$9 million fee was excessive, and lowered it to \$5 million. That result was affirmed on appeal.

The Law Society rules limit what a lawyer can charge under a contingent fee agreement in personal injury cases. Rule 8-2(1) provides that, subject to the court's approval of higher remuneration, the maximum remuneration to which a lawyer is entitled under a contingent fee agreement, when acting for a plaintiff in a claim for personal injury or wrongful death arising out of the use of a motor vehicle, is 33-1/3% of the amount recovered, and in any other claim for personal injury or wrongful death, is 40%. Note that the maximum limits apply only to trial work and not to appeals. All contingent fee agreements for these types of claims must include wording that informs the client that the limit is restricted to trial work (Rule 8-4 prescribes the wording).

Contingent fee agreements are void if they are for services relating to child guardianship, custody, parenting time, contact with a child, or access to a child. Contingent fee agreements relating to services for other matrimonial matters are void unless approved by a judge of the Supreme Court (*Legal Profession Act*, s. 67(3), (4) and (5)).

A contingent fee agreement must not include a provision that allows the lawyer to contract out of liability for negligence, to exercise a veto on settling a matter, or to prohibit a change of solicitors (Rule 8-3(c)). The agreement must set out that the fee is not based on taxable costs and disbursements. Section 67(2) of the *Legal Profession Act* prohibits a lawyer from taking a fee on both the settlement and costs (which includes disbursements).

The fact that fees are to be paid based on the end result does not excuse a lawyer from keeping proper records of work done on the file. In *Cook v. Mission Memorial Hospital*, [1996] B.C.W.L.D. 1752 in which the lawyer's fee was substantially reduced, Oliver J. said:

[H]aving regard to the way in which the law is developing and the way that *Yule v. Saskatoon* [(1955), 17 W.W.R. 296 (Sask. C.A.)] has been applied in recent contingency fee review cases, it is my view that any lawyer who hereafter fails to keep time records when undertaking contingency fee litigation in circumstances where there is a possibility of his [sic] bill being taxed is foolhardy—for the lack of detailed time records deprives the Court of important information neces-

sary to protect the legitimate interests of the provider of legal services.

Special circumstances apply if the lawyer is withdrawing from a retainer that is pursuant to a contingency fee agreement. The lawyer cannot withdraw unless the lawyer is discharged, the client persists in instructing the lawyer to act contrary to professional ethics, or the lawyer is not competent to continue to handle the matter. See *BC Code* section 3.7 and rule 3.6-2, commentary [2]. The only exception to these restrictions on withdrawal is if the written contingency fee agreement specifically states that the lawyer has a right to do so, and sets out the circumstances under which withdrawal may occur. See Discipline Advisory (August 13, 2020) on the Law Society website.

## 7. Non-Engagement Letters

After initial consultation, the lawyer may decide not to take the work. In these circumstances, it is often wise to send a “non-engagement” letter to the person confirming the lawyer’s decision. The letter should state clearly that lawyer’s firm will not represent that person in the matter. The letter will point out the limitation period, if any, and urge the individual to consult another lawyer as soon as possible. The lawyer should avoid commenting on the merits of the case, since any comments might be construed as legal advice.

There are model non-engagement letters at the end of this chapter.

## [§5.06] Fees and Disbursements

### 1. Communicating Fees at the Beginning of the Retainer

Lawyers sometimes find it embarrassing to talk about fees. Clients do not find it embarrassing. They do find it more than annoying to receive an account that is much larger than they expected.

One of the most frequent complaints by clients against lawyers is that the fees charged are excessive. Often these complaints arise because the lawyer failed to specify in advance the basis upon which fees would be charged. Misunderstandings with clients can often be avoided by having a full and frank discussion of fees at the commencement of the matter. Record fee arrangements on the file opening sheets and confirm them in writing: see §4.02.

Discussing fees up front gives the client a fair idea of what pursuing the matter would involve. If the fees are a problem, better to know that at the start than later. Further, it allows the client and lawyer to have a frank discussion about options. You might refer the client to a more junior lawyer whose fee is

lower, or you might decide to reduce your fee in the particular case. The client might qualify for Legal Aid or services through Access Pro Bono, or there might be other advocacy agencies that could help. Even if you end up not providing legal services, you might still provide helpful customer service.

### 2. Ongoing Communication About Fees

No matter what the basis of payment, a lawyer must keep in touch with the client, and keep the client advised of progress on the file. If the lawyer is billing hourly, then the lawyer should send out **monthly bills**, setting out the work done on the client’s file during the time covered by the bill. This is a good method of keeping the accounting current, and letting the client know that the file is being dealt with. Firms that bill regularly (e.g. not six months after the service was performed) tend to look more professional to the client and get paid more quickly.

Do not be afraid to ask clients how they would like to be billed; for extended matters, most will request **monthly billing**, a few will prefer bimonthly. Another method of interim billing is to bill in stages. For example, the client might be billed after the initial opinion has been done, after the pleadings are closed, and after examinations for discovery. For extended matters, advantages of interim billing include knowing where things stand (for both you and the client), and exposing misunderstandings and unreasonable clients at an early stage.

**Interim billing** also is appropriate for “set fee” files, such as criminal files, as these files may be billed in stages.

For contingent fee arrangements, a form of interim account may be a useful reporting method. The fee may be left blank with a note saying that it is governed by the contingency agreement, or the fee may be estimated for the benefit of the client as if it were payable on an hourly basis, with a notation that no money is due or owing at present. If a lawyer tends to lose money on contingencies, these interim billings will have the added benefit of convincing your clients that they are getting a tremendous bargain for their money, which they are.

Billing should be done promptly at the completion of the service. It is good practice to schedule a time during the week to attend to billing. Consider meeting with or telephoning the client, in appropriate circumstances, to discuss the bill before its delivery.

The work must have been performed or the service actually rendered before billing, unless there are specific arrangements to the contrary. This applies to both interim and final billing.

In order to comply with Rule 3-71 of the Law Society Rules, it is necessary to maintain a copy of all

fee bills. One copy should be kept in the client file. Another copy should be kept in a separate file that is filed alphabetically by client or numerically. It is usually preferable to keep separate files for “paid” and “unpaid” bills.

### 3. Setting the Fee

Basic rules regarding “Fees and Review” are set out in Part 8 of the *Legal Profession Act*. Other important points of reference for setting fees are found in section 3.6 and rule 2.1-3 of the *BC Code*.

There are no set schedules on how much lawyers may charge. The method of calculating fees varies with each lawyer and with different types of legal services. Avoid quoting maximum fees, as unexpected events could affect fees.

These are the most common ways of setting fees:

#### (a) A Fixed Fee

For example, a flat charge of \$ X for a particular service such as a conveyance, an incorporation, an impaired driving defence, or an uncontested divorce, used only when you can calculate approximately how much time will be required.

#### (b) An Hourly Rate

For example, \$ X per hour for every hour spent on preparing a complicated lease or handling a spousal support dispute, used when you cannot predict how much time will be involved. For trials, many lawyers set a rate for each day or half day at trial.

#### (c) Percentage Fee

For example, a charge of X % of the value of the subject matter when collecting debts.

#### (d) A Contingent Fee

For example, a charge of X % of what you recover on your client’s behalf in a medical negligence action, used when the client has a strong case but no funds to pay the lawyer at the beginning. The percentage normally varies depending on the amount of the client’s claim, the degree of risk involved, and when in the proceedings the case is resolved; see §5.05(6) for rules governing contingent fees.

#### (e) *Quantum Meruit*, or Lump Sum Fee

For example, a “fair fee” based on a number of considerations, including the amount involved, the time spent, the result achieved, the complexity of the matter, the importance of the matter to the client, and the means of the client: *Yule v. City of Saskatoon* (1955), 17 W.W.R. 296 (Sask. C.A.). See also the factors

set out in s. 71(4) of the *Legal Profession Act*, which generally mirror those in *Yule* and which the registrar refers to in reviewing legal fees when the lawyer and the client are unable to agree on a fair fee at the end of the file. (The factors in s. 71(4) are set out in full later in this chapter.)

The BC Court of Appeal’s decision in *Nathanson, Schachter & Thompson v. Inmet Mining Corp.*, 2009 BCCA 385, clarified that lawyers must advise their clients fully and fairly at the start of the retainer of how they intend to bill legal fees, including when they intend to bill on a *quantum meruit* basis. In this case, the client and the law firm had not discussed how fees would be billed, and the firm had sent periodic bills to the client during the course of litigation, without informing the client that those bills were subject to adjustment or that the firm intended to deliver a final bill based on a “fair fee” at the conclusion of the case. The majority of the five-judge panel held that in the circumstances, the firm was estopped from billing its client a *quantum meruit* fee in addition to fees already paid.

Lawyers sometimes bill solely by one method, but more often than not, particularly in complex matters, factors such as those mentioned in *Yule*, *Nathanson*, and s. 71(4) of the *Legal Profession Act* come into play.

Spending time on a file is not what entitles you to bill; doing the work is. The things that count most in assessing a lawyer’s fee are not the hours spent but “what the lawyer has done,” “what the lawyer has accomplished,” “the magnitude of the interests concerned” and “the skill which the lawyer manifests on behalf of the client” (see *Yule*).

Other considerations are as follows:

#### (a) Means of the Client

The client’s ability to pay becomes a significant factor if the client’s means are modest. Consider if the client can pay in installments. Note rule 2.1-3(i) of the *Code*, which states in part that “[t]he client’s ability to pay cannot justify a charge in excess of the value of the service, though it may require a reduction or waiver of the fee.”

#### (b) Complexity

Was special difficulty, novelty, or responsibility involved beyond what is normally expected in that field of law?

## (c) Result

Were the instructions successfully and promptly carried out to the satisfaction of the client?

## (d) Amount Involved

For example, where a lawyer is helping a client recover a specific amount of money, a lawyer might believe that billing 15% of that amount is fair and justified by the amount and nature of the work done, but might believe that billing as much as 20% would require special justification in the particular circumstances.

## (e) Time

Bill the lesser of the number of hours actually spent on the task and the number of hours that would have been spent by the average practitioner.

Remember, however, that a lawyer's retainer is a matter of contract, and that a departure from the retainer agreement may amount to a breach of contract. The retainer letter should clearly indicate the considerations that may apply in the lawyer's calculation of the fee.

Note also rule 2.1-3(j) of the *BC Code*:

A lawyer should try to avoid controversies with clients regarding compensation so far as is compatible with self-respect and with the right to receive reasonable recompense for services. A lawyer should always bear in mind that the profession is a branch of the administration of justice and not a mere money-making business.

It goes without saying that the principles of billing are easier to state than to apply. Practical guides are hard to find. The only real guide on which a lawyer can rely in settling on a proper fee is the lawyer's judgment and conscience, coupled with the judgment of colleagues in the lawyer's firm.

For recent articles on the topic of lawyers' remuneration, see the *Annual Review of Law and Practice*, published by the Continuing Legal Education Society of BC.

## 4. Client Protection

Clients who complain about legal fees might rely on these protections:

- (a) review of fees by the registrar (*Legal Profession Act*, s. 70); and
- (b) statutory prohibitions (for example, *Legal Profession Act*, s. 67, with respect to contingent fees).

Clients should be advised of their rights under s. 70 and the time limits to exercise them.

## 5. Lawyer Protection

Lawyers who want to prevent client complaints or protect themselves against them might rely on these protections:

- (a) early discussion of fees;
- (b) keeping the client informed;
- (c) keeping time sheets to record the time spent and work done on a file;
- (d) interim billing;
- (e) prompt billing on completion;
- (f) retainers and advance payments on account of fees and disbursements;
- (g) solicitors' liens on papers or on property received or recovered; and
- (h) providing a full and final report to the client along with the bill.

## 6. Solicitor and Own Client Reviews

Clients should be encouraged to discuss the bill with their lawyer before applying to a registrar; there may be a basic misunderstanding about what the lawyer did to resolve the client's legal problem.

Under s. 70(1) of the *Legal Profession Act*, a client charged with a lawyer's bill may apply to a Supreme Court Registrar, before or after payment of the bill, for an appointment to review the bill. The lawyer must receive five days' notice of the appointment, and of any affidavit in support (Supreme Court Civil Rule 14-1(21)). Unless special circumstances exist, the client must have the bill reviewed within one year after receiving it, or within three months after paying it, and will be barred from a review if the lawyer has received a judgment for the amount of the bill (s. 70(11)).

Section 71 states that a registrar is responsible for conducting review hearings; however, a master has the same powers and jurisdiction as a registrar (Supreme Court Civil Rule 23-6 and *Supreme Court Act*, s. 11(8)). In this chapter, the review officer is referred to as the registrar.

Unless special circumstances exist, the lawyer must pay the costs of the review if 1/6 or more of the total amount of the bill is subtracted from it, otherwise the client must pay the costs of the review.

## 7. Solicitor and Client Collections

By refusing to pay or by otherwise challenging a lawyer's bill, a client waives solicitor-client privilege to the limited extent necessary to resolve the dispute. Accordingly, lawyers have the right to bring an action in contract to recover fees (*Wilson*,

*King & Company v. Torabian* (1991), 53 B.C.L.R. (2d) 251 (S.C.)).

A lawyer may bring an action in Small Claims Court (for actions up to and including \$35,000), or in the Supreme Court (over \$35,000),<sup>4</sup> or, under s. 70, a lawyer may apply to have an account reviewed against the lawyer's own client (on the expiration of 30 days after the bill has been delivered or sent, and after having served the client with five days' notice in writing of the appointment and any affidavit in support). On conclusion of the review, the registrar may issue a certificate, which operates in the same manner as a judgment. The fee review is a nullity if the lawyer applies before the 30 days expire (*Bull, Housser & Tupper v. Mr. T. International Agencies Ltd. and Daljit Toor* (6 July 1999), Vancouver Registry, CA022827).

Naturally, your first step in proceeding against an overdue account is to send out reminder letters. Next, you should send a demand letter if the client fails to respond or if it becomes clear that the client does not intend to pay.

Your method of proceeding will depend on a number of factors, such as whether your relationship with the client is still friendly, whether the client can afford to pay, whether the client has retained another law firm, where the client resides, and the likely outcome of the dispute. In some circumstances, it may be worth reducing your bill if the client agrees to pay the lower amount. After all, a fee dispute can take up your time, and the client could complain to others about you if it is not settled.

If the client refuses to pay because the client believes the amount of an account is too high (but is not disputing the validity of the retainer), it will often be easier to pursue a review rather than a judgment. On the other hand, if the client does not respond to demand letters, commencing an action may be the better route, because the client may not defend, and the lawyer may be able to obtain a summary judgment with little cost and effort (particularly in Small Claims Court).

## 8. The Registrar's Perspective on Solicitor and Own Client Reviews<sup>5</sup>

A good part of a registrar's time is spent reviewing bills between solicitor and client. A s. 70 review hearing is conducted like a trial. Subsection 70(13) of the *Legal Profession Act* provides that the Rules of Court apply to reviews of lawyer's bills.

The onus is always on the lawyer to prove the bill; accordingly, the lawyer's case is presented first. Witnesses are called; parties may be subpoenaed. At the conclusion of the evidence, submissions are received from the lawyer, the client and, if necessary, the lawyer in reply. The lawyer arranges for attendance of a court reporter if a transcript of the proceedings is required. A party to a review may appeal the registrar's decision to the Supreme Court under s. 75 of the *Legal Profession Act*.

Section 69 of the *Legal Profession Act* and Supreme Court Civil Rule 14-1(31) prescribe the requirements of a proper bill:

### Section 69(4)

A bill under subsection (1) is sufficient in form if it contains a reasonably descriptive statement of the services with a lump sum charge and a detailed statement of disbursements.

### Rule 14-1(31)

A lump sum bill must contain a description of the nature of the services and of the matter involved as would, in the opinion of the registrar, afford any lawyer sufficient information to advise a client on the reasonableness of the charge made.

In an application by a lawyer, the registrars will decline to review "bills" that are not sufficiently descriptive of the work done. In *Tungohan et al. v. Gebara*, 2011 BCSC 1538, the registrar said it was critical that a bill specify an amount payable. The "bill" in issue had no charge and no description of disbursements, and was mere "notations" as to what a fee might be.

It is usually not enough for a solicitor to direct an articulated student to appear to speak at the review of a bill, because the student will not have personal knowledge of the work done. A client is normally entitled to expect the lawyer who performed the services to be present. The registrar may decline to review the bill where someone else attends, even if the client has not appeared to raise an objection (*Schlechter v. Ruhr* (1957), 25 W.W.R. 178 (B.C.C.A.)). One potential solution is for the solicitor to file an affidavit containing information of the

<sup>4</sup> Effective June 1, 2017, the jurisdiction of Small Claims Court increased from \$25,000 to \$35,000. As well, with few exceptions, claims under \$5,000 will no longer be resolved in Small Claims Court and instead will be resolved by the Civil Resolution Tribunal. See the Provincial Court website for further information ([www.provinciacourt.bc.ca](http://www.provinciacourt.bc.ca)).

<sup>5</sup> Updated by PLTC. Originally based on the CLE course "Practice Before the Registrar – 1984" by Gordon Turriff, KC. Reviewed in February 1997 and March 1999 by Jacqueline Morris, then staff lawyer for the Law Society of BC.

kind considered to be relevant under the *Legal Profession Act*, and to send the student only if the lawyer is sure that the client will not attend. However, Registrar Carolyn Bouck suggests that since the onus of proving the reasonableness of a bill rests with the lawyer, the lawyer who performed the work described in the bill must be available to give evidence and be available for cross-examination and “affidavit evidence will rarely, if ever, suffice.” (See Registrar Bouck, “Assessments of Costs and Reviews of Lawyers’ Accounts” (September 2004) Vol. 62 Part 5, *The Advocate* 679–686, at 683.)

Section 71(4) of the *Legal Profession Act* sets out the criteria the registrar must consider when reviewing a lawyer’s bill, which includes the following:

- (a) the complexity, difficulty or novelty of the issues involved,
- (b) the skill, specialized knowledge and responsibility required of the lawyer,
- (c) the lawyer's character and standing in the profession,
- (d) the amount involved,
- (e) the time reasonably spent,
- (f) if there has been an agreement that sets a fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable,
- (g) the importance of the matter to the client whose bill is being reviewed, and
- (h) the result obtained.

The principles for adducing evidence when a party and party bill is presented for assessment apply with equal force to the review of a bill between solicitor and client. Counsel for a client should file the client’s affidavit, be prepared to call the client as a witness and be ready to adduce any other evidence which is necessary. This evidence can include, under Supreme Court Civil Rule 14-1(32), another solicitor’s expert opinion as to “the nature and importance of the services rendered and of the matter involved and the reasonableness of the charges made.”

The solicitor has the same right to call opinion evidence. The weight given to the expert evidence is a matter for the registrar, who may be influenced by the fact that the expert gave an opinion knowing the amount of the bill. The registrar has jurisdiction to decide whether a lawyer was retained.

Most reviews are the product of the failure of lawyers to take the time, when they get instructions, to explain to their clients how fees are calculated—in a general way at least—and to keep their clients in-

formed about mounting charges and the alternatives that might be available. Some reviews result because lawyers have simply stopped treating their clients in a polite way.

## 9. Section 3.6 of the *BC Code*—“Fees”

Section 3.6 of the *BC Code* contains rules regarding fees and disbursements.

Rule 3.6-1 of the *BC Code* provides:

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

Commentary [2] to Rule 3.6-1 states:

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

Rule 3.6-4 provides that a lawyer acting for two or more clients in the same matter (i.e. on a joint retainer) must divide the fees and disbursements equitably between them, unless the clients agree otherwise.

Rules 3.6-5 to 3.6-7 govern the division of fees and referral fees. These rules state:

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

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

- (a) the fee is reasonable and does not increase the total amount of the fee charged to the client; and
- (b) the client is informed and consents.

3.6-6.1 In rule 3.6-7, “another lawyer” includes a person who is:

- (a) a member of a recognized legal profession in any other jurisdiction; and

- (b) acting in compliance with the law and any rules of the legal profession of the other jurisdiction.

3.6-7 A lawyer must not:

- (a) directly or indirectly share, split or divide his or her fees with any person other than another lawyer, or
- (b) give any financial or other reward for the referral of clients or client matters to any person other than another lawyer.

Note that there is an exception to rule 3.6-7 for lawyers practising in multi-disciplinary practices under the Law Society Rules (rule 3.6-8).

## 10. Disbursements

### (a) General

Disbursements may be billed to a client provided they are for *bona fide* specific amounts properly incurred on behalf of the client.

Typically, disbursements include such transactions as corporate and land title searches, medical reports preparation, and registration fees. Such amounts should be separately shown on the fee account under the description “disbursements” or “amounts paid on your behalf.”

It is customary to charge as a “disbursement” certain costs that may potentially include an element of “overhead fees”:

- (i) photocopies (number of copies actually used, multiplied by the rate per copy);
- (ii) delivery charges, including courier and postage, provided that the delivery charges in excess of the postage rate were not incurred because of some tardiness or default on the part of the lawyer;
- (iii) long-distance telephone calls; and
- (iv) travel expenses, such as automobile expenses at a rate per kilometer, parking fees, and any air, taxi, or similar travel expenses directly incurred on a client’s behalf, providing that the charges are reasonable amounts incurred with the client’s knowledge and consent.

When disbursements, such as for travel expenses, are incurred for the benefit of two or more clients, the actual expenses must be pro-rated on a reasonable basis and charged to the clients accordingly. For billing purposes, disbursements must be:

- (i) reasonably incurred in the circumstances of the client matter or be authorized by

the client under s. 71(2)(b) of the *Legal Profession Act*;

- (ii) billed at their actual, rather than estimated costs; and
- (iii) properly described in detail in a statement of account.

For more information, review the Discipline Advisory (August 10, 2012) *Proper recording and billing of disbursements required by rules*, available on the Law Society website.

### (b) Other Overhead Fees and Charges

In certain cases a fraction of overhead or administration costs can be specifically allocated to a particular client matter. Such amounts might include word processing charges and file opening fees.

Such amounts may be shown as a separate fee or as an amount included in the fee for services. The foregoing items must not be described on the fee account as “disbursements,” “amounts paid on your behalf,” or the like.

### (c) Agency Fees

Fees paid to other lawyers under agency arrangements are often charged as disbursements. This practice is permissible, provided that the agency arrangement is entered into with the client’s prior consent and is reasonable and necessary, and provided that it is not entered into on a regular basis for the purposes of fee splitting.

When a person not connected with the law practice performs agency or research work on a file, this work may only be done with the client’s prior consent, and the amount charged as a disbursement cannot exceed the amount actually paid.

When a cost is incurred on behalf of a client in a transaction carried out by a management company or a person or firm with whom the lawyer is not dealing at arm’s length, only the direct cost may be charged as a disbursement. No amount may be included for labour, service, overhead or profit.

The overriding consideration is that disbursements must have been actually paid on behalf of the client and they must be reasonable amounts. If a registrar is asked to assess disbursements, SCCR 14-1(5) says that the registrar must determine those that have been necessarily or properly incurred, and assess reasonable amounts for those disbursements. For further guidance, see *Li v. Giesinger*, 2015 BCSC 2414, at paras. 21–25.

## 11. GST and PST and Client Billing

The GST is a form of value-added tax, with each business in a chain of supply required to collect a tax of 5% of the sales price from its customers. “Service” is very broadly defined and clearly includes legal services.

Most legal services are a taxable supply. Every person who carries on a commercial activity, which includes the practice of law, is required to register with the Canada Revenue Agency, and to collect GST on all supplies of goods and services. Since legal services are a taxable supply, lawyers are required to collect 5% tax on the fees and on some disbursements they charge their clients. Businesses must remit to the government the net of the total tax collected from clients in a given reporting period less the total tax paid to suppliers (“input tax credits”) for the same period.

Partners in a firm need not register individually. The partnership is considered to be carrying on the commercial activity, for GST purposes, as an entity separate from the individual partners. Associates, articling students and employees of a corporation or the Crown are not required to register. Sole practitioners typically register and obtain a GST number.

For information on registration, exemptions and credits, see the Canada Revenue Agency website. See also Canada Revenue Agency Policy P-209R, Lawyers’ Disbursements, for further information.

Regular suppliers of legal services must also register for PST purposes. If a lawyer is a member of a law firm, then the law firm or the partnership registers, rather than the individual or partners. Providers of legal services are required to charge and collect 7% PST on all fees charged for legal services (including certain disbursements) with some limited exceptions. Certain legal services, including certain Legal Aid services and certain legal services provided to Indigenous people or First Nations, are exempt from PST, as are legal services provided to a client who neither resides in nor carries on business in BC, and where there is no connection in the legal services to BC. Most law firms in BC will have to register to collect the tax.

More information about PST is available on the Law Society website, in the Provincial Sales Tax Bulletin PST 106, and in the *Provincial Sales Tax Act*, S.B.C. 2012, c. 35.

## 12. Solicitors’ Liens

If you bill a client and a client doesn’t pay or a client retains another lawyer when you have outstanding fees and disbursements (billed or as yet unbilled), you may be entitled to a lien—either a retaining lien (or possessory lien) or a charging lien

(or lien at common law). These two types of solicitor’s liens and the procedures connected with them are discussed in the practice resource “Solicitors’ Liens and Charging Orders—Your Fees and Your Clients” (July 2013), available on the Law Society website. See also §4.08.

## 13. Final Reporting Letters

The absence of a final reporting letter can lead to dissatisfaction by clients and complaints about fees. It is not appropriate to simply send a covering letter with your account at the end of the file. There is a sample file closing letter on the Law Society website.

A final reporting letter should briefly summarize what has been done for the client and what result has been achieved. Most lawyers send a final reporting letter to buyers and banks (on the standard form) on completion of a conveyance, where the client is advised that the transfer and mortgage have been accepted for registration. However, some lawyers forget to do this very simple letter when acting for sellers. Many lawyers do not provide any kind of final report to wills litigation, estate, family or criminal clients. Not only does this failure not properly complete a file, but you also miss an opportunity to invite future business from the client and from friends and acquaintances.

Some firms go a step further by requesting feedback from the client to improve the firm’s services (see §5.07 on the next page for a Model Survey).

## [§5.07] Model Client Survey<sup>1</sup>

This survey is short and limited in scope, but should be a useful reference for lawyers who are interested in building stronger client relations.

The changes you make as a result of a client survey should reflect your goals in practice. What are those goals? How do you think your clients see you? How do you want your clients to see you?

You may wish to send a survey with your account, demonstrating that you care about your client's satisfaction with your work, as well as your payment for the work.

Before conducting a client survey, however, ask yourself whether you are really prepared to make changes once you receive the responses. If a client expresses unhappiness when asked to comment on your services, you should take some action. You will be marketing to your own clients—probably a better use of your marketing budget than advertising for new clients.

\* \* \*

Did you feel welcome the first time you walked into the office?  Yes  No

If not, why not?

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Did the receptionist call you by name?  Yes  No

Did someone offer to:

Take your coat?  Yes  No

Get you some coffee?  Yes  No

Tell you how long you would have to wait?  Yes  No

Did the lawyer take time to listen to everything you wanted to say?  Yes  No

Did the lawyer:

Ask what goals you wanted to achieve?  Yes  No

Tell you how the lawyer was going to try to achieve your goals?  Yes  No

Obtain your instructions and approval on the course of action?  Yes  No

Tell you how long the process would take?  Yes  No

Tell you how fees were charged?  Yes  No

Estimate your total bill?  Yes  No

Explain that you would be making decisions about your case?  Yes  No

<sup>1</sup> This Model Client Survey is from the Law Society of British Columbia Practice Advice Department and can be downloaded from the Law Society's website ([www.lawsociety.bc.ca](http://www.lawsociety.bc.ca)).

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## Chapter 6

### Trust Accounting<sup>1</sup>

#### [§6.01] Law Office Accounting Systems

All law firms need an accounting system—a method for recording all financial transactions of the law practice—and all lawyers need to have a basic understanding of how their accounting systems work. Although lawyers may delegate most of the accounting functions to other staff, the lawyer is ultimately “personally responsible to ensure that the duties and responsibilities . . . are carried out” (Law Society Rule 3-54).

The Law Society’s Practice Management Course includes an Accounting Module. The Accounting Module introduces basic law office accounting requirements and systems, and provides a context for the trust accounting concepts and rules. You should review the Module if you are at all unfamiliar with general accounting principles.

Lawyers are also urged to seek professional accounting or bookkeeping assistance if they are unsure of how to set up a system.

#### [§6.02] Introduction to Trust Accounting

All lawyers who handle trust funds for clients or third parties are subject to rigorous trust assurance standards set out in the Law Society Rules. These rules create a minimum acceptable standard in accounting procedures and record keeping, and regulate compliance with those minimum standards. Lawyers must understand the rules, and implement proper trust accounting systems. Failure to comply with the rules may result in disciplinary action.

The Law Society’s Trust Assurance Department oversees lawyers’ handling of trust funds. The Trust Assurance Department publishes and regularly updates the *Trust Accounting Handbook* to assist lawyers and their staff in understanding the procedures and rules for operating a trust account.

The most recent version of the *Trust Accounting Handbook* as of print time (V10–April 2022) is reproduced in this chapter in full. It is current to March 31, 2022. The *Trust Accounting Handbook* contains its own Table of Contents and internal pagination. The regular pagination of the *Practice Material: Professionalism: Practice Management* resumes in Chapter 7.

You should familiarize yourself with the *Trust Accounting Handbook* and expect to use it often in your practice, regularly consulting the Law Society website for the most up-to-date version.

For more information about trust accounting, lawyers should consult the Trust Accounting web page on the Law Society website. The web page includes free webinars on trust accounting topics, including “Trust Accounting Basics” and “Trust Accounting Regulatory Requirements.” Contact the department at 604.697.5810 or [trustaccounting@lsbc.org](mailto:trustaccounting@lsbc.org) with any questions.

<sup>1</sup> The **Trust Assurance Department** of the Law Society of British Columbia reviewed §6.01–§6.02 in March 2023. The *Trust Accounting Handbook* included in this chapter is updated by the **Trust Assurance Department**.



The Law Society  
of British Columbia



# The Trust Accounting Handbook

A handbook designed to assist lawyers and their staff in understanding the procedures and rules for operating a trust account.

Trust Assurance Department

V10 – April 2022

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# Introduction

The purpose of this handbook is to assist lawyers and their staff in understanding and complying with the Law Society Rules: Part 3, Division 7 – Trust Accounts and Other Client Property and Division 8 – Unclaimed Trust Money. The *Legal Profession Act* and the Code of Professional Conduct for British Columbia (the *BC Code*) also impose specific requirements with respect to handling and recording trust funds. It will explain the rules of the Law Society of BC concerning the handling of trust funds and will demonstrate the simple step-by-step procedures for accounting for trust funds.

Each day millions of dollars pass through lawyers’ trust accounts. Lawyers must safeguard and segregate these assets. Lawyers have an obligation to keep adequate books and records in accordance with these rules and statutes.

As the lawyer or delegated individual maintaining the accounting records for the practice, it is incumbent upon you to be familiar with the rules and understand why and how they apply to your firm.

Readers should understand that this handbook is designed as a tool to aid lawyers and their staff to make decisions regarding the operation of trust accounts. Ultimate responsibility for the trust account and its operation remains with the lawyer who receives, holds, or disburses client trust funds.

The Trust Accounting Handbook should be used as a secondary reference only. It is not a substitute for the Law Society’s Part 3 Division 7 Rules on Trust Accounts and Other Client Property.

The Law Society of British Columbia, and the authors and editors of the Trust Accounting Handbook accept no responsibility for any errors or omissions, and expressly disclaim any such responsibility. All references to Law Society Rules and the *BC Code* are current to March 31, 2022.

## Significant trust accounting rules

In order to maintain law firm books, it is important to familiarize yourself with the Law Society Rules: Part 3, Division 7 – Trust Accounts and Other Client Property. These rules can be downloaded from the Law Society website at [www.lawsociety.bc.ca](http://www.lawsociety.bc.ca).

The following is an overview of the significant rules that form the framework of the lawyer's trust accounting requirements.

### **Rule 3-54 Personal responsibility**

Rule 3-54 requires that a lawyer account in writing to a client for all funds and valuables received on behalf of the client. The lawyer remains personally responsible to ensure that the duties and the responsibilities of Division 7 are carried out.

### **Rule 3-55 Fiduciary property**

Rule 3-55 requires lawyers to produce the following records for any period for which the lawyer is responsible for fiduciary property:

- a current list of valuables, with a reasonable estimate of the value of each;
- accounts and other records respecting the fiduciary property; and
- all invoices, bank statements, cancelled cheques or images, and other records necessary to create a full accounting of the receipt or disbursement of the fiduciary property and any capital or income associated with the fiduciary property.

The records within this rule form part of a lawyer's books, records and accounts and must be produced and permitted to be copied upon request.

### **Rule 3-56 Designated savings institutions**

Rule 3-56 sets out the requirements for a designated savings institution. It must have an office located in British Columbia accepting demand deposits and be insured by the Canada Deposit Insurance Corporation or the Credit Union Deposit Insurance Corporation of British Columbia.

### **Rule 3-58 Deposit of trust funds**

Rule 3-58 requires that a lawyer who receives trust funds must deposit the trust funds in a pooled trust account as soon as practicable.

### **Rule 3-58.1 Trust account only for legal services**

Rule 3-58.1 prohibits a lawyer from depositing funds into or withdrawing funds from a trust account unless the funds are directly related to legal services provided by the lawyer or law firm. However, a lawyer is permitted to deposit funds received as a retainer for services as a mediator, arbitrator or parenting coordinator into a trust account. In addition, a lawyer or law firm must take reasonable steps to obtain appropriate instructions and pay out funds from trust as soon as practicable on completion of the services to which the funds relate.

### **Rules 3-59 Cash transactions**

Rule 3-59 (1) sets out the situations where a lawyer or law firm is prohibited from receiving or accepting an aggregate amount of cash of more than \$7,500 with respect to any one client matter.

Rule 3-59 (4) sets out the situations where a lawyer or law firm is allowed to accept an aggregate of more than \$7,500 in cash, for legal fees, disbursements or expenses. However, the lawyer must investigate the source of the cash and if it appears the cash may be from proceeds of crime the lawyer is not permitted to accept the cash.

Rule 3-59 (5), states if a lawyer or law firm accepts more than \$7,500 in cash, any refund must be made in cash.

Rule 3-59 (6) sets out what a lawyer or law firm must do where cash of more than \$7,500 has been accepted in a situation not allowed under subrule (2) or (3). In this circumstance, the lawyer or law firm must make no use of the cash and return the cash, or if not possible, the same amount of cash to the payer. They must also make a written report of the details of the transaction to the Executive Director within 7 days of receipt of the cash and comply with all other rules pertaining to the receipt of trust funds.

### **Rule 3-60 Pooled trust account**

All pooled trust accounts must meet the following requirements:

- kept at a designated savings institution (i.e. bank or credit union);
- be readily available to draw on;

- designated as “trust” on the records of the lawyer and savings institution;
- earn interest that is remitted to the Law Foundation of BC;
- provide periodic bank statements and cancelled cheques; and
- kept in the name of the lawyer or firm.

In order to offset inadvertent service charges by the financial institution, a lawyer may deposit up to \$300 of their own funds in the pooled trust account.

### **Rule 3-61 Separate trust account**

All separate trust accounts must meet the following requirements:

- kept at a designated savings institution;
- earn interest;
- designated as “trust” on the records of the lawyer and the savings institution; and
- kept in the name of the lawyer, the firm or the trust and identified by a number that identifies the client.

### **Rule 3-63 Trust account balance**

Rule 3-63 requires that a lawyer must maintain sufficient funds on deposit in each pooled or separate trust account to meet the lawyer’s obligations with respect to funds held in trust for clients.

### **Rule 3-64 Withdrawal from trust**

A lawyer may withdraw trust funds if the funds are:

- properly required for payment on behalf of a client or to satisfy a court order;
- the property of the lawyer;
- in the account as a result of a mistake;
- paid to the lawyer to pay a debt of that client to the lawyer;
- transferred between trust accounts;

- due to the Law Foundation under section 62 (2) (b); or
- unclaimed trust funds remitted to the Law Society under Division 8.

All withdrawals from the trust account must be made with a cheque marked “trust” and signed by a practising lawyer unless the withdrawal falls within one of the following exceptions:

- cash withdrawals as required by Rule 3-59 (5) or (6);
- electronic transfers as permitted by Rule 3-64.1 (2);
- bank drafts as permitted by Rule 3-64.3;
- property transfer tax withdrawals as permitted by Rule 3-64.1 (6); or
- remittance of net interest on pooled trust accounts to the Law Foundation as permitted by Rule 3-64 (9).

Lawyers are not permitted to withdraw funds from trust unless the trust accounting records are current and there are sufficient funds held to the credit of the client on whose behalf the funds are to be paid.

**Best Practice:** There may be times when the financial institution has deposited an amount to the trust account in error, and creates a “Debit Memo” or other type of withdrawal to take back the funds. Because the rules do not allow for these types of transactions, the error should be identified during your monthly trust reconciliation and fully explained in your supporting documentation.

### **Rule 3-64.1 Electronic transfers from trust**

A lawyer may withdraw trust funds using electronic funds transfer if the following conditions are met:

- The law firm uses a commercial banking platform that requires two individuals:
  - a person other than the lawyer, who uses their password and enters data into the online system; and
  - the lawyer, who uses another password and enters data to authorize the transaction online.

- Before any data is entered into the electronic funds transfer system, the lawyer must sign the completed Law Society's Electronic Funds Transfer (EFT) requisition form (See Electronic Transfer of Trust Funds form available at [www.lawsociety.bc.ca](http://www.lawsociety.bc.ca) and in Appendix B).
- The transfer system must produce, no later than the next business day, written confirmation from the financial institution confirming the details of the transfer which must contain the following:
  - the name of the person authorizing the transfer;
  - the amount of the transfer;
  - the trust account name, trust account number and name of the financial institution from which the money is drawn;
  - the name, branch name and address of the financial institution where the account to which money is transferred is kept;
  - the name of the person or entity in whose name the account to which money is transferred is kept;
  - the number of the account to which money is transferred;
  - the time and date that the data describing the details of the transfer and authorizing the financial institution to carry out the transfer are received by the financial institution; and
  - the time and date that the confirmation in writing from the financial institution was sent to the lawyer authorizing the transfer.
- No later than the next business day after the day the confirmation is required, the lawyer must:
  - produce a printed copy of the confirmation;
  - compare the printed copy of the confirmation against the signed EFT requisition to verify the funds were withdrawn as specified;
  - indicate on the printed copy of the confirmation the name of the client, the subject matter of the file and the file number; and
  - sign and date the confirmation.

The EFT requisition and the confirmation must be retained as supporting documentation for the transaction. Keep these documents with your accounting records so that they are easily accessible.

Lawyers must not disclose their password or allow anyone else to use their password.

A lawyer who is a sole practitioner without non-lawyer staff is permitted to use one password to enter the data into the online banking platform and use another password to enter data to authorize the transaction. The sole practitioner must use two separate passwords to process the transaction.

### **Rule 3-64.2 Electronic deposits into trust**

Electronic deposits into the trust account are permissible, so long as the lawyer obtains written confirmation, either from the financial institution or remitter, within two banking days of the deposit. This written confirmation includes, but is not limited to, a deposit receipt, letter, or email. The form is generally acceptable if it provides sufficient details for the deposit to be identified and properly recorded in the firm's trust accounting records.

### **Rule 3-64.3 Withdrawal from trust by bank draft**

A lawyer may withdraw trust funds by bank draft provided they:

- obtain written consent from the payee to receive the funds in the form of a bank draft;
- complete the Law Society's *Withdrawal from Trust by Bank Draft requisition form*. (Available [www.lawsociety.bc.ca](http://www.lawsociety.bc.ca) and in Appendix B);
- obtain a bank draft at the financial institution where the lawyer or law firm has a trust account;
- obtain written acknowledgement of receipt of the bank draft from the payee; and
- keep a copy of the written consent, written acknowledgement, requisition and bank draft.

### **Rule 3-65 Payment of fees from trust**

Lawyers are required to prepare and deliver a bill to the client prior to withdrawing funds from trust for the payment of the lawyer's fees. Lawyer's "fees" include fees for the lawyer's services, disbursements and taxes. You can deliver a bill by:

- regular or registered mail to the client's last known address;
- personal hand delivery;
- fax to the client's last known fax number;
- email to the client's last known electronic mail address; or
- making it available to the client by other means agreed to in writing by the client.

A lawyer is permitted to withdraw trust funds for payment of fees by:

- trust cheque payable to the lawyer's general account; or
- electronic transfer under Rule 3-64.1.

Under subrule (5) a lawyer must not take fees from trust if the client is disputing the fees.

### **Rule 3-66 Withdrawal from a separate trust account**

A lawyer who withdraws funds from a separate trust account that does not provide monthly bank statements and cancelled cheques must first transfer the funds to the pooled trust account.

### **Rule 3-67 Accounting records**

Rule 3-67 sets out the guidelines, applicable to the accounting records, as follows:

- all funds received and disbursed must be recorded in the books and records;
- the records must be maintained in a legible handwritten form, in ink or other permanent form (either printed form or electronic form that can be transferred to printed form on demand); and
- the records must be entered in chronological order and in an easily traceable form.

In addition, the lawyer must retain all supporting documents for all trust and general accounts, including but not limited to:

- validated and detailed deposit receipts;
- monthly bank statements, including guaranteed investment certificates, term deposits and other financial institution confirmations;
- passbooks;
- cancelled and voided cheques, including certified cheques (scanned images of the cleared cheques are acceptable in place of the original cancelled cheques, as long as the practice is receiving copies of the images of both the front and back of each cheque);
- bank vouchers and other similar documents;
- vendor invoices; and
- bills for fees charges and disbursements.

A lawyer who maintains accounting records, including supporting documents, in electronic form must ensure that they are maintained in a way that will allow compliance with Rule 10-3 (2). They must ensure that copies are made of both sides of all paper records and documents including any blank pages, and that there is clear indication of the date of the transaction, the individual who performed the transaction, and all additions, deletions or modifications to the accounting records and the individual who made each of them.

### **Rule 3-68 Trust account records**

Rule 3-68 requires a lawyer to maintain at least the following trust account records:

- book of entry to record the details of all trust funds received including the date, source and form of funds, client reference and amount; and the details of all trust funds disbursed including the date, cheque number, payee, client reference and amount;
- individual trust ledgers showing, separately for each client matter, all trust funds received and disbursed and the unexpended running balance;
- trust transfer records documenting all file-to-file transfers of trust funds between client trust ledgers;
- monthly trust reconciliations; and
- a current listing of all valuables held in trust.

### **Rule 3-69 General account records**

Rule 3-69 requires a lawyer to maintain at least the following general account records:

- book of original entry to record the details of all general funds received including the date, source, client reference and amount; and the details of all general funds disbursed including the date, cheque or voucher number, payee, client reference and amount; and
- accounts receivable ledger showing, for each client, all invoices billed, any transfers from trust, any other receipts from the client and the balance owed by the client.

### **Rule 3-70 Records of cash transactions**

Rule 3-70 requires a lawyer to maintain a cash receipt book of duplicate receipts. The lawyer or law firm must record for each cash receipt: the date, person from whom cash is received, the amount, the client name and file number. The lawyer or law firm must record for each cash withdrawal; the date, the amount, the client name and file number. All cash receipts must include two signatures; the person to whom the cash was paid and the person from whom the cash was received. As well, all receipts must indicate all dates on which the receipt was created or modified.

### **Rule 3-71 Billing records**

Rule 3-71 requires a lawyer to maintain billing records that contain copies of all manual or system generated bills rendered to clients. The bill must show the amounts and dates the charges are made, identify the client or the person charged and indicate all dates on which the bill was created or modified. In addition, the bills must be maintained as part of the accounting records and filed in chronological, alphabetical or numerical order. Therefore, maintaining a copy of the final signed bills in each of the client files is not sufficient to meet record keeping requirements. Scanned electronic copies of final signed bills are acceptable when they are filed as set out above and printable upon demand.

### **Rule 3-72 Recording transactions**

Rule 3-72 requires that all transactions must be recorded promptly. General transactions must be recorded within 30 days of the transaction. Trust transactions must be recorded within 7 days of the transaction. An exception to the 7 day time limitation is for the receipt of interest on separate trust accounts, which must be recorded within 30 days of payment or of notice that the funds have been credited to the account.

### **Rule 3-73 Monthly trust reconciliations**

Rule 3-73 sets out the requirements for how and when trust reconciliations must be completed. Lawyers must prepare a monthly trust reconciliation that covers all funds held in the pooled and separate interest bearing trust accounts as well as valuables held. Each monthly trust reconciliation should include the following:

- detailed listing showing the balance held in trust for each client, and identifying each client for whom trust funds are held;
- detailed monthly trust bank reconciliation for each pooled trust account;
- original bank statements and cancelled cheques (or approved electronic form);
- listing of all outstanding items including outstanding cheques, outstanding deposits and errors by financial institutions;
- differences between the total of reconciled bank balances, client trust liability listings and balances per trust book of entry must be clearly identified, explained and documented.
- listing of balances for each separate trust account (savings, deposit, investment or similar form of account) identifying the client for whom each is held; and
- listing of valuables received and delivered and the undelivered portion of valuables held for each client, if applicable.

The reconciliation process must be completed within 30 days after the effective date of the reconciliation and must include the date on which it was prepared. The monthly reconciliations and the supporting documents noted above must be kept for at least 10 years.

### **Rule 3-74 Trust shortage**

Rule 3-74 requires a lawyer who discovers a trust shortage to immediately pay enough funds into the account to eliminate the shortage. If the shortage is greater than \$2,500 or if the lawyer cannot deliver up, when due, any trust funds held, the lawyer is required to immediately report the shortage and the circumstances to the Law Society. A trust shortage includes, but is not limited to, trust funds inadvertently deposited into the firm's general account, payments from a wrong trust account, service charges, credit card discounts and financial institution errors. It is important to remember that you may not offset an individual client's overdrawn trust balance against other trust credit balances.

**Best Practice:** Maintain a history of all trust shortages that occur within your law practice. Document the date of occurrence, date of correction, how the shortage was corrected, acknowledgement by accounting staff, acknowledgement by lawyer in charge of trust, and copies of correspondence to the financial institution, Law Society or other affected parties. This history will be used by the firm in completing the annual trust report and during a compliance audit.

### **Rule 3-75 Retention of records**

Rule 3-75 sets out the requirements for the location and length of time that you must retain accounting records (namely accounting records referred to in Rules 3-67 to 3-71). Under this rule a lawyer must:

- keep the books, records and accounts referred to in the rules for at least 10 years from the final accounting transaction or disposition of valuables; and
- keep the books, records and accounts referred to in the rules, other than electronic records, at their chief place of practice in BC for at least 3 years from the final accounting transaction or disposition of valuables.

### **Rule 3-76 Executive Director's modification**

Rule 3-76 allows a lawyer to make a written request to the Executive Director to modify the record retention requirements of Rule 3-75. A lawyer who receives written modification from the Executive Director must retain it as long as the records are required to be retained under the Law Society Rules. Further, the Executive Director may, at any time, cancel or amend a modification previously given.

### **Rule 3-77 Annual CDIC report**

On April 30, 2022, a new Canada Deposit Insurance Corporation (CDIC) Act and By-law requirements for trust came into effect. A lawyer, partnership of lawyers or a law corporation acting in that capacity as a trustee of moneys for others is a Professional Trustee as defined under the CDIC Act. Lawyers must designate their trust account(s) as a professional trust account (PTA) and file an attestation on an annual basis to their financial institution by April 30 of each year. This attestation replaces the prior requirement for lawyers to deliver by May 30<sup>th</sup> each year a listing of balances held for each client as of April 30<sup>th</sup>.

Lawyers who do not designate their trust account(s) as a PTA or file the annual attestation will have their trust account treated as a general trust account. General trust account holders

are required to disclose beneficiary names, addresses and interests in the account. There is no exemption for lawyers to redact the names and addresses or provide an alphanumeric code or identifier. Failure to provide the required beneficiary information to the financial institution may result in a loss or reduction of insurance coverage available for the beneficiaries.

### **Rule 3-79 Trust report**

Rule 3-79 requires a lawyer to deliver to the Executive Director a completed trust report on an annual basis. Not operating a trust account does not exempt you from the requirement of filing a trust report. The trust report must be in the prescribed form and completed to the satisfaction of the Executive Director.

### **Rule 3-80 Late filing of trust report**

A lawyer who does not deliver a trust report as required under Rule 3-79 or Rule 3-82 by the due date is liable for a late fee assessment of \$200. Furthermore, if the trust report is not delivered within 30 days after it is required the lawyer is liable for a late fee assessment of \$400 per month or part of a month until the report is delivered. Lawyers should diarize the due dates for the trust report each year so that the report is filed in a timely manner.

### **Rule 3-81 Failure to file trust report**

Rule 3-81 sets out the consequences for lawyers who do not file their trust reports. A lawyer who does not deliver a trust report for 60 days after it is required, is suspended until the report is completed to the satisfaction of the Executive Director provided that the Executive Director delivers notice of the potential suspension at least 30 days before the date of suspension.

### **Rule 3-82 Accountant's report**

Rule 3-82 the Executive Director may direct a lawyer to file an accountant's report as part of the trust report. The accountant's report must be completed and signed by a qualified Chartered Professional Accountant (CPA).

### **Rule 3-85 Compliance audit of books, records and accounts**

Rule 3-85 permits the Executive Director at any time to order a compliance audit of the books, records and accounts of a lawyer to determine whether the lawyer has met the standards of the financial responsibility under Part 3 of the Law Society Rules.

### **Rule 3-86 Failure to produce records on compliance audit**

Rule 3-86 sets out the consequences for lawyers who do not produce records or provide explanations as required under Rule 3-85. A lawyer who does not provide records or explanations is suspended until the records are produced and explanations are provided to the satisfaction of the Executive Director. The Executive Director must provide at least 7 days notice before this Rule can take effect.

### **Rule 3-87 Disposition of files, trust money, other documents and valuables**

Rule 3-87 requires that a lawyer must advise the Executive Director in writing of their intended disposition of all of the following that relate to the lawyer's practice in British Columbia:

- open and closed files;
- wills and wills indices;
- titles and other important documents and records;
- other valuables;
- trust accounts and trust funds; and
- fiduciary property.

Within 30 days of withdrawing from practice, the lawyer must confirm to the Executive Director in writing that:

- the above documents and property have been disposed of as previously reported;
- all trust accounts have been closed;
- all trust balances have been remitted to clients, transferred to another lawyer or paid to the Society;

- any net interest on a pooled trust account has been remitted to the Law Foundation; and
- all clients and other persons for whom the lawyer is or potentially may become a personal representative, executor, trustee or other fiduciary have been notified regarding the lawyer's withdrawal from practice.

### **Rule 3-89 Payment of unclaimed trust money to the Society**

Rule 3-89 allows a lawyer to apply to the Executive Director to pay any money held in trust for a person, where the lawyer has been unable to locate the person for two years. If the Executive Director is satisfied that the lawyer has made appropriate efforts to locate the owner of the money, the Executive Director may accept the money. Refer to Appendix B for the *Payment of Unclaimed Trust Money Form*.

### **Rule 10-3 Records**

Rule 10-3 sets out the requirements for a law firm that uses a storage provider to store or process records outside of the lawyer's office whether or not for payment. When required under the Act or the Rules, a lawyer must, on demand, be able to print the records in a comprehensible format, provide access on a read-only basis, or export to an electronic format that allows access to the records in a comprehensible form. Further details can be found within the body of the Rule.

### **Rule 10-4 Security of records**

Rule 10-4 requires a lawyer to protect their records and information against all risks of loss, destruction and unauthorized access, use or disclosure. A lawyer must immediately notify the Executive Director in writing if they have reason to believe that they have lost custody and control of records, anyone has improperly accessed the records, or a third party has failed to destroy records completely and permanently contrary to instructions from the lawyer.

## Client identification and verification

The Law Society has an integral role in the anti-money laundering regime and continuously monitors the current landscape in order to stay current with Fintrac on client identification and verification (CIV) Rules. Please visit our website to view the CIV Rules.

Lawyers are required to follow the CIV procedures contained in Law Society Rules 3-98 to 3-109 when retained by a client.

Identification and verification are two distinct concepts.

Identification	Verification
The client identification requirements apply whenever a lawyer provides professional services to a client. These requirements call for the lawyer to obtain and record basic identifying information about the client, whether they are an individual or an organization, such as name, personal and/or business addresses, telephone numbers and occupation.	The verification requirements go a step further and apply when a lawyer receives, pays or transfers funds on behalf of a client or gives instructions for such activities on behalf of a client. Verification refers to the information you need to obtain to confirm that the client is who or what they say they are. These rules require lawyers to retain a copy of every document obtained to identify and verify a client's identity when providing legal services in respect of a financial transaction.

A number of exemptions to the verification requirement are included in the CIV Rules. For example, a lawyer is exempted from the verification requirements when the client is a financial institution, public authority, or public company. We have provided a direct link to the *Client Identification, Verification and Source of Money Checklist* and CIV frequently asked questions in the Resources section at the end of this handbook. If you have question about the CIV Rules, please contact a Practice Advisor at [practiceadvice@lsbc.org](mailto:practiceadvice@lsbc.org) or at 604.443.5797.

# Chapter 1 - Setting up Trust Accounts

## Setting up a pooled trust account

Many law firms will operate one or more pooled trust accounts depending on the nature and needs of the law firm. For example, firms that handle real estate matters may require several pooled trust accounts at different financial institutions; whereas a criminal practice may require only one pooled trust account.

The pooled trust account established at a designated savings institution must be kept in the name of the lawyer or firm and designated as “trust” on all of the records of the savings institution and the lawyer. This includes bank statements, cheques, deposit slips, and other records. The designated savings institution must have an office located in BC accepting demand deposits and be insured by the CDIC or CUDIC. Lawyers are not permitted to open or operate a pooled trust account in a foreign country.

You must instruct the savings institution to pay net interest earned on the pooled trust account to the Law Foundation. The account must provide for the return of cancelled cheques and bank statements covering all transactions on the account. Scanned images of the front and back of each negotiated cheque are allowed and electronic copies of bank statements may be stored on the firm’s server or computers. However, reliance on the financial institution’s website to store and obtain documents on demand is not permitted. Refer to Rule 3-67 and the Letter of Direction to Financial Institution in Appendix C.

## Key elements of a pooled trust account

### Separate

Trust funds in the pooled trust account must not be commingled with any personal or general funds of the practice other than a small amount of up to \$300 to cover service charges.

### Identifiable

The pooled trust account bank statements, cheques and deposit slips must be clearly labelled as “Trust” or “Trust Account” on the records of the lawyer and the financial institution.

### Accountable

The books and records for the pooled trust account must be accurate, up to date, and readily accessible at all times. Records must be kept on site for 3 years (the current and previous 2

years). Records must be maintained for at least 10 years after the termination of the representation and completion of the client matter. The lawyer is ultimately responsible for the trust account even when delegating duties to a non-lawyer.

## **Service charges on the pooled trust account**

A lawyer may maintain up to \$300 of general funds in the trust account to offset service charges associated with the account. A common way of identifying these funds in the accounting records is by creating a “trust float” ledger. When the balance of the trust float is reduced to an amount that is not adequate for the deduction of further service charges it should be replenished with a general account cheque that brings it back to a maximum amount of \$300.

**Best Practice:** When setting up a new trust account, instruct your financial institution to provide trust account statements at the end of the reporting period, which is normally the month-end date. This will ensure that the financial institution reports the activity and balances in your trust account at month-end and year-end dates, which is useful for trust reconciliations and annual trust report requirements.

If your law firm has merchant credit card charges, it is recommended to have these taken from the firm’s general account to mitigate the risk of exceeded the allowable \$300 float limit, and therefore creating a shortage in the trust account.

## **Setting up a separate interest bearing trust account**

Section 62 (5) of the *Legal Profession Act* and Rule 3-58 (2) permit a lawyer, on instruction from a client, to place funds in a separate interest bearing trust account (SIBTA). Interest paid on a SIBTA becomes the property of the client rather than the Law Foundation. Common investment accounts for SIBTAs include savings accounts, term deposits, guaranteed investment certificates and other similar financial instruments.

**Best Practice:** It is good practice to obtain client instructions to open a SIBTA in writing.

## **Considerations when setting up a SIBTA**

Some practical considerations to help determine when trust funds should be invested for the benefit of one specific client include:

- directions of the client;
- amount of funds;

- period of time the funds are expected to be held in trust; and
- cost of establishing and maintaining a SIBTA, including service charges, costs of issuing tax receipts for interest accruing to the client.

As interest earned on the SIBTA is the property of the client, income tax due on the interest earned is the responsibility of the client. The financial institution will issue T5 income tax slips that must be forwarded to the appropriate parties in a timely manner. The lawyer should be mindful of any other income tax implications such as withholding taxes and remittances for non-resident clients. Consult your CPA if you have any questions.

### **Steps to establish a SIBTA**

1. Satisfy yourself you have the client’s authority to set up and transfer trust funds to a SIBTA. We recommend that the client authorization be in writing.
2. Prepare a letter and write a cheque made payable to the financial institution. The letter should direct the financial institution to set up an interest bearing account and specify the type of investment account authorized by the client. The name on the bank account should be the name of the law firm “in trust for client X”. An authorized signatory to the trust account should sign both the letter of direction to the financial institution and the cheque. Place a copy of the letter in the client’s correspondence file and in a folder for separate interest bearing trust accounts in the accounting records. Should you wish to transfer the funds electronically please review Rule 3-64.1.

Record the transfer in the trust book of entry and client trust ledger of withdrawing the funds from the pooled trust account and depositing it into the SIBTA.

### **Steps required to record interest on SIBTAs**

1. Determine the amount of interest received on deposit from the financial institution.
2. Record the interest within 30 days in the trust book of entry and the client trust ledger.

### **Steps required to collapse a SIBTA**

1. Prepare a letter to the financial institution with instructions to close the SIBTA and transfer the funds, including accrued interest, to the pooled trust account. A practising lawyer who is an authorized signatory to the trust account must sign the

letter. Should you wish to transfer the funds electronically, please review Rule 3-64.1.

2. Record the transfer in the trust book of entry and client trust ledger of withdrawing the funds from the SIBTA and depositing it into the pooled trust account.

## **Foreign currency trust accounts**

Lawyers who routinely deal with trust funds in a currency other than the Canadian dollar may consider operating a pooled trust account in that currency (e.g. U.S. dollar, European euro and Hong Kong dollar). While the currency is different, the rules are not. The rules pertaining to pooled trust accounts apply to funds of any currency.

Effective April 30, 2020, CDIC offers protection on eligible deposits in foreign currencies. This change removes the previous requirement for lawyers to obtain written confirmation from their client before placing funds in a trust account that was not insured by CDIC (e.g. a U.S. dollar pooled trust account at a bank). As these foreign currencies are covered by CDIC, lawyers must designate the accounts as a professional trustee account and file an annual attestation in April.

Lawyers who bank with a provincial credit union continue to enjoy CUDIC coverage for their Canadian dollar trust accounts and trust accounts in foreign currencies. However, CUDIC does not require account holders to provide an annual attestation.

## **Setting up online banking access**

A lawyer may wish to view the trust account balances through online banking. This can be helpful to ensure timely review of trust transactions prior to the delivery of the statement. Online banking access is permitted and the financial institution often will issue a bank card which can be used to access the online information.

You should consider whether you will need to electronically withdraw funds from trust. The rules permit lawyers to electronically withdraw trust funds to send funds to other lawyers, clients, third parties and to your own general bank account. This will be discussed in more detail in a later section.

The rules requires lawyers to use a commercial banking platform with two passwords:

- one person to use their password to enter the details of the withdrawal; and
- a second person, who is a practising lawyer, to use their password to authorize the transaction.

**Best Practice:** Do not write down your password. If you have difficulty recalling passwords, we recommend that you use a password manager as a safeguard.

If you anticipate accepting electronic deposits into your trust account, it would be prudent to be able to access your trust transactions online as Rule 3-64.2 requires lawyers to obtain written confirmation from the remitter or financial institution within two banking days of the deposit.

## Chapter 2 - Operating a Trust Account

The following sections explain the general procedures and issues that can arise in operating a trust account.

### Deposits

Under Rule 3-58 all trust funds received must be deposited as soon as practicable into a pooled or separate account of the practice unless it is specifically exempted by the rules. Rule 3-58 (3) permits the deposit of trust funds to an account other than a trust account in a designated savings institution with client's written instructions.

#### What must be deposited to a trust account?

- Funds belonging entirely to the client such as retainers for legal work yet to be performed or disbursements yet to be made;
- funds that belong partly to the lawyer and partly to the client that cannot be easily split, such as a settlement for a personal injury case that will be withdrawn and paid in part to the client and to the lawyer for fees; and
- funds that the lawyer receives on behalf of the client such as proceeds from property sales.

#### What may be deposited to a trust account?

- a lawyer may deposit up to \$300 of their own funds, under Rule 3-60 (5); and
- retainer for services as a mediator, arbitrator or parenting coordinator.

#### What must not be deposited to a trust account?

- funds that belong to the firm or the lawyer;
- funds that are not directly related to legal services provided; and
- funds that the lawyer is holding in a personal capacity which do not meet the definition of trust funds.

## Trust funds must be directly related to legal services

Rule 3-58.1 requires any deposits into the trust account be directly related to legal services provided by that lawyer or law firm. For example, the lawyer would not be permitted to deposit funds into their trust account in the following scenarios:

- a. A lawyer is a team coach for a local soccer league. The lawyer is not permitted to deposit the funds related to the league in the trust account.
- b. Lawyer A does not have a trust account but is representing a client in the sale of a property matter. Lawyer B has a trust account. Lawyer A asks lawyer B if the sale transactions can be run through lawyer B's trust account. Lawyer B would not be permitted to deposit Lawyer A's trust funds into lawyer B's trust account because the funds are not directly related to the legal services provided by lawyer B.
- c. A lawyer is representing a client in a criminal matter and expects the legal fees to total approximately \$75,000. The client gives the lawyer \$1,800,000 as a retainer. The lawyer provides legal services and issues a bill to the client for \$75,000. The client promptly pays the invoice with a bank draft. The lawyer holds the \$1,800,000 in a separate interest bearing trust account pending instructions from the client. While the lawyer was providing legal services, the amount held as a retainer is not commensurate with the expected legal services to be performed and should not be held in a trust account.
- d. A lawyer is representing a non-resident in a corporate matter that will last several months. During this time, the client asks the lawyer to deposit \$60,000 into the trust account as the client is having difficulties opening a bank account in Canada. While the lawyer is providing legal services, the \$60,000 is not directly related to the legal services being provided and the lawyer should not deposit the \$60,000 into their trust account.
- e. A lawyer is acting as an escrow agent. They are holding \$250,000 in their trust account pending an event on September 7, 2022. If the lawyer does not provide legal services that directly relate to the \$250,000 and is simply handling the funds according to an escrow agreement, the funds should not be deposited into the trust account.
- f. A lawyer is acting for the seller in a sale of a property. The funds are received in trust in accordance to the purchase and sale contract. However, the client provides instructions to the lawyer to leave the funds in trust and periodically request to disburse the funds to various third parties unrelated to the transaction. In this situation, the lawyer is not permitted to hold funds in trust after completion of the

legal services and it is not appropriate to disburse to parties that are not involved in the transaction.

Lawyers must not allow their clients to use their trust account as the client's personal or business bank account. Before depositing funds into trust, you should determine what legal services are you are providing and whether the trust account is potentially being used to facilitate money laundering. The misuse of a lawyer's trust account can lead to disciplinary action so lawyers should exercise professional judgment before depositing funds into a trust account.

### **Steps required to process a trust deposit**

1. Issue a receipt that contains the full particulars of the transaction including the reason the funds were paid to the firm, such as retainer, mortgage advance, settlement proceeds etc.
  - a. If cash was received, review Rule 3-59 to determine whether the firm is permitted to accept the funds. If the funds received do not fall under the exemptions listed in the rule, the firm must take immediate steps to return the cash.
  - b. If funds were directly deposited into trust, obtain confirmation from the remitter or the financial institution as to the form of the funds received. A cash receipt must still be issued if cash was directly deposited into your trust account.
  - c. If funds were electronically deposited into trust, obtain confirmation from the remitter or financial institution sufficient details to record the transaction (e.g. payer's name and client's name). Lawyers have two banking days to obtain this information.
2. Record the deposit, including the client matter number and the amount, in the trust deposit book issued by the financial institution. Total the trust deposits for the day.
3. Make the deposit as soon as practicable, preferably the same day. Always retain a copy of the validated deposit receipt.
4. Records the details of the deposit in the trust book of entry and client trust ledger. You will need to record the date, the amount, the source and form of the funds received and the client's name and client number.
5. Record the trust administration fee, if applicable.

Lawyers looking for an alternative to visiting the financial institution in-person to make deposits should consider remote deposit capture or mobile deposits. Both options allow you to make trust deposits 24 hours a day, 7 days a week. If you choose to use either of these methods of depositing funds into trust, ensure the financial institution (or its related software application) is able to provide a validated deposit slip.

Remote capture deposits allows law firms with the ability to scan incoming cheques at the law firm's office for deposit into the trust account.

Mobile deposits enable lawyers to deposit paper cheques directly into their trust account using a mobile app. The financial institution will require you to take a photo of the front and back of the cheque and upload the photos into your financial institution's app.

**Best Practice:** Control who opens the mail regarding the trust account and incoming deposits; ensure that each cheque is stamped with a restrictive endorsement such as "For Deposit Only".

Order trust account supplies including trust deposit slips and trust cheques in a distinct colour from the general account. Ensure new supplies are imprinted with "Trust Account" and the correct account number before you start using them.

Issue numbered receipts for all incoming trust funds and duplicate numbered cash receipts for trust funds received in the form of cash received by the law practice. Keep copies of all cheques that are deposited noting which have not been certified. Note the date of deposit, and compare the list to your financial institution statement to ensure no cheques have been returned (i.e., non-sufficient funds or NSF) prior to disbursing the funds.

## **Certified vs. uncertified cheques**

Certified funds may take different forms including a certified bank cheque, bank draft, or money order. A certified bank cheque must be certified at the financial institution where the cheque is drawn.

Trust cheques issued by the law firm must be capable of certification. BC Code 7.2-12 requires that if a lawyer authorizes the withdrawal of trust funds from a trust account by cheque, they undertake that the cheque will be paid and that it is capable of being certified if presented for that purpose. Please note the commentary to BC Code 7.2-12 which states,

"Unless funds are to be paid under an agreement that specifically requires another form of payment or payment by another person, a lawyer must not refuse to accept another lawyer's uncertified cheque for the funds. It is not improper for a lawyer, at that lawyer's own expense, to have another lawyer's cheque certified."

You should be aware of the following so that there is sufficient funds in trust:

- your law firm's policy for accepting uncertified cheques for deposit into the firm's trust accounts;
- your financial institution's policy on placing holds on funds in your law firm's trust account; and
- the time required for the financial institution to negotiate cheques within your city, within the province, and elsewhere.

If you are going to withdraw trust funds soon after you deposit the funds to your trust account, we suggest that you request guaranteed deposit funds from the client. One of the most reliable ways to receive funds into your trust account is by way of wire or electronic transfer. Options for receiving payment into your trust account should be discussed with your financial institution.

**Best Practice:** Take a photocopy of the cheque prior to getting the cheque certified for your records. If the financial institution does not return the original certified cheque, request at a minimum, copies of the front and back of all certified cheques that cleared the trust account for your records.

The Law Society's Practice Advice Department has prepared guidance on risk management tips to reduce the risk of a hold on trust cheques, certified cheques and bank drafts. Refer to the Resources section at the end of the handbook for the link to the guidance on our website.

## Electronic deposits into trust

Lawyers are permitted to receive money into a trust account by electronic transfer if the lawyer obtains sufficient information from the financial institution or the remitter in order to record the transaction. Therefore, the lawyer needs to obtain the source of funds received, the client's name and the client matter. Furthermore, lawyers must obtain this written confirmation within two banking days of the deposit.

## Interest on trust accounts

Under Rule 3-60 (3) interest on the pooled trust account must be paid by the financial institution directly to the Law Foundation. It is the lawyer's responsibility to ensure that they have provided written instructions to the financial institution to pay interest to the Law Foundation.

The calculation of interest has been negotiated between the Law Foundation and the various financial institutions. Usually interest is calculated at an agreed upon rate and may be in

some cases be reduced by the amount of service charges related to the trust account. The total or gross interest amount minus service charges equals the net interest amount to be remitted to the Law Foundation.

## Trust withdrawals

The provisions that allow for the withdrawal of trust funds are included in Rules 3-58.1, 3-64, 3-64.1, 3-64.3, 3-65 and 3-66. Under Rule 3-64 (3) no withdrawals from trust may be made unless the firm's trust accounting records are current and there are sufficient funds held to the credit of the client on whose behalf the funds are to be paid. As such, the trust funds must be on deposit in the same account for the specific client matter that you draw the funds on.

Generally, you may withdraw trust funds that:

- are properly required for payment to or on behalf of a client or to satisfy a court order;
- belong to the lawyer;
- are in the trust account because of a mistake;
- are paid to the law practice to pay a debt of the client;
- are transferred between trust accounts;
- are due to the Law Foundation; or
- are remitted to the Law Society as unclaimed trust money.

Rule 3-58.1 requires any withdrawals from the trust account be directly related to legal services provided by that lawyer or law firm. Furthermore, the funds must be withdrawn from trust as soon as practicable on completion of the services to which the funds relate. For example, the lawyer would not be permitted to withdraw funds from their trust account in the following scenarios:

- a. A lawyer is representing a client in a sale of a property matter. The transaction completes and the lawyer is about to issue a trust cheque to the client for the sale proceeds. The client instructs the lawyer to make the trust cheque payable to a third party, unrelated to the transaction. Paying sale proceeds to the seller is an action that is directly related to legal services provided by the lawyer. Paying sale proceeds to someone else is not. The lawyer should issue the trust cheque to the client and the client can issue a cheque to the third party themselves.

- b. A lawyer is representing a client in a personal injury matter. The transaction completes and the settlement proceeds of \$1,000,000 are deposited into trust. The client instructs the lawyer to wire \$50,000 into the client's bank account on the first of every month for the next 20 months. While the funds paid to the client are directly related to legal services provided by the lawyer, the lawyer must deliver the \$1,000,000 to the client as soon as practicable as the legal services have been completed.
- c. A lawyer is representing a client in the sale of a property matter. The transaction completes and the client instructs the lawyer to put the funds into a separate interest bearing trust account as they will be purchasing a property soon. The lawyer must not hold onto the funds. The lawyer must deliver the funds to the client as soon as the legal services have been completed.
- d. A lawyer is representing a client in the purchase of a company matter. The client provides a personal cheque for \$300,000 to the lawyer and the funds are deposited into the trust account. The deal collapses and the client instructs the lawyer to wire the \$300,000 to a foreign company that is purportedly owned by the client. The lawyer must return the funds to the client and not the client's company.

Before withdrawing funds from trust, lawyers should ask themselves whether the payment is required as part of the legal services provided. This includes evaluating who funds are being paid to as lawyers should not be acting as a financial intermediary. Lawyers are expected to exercise caution and not follow their client's instructions blindly. The misuse of a lawyer's trust account can lead to disciplinary action so lawyers should exercise professional judgment before withdrawing funds from trust.

## **Forms of trust withdrawals**

The Rules allow lawyers to withdraw trust funds:

- by cheque as permitted by Rule 3-64 (5) or 3-65 (1.1) (a);
- by electronic transfer as permitted by Rule 3-64.1;
- by bank draft as permitted by Rule 3-64.3;
- by instructions to the designated savings institution to remit net interest to the Law Foundation as permitted by Rule 3-64 (9); and
- in cash as permitted by Rule 3-59 (5) or (6) in very specific circumstances.

## Steps required to issue a trust cheque

The majority of trust withdrawals by lawyers are conducted via trust cheque. Familiarize yourself with the following steps so that trust funds are properly accounted for:

1. Satisfy yourself as to the authority to issue the trust cheque. An example would be a trust cheque requisition approved by the lawyer in charge of the trust account or a signed statement of adjustments on a conveyance matter.
2. Verify by checking the client ledger that there are sufficient funds on deposit for this client to issue the trust cheque. Also, verify that the firm did not accept an aggregate amount of more than \$7,500 in cash, if so you are required to refund your client in cash and not issue a trust cheques. The topic of cash will be discussed in a later section.
3. Prepare the trust cheque. Photocopy or scan the cheque and retain a copy on file (this is an optional procedure).
4. Record the cheque details in the trust book of entry and client trust ledger.
5. Have the trust cheque signed by an authorized signatory to the trust account. At least one of the signatories must be a practising lawyer in BC.

A cheque issued from a pooled or separate trust account must be signed by a practising lawyer and marked “trust”. Lawyers must not sign blank trust cheques. If a lawyer will be away, arrange to have another practising lawyer sign the trust cheque on their behalf.

**Best Practice:** Record the file number on the face of the cheque as well as the cheque stub so that the disbursement can be easily traced.

## Electronic withdrawal of trust funds

Lawyers are permitted to electronically withdraw trust funds under Rule 3-64.1. For property transfer tax electronic payments you are required to keep the following records:

- all electronic payment authorizations submitted to electronic filing system;
- the property transfer tax return; and
- the transaction receipt provided by the electronic filing system.

In addition, the lawyer must digitally sign the property transfer tax return in accordance with the requirements of the electronic filing system and verify that the funds were drawn from

the trust account as specified by the property tax return. A lawyer must safeguard their digital signature and is not permitted to delegate signing authority to a non-lawyer.

Lawyers are also permitted to electronically withdraw trust funds provided that they:

1. Complete and sign the Law Society Electronic Transfer of Trust Funds (EFT) requisition form (refer to Appendix B for a copy of the form).
2. Use a financial institution's commercial banking platform that requires a two-person authentication system. The first person will enter the details of the transaction using one password and the second person, who must be a lawyer and using another password, will enter the details to authorize the transaction.
3. Obtain written confirmation from the financial institution by the close of the next banking day.
4. Verify the transaction by completing the following by the close of the next banking day after the confirmation is required:
  - a. Print a copy of the confirmation;
  - b. Compare the printed copy of the confirmation to the requisition to ensure transaction was processed as requested;
  - c. Write on the printed copy of the confirmation the name of the client, the subject matter and the file number;
  - d. Sign and date the paper copy of the confirmation; and
  - e. Retain a copy of the confirmation and requisition form as part of the accounting records.

If you are a sole practitioner who does not have non-lawyer staff, you are permitted to perform the duties of both individuals in a two-person authentication system if you maintain a different password for each function.

### **Withdrawal by bank draft**

Lawyers are permitted to directly withdraw funds from trust using a bank draft provided they:

1. Obtain written consent from the payee to receive the funds via bank draft;
2. Complete the prescribed form (See Appendix B);

3. Obtain the bank draft at the financial institution where the lawyer's law firm has a trust account;
4. Obtain written acknowledgement of receipt of the bank draft from the payee; and
5. Retain a copy of all documents listed above, including the bank draft.

## **Cheques, wire transfers and bank drafts**

Trust cheques and wire transfers leave a better audit trail than bank drafts as you can easily determine the funds have been withdrawn. Financial institutions will typically debit your trust account to remove the funds for the bank draft. If you want to determine whether the bank draft was deposited by the payee, you will need to follow-up with your financial institution. Furthermore, if a bank draft is lost, it may be difficult for the financial institution to assist you in reclaiming the funds.

Cancelled cheques, including certified cheques, belong to the firm must be retained in the accounting records. Wire payments made using the Electronic Transfer of Trust Funds requisition form also provide an adequate audit trail. In addition, if you are making a payment to a client overseas, it is strongly suggested that a wire payment be used. Sending a cheque overseas increases the risk of loss or theft.

The lawyer signing the trust cheque should review the client trust ledger to determine if payment is appropriate. Under no circumstances should the firm disburse more funds than received for a specific client. To do so would create a trust shortage and may require a written report to the Executive Director, under Rule 3-74 (2).

### **Best Practice:**

Use pre-numbered cheques and periodically examine the sequential order of the blank cheque supply. Keep all voided cheques and blank cheques under your control during the day and in a locked, secure location during non-office hours.

Establish a disbursement/withdrawal procedure. Written documentation such as a signed statement of account or an approved invoice provides authorization that the withdrawal is appropriate. The firm's withdrawal procedures should be clearly communicated.

Stamp original copies of invoices "PAID" to prevent duplicate payments.

Cheques payable to a financial institution should include details of the transaction such as a mortgage number and file reference.

## Signing authority on trust accounts

Withdrawals by trust cheque must be signed by at least one practising lawyer as required by Rule 3-64 (5).

A lawyer may lose the right to sign on trust accounts in the following instances:

- as an undischarged bankrupt;
- as a result of a Law Society disciplinary hearing; or
- because of a voluntary undertaking to the Law Society.

On occasion, sole practitioners may allow another lawyer to sign their trust cheques when they are not available to sign themselves. It is permitted to provide another practising lawyer with temporary signing authority on your trust account.

The rules do not permit trust cheques to be signed by a non-lawyer alone. A non-lawyer may be a second signatory to the trust account. This is common in larger firms where the director of finance or office manager may be given signing authority as an internal control.

A lawyer is also required to sign the *Electronic Transfer of Trust Funds* and *Withdrawal from Trust by Bank Draft requisition forms* if funds are being withdrawn electronically or via bank draft.

Lawyers must be scrupulous with the funds they hold in trust on behalf of clients. Before a withdrawal is made from trust, a lawyer's signature authorizing the transaction is required.

## Payment of fees from trust

Rules 3-64, 3-64.1 and 3-65 deal with the provisions for withdrawing funds from the trust account, for the payment of fees. Familiarize yourself with the provisions of these specific rules. Generally, once the work is performed by the lawyer, a fee bill is rendered to the client itemizing all the amounts charged prior to withdrawing funds from trust. Fees can be withdrawn from trust by a trust cheque payable to the lawyer's general account or by electronic funds transfer using a financial institution's commercial banking platform that requires a two-person authentication system. In order to avoid comingling the lawyer's funds with trust funds, under Rule 3-60 (5), a lawyer should not defer the withdrawal of trust funds to the general account for an unreasonable period of time.

**Best Practice:** Before you write a trust cheque to your general account or complete the Law Society's *Electronic Transfer of Trust Funds requisition form* for fees, look at the date of the invoice and cover letter. You should not be taking any funds unless the invoice is dated and delivered prior to the date you are writing the cheque or completing the requisition form.

## Shortages and overdrafts

Trust shortages are a very serious matter. Rule 3-63 requires that a lawyer must, at all times, maintain sufficient funds on deposit in each trust account to meet all of their obligations to the clients. Trust shortages are not the same as a physical overdraft. A trust shortage occurs when more funds are paid out on a client matter than what is available to the credit of that particular client. So, even though the trust account may have a positive balance, it may experience a shortage with a specific client matter. Shortages also include instances in which trust funds are deposited to an account which is not designated as a trust account, such as a general account or personal account.

For example: John gives you \$5,000 in trust. Mary gives you \$1,000 in trust. Assuming that these are your only two clients, you now have \$6,000 in trust. You withdraw \$4,000 from trust in payment of an invoice for fees and disbursement issued to Mary; creating a \$3,000 trust shortage under Mary's trust ledger. Why? Because Mary only had \$1,000, yet you paid \$4,000, even though you still have a positive balance in your trust account of \$2,000 ( $\$6,000 - \$4,000 = \$2,000$ ). It is considered a shortage because Mary did not have enough funds under her client trust ledger to make the payment resulting in using some of John's funds.

In the event that you discover a trust shortage, Rule 3-74 (1) requires you to immediately pay enough funds into trust to correct the trust shortage. Under Rule 3-74 (2) you must make a written report to the Executive Director noting the circumstances if you:

- have a trust shortage in excess of \$2,500; or
- are unable to deliver trust funds when due (eg. a trust cheque has been returned by your financial institution and was not negotiated).

There are several scenarios where a trust shortage could occur. Additional examples of shortages include:

- Trust funds inadvertently deposited into the general account.
- Trust funds were held in Bank A but the funds were withdrawn from Bank B.

- The client's cheque was deposited into trust and subsequently a trust cheque was issued to withdraw the trust funds. However, the client's cheque was returned as non sufficient funds.
- The bank debits the trust account for NSF fees, cheque printing and other service charges.
- The bank debits the trust account an amount greater than what the trust cheque was issued for.

Please refer to Appendix C for sample trust shortage letters to the Law Society.

**Best Practice:** Do not authorize a trust cheque until you are satisfied that the deposited trust funds have cleared your financial institution. Be diligent and ensure you have funds for the specific client in the right trust account to cover the trust cheque.

## Other valuable property

When valuable property is received by the law firm, a receipt should be given to the client providing sufficient detail to identify the property concerned. The property should be immediately secured. If the law firm does not have a fire protected safe the property should be delivered to a safety deposit box with the client's authorization. Valuable paper and property should not be stored in the client file.

A permanent record must be maintained of the receipt and disposition of all valuable property handled on behalf of the clients. It is also required as part of the monthly trust reconciliation process to reconcile the valuable property listing. Each month, compare the listing against the physical valuable property. Any discrepancies must be investigated and corrections made. Retain a copy of the listing as part of the monthly trust reconciliation and record the date it was prepared.

The valuable property record may include executed Powers of Attorney, bearer bonds, share certificates or similar securities, estate assets including jewellery, antiques or other negotiable property. Please refer to Appendix A for a sample of a Valuable Property Record.

## Credit card transactions

A law firm may accept credit or debit card payments from clients for both trust and general funds. You must make proper arrangements with your financial institution to ensure that all service charges relating to these payments are paid from the general account. The effect of this arrangement will be that funds deposited to trust accounts will not be reduced by discounts or service charges.

**Best Practice:** If the financial institution is not willing to set up two separate machines (one for trust and one for general), these payments can be received directly into the law firm’s trust account with all related service charges being paid from the law firm’s general account. Then, if funds are received related to the payment of a statement of account, they should be immediately transferred to the general account.

## Cash transactions

Anytime a lawyer or law firm is dealing with cash received from or on behalf of a client, special attention is required. The improper handling of cash transactions can lead to disciplinary action so a careful reading of Rule 3-59 is required.

Generally, the rule prohibits a lawyer or law firm from receiving cash in connection with the provision of legal services by the lawyer or law firm in an aggregate amount over \$7,500 Canadian dollars in respect of any one client matter unless received:

- from a financial institution or public body;
- from a peace officer, law enforcement agency, or other agent of the Crown;
- pursuant to a court order or other tribunal for the release to the lawyer or the lawyer’s client of cash that has been seized by a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity;
- to pay a fine, penalty or bail;
- for professional fees, disbursements or expenses.

Cash, in any amount, can be received as a retainer or for the payment of an outstanding invoice for services rendered. When a firm does accept more than \$7,500 in cash, any refund out of those funds, must be refunded in cash. In addition, the lawyer must have the payee sign the receipt for the refund. An important point to remember is that cash receipts are considered in aggregate and over the entire life of the client matter. That means that not all the cash has to come in on the same day. So, \$1,000 can come in today, \$500 tomorrow, etc. The distinction between “client” and “client matter” is also important since you may have a client with several distinct client matters such as a purchase, sale, or personal injury matter. You must track the cash received on each distinct client matter.

Lawyers must be on guard against cash that is deposited directly into their trust account. Lawyers must investigate all direct deposits to determine the form of funds received. We recommend lawyers retain supporting documents (e.g. a copy of the validated deposit receipt or wire transfer confirmation form) for each direct deposit. The form of funds

received must be accurately recorded in the accounting records. Lawyers are not permitted to record the form of funds received as “direct deposit”.

Beware of a change in use of the cash accepted. A lawyer may have accepted more than \$7,500 in cash for a retainer but subsequently uses that cash to pay for something other than the lawyer’s fees (e.g. settlement or property purchase), the lawyer may face disciplinary action for not complying with the cash rules.

## **Cash receipt book of duplicate receipts**

The rules for handling cash require that you prepare a duplicate receipt for all cash that you receive for the law firm. In this cash receipt book of duplicate receipts, you must record the following for each receipt of cash:

- the date of receipt;
- the name of the person from whom the cash was received;
- the amount of cash received;
- the name of the client for whom the cash was received;
- the file number;
- the signature of the lawyer or a person designated by the lawyer;
- the signature of the person who provided the cash; and
- all dates on which the record was created or modified (if generated electronically).

In addition, Rule 3-70 (3) requires that for each withdrawal of cash required by Rule 3-59 (5) and (6), you must issue a receipt and record the following:

- the date of the withdrawal;
- the amount of the withdrawal;
- the name of the client in respect of whom the cash was withdrawn;
- the number of the file in respect of which the cash was withdrawn;
- the name of the person to whom the cash was paid;
- the signature of the lawyer or a person designated by the lawyer;

- the signature of the person to whom the cash was paid; and
- all dates on which the record was created or modified (if generated electronically).

## Cash refund examples

Review the examples below to see if you know how to properly refund a client. You may be assisting your client in money-laundering if you do not refund the client in a method that is required by the rules.

Scenarios for cash or cheque refunds – as of July 12, 2019	
Scenario 1	<ul style="list-style-type: none"> <li>• Lawyer requests an \$8,000 retainer for legal services</li> <li>• Client provides an \$8,000 cash retainer</li> <li>• Lawyer provides the services and bills the client \$7,500</li> <li>• Lawyer must refund \$500 to the client</li> </ul>
	The lawyer must refund \$500 to the client in cash because the cash accepted was greater than \$7,500.
Scenario 2	<ul style="list-style-type: none"> <li>• Lawyer requests \$7,000 retainer for legal services</li> <li>• Client provides \$7,000 cash retainer</li> <li>• Lawyer provides the services and bills the client \$4,000</li> <li>• Lawyer must refund the client \$3,000</li> </ul>
	The lawyer must refund \$3,000 to the client by trust cheque or wire transfer because the cash accepted was \$7,500 or less.
Scenario 3	<ul style="list-style-type: none"> <li>• Lawyer requests an \$8,000 retainer for legal services</li> <li>• Client provides an \$8,000 cash retainer</li> <li>• Client decides to be represented by another another lawyer and requests that the \$8,000 retainer be transferred to the new lawyer</li> </ul>
	The lawyer must refund the \$8,000 to the client in cash because the cash accepted was greater than \$7,500. The lawyer should not issue a trust cheque or bank draft or wire the \$8,000 to the new lawyer.

The following is an excerpt from the Benchers' Bulletin, 2008: No. 3 July written by Practice Advisor Barbara Buchanan, QC (Buchanan):

“If you are providing a cash refund, it means a trip to your financial institution to make a cash withdrawal. You must not make out a trust cheque payable to "Cash" or "Bearer" (Rule 3-64 (5) (b)). You can use the form of withdrawal slip provided by your financial institution to make the withdrawal. We suggest that you ask for a copy of the withdrawal slip to staple in your deposit book or to your bank statement.

When you hand over the cash to your client, have the client sign your duplicate receipt book for the cash refund just as you had the client sign your duplicate receipt book when your client originally gave you cash (Rule 3-70). Also, make sure that you document the cash refund in both the individual client file and the monthly trust reconciliation so you have a written explanation for a withdrawal made other than by way of a trust cheque.”

While lawyers are permitted to accept cash in aggregate of more than \$7,500 for fees, we urge lawyers to exercise caution. While there are no limitations to the amount of cash you may accept for fees and disbursements with respect to Rule 3-59, the Law Society Rules do not supersede the *Criminal Code* or allow lawyers to accept cash without inquiry or scrutiny. The following is an excerpt from Buchanan’s article in the Benchers’ Bulletin, 2019: No. 2 Summer:

“Lawyers must be aware of their vulnerabilities, as well as, changes in the regulatory and legislative landscape regarding criminal activities and money laundering. It is an offence to possess property obtained by crime (section 354(1), 462.3(1) and 462.31(1) of the Criminal Code). A lawyer owes a duty to the state to maintain the law and not to aid, counsel or assist any person to act contrary to the law (Canon 2.1-1(a) of the Code of Professional Conduct for British Columbia.)”

Dealing in large volumes of cash is inconsistent with most mainstream activities. Routinely accepting large volumes of cash is a high-risk practice and will be reviewed in detail during a compliance audit.

**Best Practices:** Create a “no cash” policy in the firm. Educate your staff, inform your clients, include wording in the retainer agreement and instruct the bank to put a note in your account to not accept any cash.

## Unclaimed trust money

When a lawyer is holding funds in trust for a client for a period in excess of two years and the client cannot be located to return the funds, the lawyer may use the provisions of Rule 3-89 and section 34 of the *Legal Profession Act* to pay the funds to the Law Society.

Once the funds have been received by the Law Society, the Society will attempt to locate the rightful owner or their heirs. If the owner cannot be found within five years, the funds will be paid to the Law Foundation with the understanding that all valid claims for return of trust funds will be honoured.

When remitting funds to the Law Society under Rule 3-89, the lawyer must report to the Law Society the full name and last known address of the owner, the amount of trust funds held, efforts made to locate the party, any unfulfilled undertakings given by the lawyer in

relation to the funds, and the details of the transaction. Refer to Appendix B for the Law Society's *Unclaimed Trust Money form*.

## Handling aged trust funds

All trust funds, regardless of the amount or the length of time held in trust, must be dealt with properly in accordance with the Rules. Rule 3-64 (1) sets out the circumstances in which a lawyer may withdraw funds from trust. A withdrawal for any other reason is improper. Further, a lawyer may only transfer funds from trust to general if the lawyer:

- is entitled to those funds as payment for fees, disbursements or taxes; and
- has prepared and delivered a bill to the client in accordance with the requirements of Rule 3-65 and section 69 of the *Legal Profession Act*.

A lawyer who has no entitlement to the money must not issue a bill to “zero out” the remaining trust balance. A lawyer’s conduct in transferring funds from trust to general without meeting the proper requirements may lead to disciplinary action for failure to comply with the Rules. Moreover, depending on the circumstances, this conduct could be considered misappropriation.

What should you do?

Avoid the problem of dealing with lingering trust funds by the early identification of files which have a remaining trust balance after the work has been completed. Once the files have been identified the remaining funds should be immediately disbursed to the appropriate party. Do not let it get to the point where a great deal of time has passed since your last contact with the person(s) for whom you hold the money.

Carefully review the monthly trust reconciliations for any trust cheques that have not cleared within two or three months of issuance and for any trust balances remaining on closed or inactive files.

If a lawyer holds unclaimed trust funds, they must make reasonable efforts to locate the owner of the funds to pay them to the owner. The lawyer should also document the efforts taken to locate the owner. If, after 2 years, the lawyer has been unsuccessful in locating the owner of the funds, they may then remit the funds to the Law Society under Rule 3-89.

**Best Practice:** Request a voided cheque from the client as part of the client intake process. If there are funds remaining in trust, you may issue a trust cheque and deposit the funds directly into the client’s account or electronically transfer the funds to the client’s account. Please refer to Appendix B for the *Unclaimed Trust Money form*.

If you require further information about the process of submitting funds as unclaimed trust money, contact the Law Society at: [unclaimed@lsbc.org](mailto:unclaimed@lsbc.org).

## Annual reporting requirements

Every law firm must deliver to the Law Society an annual trust report complete to the satisfaction of the Executive Director. The requirement to file a trust report is in place for all firms regardless if they do not maintain a trust account.

The purpose of the trust report is to ensure that the firm has an adequate system for recording all financial transactions and complies with the trust accounting requirements set out in Part 3, Division 7 of the Law Society Rules.

A trust report usually covers a period of 12 months; however, it may cover a period of less than 12 months in the first or last year of operation. The report is due within 90 days of the year-end for trust reporting. The trust reporting year-end month is usually the month in which the firm began operating.

Failure to submit the required trust report by the due date will result in late fee assessment(s). In addition, the firm will be on notice that all lawyers at the firm will have their membership suspended if the trust report is not submitted within 60 days after the due date. We recommend you diarize the due date to ensure the trust report is filed on time.

Please refer to Rules 3-79 to 3-83.

## Compliance audits

The Compliance Audit Program is a proactive process that is designed to be an effective means by which the Law Society can fulfill its duty to ensure compliance with the trust accounting rules.

A compliance audit is defined in Rule 3-53 as “an examination of a lawyer’s books, records and accounts and the answering of questions by lawyers”. Rule 3-85 authorizes the Law Society to perform the audit. All law firms in BC are subject to a compliance audit. The primary goal of the compliance audit is to ensure that books, records and accounts comply with the requirements of the *Legal Profession Act*, the Law Society Rules and the *Code of Professional Conduct for BC*. The compliance audit process also aims to provide on-site guidance to help law firms identify and correct minor problems with record-keeping before they lead to serious issues of non-compliance; and to identify possible professional conduct concerns.

The audits are generally selected at random and the goal is to audit each firm at least once every 6 year cycle. Compliance audits are conducted by a trust assurance auditor either

onsite at your chief place of practice or remotely. The time period examined is typically the most recent 12 to 24 months. Advance notice is given along with a checklist of the books and records required for the audit period. A compliance audit usually takes 2 to 5 days to complete.

Receiving a compliance audit does not waive the requirement under Law Society Rule 3-79 to file a trust report. The report is still required in the year in which the Law Society audits the firm.

## **Other trust fund regulations**

You should also be familiar with the provisions of the *Code of Professional Conduct for BC* that set out additional requirements governing the handling of trust funds.

*BC Code 7.1-3*: states that unless to do so would involve a breach of solicitor-client confidentiality or privilege, a lawyer must report to the Society:

- a shortage of trust monies;
- a breach of undertaking or trust condition that has not been consented or waived;
- the abandonment of a law practice;
- participation in criminal activity related to the lawyer's practice;
- conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer; and
- any other situation in which a lawyer's clients are likely to be materially prejudiced.

## **Closing a trust account**

If the firm is closing a trust account, you are required to obtain confirmation from your financial institution of account closure. This can come in different forms. First, if your final statement specifically states that the account is "closed", you do not have to do anything further. However, if your final bank statement simply shows a zero balance, with no notation that the account is closed, then you must contact your financial institution and ask them to provide written confirmation that the account has been closed, and the date it was closed. The confirmation of account closure should be maintained within your accounting records, with a copy in your monthly trust reconciliation in the month it was closed. This confirmation will be reviewed during the compliance audit.

If the trust account you are closing is your sole or final trust account, and after its closure, you no longer are operating a trust account; then, upon request, you will be required to provide a copy of the account closure to the Law Society.

## Chapter 3 - Setting Up and Operating a General Account

The general account of the practice is a deposit account at a financial institution with cheque writing privileges that is commonly referred to as the operating account. It is a non-trust account and one from which payments for the day to day operating expenses of the firm are made. The account is kept in the name of the firm and is identified as the general account on the books and records of the firm and the financial institution.

The general account is normally opened at the same financial institution as your pooled trust account. Many law firms will also set up a line of credit or other borrowing vehicle that is used to fund the general account in case the available cash in this account falls below the level required to meet all the operating expenses of the firm.

### Signatories to the general account

The rules do not have any specific requirements regarding who signs a general account cheque. Often, administrators have signing authority on the general account, as well as, a lawyer of the firm. It is up to the individual firm to decide on the appropriate signing authorities on the general account.

**Best Practice:** The law firm should set up segregation of duties to ensure there is appropriate oversight that the person given signing authority on the general account has not abused their privilege. As such it would be prudent to have another person, other than the signing officer to the account, open the bank statements and review the negotiated cheques to ensure that all cheques have been accounted for and appropriately authorized.

### Steps required to process a general deposit

1. Issue a receipt that contains the full particulars about the transaction. If funds were directly deposited into general, obtain confirmation from the remitter or the financial institution as to the form of the funds received. A cash receipt must still be issued if cash was directly deposited into your general account.
2. Record the deposit amount and matter number in the general deposit book.
3. Deposit all receipts as soon as practicable, preferably daily in the appropriate accounts. Always retain a copy of the validated deposit receipt.
4. Record the details of the deposit in the general book of entry and update the running balance.

5. Record the deposit details for payments of a client account to the accounts receivable ledger and update the running balance.

## Rendering accounts to clients

The law firm must prepare and deliver a bill to their clients prior to receiving any funds into the general account. You are required to keep a file copy of all bills to clients showing the professional fees and other charges that you have billed and keep them in an organized manner such as chronologically, numerically or alphabetically. Most firms issue bills (commonly referred to as statements of account) that are numbered so it is easy to file the bills in numerical order.

You must also keep an accounts receivable ledger or some other suitable system that records all firm billings and all payments made and the remaining accounts receivable running balance for each client. When you have created an invoice, whether it was paid immediately or not, you have created a “receivable”. Therefore, every bill issued by the firm should be recorded in the accounts receivable ledger.

The bill should include a reasonably descriptive statement of the services and a detailed statement of disbursements. Payments to third parties by the firm such as courier charges, court filing fees, land registry fees and internal costs such as photocopying, receiving and sending faxes may also be charged as client disbursements. These client disbursements are usually broken down between taxable and non-taxable disbursements on the statement of account and can only be charged after the firm has incurred the expense. GST and PST will also be charged to the clients at the rates set by the federal and provincial government applicable at the time of billing.

The bill must also be signed by or on behalf of a lawyer. Alternatively, the bill must be accompanied by a letter, signed by or on behalf of the lawyer that refers to the bill. Retain a copy of the signed bill or letter as a supporting document of what was provided to the client. The Rules require that the bill be delivered to the client so we recommend you manually indicate the method of delivery and the date it was delivered on the copy retained (e.g. dropped off at Post Office on September 7, 2022).

**Best Practice:** Mark on your invoices the amount which was paid from trust. The bill will normally include a record of trust funds received and withdrawn for the relevant client matter, if any, and inform the client if any trust funds have been applied to the amount owing on the bill. It will also inform the client of any amounts owing after the transfer of funds from trust.

Please refer to the Resources section at the end of this handbook for links to the Canada Revenue Agency and Ministry of Finance website that contains information on GST and PST.

## **Payment of fees and disbursements**

When the firm renders and delivers a statement of account, the total amount of the bill to the client is entered in the accounts receivable ledger.

If funds are available in the client's trust account to cover a bill, which has been rendered to the client, the funds can be withdrawn from trust and paid to the firm's general account.

Lawyers must properly record and bill disbursements as required under section 69 (4) of the *Legal Profession Act*. When you sign your name to an account, you represent that the fees and disbursements are accurate and verifiable. For billing purposes, disbursements must be:

- reasonably incurred in the circumstances of the client matter or be authorized by the client under section 71 (2) (b) of the Act;
- billed at their actual, rather than estimated costs; and
- properly described in detail in the statement of account.

Disbursements must be billed at their actual rather than estimated costs. In addition, disbursements must not be inflated. It is important to keep back up documentation for all disbursements so that the disbursement is easily traceable should the client or auditor request a copy.

Under *Code of Professional Conduct of BC 7.1-2* lawyers also have a professional duty to meet their financial obligations. This includes those that are incurred or assumed in the course of practice, apart from any legal liability to do so. You are responsible to pay disbursements if clients do not, and your recourse is to collect the amounts from the clients.

## **Withdrawals from the general account**

The general account funds are used to pay for the following:

- general overhead and expenses of the practice such as rent, parking and general office expenses;
- disbursements on behalf of clients;

- pay owners of the firm, associate lawyers, employees of the firm along with contract staff; and
- tax remittances such as PST, GST and corporate taxes, and payroll source deductions.

### **Steps required to issue a general cheque**

1. Check the balance in the account to ensure that you have sufficient funds to cover the cheque.
2. Prepare the cheque and have an authorized signatory to the general account sign it.
3. Record the cheque in the general book of entry and update the running balance.

## Chapter 4 - Trust Administration Fee

Lawyers who maintain one or more trust accounts in BC are required to remit to the Law Society a trust administration fee (TAF) for each client matter upon initial deposit of funds into trust, not including fees and retainers for fees.

Under Rule 2-110 (3) a lawyer must remit the TAF collected or allocated to a client file for the previous quarter within 30 days of the end of that quarter. Each of these remittances will cover three-month period of trust activity ending March 31, June 30, September 30, and December 31. Zero balance returns are not required. The due dates should be diarized in your calendar to ensure that the firm remits on time. A late fee of 5% of the amount due will be applied to late payments.

It is important to note that sufficient backup documentation must be maintained as the reasonableness of your TAF remittances will be tested during any Law Society compliance audit of your firm or by specific request of the Trust Assurance Department. At a minimum, you will need to retain a list of client numbers and client names for which TAF was remitted.

Please consult the Law Society website for the most up to date information regarding the current rate of the TAF.

## Chapter 5 - Recordkeeping

Accounting records must be retained at the chief place of practice for a minimum of 3 years and retained for a period of 10 years after the termination of the representation. Termination of the representation usually occurs when the final billing has been rendered to the client and all balances including trust funds owing to the client have been accounted for to the client as recorded on the client trust ledger and the client file is closed and sent to storage.

### What do you keep?

A lawyer who practices in BC must maintain current financial records as set out in the rules and retain the following fiduciary, trust and general account records.

#### Fiduciary property records

As required by Rule 3-55

- current list of valuables, with a reasonable estimate of the value of each;
- accounts and other records respecting the fiduciary property; and
- all invoices, bank statements, cancelled cheques or images, and other records necessary to create a full accounting of the receipt or disbursement of the fiduciary property and any capital or income associated with the fiduciary property.

#### Trust accounts records

As required by Rule 3-67 (6)

- original bank statements and cancelled cheques, statements for savings accounts, term deposits and other type of accounts (electronic bank statements and cheque images are also acceptable provided they are saved on the firm's service and not the financial institution's server);
- trust deposit book, including original validated bank deposit receipts and ATM deposit slips;
- pooled trust account cheque book, along with voided cheques;
- Electronic Funds Transfer (EFT) requisition forms and confirmations; and
- all other supporting documents, vouchers and invoices.

As required by Rule 3-68

- trust book of entry;
- client trust ledgers; and
- trust transfer journal.

As required by Rule 3-70

- cash receipt book of duplicate receipts.

As required by Rule 3-73

- monthly trust reconciliations for pooled and separate interest bearing accounts, along with client trust liability listing; and
- valuable property record.

## **General accounts records**

As required by Rule 3-67 (6)

- original bank statements and cancelled cheques, statements for savings accounts, term deposits and other type of accounts (electronic bank statements and cheque images are also acceptable provided they are saved on the firm's service and not the financial institution's server);
- general account deposit book, including original validated bank deposit receipts and ATM deposit slips;
- general account cheque book; and
- all other documents that support the above-noted records and accounting transactions such as credit and debit memos.

As required by Rule 3-69

- general book of entry; and
- accounts receivable ledger.

As required by Rule 3-70

- cash receipt book of duplicate receipts.

As required by Rule 3-71

- file copies of bills delivered to clients.

Upon dissolution, transfer or the discontinuance of a law firm, the lawyers must make appropriate arrangements for the maintenance of the books and records specified in Rule 3-87.

## **Additional accounting procedures and reports**

There are a number of additional accounting procedures that you will commonly encounter in a law firm. These additional procedures are not required by the Law Society Rules but can help confirm the accuracy of the books and records and assist the lawyers in making decisions about such matters as billing, budgeting, compensation and operational cashflow.

These additional procedures and reports are commonly available from computerized accounting packages and may include:

- *Accounts receivable – aged trial balance* – enables managers of the practice to follow up on delinquent accounts receivable.
- *Budget reports* – usually set up at year end and monitored monthly to assist management in anticipating cash needs of the practice and monitor performance of the firm.
- *Fee analysis reports* – enables management to assess the fee income by area of law.
- *Financial statements* – enables management to determine revenue, expenses, uncollected fees, and income or loss.
- *Pre-bill report* – usually completed as needed to help determine for each individual client the amount of unbilled work in progress, unbilled disbursements, previous billings, payments, amount in trust if any, and the accounts receivable balance.
- *General reconciliation* – usually performed monthly to confirm that the general bank statement accurately reflects the transactions recorded in the general book of entry.
- *Work in progress report* – enables lawyers to monitor the level of unbilled time and unbilled client disbursements and aids management in monitoring the work performed by each lawyer.

## Internal controls

To mitigate the risk of misappropriation of trust or general funds its recommended to implement and monitor internal controls. In addition, be mindful of some of the warning signs that someone might be involved in the misappropriation of client or firm funds or property such as:

- blank or incomplete deposit slips or cheque stubs;
- missing cheques;
- bank accounts that do not reconcile;
- cheques returned for insufficient funds;
- unidentified counter cheques or electronic transfers;
- cheques that clear the account out of numerical sequence;
- excessive number of voided cheques;
- excessive cheques to a particular vendor or client including numbered companies;
- frequent trips to the financial institution that break the normal routine;
- complaints from vendors or third parties that their accounts are not paid in a timely manner;
- failure to meet regulatory remittances such as GST, PST or payroll source deductions;
- signs of a lifestyle beyond the means of the person, signs of depression, or drugs and alcohol abuse;
- unwillingness to take vacation or extended periods of time off; and
- unwillingness to share accounting duties with another person.

If you observe any of the above warning signs you should follow up in order to satisfy yourself that there is a reasonable explanation for the event.

**Best Practice:** Establish a system of internal control over all funds of the practice. Refer to Appendix B for a sample *Internal Control Checklist*. An easy internal control measure for small firms is to have all the bank statements (trust and general) go unopened to a designated person, usually the lawyer in charge of trust activities. The initial review, by someone other than the person recording deposits, issuing cheques and reconciling the accounts, may identify unusual items such as unauthorized signatures, non-sufficient funds (NSF) cheques, and overdrawn balances.

## Maintaining an audit trail

Your ability to tell the complete story of what happened to all client funds from the date of receipt to the date of the final disposition is essential. An audit trail is a number of documents that make it possible to trace what happened to trust or general funds that the practice has handled. You need to maintain a good audit trail that ties together all the records that relate to a financial transaction and you may record the same information several times in various journals and ledgers to accomplish this function.

The following documents provide an audit trail for most transactions that you will record:

- copy of the cheque or deposit instrument;
- cash receipt, if applicable;
- validated deposit slip showing the date and amount of the deposit, the name/file reference of the client, the form and source of the funds received, and the date stamp showing the date the funds were deposited in the bank account;
- written confirmation for electronic deposit into trust from the financial institution or remitter showing the date and amount of the deposit, the name/file reference of the client and the source of the funds received;
- bank statement showing the date and amount of the deposits, the date and amounts of the withdrawals and the running balance of the funds held in the account;
- cheque stub and cheque requisition showing when the withdrawal was authorized, to whom and the lawyer authorizing the withdrawal;
- cancelled cheque showing the date it was drawn, the amount, the payee, the purpose of the cheque and the order of negotiation from the endorsements on the back of the cheque;

- Electronic Funds Transfer (EFT) requisition form and confirmation which shows who authorized the transaction, the date, the amount, the client number and the payee's name;
- Withdrawal from Trust by Bank Draft requisition form, written confirmation of receipt from the payee and copy of the bank draft; and
- any file documentation that would explain and support the deposit or the authority for how the client's funds were distributed such as a closing statement of account, a court order or a signed authorization by the client for the disbursements of the funds.

## Chapter 6 - The Reconciliation Process

Mistakes happen! The best way to find and correct these errors is through the reconciliation process. Rule 3-73 (5) requires that you reconcile all the trust accounts monthly. This is one of the most important functions that you perform with respect to the accounting records. The reconciliation process involves the comparison of three basic records: the bank statements, the client trust ledgers and the trust book of entry. At the end of the process all three amounts must agree.

The reconciliation process is a simple arithmetical procedure, usually completed at month-end, and involves the following documents:

- bank statements – the totals of the balances as shown on each pooled trust account and the statements for separate interest bearing accounts that have been adjusted for outstanding deposits and outstanding cheques and any recording errors;
- client trust listing – the total of all client trust ledger balances including client ledger balances held in separate interest bearing trust accounts; and
- trust book of entry – the running balance shown in your journal at the reconciliation date.

### How to perform a trust account reconciliation

1. Obtain the trust bank statement(s).
2. Check off all returned cheques on the trust bank statement and the trust book of entry for the previous month, noting any discrepancies in the amounts.
3. Identify any cheques that you have issued, but have not cleared the financial institution, from your trust book of entry.
4. List the outstanding cheques including cheque number, date of issue, amount, payee, and client file reference. Total the listing of outstanding cheques; these are your outstanding cheques to note on your trust account reconciliation.
5. From your deposit book, check off all deposits on the bank statements noting any discrepancies in the amounts.
6. Identify any deposits that do not appear on the bank statement that you recorded in your trust book of entry.

7. List the outstanding deposits, by date and the amount that are not recorded on the bank statement; these are your outstanding deposits to note on your trust account reconciliation.
8. List any errors individually by date of occurrence and provide a detailed explanation. Attach a copy of any supporting documents to your reconciliation.
9. Enter the ending balance from the trust bank statement on your trust reconciliation form.
10. Calculate your reconciled trust bank balance by subtracting the outstanding cheques, adding the outstanding deposits from the ending balance on the trust bank statement and adjust any errors or reconciling items.
11. From the client trust ledgers, identify and list the clients for whom you hold trust funds at the month end.
12. List the client names, client matter number, pooled trust account balances and separate interest bearing trust account balances, if any, for each client trust ledger with an unexpended balance at month end. This is your client trust listing.
13. Include the date of the last trust activity on your client trust listing to help you monitor inactive trust accounts.
14. Total the client trust listing and enter the total on your trust reconciliation form.
15. Enter the following from the trust book of entry on the trust reconciliation form:
  - a. record the beginning balance by carrying forward the balance at the end of the previous month;
  - b. add the total deposits made in the current month;
  - c. subtract the total cheques written, electronic withdrawals made and bank drafts withdrawn in the current month; and
  - d. the total amount is the month end balance in the trust book of entry.

## The comparison

1. Compare your reconciled trust bank balance to your client trust listing balance and your trust book of entry balance.
2. All three figures must be the same. If there is a discrepancy, you must find and immediately correct the discrepancy.
3. When all numbers agree, sign and date the reconciliation.

Regardless of who prepares the trust comparisons, good internal control requires that the lawyer in charge of trust review all supporting documentation to ensure:

- the trust reconciliation is completed on time;
- all client trust funds are accounted for (pooled and separate interest bearing accounts);
- reconciling items are cleared each month;
- any unreconciled items have been explained and documented;
- stale-dated cheques, which are cheques more than 6 months old, are re-issued;
- there are no overdrawn client trust ledger balances;
- the trust float balance is \$300 or less;
- the balances listed in trust for each client are correct;
- any client trust ledger balance with no activity in the previous 12 months is investigated;
- funds in trust for completed matters have been billed to the proper clients and the funds are either transferred to the general account or returned to the client as appropriate; and
- all trust funds are allocated to a client and there are no miscellaneous or suspense accounts or accounts in the name of the lawyer or the practice, except for the trust float.

Practice makes perfect. We have a simple trust reconciliation exercise that you can download on our website to test your proficiency at preparing trust reconciliations. See the Resources section at the end of this handbook to find the Trust Accounting Basics course.

## Monthly Trust Reconciliation Sample

<b>TRUST BANK SEPTEMBER 30 2022</b>		
<b>TRUST ASSETS</b>		
Bank Reconciliation – Pooled Trust Account #123-456		
Balance per bank statement at September 30 2022		\$40,800.00
Add: outstanding deposits (per listing attached)		Nil
Less: outstanding cheques (per listing attached)		\$500.00
Add/deduct adjustments		
	Subtotal	<b>\$40,300.00</b>
Separate interest bearing trust account (SIBTA #99-001)		
Client Matter #1003		\$10,000.00
	<b>Total Trust Assets as at September 30 2022</b>	<b>\$50,300.00</b>
<b>TRUST LIABILITIES</b>		
Pooled Trust Account #123-456		
	<b>Last Transaction Date</b>	
Client Matter # 1001	Aug 31 2022	\$ 300.00
Client Matter # 1002	Sept 30 2022	\$40,000.00
	Subtotal	\$40,300.00
Separate interest bearing trust account #9-8888		
Client Matter # 1003	Sept 30 2022	\$10,000.00
	<b>Total Trust Liabilities as at Sept 30 2019</b>	<b>\$50,300.00</b>
<b>Control Account – Trust Book of Entry</b>		
Beginning balance	Aug 31 2022	\$300.00
Add: current month receipts	Sept 2022	\$50,000.00
Less: current month cheques	Sept 2022	Nil
<b>Ending Balance</b>	<b>Sept 30 2022</b>	<b>\$50,300.00</b>
Prepared by:		Date:
Reviewed and Approved by:		Date:

## How to review a trust account reconciliation

The trust bank balance, trust book of entry and client trust listing must all agree. If there is a discrepancy, it must be identified and fully explained on the reconciliation. When all numbers are in agreement, sign and date the reconciliation. The trust reconciliation must be prepared within 30 days of the effective date of the reconciliation, as required by Rule 3-73 (5), so please remember to indicate on the trust reconciliation the date it was prepared.

### Trust bank statement

1. Are there any outstanding deposits noted? If so, is it a timing difference (i.e., were the funds deposited on the last day of the month but recorded by the bank on the following day). Outstanding deposits not due to timing differences merit your immediate attention as it may indicate a trust shortage.
2. Are there any stale-dated cheques listed under the outstanding cheque list? If so, consider re-issuing the cheque(s) to your client(s) or consider submitting the funds to the Law Society under the provisions of Rule 3-89.
3. Are there any bank service charges, bank errors or recording errors? If so, ensure that they have been corrected.
4. Ensure that all separate interest bearing trust accounts are included on the trust reconciliation.

### Client trust listing

1. Are there any client files that have been inactive for more than 2 years? If so, consider remitting the funds to the Law Society under the provisions of Rule 3-89.
2. Are there any files with large balances in trust? If so, consider whether it would be appropriate to open a separate interest bearing trust account. Please obtain written client authorization prior to opening a separate interest bearing trust account.
3. Are there any unidentified funds? If so, the deposit should be immediately tracked in order to identify the ownership of the funds.
4. Is the firm's "float" within the allowable limit of up to \$300? If not, please issue a trust cheque payable to the general account for the excess amount over \$300, as required by Rule 3-60 (5).

5. Are there any overdrawn client trust ledger balances? If so, the trust shortage must be immediately eliminated. If the trust shortage is greater than \$2,500, please provide a written explanation to the Executive Director, as required under Rule 3-74 (2) (a).
6. Are there any funds in trust that should be transferred to the general account (i.e., an invoice recently rendered yet the fees have not been withdrawn from trust)? If the fees are not in dispute or impressed with a specific purpose, the funds must remain in the trust account.

### **Trust book of entry**

Ensure the ending balance of the trust bank statement agrees with the client trust listing and trust book of entry balances.

## Appendix A - Trust Accounting Samples

### Trust book of entry – Rule 3-68 (a)

This journal lists all trust deposits chronologically for all clients and must include:

- the date and the amount of funds received;
- the source, name of person or institution from whom you received the funds;
- the form of funds received, cash, cheque, bank draft, wire transfer etc.; and
- the name of the client for whom you received the funds.

This journal lists all trust account cheques chronologically and must include:

- the date and amount of the trust cheque;
- the identity of the client on whose behalf the trust funds are disbursed;
- the cheque or voucher number for each payment out of trust; and
- the name of each recipient of funds out of trust.

### Trust book of entry – sample

DATE	PARTICULARS	DOC#	DEPOSITS	CHEQUES	BALANCE	FORM FUNDS RECEIVED
Sept 30, 2022	Balance Forward				10,500.00	
Oct 01, 2022	Received from: Smith - Retainer Smith, Josie Client Matter #1001	R123	500.00		11,000.00	Cash
Oct 07, 2022	Paid to Jones & Jones in Trust - balance due Brown, Tamara Client Matter #1002	T1005		5,000.00	6,000.00	

## Client trust ledger – Rule 3-68 (b)

The client trust ledger is used to record chronologically, for each client matter, all trust receipts and disbursements and must include:

- a separate client ledger for each client matter;
- transactions by date, purpose and amount; and
- calculation of the unexpended balance in trust for the client matter.

Each entry in the trust book of entry must be recorded in the client trust ledger. Keep the entire client trust ledger intact as part of your accounting records.

Accurately record trust transactions in the client trust ledgers as the balances will be used to create the client trust listing for the monthly trust reconciliations.

## Client trust ledger – sample

Client: SMITH, JANE Re: Litigation Matter Bank: Pooled Trust Account #123-456 Client Matter: #1001 Responsible Lawyer: Evan Johnson					
DATE	PARTICULARS	DOC.#	CHEQUES	DEPOSITS	BALANCE
Oct 1, 2022	Received from Jane Smith- Retainer- cash	R123		\$500.00	\$500.00
Nov 1, 2022	Received from Oliver Smith – Retainer – cheque	R127		\$1,500.00	\$2,000.00
Nov 11, 2022	Payment of account – bill #493867	TC#62	\$1,800.00		\$200.00
Dec 15, 2022	Payment of account – bill #493900	TC#86	\$200.00		Nil

## Trust transfer journal – Rule 3-68 (c)

This journal is used to record all transfers between client trust trust ledgers. Whenever you move trust funds from one client trust ledger to another client trust ledger you must record the transfer, explain the purpose of the transfer and have the transfer authorized in writing by the lawyer. From this journal, you need to record the entries to the specific client trust ledger involved in the transfer.

The transfer journal should be signed by the lawyer, outline the specifics of the transfer, form part of your accounting records and be retained for at least 10 years.

### Trust transfer journal – sample

DATE	FROM CLIENT	TO CLIENT	AMOUNT	PURPOSE	LAWYER'S AUTHORIZATION
Oct 01 2019	Jones, Jessica Client Matter #1006	Elliot, Sue Client Matter #1050	40,000.00	Transfer from: Jones sale file to Elliot purchase file	

### General book of entry – Rule 3-69 (1) (a)

This journal lists all general deposits chronologically for all amounts received in connection with the law practice, other than trust funds, and must include:

- the date of the receipt;
- from whom the funds were received;
- amount received;
- the purpose of the funds (e.g. paid on account, expense recovery); and
- bill number, if applicable.

It also lists all general cheques issued and other other withdrawals chronologically for all amounts paid in connection with the law practice, other than trust funds, and must include:

- the date paid;
- to whom the funds were paid;
- amount paid;
- the purpose of the funds, e.g. paid on account, expense recovery; and
- cheque or voucher number used, if applicable.

A manual general book of entry may contain over 20 columns to categorize and record general account transactions. Some of the more common headings are presented in the following sample:

## General book of entry – sample columns

Date	Particulars Payer/Payee	Receipt / Cheque #	General Bank		Revenue		Client Disbursements	
			Deposits	Cheques	Fees	Other	Description	Amount
PST Payable	GST Payable	GST ITC	Accounts Receivable	Salaries	Income Tax Withheld/Paid	CPP Withheld/Paid	EI Withheld/Paid	TAF Payable
Auto	Business Promo 50%	Phone	Office	Travel	Sundry Description	Amount	Running Balance	

## Accounts receivable ledger – Rule 3-69 (1) (b)

This ledger lists all bills issued by the firm and any payments received for those bills. Each time a bill is generated, an entry must be recorded in the accounts receivable ledger even when the payment has been made immediately by the client or from the trust account. Maintain a separate accounts receivable subledger for each client to track the balances owed to the firm. This will enable the firm to follow-up with the specific client for payment if necessary.

## Accounts receivable ledger - sample

Client: #2022-0005 Travis Boots				
Date	Description	Bill Amount	Payments made	Balance
January 8, 2022	Issued bill #297538	\$5,000.00		\$5,000.00
March 21, 2022	Cheque #7 from Tiffany Boots		\$2,000	\$3,000.00
March 22, 2022	Issued bill #297544	\$1,000.00		\$4,000.00
May 25, 2022	Issued bill #297591	\$500.00		\$4,500.00
July 2, 2022	Interact e-transfer from Travis Boots		\$4,500.00	Nil

## Cash receipt book of duplicate receipts<sup>1</sup> (Rule 3-70)

Duplicate Cash Receipt		No. _____	
Select one:	<input type="checkbox"/> Cash Receipt <input type="checkbox"/> Cash Refund		
Date:		Amount of \$:	
Client Name		File #:	
Name of payer / payee:		Signature of payer / payee:	
Name of lawyer or authorized staff:		Signature of lawyer or authorized staff:	
Comments:			

## Valuable property record

- When the law firm receives valuable property, a receipt should be given to the client giving sufficient details to identify the property concerned.
- The property should be immediately secured. Where the law firm does not have proper fire protection or secured facilities, the property should be delivered to a safety deposit box with the client’s concurrence. Valuable paper and original documents should not be stored in the client file.
- A permanent record must be maintained of the receipt and disposition of all valuable documents handled on behalf of clients.

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<sup>1</sup> This applies to both cash received as general funds and as trust funds.

- The record should be kept current as it forms a part of the monthly trust reconciliation.
- The type of documents or securities to be detailed in this record include Powers of Attorney, bearer bonds, share certificates or similar securities, mortgages registered in the name of the lawyer or the lawyer in trust, estate assets including jewelry, antiques, etc.
- Any valuable property maintained as fiduciary property should be kept on a separate list as required by Rule 3-55 from other valuable property held by the firm.

### Valuable property record - sample

Client	Security	Amount or # of shares	Certificate Numbers	Deposited by	Date	Removed by	Date	Comments
Jane Smith	ABC Hydro Bearer Bonds	1,000	AK-39-1052	Jane Smith	Feb 27/22			Bearer Bonds
Estate of Jessica Doe	CDE Explorations	3,000	YX4329 YX4372	Lily Doe	Apr 3/22			
Julie Jones	Power of Attorney	1	Dated Apr 5/02	Jaclyn Jones	Apr 6/22			

# Trust Account Reconciliation Template

Firm Name: \_\_\_\_\_

Account: \_\_\_\_\_

Date: \_\_\_\_\_

## Trust Assets - Bank Statement Balance

\$ \_\_\_\_\_ A

### Plus: Outstanding Deposits / Deposits In Transit

Date of Deposit	Amount	Date of Deposit	Amount
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

\_\_\_\_\_ - B

### Minus: Outstanding Cheques (attach separate sheet if necessary)

Cheque # & Payee	Cheque Date	Amount
_____	_____	_____
_____	_____	_____
_____	_____	_____

\_\_\_\_\_ - C

### Plus/Minus: Adjustments / Errors

Description	Date	Amount
_____	_____	_____
_____	_____	_____
_____	_____	_____

\_\_\_\_\_ - D

### Plus: Separate Interest Bearing Trust Accounts

Client Name/Identifier	Amount	Client Name/Identifier	Amount
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

\_\_\_\_\_ - E

**Total Trust Assets - Reconciled:**

\_\_\_\_\_ - F



## Appendix B – Checklists and Forms

### Requisition – Electronic transfer of trust funds

# Requisition

The Law Society  
of British Columbia



#### Electronic Transfer of Trust Funds

Rule 3-64.1 *Requires dual password/access code system*

845 Cambie Street, Vancouver, BC, Canada V6B 4Z9  
t 604.669.2533 | BC toll-free 1.800.903.5300  
f 604.646.5917 | TTY 604.443.5700 Email  
trustaccounting@lsbc.org | lawsociety.bc.ca

PART A: Details of transfer		
Amount	Recipient	
<b>Source account</b>		
Financial institution	Account number	
<b>Destination account</b>		
Financial institution	Account number	
Branch address		
PART B: Client matter		
Client name	Client file number (May be entered into transfer system as customer reference)	
Client file subject matter	Reason for transfer	
PART C: Person entering details of transfer		
Must be someone other than the lawyer authorizing the transfer in Part D unless the lawyer is the only lawyer in the firm and has no non-lawyer staff. (Rule 3-64.1(2) (a) & (3))		
Name	Position	
PART D: Lawyer(s) authorizing transfer		
Lawyer (required)	Signature	Date
Second lawyer (optional)	Signature	Date

After transfer, obtain written confirmation from financial institution (Rule 3-64.1(2) (c) (d) & (g)) and complete steps under Rule 3-64.1 (4). File the requisition and confirmation together in a centralized location with your accounting records.

Requisition – Bank Draft

# Requisition

The Law Society  
of British Columbia



**Withdrawal from Trust by Bank Draft**  
Rule 3-64.3 Requires using the prescribed form

845 Cambie Street, Vancouver, BC, Canada V6B 4Z9  
t 604.669.2533 | BC toll-free 1.800.903.5300  
f 604.646.5917 | TTY 604.443.5700  
trustaccounting@lsbc.org | lawsociety.bc.ca

<b>PART A: Details of bank draft withdrawal</b>		
Amount	Recipient	
Date of written consent to receive bank draft		
Delivery method of bank draft		
<b>Source account</b>		
Financial institution	Account number	
Branch address		
<b>PART B: Client matter</b>		
Client name	Client file number	
Reason for withdrawal		
<b>Part C: Lawyer(s) authorizing bank draft withdrawal</b>		
Lawyer (required)	Signature	Date
Second lawyer (optional)	Signature	Date
<b>PART D: Written acknowledgement from recipient</b>		
Date of acknowledgement of bank draft received		

Maintain all documents obtained from the recipient under Rule 3-64.3 (a), the completed prescribed form and a copy of the bank draft together in a centralized location with your accounting records.

## Sample Checklist of Internal Controls

<b>Segregation of duties:</b>	<b>Yes/No</b>
Is the individual who is responsible for opening the mail different than the individual who issues receipts for all cash and cheques?	
Are all cheques received stamped for “deposit only”?	
If a staff member deposits cash and cheques, does another individual enter the receipts into the accounting records?	
Are all receipts issued in numerical sequence?	
Is there a check of the numerical sequence of receipts to ensure that all receipts are recorded in the accounting records and deposited to the proper bank account?	
Does the lawyer in charge of trust review the original bank statements and cancelled cheques before forwarding the documents to the individual responsible for completing the monthly trust and general bank reconciliations?	
<b>Staffing policies and procedures:</b>	<b>Yes/No</b>
Do you conduct thorough reference checks before hiring lawyers and support staff?	
Does the practice maintain a written description of the accounting system and procedures?	
Do you provide your staff with written instructions on your accounting procedures and retention policies?	
Does your practice maintain an up-to-date copy of the Law Society Rules?	
Are the amendments to the Law Society Member’s Manual filed and up-to-date?	
Do you ensure that all staff have access to the Law Society Rules?	
Do you ensure that you and your staff conduct yourself in a professional manner and identify and address conflict of interest situations?	
Do you ensure that all staff are aware and respect the requirements of client confidentiality?	
Does the practice have a policy respecting all staff to take a vacation?	
Does the lawyer in charge of trust periodically review client files to make sure that the clients receive an accounting of trust receipts and disbursements?	
Are there periodic reviews of a lawyer’s work to ensure that clients are receiving an accounting of trust receipts and disbursements?	
Does your firm conduct a periodic review of all staff to identify individuals who are too busy to take a vacation or request urgent need for a salary advance?	
<b>Are your trust cheques:</b>	<b>Yes/No</b>
Sequentially numbered and accounted for?	
Secured in a locked and fireproof vault or safe?	
Clearly identified (pre-printed or marked) as trust cheques?	
Printed in a different colour than your general account cheques?	
Are blank trust cheques kept in a secure manner?	

Are all cheque requisitions accompanied by a signed cheque requisition evidencing approval?	
If you are a sole practitioner, have you made arrangements with another member of the Law Society to sign cheques on your trust account if you are unable to do so?	
If applicable, have lawyers kept their banking password secure?	
Does supporting documentation accompany a cheque requisition?	
<b>Cash transactions:</b>	<b>Yes/No</b>
Do you issue duplicate receipts, of which you retain a copy, for all receipts of cash and cash refunds?	
Does the individual providing the cash sign the receipt as well as the individual at the firm who receives the cash?	
<b>Signatories:</b>	<b>Yes/No</b>
Do cheques in excess of a threshold amount require the approval and signature of partners, if applicable?	
Is there a policy in place that prohibits cheques to be signed in blank?	
For trust cheques, is the individual signing the cheque reviewing the validity of the request, the reasonableness of the amount requested and determining if there are sufficient funds available to pay the amount of the cheque requisition?	
Do you review the supporting documentation prior to signing the cheques to ensure that the service was provided and billed, or the disbursement is proper?	
Do cheques payable to a financial institution include sufficient details of the transaction?	
Are all trust cheques signed by at least one practicing lawyer who is authorized to sign?	
Are all EFT requisition forms signed by a lawyer?	
<b>Are your trust account deposit books:</b>	<b>Yes/No</b>
Clearly identified as being for your trust account?	
Stored in a different location than your general account deposit books?	
If you make automatic bank machine (ABM) deposits, do you always print out an ABM deposit receipt, attach it to your trust deposit book and record all the details of the deposit?	
<b>Trust records:</b>	<b>Yes/No</b>
Are your books and records up-to-date?	
Do you review your client trust ledgers on a regular basis to identify unusual activities?	
Are the trust reconciliations and reconciling items reviewed and signed on a monthly basis by someone other than the individual who prepared the reconciliation?	
Does the review of the trust reconciliation ensure that reconciliations are prepared on time; that reconciling items are cleared promptly; that unusual items are questioned and adequately explained?	
Do you ensure that the trust comparison which compares your trust reconciliation of all trust bank accounts and the client trust listing is completed within 30 days of the month end?	
Do you review, date and sign the monthly trust reconciliations?	

Have you instructed your bank in writing to pay net interest to the Law Foundation?	
Are the listings of client trust ledger balances reviewed periodically for closed and completed matters including trust balances that have not changed for twelve months?	
Are all reconciling items on the trust reconciliations cleared promptly?	
Are all unusual reconciling items on the trust reconciliations questioned and followed up?	
Does the lawyer in charge of trust periodically review the trust client ledger balances for unusual items?	
Are trust transfer requisitions signed by the responsible lawyer?	
Has the accounting department or person responsible for trust records been informed to process trust transfers only if the criteria for authorized signatures and explanations have been met?	
<b>Billing:</b>	<b>Yes/No</b>
Do you discuss the fees and anticipated disbursements with your client at the start of the matter?	
Do you confirm all fee arrangements in writing?	
Do you ensure that all billings for legal fees are mailed or delivered before transferring the fee amount from your trust bank account to your general account?	
Are all computerized or manual billings entered in your books and records as to date, client and amount?	
Do you review your accounts receivable periodically to identify any credit balances, which may indicate that billings to clients have not been prepared and entered in your books and records?	
Are major billing adjustments reviewed by a partner or another lawyer other than the lawyer responsible for the client file and its billing?	
<b>Computerized systems:</b>	<b>Yes/No</b>
Is your software licensed?	
Is your computer protected with a surge protector?	
Is your data backed up and stored offsite on a regular basis?	
Is your computer system password protected?	
Do you change passwords periodically?	
Do you maintain a list of lawyers and staff who have been assigned passwords and is it updated for changes in staff?	

# Unclaimed Trust Money Application Form

# Application

The Law Society  
of British Columbia



## Payment of Unclaimed Trust Money to the Law Society

845 Cambie Street, Vancouver, BC, Canada V6B 4Z9  
t 604.669.2533 | BC toll-free 1.800.903.5300  
f 604.687.0135 | TTY 604.443.5700  
Email [unclaimed@lsbc.org](mailto:unclaimed@lsbc.org) | [lawsociety.bc.ca](http://lawsociety.bc.ca)

PART A: Contact information		
Name of law firm		Date
Responsible lawyer		
Street address		City
Province/State	Postal/ZIP code	Telephone
Name of custodian (if applicable)		
Street address		City
Province/State	Postal/ZIP code	Telephone
<p>The information on this form is collected under the authority of Rule 3-89 (1) and (2) of the Law Society Rules, which is as follows:</p> <p>3-89 (1) A lawyer who has money in trust on behalf of a person whom the lawyer has been unable to locate for 2 years may apply to the Executive Director to pay those funds to the Society under section 34 [Unclaimed trust money].</p> <p>(2) A lawyer must make the application referred to in subrule (1) in writing containing all of the following information that is available to the lawyer:</p> <ul style="list-style-type: none"> <li>(a) the full name and last known mailing address of each person on whose behalf the funds were held;</li> <li>(b) the exact amount to be paid to the Society in respect of each such person;</li> <li>(c) the efforts made by the lawyer to locate each such person;</li> <li>(d) any unfulfilled undertakings given by the lawyer in relation to the funds;</li> <li>(e) the details of the transaction in respect of which the funds were deposited with the lawyer.</li> </ul>		

The information on this form is collected under authority of section 34 of the Legal Profession Act and Part 3, Division 8 of the Law Society Rules. The information provided will be used to administer the unclaimed trust funds. If you have any questions about the collection and use of this information, contact Member Services at the Law Society of British Columbia, 845 Cambie Street, Vancouver, BC V6B 4Z9, telephone 604.669.2533.

<p>For Law Society use only</p> <p>Approved by _____</p>
--

<b>PART B: Trust amount information</b>		
<b>Client A</b>		
Name of rightful owner(s) of funds		Amount
Last known address		
Province/State	Postal/ZIP code	City
Telephone	Fax	Email
For corporate clients please provide name, address and telephone number for contact person(s), officer(s) and/or directors		
Efforts to locate client (telephone directory/criss-cross searches, internet searches conducted, etc.)		
Unfulfilled undertakings in relation to these trust funds <input type="checkbox"/> Yes <input type="checkbox"/> No If 'yes' please provide details		
Details of the transaction in which the funds were deposited in trust		
Date of last contact with client (must exceed two years)		
Other information		
<b>Client B</b>		
Name of rightful owner(s) of funds		Amount
Last known address		
Province/State	Postal/ZIP code	City
Telephone	Fax	Email
For corporate clients please provide name, address and telephone number for contact person(s), officer(s) and/or directors		
Efforts to locate client (telephone directory/criss-cross searches, internet searches conducted, etc.)		
Unfulfilled undertakings in relation to these trust funds <input type="checkbox"/> Yes <input type="checkbox"/> No If 'yes' please provide details		
Details of the transaction in which the funds were deposited in trust		
Date of last contact with client (must exceed two years)		
Other information		

## Appendix C - Sample letters

### Letter of Direction to Financial Institution – New Trust Account

[Name]

[CONFIDENTIAL]

[Date]

[Addressee]

[Address]

Dear Sir/Madam:

**Re: Trust Account – [Number]**

By this letter, I am (*we are*) advising your institution that the above account is a pooled trust account that will contain the funds of more than one client.

The Law Society of British Columbia requires that a pooled trust account shall:

- be interest bearing;
- provide monthly cancelled cheques and statements to the lawyer;
- be readily available to be drawn upon by the lawyer;
- be designated as a “trust” account on the records of the savings institution (and the lawyer); and
- be an account in respect of which the savings institution has agreed with the lawyer to pay interest to the Law Foundation.

Law Society Rule 3-60 (3) (a) requires that every lawyer who opens or maintains a pooled trust account “instruct the savings institution, in writing, to remit the net interest earned on the account, directly to the Law Foundation of British Columbia.”

This letter is my (*our*) instruction to you to calculate the interest on the above account at the rate and in the manner agreed upon between your institution and the Law Foundation of British Columbia, and to remit such interest directly to the Law Foundation according to the terms of that agreement (in the event that there is no agreement in place, please contact The Executive Director of the Law Foundation). This letter authorizes and directs you to provide the Law Foundation with such information and explanation, as it requires verifying the calculation of the interest remitted, including:

- account balance information during the reporting period;
- the interest rate and the gross interest earned;
- service charges deducted (if service charges are deducted, they are limited to the routine processing of transaction items for: deposits; cheques; return of cancelled (cleared) cheques; stop payment orders; and a reasonable fee for Law Foundation payment processing; and
- the net interest earned after deduction of service charges.

A standard form remittance report that should accompany that remittance can be obtained from the Law Foundation.

Please forward the interest directly to:

**The Law Foundation of British Columbia  
1340 - 605 Robson Street  
Vancouver, BC V6B 5J3**

As well, please advise me of the amount of each transmittal.

Yours truly,

**[Name, Title]**

cc: Law Foundation

## Confirmation of Law Foundation of BC interest remittance

<p><b>Financial institution</b> (Name, branch &amp; address)</p>	<p><b>Law firm</b> (Name, address &amp; contact information)</p> <p>The financial institution is authorized to provide the details requested herein to the Law Society of British Columbia.</p> <p>_____ Client's authorized signature</p> <p>_____ Client's authorized signature</p> <p><b>Pooled trust account number(s)</b></p> <p>_____</p>
--	---

Date \_\_\_\_\_

Dear Sir or Madam:

Our law firm is in the process of updating our records and, pursuant to the regulations of the Law Society of British Columbia and the *Legal Profession Act*, a lawyer who opens or maintains a pooled trust account must direct the savings institution to remit the interest earned on the pooled trust account, net of service charges if any, to the Law Foundation of British Columbia (Foundation).

Interest rate agreements on pooled trust accounts are negotiated between the Foundation and senior executives at your financial institution. At the branch level it may not be readily apparent that the interest is being calculated and remitted to the Foundation as, in some instances, this process may be performed at a central administration branch.

As we are updating our records for audit purposes, we require written confirmation that interest is being calculated on the pooled trust account and that this interest is being remitted to the Foundation as required. If you are unable to confirm this is being done at the branch level, please contact your central administration branch for verification.

<p><b>TO BE COMPLETED BY FINANCIAL INSTITUTION</b></p> <p><b>We hereby acknowledge and confirm that the interest is being calculated on the above-noted pooled trust account and that the interest earned has been, and is being, paid to the Law Foundation of British Columbia.</b></p> <p>Authorized signature of financial institution _____ Date _____</p> <p>Branch Contact (Name and telephone number) _____</p>	
---	--

**Please mail or email this form back to our firm with a copy to the Law Society of British Columbia.**

Law firm name and address:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**The Law Society of British Columbia**  
Attention: Trust Assurance  
845 Cambie Street, Vancouver, BC V6B 4Z9  
Email: trustaccounting@lsbc.org

## Trust Shortage Letter Samples – Rule 3-74

### NSF Client Cheque

[Date]

Sent via email (*trustaccounting@lsbc.org*)

Executive Director  
The Law Society of British Columbia  
845 Cambie Street  
Vancouver, BC V6B 4Z9

Dear Executive Director:

#### **Re: Trust Shortage – Rule 3-74**

Pursuant to Law Society Rule 3-74 (2), please be advised that a trust shortage of \$15,000 occurred as follows:

- |                        |  |
|------------------------|--|
| <b>August 24, 2022</b> | Client cheque for \$15,000 was deposited into our Scotiabank trust account.                                |
| <b>August 25, 2022</b> | Funds were paid out on behalf of the client by Scotiabank trust cheque for \$15,000.                       |
| <b>August 26, 2022</b> | Scotiabank called to advise that the client's cheque for \$15,000 was returned NSF.                        |
| <b>August 26, 2022</b> | Cheque #1234 for \$15,000 was written from our general account to our trust account to cover the shortage. |
| <b>August 30, 2022</b> | Client provided replacement funds in the form of a \$15,000 bank draft.                                    |

Please find attached a copy of our August 2022 trust bank statement along with a copy of the front and back images of general cancelled cheque #1234.

Please contact me if you have any questions or require any further information.

Sincerely,

Lawyer

## Trust funds deposited to wrong trust account

[Date]

Sent via email (*trustaccounting@lsbc.org*)

Executive Director  
The Law Society of British Columbia  
845 Cambie Street  
Vancouver, BC V6B 4Z9

Dear Executive Director:

### **Re: Trust Shortage – Rule 3-74**

Pursuant to Law Society Rule 3-74 (2), please be advised that a trust shortage of \$25,000 occurred as follows:

- August 24, 2022** Client cheque for \$25,000 was deposited into our Scotiabank trust account.
- August 25, 2022** Due to an internal error, \$25,000 was paid out by trust cheque on our Bank of Montreal trust account.
- September 15, 2022** Upon completing our August 2022 bank reconciliation for the Bank of Montreal account, we noticed this error.
- September 15, 2022** We issued trust cheque #1234 from the Scotiabank trust account to our Bank of Montreal trust account to cover the shortage.

Please find attached a copy of our August 2022 and September 2022 trust bank statement along with a copy of the front and back images of Scotiabank cancelled trust cheque #1234.

Please contact me if you have any questions or require any further information.

Sincerely,

Lawyer

Enclosures

## Trust funds deposited into general account

[Date]

Sent via email (*trustaccounting@lsbc.org*)

Executive Director  
The Law Society of British Columbia  
845 Cambie Street  
Vancouver, BC V6B 4Z9

Dear Executive Director:

### **Re: Trust Shortage – Rule 3-74**

Pursuant to Law Society Rule 3-74 (2), please be advised that a trust shortage of \$350,000 occurred as follows:

- August 24, 2022** Trust deposit of \$350,000 was prepared and taken to Scotiabank.
- August 26, 2022** Scotiabank called to advise that there was an overdraft in our trust account.
- August 26, 2022** We discovered that the trust deposit was inadvertently deposited to our general account as a result of using the wrong deposit book.
- August 30, 2022** We deposited general cheque #1234 to our trust account for \$350,000 to correct the error.

Please find attached a copy of our August 2022 trust and general bank statements along with a copy of the front and back images of general cancelled cheque #1234.

Please contact me if you have any questions or require any further information.

Sincerely,

Lawyer

Enclosures

## Key definitions

The following key definitions are commonly used in the rules and when referring to the books and records of a law practice.

**Accounts receivable** – are amounts due from law firm clients for statements of account (bill) for legal services provided and billed.

**Accrual basis** – is a method of accounting that recognizes revenues (typically fees billed in a law firm) when earned rather than when collected. Expenses are recognized when incurred rather than when paid.

**Act** – means the *Legal Profession Act*, S.B.C. 1998, c 9.

**Audit trail** – is a series of records such as, cancelled cheques, bank deposit slips, bank statements that enable you to trace what happened to the trust and general funds that you handled. For trust funds, it should start when you receive the funds and would continue until you disburse all the funds bringing the balance that you owe the client to zero.

**BC Code** – means the *Code of Professional Conduct for British Columbia*.

**Benchers** – members of the Law Society’s board of governors.

**Book of original entry** – is a book (or books) recording in chronological order, the receipt of all funds, both trust and general funds, showing from whom and for whom the funds were received and all disbursements made out of trust and general funds, showing to whom and for whom the funds were paid and showing the date when funds were received and/or disbursed. This is also commonly known as a “receipts and disbursements journal”.

**Cash** – is coins referred to in section 7 of the Currency Act of Canada, notes issued by the Bank of Canada under the *Bank of Canada Act* that are intended for circulation in Canada, and coins or bank notes of countries other than Canada.

**Cash receipt book** – means a book of duplicate receipts for funds received in the form of cash (whether received in trust or as payment for non-trust related activities) referred in Rule 3-70 (1).

**CDIC** (Canada Deposit Insurance Corporation) – is a federal Crown Corporation that provides deposit insurance on eligible deposits at member institutions (up to \$100,000 per depositor) and reimburses depositors for the amount of their insured deposits if a member institution fails.

**Client** – includes any beneficial owner of funds or valuables received by a lawyer in connection with the lawyer's practice.

**Client trust ledger** – is an individual ledger for each client recording all trust transactions for that client matter. If a client has trust funds on deposit for more than one client matter, separate client ledger cards should be kept for each matter showing the trust transactions pertaining to that matter.

**Comingling** – occurs when a lawyer deposits personal or business funds into a trust account where trust funds are maintained.

**Compliance audit** – means an examination of a lawyer's books, records and accounts and the answering of questions by lawyers as ordered under Rule 3-85.

**Credit** – is an entry on the right side of the double-entry bookkeeping system that represents the decrease of an asset or expense or the increase of a liability or revenue.

**CUDIC** (Credit Union Deposit Insurance) – is a government corporation that protects credit union members against loss of deposits (providing unlimited insurance) held by British Columbia credit unions. CUDIC's responsibility is to administer and operate a deposit insurance fund.

**Debit** – is an entry on the left side of the double-entry bookkeeping system that represents the increase to an asset or expense or a decrease to a liability or revenue.

**Deposit book** – is a bound book supplied by a financial institution in which deposits are recorded chronologically.

**Designated savings institution** – is a savings institution that has an office in British Columbia for accepting demand deposits insured by CDIC or CUDIC.

**Disbursements** – means amounts paid or required to be paid to a third party by a lawyer or law firm on behalf of a client in connection with the provision of legal services to the client by the lawyer or law firm that are to be reimbursed by the client.

**Document** – is a written or printed paper that bears information that can be used to furnish evidence of a financial transaction. It may also be in the form of computer readable information, such as a PDF.

**Double-entry system** – is a system of accounting that records each transaction twice – once as a debit and once as a credit.

**Efforts to locate** – means steps that are reasonable and adequate in all circumstances, including the amount of funds involved in relation to the Law Society Rules, Part 3, Division 8 – Unclaimed Trust Money.

**Electronic funds transfer** – is a system of transferring funds electronically from one account to another. It does not involve the exchange of paper-based instruments such as cash or cheques.

**Executive Director** – includes a person designated by the Executive Director to perform any of the duties assigned to the Executive Director in these rules.

**Expenses** – means costs incurred by a lawyer or law firm in connection with the provision of legal services to a client that are to be reimbursed by the client.

**Fees** – means fees for services performed by a lawyer and the taxes (GST/PST) on those fees.

**Fiduciary property** – means funds, other than trust funds, and valuables for which a lawyer is responsible in a representative capacity or as a trustee, if the lawyer's appointment is derived from a solicitor-client relationship. Fiduciary property does not include any funds and valuables that are subject to a power of attorney granted to the lawyer if the lawyer has not taken control of or otherwise dealt with the funds or valuables.

**Financial institutions** – are those institutions legally entitled to accept funds on deposit and includes chartered banks, trust or loan companies, and credit unions.

**Firm** – includes one lawyer or two or more lawyers in practice arrangements that include a sole proprietor, a partnership, an apparent partnership or any other joint arrangement.

**Funds** – includes current coin, government bank notes, bills of exchange, cheques, drafts, money orders, email payments, PayPal payments, charge card sales slips, credit slips and electronic transfers.

**General account** – is a deposit account set up at a financial institution, commonly known as the operating account, to receive funds other than trust funds and fiduciary property and pay for day-to-day expenses of running the practice.

**General funds** – means funds received by a lawyer in relation to the practice of law, but does not include trust funds or fiduciary property.

**General book of entry** – is a journal in a double-entry bookkeeping system, chronologically listing deposits into and withdrawals from the general account.

**Journal** – is a book of original entry in a double-entry bookkeeping system. The journal lists all transactions chronologically and the accounts to which they are recorded.

**Ledger** – is the book or computer software containing the accounts of the practice. A general ledger is a collection of all the asset, liability, owner's equity, revenue and expense accounts.

**Net interest** – means the total interest earned on a pooled trust account, minus any service charges and transmittal fees that the savings institution charges to that account.

**Outstanding deposits** – are deposits that arrive too late at the financial institution to be credited to the bank statement for the current month. These deposits will be added to the bank balance when preparing the bank reconciliation.

**Outstanding cheques** – are cheques that you have issued from the trust or general account that have not cleared through the financial institution's clearing and payment system. These cheques will be deducted from the bank balance when preparing the bank reconciliation.

**Partnership** – is a relationship between two or more persons or corporations based on a written, oral or implied agreement whereby they agree to carry on business for profit and share in resulting profits. The partners are liable for the debts of the partnership.

**Personal responsibility** – means that a lawyer must account in writing to a client for all funds and valuables received on behalf of the client and is personally responsible to ensure that the duties and responsibilities of the Law Society Rules are carried out as set out in Rule 3-54.

**Pooled trust account** – is a deposit account in a financial institution, which may contain funds of more than one client. Interest earned on these pooled funds is for the benefit of the Law Foundation.

**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 law firm.

**Reconciliation** – is the procedure that proves the accuracy of the recording of the transactions in books and records of the law practice by comparing the law firm's internal records to external records such as bank statements.

**Separate trust account** – is a deposit account in a financial institution where funds received in trust for one client are kept separate from other client funds and the interest earned on these trust funds is for the benefit of that one specific client.

**Trial balance** – is a statement of all general ledger accounts with open debit and credit accounts to test their equality.

**Trust funds** – means funds directly related to legal services provided by a lawyer or law firm received in trust by the lawyer or law firm acting in that capacity, including funds received from a client for services to be performed or for disbursements to be made on behalf of the client (retainer funds), or belonging partly to a client and partly to the lawyer if it is not practicable to split the funds.

**Trust book of entry** – is a journal in a double-entry bookkeeping system, listing trust account deposits and withdrawals in chronological order along with a running balance.

**Trust property** – is any property of value belonging to the client, other than trust funds, received by a lawyer in trust over which the lawyer has authority or control in any representative capacity.

**Trust transfer journal** – is used to keep track of all transfers between client trust ledgers. It includes an explanation for the purpose of each transfer and the lawyer's written approval of the transfer.

**Valuables** – means anything of value that can be negotiated or transferred, including, but not limited to, securities, bonds, treasury bills, and personal or real property.

**Valuable property record** – is a record showing all valuable property, other than monetary funds, held for each client matter.

## Resources

Websites	Description
<a href="http://www.lawsociety.bc.ca">www.lawsociety.bc.ca</a>	Access The Law Society website for information regarding: Division 7 Rules, the Trust Report, TAF and Compliance Audits
<a href="https://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/checklists/A-1.pdf">https://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/checklists/A-1.pdf</a>	Client Identification, Verification and Source of Money Checklist
<a href="https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/your-clients/client-id-verification/client-id-verification-faqs/">https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/your-clients/client-id-verification/client-id-verification-faqs/</a>	Client Identification and Verification FAQs
<a href="http://www.lawsociety.bc.ca/docs/practice/resources/guidelines-cloud.pdf">http://www.lawsociety.bc.ca/docs/practice/resources/guidelines-cloud.pdf</a> <a href="http://www.lawsociety.bc.ca/docs/practice/resources/checklist-cloud.pdf">http://www.lawsociety.bc.ca/docs/practice/resources/checklist-cloud.pdf</a>	Information on cloud computing guidelines and the Law Society’s Cloud Computing Checklist.
<a href="https://www.canada.ca/en/revenue-agency.html">https://www.canada.ca/en/revenue-agency.html</a>	Access information regarding income tax, GST and payroll
<a href="https://www2.gov.bc.ca/gov/content/taxes/sales-taxes/pst">https://www2.gov.bc.ca/gov/content/taxes/sales-taxes/pst</a>	Access information regarding PST
<a href="https://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/Holds-on-certified-cheques-and-bankdrafts.pdf">https://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/Holds-on-certified-cheques-and-bankdrafts.pdf</a>	Risk management tips to reduce the risk of holds on cheques and bank drafts.
<b>Trust Accounting Online Courses</b>	
Anti-Money Laundering Measures (2 hours of CPD credit) <a href="https://www.youtube.com/watch?v=d5yO_iI58BM">https://www.youtube.com/watch?v=d5yO_iI58BM</a>	Information on money laundering, cash, client identification and verification, red flags and risk management.
Trust Accounting Basics (2 hours of CPD credit) <a href="https://www.youtube.com/watch?v=8RgxoXMFrpK">https://www.youtube.com/watch?v=8RgxoXMFrpK</a>	Information on opening and operating a trust account, seven key concepts in trust accounting, dealing with trust shortages and inactive trust balances and understanding and preparing trust reconciliations.
Trust Accounting Regulatory Requirements (1 hour of CPD credit) <a href="https://www.youtube.com/watch?v=CW-w1qocZu0">https://www.youtube.com/watch?v=CW-w1qocZu0</a>	Covers reporting requirements to the Executive Director, the compliance audit process and common exceptions identified during a compliance audit.

## Contact Us

### Trust Assurance Department

Direct phone line: 604.697.5810  
Direct fax line: 604.646.5917  
Email: [trustaccounting@lsbc.org](mailto:trustaccounting@lsbc.org)



## Chapter 7

### Anti-Money Laundering Measures<sup>1</sup>

#### [§7.01] Concerns About Money Laundering

“Money laundering” refers to the process used to disguise the source of money or assets derived from criminal activity. As the Federation of Law Societies of Canada noted in its *Guidance for the Legal Profession* (February 2019), lawyers are vulnerable to being targets of money laundering schemes because of their unique role in facilitating transactions (p. 5):

Legal professionals are perceived as “gatekeepers” within money laundering and terrorist financing systems because of our unique role in facilitating financial transactions. Specifically, legal professionals may be used to:

- give an appearance of legitimacy to a criminal transaction;
- facilitate money laundering through the creation of a company or trust, and/or the purchase and sale of property; and
- eliminate the trail of funds back to a criminal through the use of a professional trust account.

Because of the role they play in facilitating transactions, and the fact that communications for the purpose of obtaining legal advice are protected by solicitor-client privilege, legal professionals may be targeted by criminals.

Lawyers must therefore always be alert to the potential risks posed by clients and the services they are requesting.

Public awareness of the issue of money laundering has increased in recent years as a result of independent reviews and media coverage. Reports by retired RCMP deputy commissioner Dr. Peter German, KC, and an expert panel led by professor and former deputy attorney general Maureen Maloney, KC, have estimated that billions of dollars have been laundered in BC in recent years. Money laundering is thought to have taken place through real estate transactions, luxury car sales, gaming, and other processes.

A public inquiry into money laundering, headed by The Honourable Austin F. Cullen, Commissioner, released its final report in June 2022. The scope of the inquiry included real estate, gaming, luxury goods, trade-based

money laundering, and financial and professional services. The Commissioner was also asked to examine the role of regulatory authorities, including the Law Society. He found that lawyers are exposed to significant money laundering risks, but are subject to extensive regulation by the Law Society of British Columbia. In particular, he concluded that the Law Society rules with respect to the acceptance of cash, client identification and verification, and trust accounts mitigate the risk of money laundering. He noted that lawyers’ broad ethical obligations enable the Law Society to respond to evolving risks. He also made a number of findings and recommendations directly relevant to the legal profession and the Law Society. The full report is available online.

As the Law Society noted in its opening statement to the Cullen Commission, the Law Society’s mandate includes preventing lawyers from involvement in any dishonesty, crime, or fraud, including money laundering. The Law Society has taken a multi-pronged approach to preventing money laundering, which reflects this mandate:

The Law Society of British Columbia has a long and active history of engagement and innovation in addressing money laundering in this province. The Law Society’s involvement has included rule-setting and enforcement, law firm audits, investigation and discipline, education of the legal profession, and collaboration with other agencies that also play a role in combatting money laundering. The Law Society works to minimize the risk that lawyers might, knowingly or unknowingly, have any involvement in money laundering.

The standard for lawyers is clear. Lawyers must never engage in activity that they know or ought to know is connected in any way with money laundering. If a lawyer knows or ought to know that money laundering is occurring, he or she must immediately cease acting. A rigorous set of rules and other anti-money laundering (“AML”) measures are in place setting out the high standard of conduct lawyers are expected to meet.

This chapter focuses on Law Society Rules developed to prevent lawyers from any involvement in money laundering, and on the lawyer’s ethical duty to “not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud” (*BC Code* rule 3.2-7). However, it is not enough for lawyers to simply follow the rules: they must apply their own good judgment, understand the transactions they have been retained on, and constantly be alert to potential risks.

Lawyers should regularly consult the Law Society’s resources to keep up to date on their obligations. The following are particularly relevant to anti-money laundering:

<sup>1</sup> Updated in February 2023 by **Barbara Buchanan, KC**, Practice Advisor at the Law Society of British Columbia.

- The Law Society’s Anti-Money Laundering web page ([www.lawsociety.bc.ca/our-initiatives/anti-money-laundering/](http://www.lawsociety.bc.ca/our-initiatives/anti-money-laundering/)) includes links to rules, publications, and resources related to anti-money laundering, including guidance for the profession.
- The Law Society’s Client Identification and Verification web page ([www.lawsociety.bc.ca/support-and-resources-for-lawyers/your-clients/client-id-verification/](http://www.lawsociety.bc.ca/support-and-resources-for-lawyers/your-clients/client-id-verification/)) contains resources to help lawyers comply with their obligations under Part 3, Division 11 of the Law Society Rules and under the *BC Code*. Resources include the *Client Identification, Verification and Source of Money Checklist*, Frequently Asked Questions, free Law Society webinars (including “Anti-Money Laundering Measures,” a two-hour program released in Summer 2020), Discipline Advisories, and articles from *Benchers’ Bulletins*.
- The Client ID & Verification category in Law Society’s Advice Decision-Making Assistant (ADMA) web page ([www.lawsociety.bc.ca/labc/apps/practice-support/adma/welcome.cfm](http://www.lawsociety.bc.ca/labc/apps/practice-support/adma/welcome.cfm))

In addition to the Law Society’s resources, lawyers should familiarize themselves with the following publications by the Federation of Law Societies:

- *Canadian Sanctions Related to Russia, Ukraine, and Belarus: Implications for the Profession* (April 6, 2022);
- *Risk Advisories for the Legal Profession* (December 2019), which addresses risks of money laundering and terrorist financing in five practice areas; and
- *Risk Assessment Case Studies for the Legal Profession* (February 2020), which contains case studies based on common methods that criminals use to target legal advisors, and helps lawyers identify red flags.

## [§7.02] Anti-Money Laundering Legislation and the Law Society’s Role

The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 and its regulations impose record-keeping and reporting requirements on financial service providers and others who engage in activities that are susceptible to being used for money laundering. Following a constitutional challenge, this legislation has been held not to apply to lawyers or law firms.

In *Attorney General of Canada v. Federation of Law Societies of Canada*, 2015 SCC 7, the Court held that the provisions of the Act and its regulations were unconstitutional to the extent that they applied to lawyers and law firms, finding the provisions violated *Charter* protections

against unreasonable search and seizure, and rights of security of the person. The Court found that the requirements of the legislation interfered with lawyers’ duties of confidentiality to their clients and of commitment to their clients’ causes, duties which the Court held were “essential to the due administration of justice.” In the result, certain provisions were declared to be of no force or effect and others were read down so as to not apply to documents in the possession of legal counsel or in law offices.

In the course of the constitutional challenge, and in response to the federal government’s concerns, the Law Society of British Columbia adopted stringent rules to prevent money laundering—specifically, rules about the receipt of cash (in 2004), and rules for identifying, verifying and recording the identity of clients (in 2008).

The Law Society has continued to develop anti-money laundering measures. The Benchers approved changes to the trust account and cash transactions rules, effective July 2019, and changes to the client identification and verification rules, effective January 1, 2020. These changes are based on the Federation of Law Societies’ updated model rules. As Barbara Buchanan, KC, noted, the changes to the rules “are designed to reflect the federal legislative objectives under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, at the same time as reflecting the rights of clients and obligations of lawyers” (Winter 2019, pp. 13–17, included at §7.05).

In addition to the material in this chapter, lawyers should carefully review the Law Society Rules and *BC Code*, in particular, Part 3, Division 7—Trust Accounts and Other Client Property (Rules 3-53 to 3-87); Part 3, Division 11—Client Identification and Verification (Rules 3-98 to 3-110); and *BC Code* rules 3.2-7 to 3.2-8.

## [§7.03] Overview of Key Anti-Money Laundering Rules

The key anti-money laundering rules concern cash transactions, trust accounts, and client identification and verification (including source of money). These rules are summarized below. Parts of this summary are adapted from the practice resource *Highlights of Changes to the Trust Account and Cash Rules, July 2019*, available on the Law Society website, and from other Law Society publications.

The rules and the recent changes are further discussed in the *Benchers’ Bulletin* excerpts at §7.04, §7.05 and §7.06.

### 1. Cash Transactions

Rule 3-59 (the cash transactions rule) was created to protect against money laundering by imposing restrictions on the receipt of cash.

Under Rule 3-59(3), lawyers and law firms are prohibited from receiving or accepting cash in an aggregate amount of greater than \$7,500 in respect of any one client matter.

The rule applies whenever a lawyer engages in any of the following activities on behalf of a client, including giving instructions on behalf of a client about these activities (Rule 3-59(1)):

- receiving or paying funds;
- purchasing or selling securities, real property or business assets or entities; and
- transferring funds or securities by any means.

However, Rule 3-59 does not apply when, in connection with the provision of legal services by the lawyer or law firm, a lawyer or law firm receives or accepts cash as follows (Rule 3-59(2)):

- from a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity;
- pursuant to the order of a court or other tribunal for the release to the lawyer or the lawyer's client of cash that has been seized by a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity;
- to pay a fine, penalty or bail; or
- from a "financial institution" or "public body" (as those terms are defined in Rule 3-53).

Rule 3-59(4) permits limited exceptions to the \$7,500 limit:

(4) Despite [Rule 3-59(3)], a lawyer or law firm may receive or accept cash in an aggregate amount greater than \$7,500 in respect of a client matter for "professional fees," "disbursements" or "expenses" in connection with the provision of legal services by the lawyer or law firm.

The words in quotations in Rule 3-59(4) are defined in Rule 3-53:

- "**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 law firm.
- "**Disbursements**" means amounts paid or required to be paid to a third party by a lawyer or law firm on behalf of a client in connection with the provision of legal services to the client by the lawyer or law firm that are to be reimbursed by the client (for example, payment to a courier company to deliver documents).

- "**Expenses**" means costs incurred by the lawyer or law firm in connection with the provision of legal services to a client that are to be reimbursed by the client (for example, costs incurred by a law firm for in-house photocopying).

If the lawyer or law firm has received or accepted cash in an aggregate amount greater than \$7,500, the lawyer must make any refund in cash (Rule 3-59(5)).

The prohibition on receiving or accepting an "aggregate amount" of cash greater than \$7,500 means that if a lawyer receives cash at different points in time on a client's behalf, the lawyer must keep track of the cash amounts received for the file's duration. The total amount received for that client matter must not be more than \$7,500.

Rule 3-59 distinguishes between "receive" and "accept." If a lawyer receives cash that the lawyer is not permitted to accept, Rule 3-59(6) requires that the lawyer follow these steps:

- make no use of the cash
- return the cash, or if that is not possible, the same amount in cash, to the payer immediately,
- make a written report to the Executive Director within seven days of receipt of the cash, and
- comply with all other rules pertaining to the receipt of trust funds.

If, for example, a client made a direct deposit of \$10,000 cash into the lawyer's trust account towards the completion of a real estate purchase, the lawyer would have *received* the cash but cannot *accept* it. The lawyer would be required to follow the steps in Rule 3-59(6).

A lawyer who receives any amount of cash for a client must maintain a cash receipt book of duplicate receipts and make a receipt in it for the amount received (Rule 3-70).

## 2. Trust Accounts

Under the trust account rules, lawyers and law firms must only use their trust accounts for funds directly related to legal services (see Rule 3-58.1(1) and the definition of "trust funds" in Rule 1). When the legal services to which the funds relate are completed, a lawyer or law firm must take reasonable steps to obtain appropriate instructions to pay out the funds as soon as practicable (Rule 3-58.1(2)).

The definition of "trust funds" in Rule 1 specifies that funds are "trust funds" only if they are directly related to legal services:

In these rules, unless the context indicates otherwise:

“**trust funds**” means funds directly related to legal services provided by a lawyer or law firm received in trust by the lawyer or law firm acting in that capacity, including funds

- (a) received from a client for services to be performed or for disbursements to be made on behalf of the client, or
- (b) belonging partly to a client and partly to the lawyer or law firm if it is not practicable to split the funds.

A cash retainer should be commensurate with the legal services to be provided; cash must not be deposited into a trust account as a place for a client to store money (e.g. don’t permit a client to deposit \$25,000 with you for a \$5,000 matter). See “Anti-money laundering cash transaction rule essentials” in the Summer 2019 *Benchers’ Bulletin* (p. 10).

These rules are intended to reduce the risk that lawyers facilitate money laundering, and to codify a principle stated in the decision of *LSBC v. Gurney*, 2017 LSBC 15 at para. 79:

[T]rust accounts are to be used for the legitimate commercial purposes for which they are established, the completion of a transaction, where the lawyer plays the role of legal advisor and facilitator. They are not to be used as a convenient conduit.

### 3. Client Identification and Verification

Lawyers are obligated to know their clients, to understand their clients’ financial dealings in relation to the retainer, and to manage any risks arising from the professional business relationship with the client. Rules 3-98 to 3-110 require lawyers to follow client identification and verification procedures when retained by clients to provide legal services.

There are six main requirements:

1. Identify the client and record basic identification information about a client upon being retained (Rule 3-100). For example, for individual clients, this information includes the client’s full name, home address, home telephone number, occupation, and the address and telephone number of the client’s place of work or employment, if applicable (Rule 3-100(1)(b)).
2. Verify the client’s identification if there is a “financial transaction” (Rules 3-102 to 3-106; “financial transaction” is defined in Rule 3-98). The verification rules require that the lawyer confirm the client’s identity using “valid, original and current” documents or

“valid and current” information (Rules 3-102(1) and (2)). Acceptable documents and information for this purpose are listed in Rule 3-102(2). An electronic image of a document is not a document or information that can be used for verification of identity (Rule 3-102(3)). However, if the client is an organization, documents directly obtained from a registry maintained by government of Canada, a province or territory or a foreign government, other than a municipal government, may be treated as a document or information for verification purposes (Rule 3-102(3.1)). Rule 3-101 sets out limited exceptions to the verification requirements.

3. Obtain from the client and record, with the applicable date, information about the source of money if there is a “financial transaction” (Rules 3-102(1)(a), 3-103(4)(b)(ii), and 3-110(1)(a)(ii)).
  4. Maintain and retain records, with applicable dates, of any documents obtained or produced for the purposes of client identification, identification of directors, shareholders and owners, verifying client identity, the use of an agent for client verification, and monitoring. Obtain and retain a copy of every document used to verify the identity of any individual or organization for the purposes of Rule 3-102 (Rule 3-107).
  5. Withdraw if you know or ought to know that you would be assisting in fraud or other illegal conduct (Rule 3-109).
  6. Monitor your professional business relationship periodically with the client while retained in respect of a “financial transaction” and keep a dated record of the measures taken and information obtained (Rule 3-110).
- (a) Verification Methods

Rule 3-102 sets out three basic methods to verify an individual’s identity:

1. government-issued photo ID method;
2. credit file method; and
3. dual process method.

Lawyers can use any one of these methods; however, a lawyer must use an agent to verify a client’s identity if the client is not present in Canada and is not physically present before the lawyer.

The government-issued photo ID method is the most common method for verifying a client’s identity, and is recommended where possible. It requires the lawyer to use the individual’s valid,

original and current government-issued photo ID in the physical presence of the client to verify that the name and photograph are those of the client (Rule 3-102(1)(b) and (2)(a)(i)).

The credit file method can be used when the individual has a credit file located in Canada that has been in existence for at least three years (Rule 3-102(1)(b) and (2)(a)(ii)). Information in the credit file is used to verify that the name, address and date of birth in the credit file are those of the individual. The information to verify the client's identity must be obtained directly from a Canadian credit bureau (or from a third-party vendor authorized by a Canadian credit bureau to provide such information)—the lawyer cannot rely on a copy of the credit file provided by the individual. This method does not require the client's physical presence.

The dual process method requires that lawyers must use any two of the following sources of information (Rule 3-102(2)(a)(iii)) to verify an individual's identity:

- Information from a reliable source that contains the individual's name and address that is used to verify that the name and address are those of the individual.
- Information from a reliable source that contains the individual's name and date of birth that is used to verify that the name and date of birth are those of the individual.
- Information that contains the individual's name and confirms that the individual has a deposit account or a credit card or other loan amount with a "financial institution" (as defined in Rules 3-98 and 3-53) that is used to verify that information.

The information set out above for the dual process method must be from different sources. A reliable source of information would be a source that is well known and considered reputable, such as the federal, provincial, territorial and municipal levels of government, Crown corporations, financial institutions and utility providers. Additional requirements for the process include that the individual, the lawyer, or the agent cannot be the source; documents must be valid, original, and current; information must be valid and current; and an electronic image of a document does not satisfy the requirements of the rule (see Rule 3-102(2)(a)(iii), (3) and (4)). The dual process method does not require the individual's physical presence.

In addition to the three basic methods, Rule 3-104 provides the option to use an agent to obtain the

information required to verify client identity, and sets out requirements for the process.

#### (b) Source of Money Information

If there is a financial transaction, obtaining information about the client's source of money for the transaction and its appropriateness is crucial. This may include obtaining supporting documents (e.g. if there are suspicious circumstances). For the information that a lawyer should obtain about the source of money, see "Rule amendments enhance Law Society's anti-money laundering measures" in the Fall 2019 *Benchers' Bulletin* (pp. 14–17), included at §7.04.

More information on the client identification and verification requirements is available on the Law Society website (particularly on the Client Identification and Verification web page: [www.lawsociety.bc.ca/support-and-resources-for-lawyers/your-clients/client-id-verification/](http://www.lawsociety.bc.ca/support-and-resources-for-lawyers/your-clients/client-id-verification/)), and in the *Benchers' Bulletin* excerpts that follow in this chapter. Two articles (available on the Law Society website) are also helpful: see "Knowing your client—Guidance and rules during COVID-19" in the Summer 2020 *Benchers' Bulletin* (pp. 18–21) (this article contains guidance that applies generally, not just during the COVID-19 pandemic, including information about managing risk), and "Client identification and verification—addressing your questions," in the Fall-Winter 2020 *Benchers' Bulletin* (pp. 12–15).

The next section of this chapter, §7.04, begins on the following page.

PRACTICE ADVICE, by Barbara Buchanan, QC, Practice Advisor

## Rule amendments enhance Law Society's anti-money laundering measures

IN JULY, THE Law Society amended the trust account and cash transaction rules, as well as the client identification and verification rules. The changes, which are based on the Federation of Law Societies' model rules, are part of the Law Society's ongoing commitment to combat money laundering.

In this article, I focus on three specific topics:

1. client identification and verification – information required as to a client's source of money (Rule 3-102(1));
2. cryptocurrency – risks of money laundering and dishonest activity (Rule 3-99(1.1));
3. cash transactions – when refunds must be made in cash (Rule 3-59(5)).

For an overview of the trust account and client identification and verification rule changes, and the rules, refer to the following information:

### Part 3, Division 7 – Trust Accounts and Other Client Property

A Notice to the Profession summarizing the changes to Part 3, Division 7, Trust Accounts and Other Client Property, was emailed to lawyers in July. For a more detailed explanation, see the Practice Resource Highlights of Changes to Trust Account and Cash Rules, July 2019. For more on the cash rules and anti-money laundering, read "Anti-money laundering cash transaction rule essentials" in the Summer 2019 Benchers' Bulletin (pages 10 to 14).

The Law Society's consultation with the profession on proposed changes to the fiduciary property rule (Rule 3-55(6)) that would prohibit "fiduciary property" (defined in Rule 1) from being deposited into a trust account when no legal services are provided has concluded. The Benchers are expected to consider the fiduciary property rules in light of new Rule 3-58.1 (Trust account only for legal services).

### Part 3, Division 11 – Client Identification and Verification

The rule changes to Part 3, Division 11,

Client Identification and Verification, **will take effect on January 1, 2020** (E-Brief: July 2019). The changes introduce more stringent requirements to verify a client's identity, provide more options for how to confirm the client's identity and require lawyers to obtain additional information about a client's source of "money" (see the topic "Source of money" below), as well as monitoring on a periodic basis the professional business relationship with the client and keeping records of the monitoring measures taken and information obtained. Rule 3-102(1) changes the requirement that a lawyer "must take reasonable steps" to verify the client's identity to a requirement that the lawyer "must verify" the client's identity. If a government-issued identification document is used in the physical presence of the client to verify the client's identity, the document must contain the individual's name and photograph in order to compare the name and photograph with the individual (Rule 3-102(2)(a)(i)). Under the existing rule, a photograph is not specifically required. The identity document must be valid, original and current; an electronic image of the document does not suffice. Notably, the exemptions from verification of a client's identity when a lawyer pays or receives money pursuant to the order of a court or other tribunal or as a settlement of any legal or administrative proceeding that has been commenced, are eliminated (Rule 3-101(b)(iv)).

See also the Federation's website for its "Guidance for the Legal Profession" and the model rules. Further resources and education will be available between now and the end of 2019.

### SOURCE OF MONEY – CLIENT IDENTIFICATION AND VERIFICATION REQUIREMENTS

The Law Society has strengthened Rule 3-102(1) to require that when a lawyer provides legal services in respect of a financial transaction, the lawyer must obtain from the client and record, with the

applicable date, information about the client's "source of money." This requirement, effective January 1, 2020, is separate from the existing requirements in the accounting rules regarding the source and form of funds (more below on this distinction).

As of January 1, 2020, Rule 3-102(1) states:

- (1) When a lawyer provides legal services in respect of a financial transaction, the lawyer must
  - (a) obtain from the client and record, with the applicable date, information about the source of money, and
  - (b) verify the identity of the client using documents or information described in subrule (2).

The terms "money" and "financial transaction" are defined in Rule 3-98:

"**money**" includes cash, currency, securities, negotiable instruments or other financial instruments, in any form, that indicate a person's title or right to or interest in them, and electronic transfer of deposits at financial institutions.

"**financial transaction**" means the receipt, payment or transfer of money on behalf of a client or giving instructions on behalf of a client in respect of the receipt, payment or transfer of money.

Note that a "financial transaction" can occur without "money" being deposited into a lawyer's trust account.

Below are questions to consider in relation to the source-of-money requirements.

#### 1. Why must a lawyer obtain information about a client's source of money when verifying the client's identity?

A client's source of money is relevant to understanding the risk of acting for the client with respect to a "financial transaction." For example, more risk of money laundering or other illegal activity is generally associated with cash and cryptocurrency (also referred to as virtual currency

or digital currency) than payment by credit card. Also, if the client's source of money is coming from a third party unrelated to the transaction or from outside of Canada, this may also be an indication of increased risk.

### 2. What does "source of money" mean in client verification?

For the purposes of client verification Rule 3-102(1)(a), a client's source of money is directly related to the economic origin of the money. The money is most likely to be received from a bank account regardless of the form in which it is received (e.g., cheque, e-transfer). However, in addition to a bank account or other source (e.g., cash), the client's source of money means the name of the payer and the activity or action that generated the client's money for the financial transaction for which the lawyer is providing legal services. Some examples are the client's salary, a bank loan, a share sale, the sale of an insurance policy, payment from a trust fund and payment from a third party.

At a minimum, the lawyer must record for the purposes of Rule 3-102(1)(a):

- information obtained from the client about the activity or action that generated the client's money (e.g., salary, bank loan, inheritance, court order, sale agreement, settlement funds);
- the economic origin of the money (e.g., credit union account, bank account, Canada Post money order, credit card charge, cash);
- the date the money was received; and
- the source from whom the money was received (i.e., the payer: the client or name and relationship of the source to the client).

It would be prudent to make copies of any supporting documents (e.g., bank statement, court order, sale agreement) obtained regarding the source of money and retain them. Of course, you are required to obtain and retain information and documents used for verification of a client's identity (Rule 3-107).

### 3. When should a lawyer obtain information about a client's source of wealth?

A client's source of wealth is related to a client's source of money. In some circumstances, a lawyer should engage in enhanced due diligence and make inquiries

about a client's source of wealth. A client's source of money and source of wealth may be the same for some clients (e.g., a teacher's salary and savings from teaching) or different (e.g., a teacher with a modest salary who has money from an inheritance). If a teacher is purchasing a \$6 million home, such an amount is not commensurate with normal spending for a teacher. Another example is that a client may have a cashier's salary but drive a \$250,000 car and want the lawyer to act on a purchase of a \$5 million home. A prudent lawyer would look to obtain satisfactory information about the client's source of wealth.

### 4. What should a lawyer do if the client has no satisfactory explanation regarding the client's source of money in respect of the financial transaction?

If there is no satisfactory explanation as to the client's source of money (including source of wealth) for the financial transaction for which you would provide legal services, do not act for the client. If you are already acting, you may have a duty to withdraw at any time. For example, while monitoring your professional relationship with the client, you may determine that the client's information in respect of the source of money used in the financial transaction for the retainer is untrue and there is a risk that you could assist in or encourage illegal conduct if you were to continue. See Rules 3-109 and 3-110 and *BC Code* rule 3.2-7 and commentary.

### 5. Do the accounting rules have additional obligations for recording the source of money?

Yes. Take careful note that lawyers have additional obligations in the accounting rules, apart from the client identification and verification rules, although there is some overlap. The term "money" isn't used in the accounting rules; other defined terms are used for accounting purposes. See Law Society Rules 1 (definition of "funds," "general funds" and "trust funds"), 3-53 (definition of "cash"), 3-59 (cash transactions), 3-68(a) (source and form of funds), 3-69 (source of funds) and 3-70 (record of cash transactions).

For example, Rule 3-68(a) requires that a lawyer maintain at least the following for trust account records in a book of entry or data source:

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- the date and amount of receipt or disbursement of all funds;
- the source and form of funds received;
- the identity of the client on whose behalf trust funds are received or disbursed;
- the cheque or voucher number for each payment out of trust;
- the name of each recipient of money out of trust.

For the source of funds, a lawyer must record the payer's name (the client's name or a third party's name). For the form of funds, a lawyer must record whether the funds were received by bank draft, cheque, wire, cash, e-transfer or electronic funds transfer.

### CRYPTOCURRENCY RISKS

Cryptocurrency — also known as virtual currency, digital currency or electronic currency — is becoming more and more common in the consumer marketplace. For instance, just last weekend I was in a rural BC village where a small health food shop accepted bitcoin for purchases. An online search reveals that 15 cities in BC have bitcoin and other cryptocurrency ATMs.

When it comes to legal services, some clients may expect to pay your professional account with bitcoin or ethereum. They may also want to use cryptocurrency to finance real property conveyances or other transactions, or they may ask you to advise them on cryptocurrency offerings and investment schemes (e.g., initial coin offerings, initial token offerings). Cryptocurrency transactions in a legal practice come with increased risks and should be a red flag for lawyers to be on high alert. Unfortunately, some BC lawyers' introduction to cryptocurrency has been the unfortunate experience of being hit with ransomware attacks, with the criminal demanding bitcoin to restore the firm's computer system.

If a client wants to engage in a cryptocurrency transaction, consider your competency and be aware of the increased risks of money laundering and dishonest activity. Use a high degree of scrutiny in relation to the client, any third party involved, the source of the currency, the proposed transactions and your resources. Cryptocurrency exchanges (platforms that facilitate the transfer of cryptocurrency) operate in

many countries, often with little or no regulatory oversight, which makes them attractive for criminals, including organized crime and terrorist organizations that want to move currency with relative anonymity. Cryptocurrency transactions often involve large amounts and come with significant security and other risks. Similar to cash, it can be difficult to discern the source of the currency. Rule 3-99(1.1), effective January 1, 2020, states:

(1.1) The requirements of this division are in keeping with a lawyer's obligation to know his or her 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.

Assuming you are competent in this sector, assess the risks of acting for the client and make sure you comply with the anti-money laundering rules (Law Society Rules, Part 3, Divisions 7 and 11, and *BC Code* rules 3.2-7 and 3.2-8). Maintain an awareness of the Law Society's [Discipline Advisories](#) and [Fraud Alerts](#). In addition to cryptocurrency risks, consider other red flags such as:

- client does not have a bank account and is unable to obtain banking privileges with a financial institution;
- client wants to pay legal fees in cryptocurrency in an amount out of proportion with the legal services involved;
- new client outside of Canada;
- few legal services required;
- size of transaction doesn't fit with the client's occupation or source of wealth;
- third parties involved with no reasonable connection to the client;
- no reasonable business plan in place;
- known scammers involved.

Record your inquiries and your findings and, if the results are not satisfactory, do not act or provide any further services.

Even if the client is reputable, recognize your limitations. Cryptocurrency presents novel and complex issues. Lawyers must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer. Before acting, review *BC Code* section 3.1 and consider whether

you have the relevant knowledge and skills to ask the appropriate questions and carry out the required due diligence and legal services. The cryptocurrency sector is evolving and complex. For example, below is a short list of things to consider. There are many more.

- Are you aware of the regulatory requirements and laws that may apply? Parties may reside in jurisdictions outside of Canada, and the applicable laws may be unclear.
- Do you have sufficient substantive knowledge regarding cryptocurrency transactions?
- Do Canadian securities laws apply?
- Are you aware of the tax implications of the transaction? Has the client received accounting and tax advice from a knowledgeable person?
- Is the proposed cryptocurrency exchange regulated? Does it have policies and procedures for anti-money laundering and anti-terrorist financing, verification of identity and record-keeping? What standards and insurance are in place to safeguard a client's cryptocurrency?
- How will you value the cryptocurrency and eliminate or mitigate the risk resulting from currency volatility?
- How will you protect your client from access, custody and liquidity issues? The cryptocurrency sector received significant scrutiny after the death of Quadriga CEO Gerald Cotten and the ensuing difficulties accessing its holdings.
- Are all of the parties represented by lawyers? If you are acting for a start-up and unrepresented investors are involved, note Code rule 7.2-9.

### Client paying your account with cryptocurrency

Currently there is no Law Society Rule that specifically prohibits lawyers from receiving cryptocurrency for payment of legal services. However, you should view requests to accept cryptocurrency with skepticism and be on guard against engaging in any activity that you know, or ought to know, assists in or encourages any dishonesty, crime or fraud (Code rules 3.2-7 and 3.2-8, and Law Society Rule 3-109

and, effective January 1, 2020, Rule 3-110. After performing your due diligence and determining that you can accept payment, consider how you will account for changes in value due to the volatility of cryptocurrency. Lawyers have a duty to ensure that their fees are fair and reasonable. The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the lawyer of any hidden fees (Code section 3.6). Use a reputable cryptocurrency exchange when you convert the cryptocurrency to fiat currency. Report the amount to the client and, if you receive a higher amount than your account, the excess must be deposited into trust and then refunded to the client if you are not providing more legal services (Rule 3-58.1). Lawyers are required to retain supporting documents to confirm the cryptocurrency transaction and provide a clear audit trail. When required under the *Legal Profession Act* or the Law Society Rules,

a lawyer must, on demand, promptly produce the records (Rule 10-3). The Rules do not permit cryptocurrency to be held as “trust funds” (Rule 1).

### CASH TRANSACTIONS – WHEN REFUNDS MUST BE MADE IN CASH

The cash rules are in Part 3, Division 7 – Trust Accounts and Other Client Property. A lawyer or law firm may receive or accept cash in an aggregate amount greater than \$7,500 in respect of a client matter for “professional fees,” “disbursements” or “expenses” (defined in Rule 3-53) in connection with the provision of legal services by the lawyer or law firm (Rule 3-59(4)). Read Rule 3-59 and the examples in the table below to determine when a refund must be made in cash. Any refund of cash received or accepted in an aggregate amount greater than \$7,500 must be made in cash. Rule 3-59(5) states:

(5) A lawyer or law firm that receives or

accepts cash in an aggregate amount greater than \$7,500 under subrule (4) [in respect of a client matter for professional fees, disbursements or expenses] must make any refund out of such money in cash.

Records of cash transactions must be kept in accordance with Rule 3-70. Keep in mind that other rules exist related to cash that are not dealt with in the examples. If you have questions about the accounting rules or refunding cash, contact a trust auditor at [trustaccounting@lsbc.org](mailto:trustaccounting@lsbc.org) or 604.697.5810.

### FURTHER INFORMATION

You are welcome to contact Practice Advisor Barbara Buchanan, QC (604.697.5816 or [bbuchanan@lsbc.org](mailto:bbuchanan@lsbc.org)) regarding the content of this article. Contact an auditor for trust account and general account questions ([trustaccounting@lsbc.org](mailto:trustaccounting@lsbc.org) or 604.697.5810).❖

### Scenarios for cash or cheque refunds – as of July 12, 2019

Scenario	How to refund the balance of the retainer
<p><b>#1 – Lawyer receives greater than \$7,500 cash in a lump sum</b></p> <ul style="list-style-type: none"> <li>• Lawyer requests an \$8,000 retainer for legal services.</li> <li>• Client provides an \$8,000 cash retainer.</li> <li>• Lawyer bills the client \$5,000.</li> <li>• Lawyer must refund \$3,000.</li> </ul>	<p>The lawyer must refund the \$3,000 in cash because the lawyer received an amount greater than \$7,500 cash.</p>
<p><b>#2 – Lawyer receives greater than \$7,500 cash in the aggregate</b></p> <ul style="list-style-type: none"> <li>• Lawyer requests a \$5,000 retainer for legal services.</li> <li>• Client provides a \$5,000 cash retainer.</li> <li>• Lawyer bills the client \$5,000.</li> <li>• Lawyer requests a further \$5,000 retainer.</li> <li>• Client provides a \$3,000 cash retainer.</li> <li>• Client provided \$8,000 in cash in the aggregate.</li> <li>• Lawyer bills the client \$1,000.</li> <li>• Lawyer must refund \$2,000.</li> </ul>	<p>The lawyer must refund the \$2,000 in cash because the lawyer received an amount greater than \$7,500 cash in the aggregate.</p>
<p><b>#3 – Lawyer receives less than \$7,500 cash</b></p> <ul style="list-style-type: none"> <li>• Lawyer requests a \$7,000 retainer for legal services.</li> <li>• Client provides a \$7,000 cash retainer.</li> <li>• Lawyer bills the client \$4,000.</li> <li>• Lawyer must refund \$3,000.</li> </ul>	<p>The lawyer is not required to provide a cash refund because the client provided less than \$7,500 in cash. The lawyer may make the refund by trust cheque or by electronic transfer. The lawyer may not make the refund in cash because the lawyer is not required to do so (Rule 3-64(4)(d)).</p>
<p><b>#4 – Lawyer receives a combination of cash and cheque</b></p> <ul style="list-style-type: none"> <li>• Lawyer requests a \$10,000 retainer for legal services.</li> <li>• Client provides an \$8,000 cash retainer and a \$2,000 cheque.</li> <li>• Lawyer bills the client \$7,000.</li> <li>• Lawyer must refund \$3,000.</li> </ul>	<p>The lawyer must refund the \$3,000 in cash because the lawyer received an amount greater than \$7,500 cash.</p>

For an online version of this Bulletin with links to further reading, see the Law Society's website.

PRACTICE ADVICE, by Barbara Buchanan, QC, Practice Advisor

## New client verification and source of money requirements



IN THIS ARTICLE, I focus on some of the changes to the client identification, client verification and source of money rules that will come into effect on January 1, 2020. The changes to the rules are designed to reflect the federal legislative objectives under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*,<sup>1</sup> at the same time as reflecting the rights of clients and obligations of lawyers. Lawyers should familiarize themselves with the actual rules and pay close attention to the definitions. The Federation of Law Societies has developed a booklet, *Guidance for the Legal Profession*, which details measures that lawyers can take to implement rules and avoid facilitating or participating in money laundering or terrorist-financing activities. Here, I pay particular attention to what lawyers may do to implement Law Society Rules 3-98 to 3-110 (Part 3, Division 11 – Client Identification and Verification).

### OVERVIEW

The rule changes that come into effect on January 1, 2020 modify or add to what lawyers are required to do in the following areas:

1. Client identification (Rule 3-100);
2. Verification of the client's identity where the lawyer is retained in respect

of a “financial transaction” (Rules 3-102 to 3-106);

3. Obtain information from the client about the source of money and recording the information, with the applicable date (Rules 3-102(1)(a), 3-103(4)(b)(ii) and 3-110(1)(a)(ii));
4. Maintain and retain records (Rule 3-107);
5. Monitor the lawyer-client professional business relationship periodically, and keep a dated record of the measures taken and information obtained (new Rule 3-110);
6. Withdraw if you know or ought to know you would be assisting in fraud or other illegal conduct (Rule 3-109).

Some key points to keep in mind about what these rule changes entail are as follows:

- A lawyer's general obligations are explained in new Rule 3-99(1.1).
- The standards for identification and verification – different concepts with

differing obligations – have changed.

- There are new requirements to obtain information about a client's source of money.
- Also new is a requirement to monitor the professional business relationship with clients on a periodic basis.
- Some broadly defined terms are new or amended (Rule 3-98).
- The methods for verification have expanded (Rule 3-102).
- A photo identification requirement has been added (Rule 3-102(1) and (2)(a)).
- Rules to verify children under 15 years of age have been added (Rule 3-102(5) and (6)).
- Requirements to obtain and confirm the accuracy of information regarding an organization's ownership, control and structure, directors, shareholders, trustees, beneficiaries, settlors of a trust and related record-keeping have been expanded (Rule 3-103).
- The timing for verification of organizations has been decreased to 30 days (Rule 3-106).
- The commissioner and guarantor provisions for attestations in Canada have been rescinded.
- Agents may be used inside and outside of Canada (Rule 3-104).
- An agent *must be used* to verify client identity if the client is not in Canada and not physically present before the lawyer (Rule 3-104).
- The responsibilities of a lawyer may be fulfilled by the lawyer's firm, including members or employees of the firm wherever located (Rule 3-99(3)).

<sup>1</sup> In 2015 the Supreme Court of Canada struck down specific provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and regulations, finding the provisions violated *Charter* protections against unreasonable search and seizure and rights of security of the person. As a result, lawyers are exempt from reporting clients to FINTRAC.

## PRACTICE

- Record-keeping requirements have been expanded (Rule 3-107).
- Some previous exemptions from verification have been rescinded (Rule 3-101).

### WHEN THE CLIENT ID AND VERIFICATION RULES APPLY

With limited exceptions, the rules apply when you are retained by a new or existing client to provide legal services (Rule 3-99). Being retained means that you have agreed to act. Being retained is not necessarily limited to the circumstances of having received a retainer in trust. *Code of Professional Conduct for British Columbia* rule 3.6-9 states:

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

The rules do not include a definition of legal services. In most instances, it will be obvious if you are providing a legal service (e.g., providing legal advice, drawing a will) and when you are not (acting as an arbitrator or mediator). If you are unsure if you are providing a legal service, refer to the definition of "practice of law" in the *Legal Profession Act* or seek professional legal advice.

### A LAWYER'S GENERAL OBLIGATIONS

Lawyers are bound by strict "know your client" rules, in order to ensure that they are providing advice only to bona fide clients whose identity can be reliably ascertained.

New Rule 3-99(1.1) sets out a lawyer's overarching obligations to know the client:

The requirements of this division are in keeping with a lawyer's obligation to know his or her 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.

It is important, therefore, for a lawyer to know who the client is and understand the purpose of the retainer. As general guidance, it would be prudent to take documented, traceable steps to obtain from

the client and record, with the applicable date, information about the source of money and verify a client's identity, when required. Understand and substantiate the reasonableness of a "financial transaction" (broadly defined in Rule 3-98) that you facilitate. Periodically monitor your professional business relationship with the client when retained in respect of a financial transaction to identify any changes in circumstances.

If verification is not clearly required, consider the risks and err on the side of caution. Lawyers' risks can vary considerably, based on the client, third-party involvement, the country or geography involved and the legal services to be provided. Be keenly aware that there are various federal laws by which Canada prohibits dealing

### Umbrella Rule 3-99(1) – NEW



with some specific foreign countries, individuals or entities or imposes limitations (e.g., see the *Special Economic Measures Act*, the *Justice for Victims of Corrupt Foreign Officials Act*, and the *United Nations Act*). The *Criminal Code* applies measures regarding terrorist entities. Lawyers must ensure that they do not improperly facilitate financial transactions for any listed or sanctioned individuals or groups and incorporate measures into their due diligence for this. [Canada's Global Affairs](#) and [Public Safety Canada](#) provide updated web resources that you may consult.

Do not act for a client, or if you are already acting, withdraw your services if you know or ought to know that you would be assisting a client in fraud or other illegal conduct (Rules 3-109 and 3-110 and Code rules 3.2-7 and 3.2-8). At all times, practise within your comfort zone and competencies (Code sections 3.1 and 3.2).

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### THE DIFFERENCE BETWEEN IDENTIFICATION AND VERIFICATION

Identification and verification are separate but related concepts. The concepts themselves are not new but the distinction bears repeating. Understanding how they differ can not only save you and your clients time and expense (if you verify identity when it is unnecessary), but can keep you from being on the wrong side of compliance (e.g., if you improperly rely on a scan of a driver's licence for verification).

**Identification:** Identification refers to the basic information that you must obtain and record with the applicable date about your "client" at the time you are retained to provide legal services. Rule 3-100 sets out the minimum information that you must obtain about individuals and organizations, unless there is an applicable exemption (Rule 3-99(2)). Note that the standard for obtaining the information is more stringent. The current standard of "must make reasonable efforts to obtain and, if obtained, record" will become "must obtain and record, with the applicable date." Information can be taken in a variety of ways (phone, email, etc.), and you do not have to physically meet with the client to *identify* the client. However, information and any documents obtained for identification purposes must be retained (Rule 3-107).

**Verification:** Verification requires more effort than simple identification. Verification of identity is required, with limited exceptions, if there is a "financial transaction" (defined as the receipt, payment or transfer of money on behalf of a client or giving instructions on behalf of a client in respect of the receipt, payment or transfer of money). Verification involves obtaining valid, original and current documents and valid and current information from independent and reliable sources to confirm that your "client" (as broadly defined) is who they say they are. Note that on January 1, 2020 the current verification standard of "must take reasonable steps to verify the identity" changes to the more stringent "must verify the identity." See Rules 3-102 to 3-106 and the Federation's *Guidance for the Legal Profession*. Verification records must be retained (Rule 3-107).

In some circumstances, an exemption from verification may apply, such as for a

lawyer who only provides legal services to an employer as in-house counsel or as an agent to another BC lawyer or member of a governing body who is authorized to practise law in another Canadian jurisdiction and who has complied with the Law Society's identification and verification requirements or equivalent provisions. However, consider the risks and err on the side of caution. Rather than looking for a way out of verifying your client's identity, you should be confident about who your client is, what the intent and purpose of the legal services are, that you know the source of money in respect of a financial transaction and that it is proper for you to act.

**Source of money information – new to verification:** A key new component of verification is that lawyers must also obtain information from the client and record, with the applicable date, information about the source of "money" when a lawyer provides legal services in respect of a "financial transaction" (Rules 3-98 (Definitions), 3-102(1)(a), 3-103(4)(b)(ii) and 3-110). "Money" is broadly defined in Rule 3-98.

Understanding the source of money and its appropriateness is the crux of anti-money laundering. Lawyers must understand the importance of their role as gatekeepers of their trust accounts and ensure that they make sufficient inquiries. You have a positive duty to make inquiries about financial transactions that you facilitate. This may include obtaining supporting documentation if there are suspicious circumstances (Code rule 3.2-7) or when it is required by the trust accounting rules (Part 3 - Division 7). Some relevant information that a lawyer should obtain about the source of money is as follows:

- the payer's full name, occupation and contact information;
- the relationship of the payer to the client (the payer may be the client);
- the date on which the money was received by the lawyer from the payer;
- the economic activity or action that generated the money (e.g., bank loan, savings from salary, settlement funds);
- the form in which the money was received by the lawyer (e.g., cheque, bank draft);
- the full name and address of all

financial institutions or other entities through which the payer processed or transmitted the money to the lawyer;

- any other information relevant to determining the source of money.

Lawyers will need to obtain and record information about the source of money early on in the retainer as part of the client identification and verification process, as it is a key component to anti-money laundering and preventing engagement in any activity that assists in or encourages any dishonesty, crime or fraud. If you have "money" in trust in December 2019 for a "financial transaction" that will complete in 2020, you are expected to obtain information from the client about the source of "money". See the [Fall 2019 Benchers' Bulletin](#) (pp. 14-17) regarding the distinction of Division 11 from the trust accounting requirements. Also see the Discipline Advisories [Private Lending](#) and [Lawyers are Gatekeepers](#).

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*A key new component of verification is that lawyers must also obtain information from the client and record, with the applicable date, information about the source of "money" when a lawyer provides legal services in respect of a "financial transaction."*

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**Monitoring – new to verification:** New Rule 3-110 requires you to monitor your professional business relationship with a client while retained in respect of a financial transaction. This includes long-standing clients. You must periodically assess whether the information that you have obtained, the client's information about their activities, the source of money used in the financial transaction and the client's instructions are consistent with the purpose of the retainer. Another purpose of monitoring is to assess whether there is a risk that, by continuing to act for the client, you may be assisting in or encouraging dishonesty, fraud, a crime or other illegal conduct. Lawyers must record, with the applicable date, the monitoring measures they have taken and the information obtained, and retain the records for the period required in Rule 3-107.

## UNDERSTANDING THE DEFINITIONS

In order to know your obligations and any applicable exemptions, an understanding of the definitions is crucial and could save you time and expense, or from being offside of a rule.

Rule 3-98(1) has 12 defined terms that are used throughout Division 11. Some terms are broadly defined and are different from common usage. Defined terms for "disbursements," "expenses" and "professional fees" were added and effective on July 12, 2019. The definitions for "money" and "securities dealer" were widened and the definition for "public authority" was rescinded and replaced with the more succinct definition of "public body." These changes were made in July 2019 but are effective on January 1, 2020.

The definitions are critical to whether you are not required to verify a particular client's identity in circumstances where there are no suspicious circumstances that would inspire you to undertake enhanced due diligence (e.g., the verification rules do not apply to a client that is a "financial institution" or an individual who instructs the lawyer on behalf of one). If you verify the client's identity where the definitions and circumstances do not require it, you may expend unnecessary effort and expense, including mandatory record-keeping and retention obligations.

Equally important, you can easily be offside of a rule if you overlook a term's meaning. For example, if you know the meaning of "financial transaction" you will understand that even if money is not deposited into your trust account, there still may be a financial transaction and thus a requirement to verify a client's identity. By understanding the definitions of "financial transaction" and "money," you will know that giving instructions on your client's behalf with respect to a share transfer may be a financial transaction. While all the definitions are important, pay special attention to the broadly defined terms "client," "financial transaction" and "money."

## KNOW YOUR CLIENT

The definition of "client" deserves further attention. The term as defined has a broad meaning and is not always limited to the person who retains you. Pay close

attention to the definition to determine who you must identify and verify. Rule 3-98(1) provides that in Division 11,

“client” includes

(a) another party that a lawyer’s client represents or on whose behalf the client otherwise acts in relation to obtaining legal services from the lawyer, and

(b) in Rules 3-102 to 3-105, an individual who instructs the lawyer on behalf of a client in relation to a financial transaction.

What this means is that you may need to question the client to determine if they represent or are acting for another party in relation to obtaining legal services from you. Making inquiries will help to clarify situations where it may not be obvious that someone else is pulling the strings. If someone else falls within the definition of “client,” you are required to apply the rules in relation to that party as if they are your client too. Below are some examples.

### Organization client

If you act for an “organization,” the organization is obviously your client – but, in addition and for the purpose of Division 11, your client is also the individual who is instructing you on behalf of the organization in relation to a financial transaction.

Using a company as an example, you are required to identify and verify the identity of both the company and the instructing individual (Rule 3-98 definition of “client” and Rule 3-102). A lawyer who provides legal services in respect of a financial transaction must verify an organization’s identity promptly and, in any event, within 30 days (a change from 60 days). The timing for verifying the instructing individual is earlier, i.e., at the time that a lawyer provides legal services in respect of a financial transaction. (Note that if your client is a “financial institution,” “public body” or “reporting issuer,” you are not required to verify the identity of the client nor the individual instructing you on behalf of the client (Rule 3-101).

### Requirement to identify directors, shareholders and owners

If you provide legal services for a company in respect of a financial transaction, in addition to verifying the identity of the

company and the individual instructing you on behalf of the company, you must *identify* the directors by obtaining and recording all of their names with the applicable date (other than an organization that is a “securities dealer”). Rule 3-103 has been expanded so that, in addition, you must make reasonable efforts to obtain, and if obtained, record with the applicable date certain information pertaining to shareholders, ownership, control and structure of a company, and take reasonable measures to confirm the accuracy of the information obtained. Because a money launderer may try to obscure his or her identity through beneficial ownership, the requirements include making reasonable efforts to obtain and record beneficial ownership information: the names and addresses of all persons who own, directly or indirectly, 25 per cent or more of the organization or the shares of the organization.

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*Lawyers will need to obtain and record information about the source of money early on in the retainer as part of the client identification and verification process, as it is a key component to anti-money laundering and preventing engagement in any activity that assists in or encourages any dishonesty, crime or fraud.*

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If those owners are companies too, you must continue with your efforts to obtain information about the natural person, not stopping at the entity level. Refer to Rule 3-98(2) to determine, for the purposes of Division 11, if a person controls an organization. Rule 3-103 is very detailed so read it carefully and take note of the requirements to obtain and record information with respect to trustees and beneficiaries and settlors of a trust.

### Other examples

If your client is a real estate developer selling condominiums and you are receiving deposits in trust from purchasers who are not your clients, you should endeavour to make sure that the purchasers are aware that you are not their lawyer if they are unrepresented (see Code rule 7.2-9). While the purchaser may not be your “client” and you are not required to verify their identity pursuant to Rule 3-102, you may wish to

do so for other reasons. For example, you still need to be concerned about the source of money in respect of the financial transaction, and if a deposit must be returned to a purchaser, it could be difficult to determine if the person claiming the deposit is the same person who provided the money originally if you did not verify their identity and they are unrepresented.

If an attorney appointed under a power of attorney asks you to act on a financial transaction, the attorney is representing another party (the donor or adult) on whose behalf the attorney is acting. Accordingly, the definition of “client” would normally require you to verify the donor’s identity as well as the attorney. For example, if the donor has executed a power of attorney allowing the attorney to execute land transfer documents while he or she is on holidays, the donor’s identity must be verified before the financial transaction takes place. When drafting a power of attorney, complete the verification process on the donor at or before the time of execution. You will want to take sufficient steps to ensure that the power of attorney and the attorney are legitimate.

If your client is a private lender or a borrower from a private lender, there may be an increased risk that criminals will attempt to use this type of transaction to launder the proceeds of crime. Read the Discipline Advisory [Private lending](#) (April 2, 2019), make inquiries and, before acting, satisfy yourself that the loan and the parties are legitimate.

### VERIFYING AN INDIVIDUAL’S IDENTITY

The simplest method to verify an individual’s identity, including verifying an individual acting on behalf of an organization, is set out in Rule 3-102(2)(a)(i). You would physically meet with the individual who would produce their valid, original and current identification document in your presence. The document must contain the individual’s name and photograph, and it must be issued either by the government of Canada, a province, a territory or a foreign government. A document issued by a municipality is not acceptable. You are required to use the document to compare the photograph with the individual before you. Viewing a scanned image of the document does not fulfill the requirements,

nor does viewing the document through a video conference.

Some examples of common photo identity documents acceptable for verification purposes are a Canadian passport, Canadian permanent resident card, Secure Certificate of Indian Status, BC driver's licence, BC enhanced driver's licence and BC Services Card.

Two other methods of verifying an individual's identity are the credit file method (Rule 3-102(2)(a)(ii)) and the dual process method (Rule 3-102(2)(a)(iii) and (4)). An electronic image of a document is not a document or information for the purposes of these methods (Rule 3-103(3)). For more information on these methods, see the Federation's *Guidance for the Legal Profession*.

## USING AN AGENT TO VERIFY IDENTITY

Rule 3-104 permits a lawyer to use an agent to obtain the information required under Rule 3-102 (Requirement to verify client identity) on the lawyer's behalf when the client is inside Canada or outside of Canada. (The guarantor provisions regarding clients inside Canada under subrules (2) to (4) have been rescinded.) The lawyer and the agent must have an agreement or arrangement in writing to comply with the rule.

A lawyer must use an agent if the client is not present in Canada and is not physically present before the lawyer. A lawyer may be able to meet with a client outside of Canada before the financial transaction and, in such case, may not require an agent. Similarly, the responsibilities of a lawyer may be fulfilled by the lawyer's firm, including members or employees of the firm wherever located (Rule 3-99(3)). An agent agreement is on the website.

Know your agent. Keep in mind that the agent is your agent, not the client's agent. Be careful who you are dealing with. The agent should be someone reputable who takes the verification of client identity seriously. Ensure the agent thoroughly understands what you require them to do and that they will carry out the work and provide you with all of the required information under the agreement or arrangement. The agent does not have to be a lawyer; you might retain a suitable accountant, notary or other professional. If the client

is outside of Canada, some embassies or consulates have been known to occasionally provide such services. Be aware that a criminal could try to persuade a lawyer to use a certain agent who is a part of the criminal's scheme.

## EXEMPTIONS FROM SOME REQUIREMENTS

Rule 3-99(2) provides that rules relating to identification, verification, record-keeping and retention, and monitoring (Rules 3-100 to 3-108 and 3-110) do not apply in some specific situations (e.g., in the form of pro bono summary advice if no financial transaction is involved). It should be noted, however, that in these same situations Rule 3-109 (Criminal activity, duty to withdraw) still applies (as do Code rules 3.2-7 and 3.2-8).

Rule 3-101 provides for some specific exemptions only with respect to the verification requirements (Rules 3-102 to 3-106 do not apply). The rules with respect to identification, record-keeping and retention, retention for a matter prior to December 31, 2008, criminal activity, duty to withdraw and monitoring still apply.

Read Rule 3-101 carefully. Note that two exemptions from the verification requirements under the current rules have been rescinded: (1) when a lawyer pays or receives money pursuant to an order of a court or other tribunal; and (2) as a settlement of any legal or administrative proceeding.

## FURTHER INFORMATION

For more information regarding anti-money laundering, see the Fall 2019 *Benchers' Bulletin* (pp. 12-17) and the Summer 2019 *Benchers' Bulletin* (pp. 10-14). The agent agreement, FAQs and the Federation's *Guidance for the Legal Profession* (February 19, 2019) are also useful resources. More resources will be forthcoming, including a further update to the client identification and verification procedure checklist (at this time, current to September 1, 2019).

You are welcome to contact Practice Advisor Barbara Buchanan, QC (604.697.5816) regarding questions about client identification and verification or the content of this article. Please contact an auditor for trust account and general account questions ([trustaccounting@lsbc.org](mailto:trustaccounting@lsbc.org) or 604.697.5810). ❖

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## PRACTICE

### [\$7.06] Spring 2020 Benchers' Bulletin

For an online version of this Bulletin with links to further reading, see the Law Society's website.



PRACTICE ADVICE, by Barbara Buchanan, QC, Practice Advisor

## Know your client – addressing questions and risks

THE RULE CHANGES to Part 3, Division 11 – Client Identification and Verification, have been in effect since January 1, 2020. It was a busy first month answering lawyers' questions. In this article I focus on some topics and questions that came up as well as two new Federation of Law Societies of Canada's resources that highlight specific circumstances in which lawyers may be vulnerable to criminals, including those who hope to dupe lawyers into assisting with money laundering and terrorist financing schemes: For more resources, see the [Client ID & Verification](#) web page, in particular the FAQs, and read [New client verification and source](#)

[of money requirements](#) in the Winter 2019 *Benchers' Bulletin*.

### THE STARTING POINT – WHO THE CLIENT IS AND THE RETAINER'S PURPOSE

To determine your professional responsibilities under the Law Society Rules and the *Code of Professional Conduct for British Columbia*, you should first determine who the client is and the purpose of the retainer. This may seem obvious; however, it is of fundamental importance and I find that lawyers who request practice advice have sometimes not worked through these

threshold questions. Why is this important? There are several reasons.

First, who the client is and the retainer's purpose is important to determine potential conflicts, your confidentiality obligations, your own competence in the relevant practice area and whether you have adequate resources to deliver the services. The purpose helps establish whether the client is retaining you to provide legal services, which has concomitant implications for the permitted use of your trust account (Rules 3-55, 3-58.1 and 3-59 in Part 3, Division 7 – Trust Accounts and Other Client Property).

Second, but no less important, who the client is and the retainer's purpose is important for determining your Division 11 responsibilities of knowing your client, understanding the client's financial dealings in relation to the retainer and managing any risk arising from your professional business relationship (Rule 3-99(1.1)). You may quickly determine if you have suspicions about whether the proposed client is attempting to use you to assist in or encourage any dishonesty, crime or fraud and decline to act.

### WHEN DIVISION 11 APPLIES

Understanding who the "client" is and the purpose of the retainer has implications for whether Division 11 applies at all or in part, whether you must merely identify the client and whether you must take the further steps to verify the client's identity and obtain and record, with the applicable date, information about the source of "money" if there is a "financial transaction." The terms "client," "money" and "financial transaction" are broadly defined in Rule 3-98. Read the definitions carefully.

With limited exceptions, Division 11 applies when you are retained by a new or existing client to provide legal services. Rule 3-99(1) states:

3-99 (1) Subject to subrule (2), this division applies to a lawyer who is retained by a client to provide legal services.

Let's break Rule 3-99 down into three parts: retention, legal services and exemptions.

#### When you are retained

You are retained to provide legal services when you agree to act. Note that you may be retained even if you have not received a money retainer in trust. If you and the client agree that you will only act if a money retainer is paid in advance, you must confirm that agreement in writing and specify a payment date (*BC Code* rule 3.6-9). If you agree to provide pro bono legal services, you are nevertheless retained.

#### When you provide legal services

It will usually be obvious if you provide legal services (e.g., giving legal advice, acting for a party in court, drawing a will, preparing an affidavit for use in a proceeding, acting on a conveyance, drawing a document relating to an incorporation). If you are unsure if you are providing legal services,

refer to the definition of "practice of law" in the *Legal Profession Act* or seek legal advice (practice advisors do not provide legal advice).

Division 11 rules generally do not apply to a lawyer who acts as a neutral mediator of a dispute for parties to a mediation (lawyers are not permitted to represent opposing parties in a dispute, even with consent (Code rule 3.4-3)). Neither do the rules apply to lawyers who perform the adjudicative function of being an arbitrator of a dispute for parties to an arbitration process. If you receive prepaid fees for acting as either a mediator or an arbitrator, you must not deposit such fees into your trust account, because mediation by itself and arbitration are not the "practice of law" (Rule 3-58.1).<sup>\*</sup> If you open an account for such deposits, make it clear to your financial institution that the account is not a lawyer's trust account regulated by the Law Society of BC. You may deposit the prepaid fees into your general account or another account.

#### Rule 3-99(2) exemptions to the application of Division 11

If you have agreed to provide legal services, Rule 3-99(2) provides exemptions to the application of some Division 11 rules:

3-99 (2) Rules 3-100 to 3-108 and 3-110 *do not apply* when a lawyer provides legal services

(a) on behalf of his or her employer, or  
(b) in the following circumstances *if no financial transaction is involved*:

- (i) as part of a duty counsel program sponsored by a non-profit organization;
- (ii) in the form of pro bono summary advice. [emphasis added]

For example, if you are an in-house counsel employee to XYZ Electric Planes Ltd., you provide legal services on behalf of your employer; you do not provide legal services to the general public through XYZ. Subrule (2)(a) provides that Rules 3-100 to 3-108 and 3-110 do not apply (generally, the identification, verification, source of money, record-keeping and retention and monitoring rules). Rule 3-109 (Criminal activity, duty to withdraw) always applies. Likewise, a lawyer is never exempted from the application of Code rules 3.2-7

(Dishonesty, fraud by client) and 3-2-8 (Dishonesty, fraud when client an organization) and 3.7-7 (Obligatory withdrawal).

The subrule (2)(b) exemptions are less broad than the employee exemption and turn on whether a "financial transaction" is involved. If, for example, you provide one hour of pro bono legal services to a client in circumstances where there is no "financial transaction", you are exempted from identification, verification, source of money obligations, record-keeping and monitoring. If, however, you provide one hour of pro bono legal services for the same client that includes giving instructions on the client's behalf in respect of the transfer of money (e.g., regarding a client's financial dispute with an organization), the Division 11 rules apply.

#### Rule 3-101 exemptions to the verification and source of money rules

Assuming you are retained to provide legal services, unless exempted under Rule 3-99(2), you must identify your client (Rule 3-100). In addition, if there is a "financial transaction" you must verify the client's identity, obtain the source of money information, keep records and engage in periodic monitoring. However, Rule 3-101 provides some limited exemptions from the verification of identity and source of money requirements for some clients, organizations and payments. Use exemptions cautiously, considering the risks.

How do the Rule 3-101 exemptions work and when might you use one? First, be aware that more than one "financial transaction" may be involved when acting for a client. Just because one "financial transaction" exists to which an exemption applies does not mean that exemption absolves you from verifying your client's identity and obtaining source of money information with respect to all financial transactions that may be involved. It doesn't work that way. For example, you may receive money paid from a trust account of an Alberta lawyer, a "financial transaction" for which there is an exemption in Rule 3-101(b)(ii); however, that exemption does not include an exemption for paying out the money to your client as part of a settlement, unless another exemption exists.

Second, an understanding of the Rule 3-98 definitions is key. For example,

<sup>\*</sup>But see recent changes to Rule 3-58.1.

Rule 3-101(a) provides that Rules 3-102 to 3-106 do not apply if your client is a “financial institution,” “public body” or a “reporting issuer” (defined terms). Further, those rules do not apply to the individual who instructs you on their behalf. So if your client is a “public body,” you are not required to verify that client’s identity nor ask about its source of money. You are also exempted from verifying the identity of the instructing individual. Why? Because the risk is generally low. If, however, you determine that something is suspicious, you should obviously perform more due diligence.

Note that on January 1, 2020, the former definition of “public authority” was rescinded and replaced with a new, narrower definition of “public body.” Thus, an organization that qualified as a “public authority” in 2019 may not qualify as a “public body” in 2020.

Another frequent question concerns the professional fees exemption. If you receive money for your “professional fees” (includes a retainer) from client Jane Doe and payments for these fees are the only “financial transaction” involved, you are not required to verify the client’s identity and obtain information about the source of money (Rule 3-101(b)(iv)(D)). However, you may have another good reason for doing so, including suspicious circumstances that require additional due diligence (e.g., client wants to pay your fees in cash). Also, remember that the Part 3 Division 7 rules apply with respect to source of funds requirements separately from the Division 11 rules (e.g., Rules 3-68 and 3-69).

Finally, some lawyers have expressed a desire to routinely verify the identity of every client regardless of whether there is a “financial transaction” requiring it. On the one hand, this seems an attractive way to manage risk; however, routine verification is inappropriate. If the Division 11 rules do not require you to verify a client’s identity, you should have a good reason for doing so. Consider privacy issues. Keep in mind that when you obtain identification and verification information and documents, you must securely retain it for the requisite period (Rules 3-107, 10-3 and 10-4 and Code section 3.5) until you can safely destroy it in accordance with your retention policy and applicable retention rules.

### RULE 3-104(7) – PREVIOUS VERIFICATION BY AGENT

Rule 3-104 permits a lawyer to use an agent to obtain the information required under Rule 3-102 (Requirement to verify client identity) on the lawyer’s behalf. Subrule (7) was added to Rule 3-104, effective January 1, 2020, permitting lawyers to rely on an agent’s previous verification of an individual client in the following circumstances:

**3-104 (7)** A lawyer may rely on an agent’s previous verification of an individual client if the agent was, at the time of the verification

- (a) acting in the agent’s own capacity, whether or not the agent was acting under this rule, or
- (b) acting as an agent under an agreement or arrangement in writing entered into with another lawyer required under this division to verify the identity of a client.

You must have an agreement or arrangement with the agent in writing if you wish to rely on an agent’s previous verification of an individual. In follow-up, the verification information that you obtain from the agent must match what the individual client provided to you when you obtained their basic identification information. You must satisfy yourself that the information from the agent is valid (authentic and unaltered) and current (not expired) and that the agent verified the individual’s identity through a permitted method (e.g., government-issued photo identification). If, for example, the agent used an expired driver’s licence to verify the individual’s identity, this is not acceptable. Note the date that you receive the agent’s confirmation of verification, as this relates to whether the information is recent and the timing within which verification must take place with respect to the “financial transaction” (Rule 3-105). FAQs with respect to using an agent and a sample agreement with an agent for verification of identity are published on the [Client ID & Verification](#) web page.

### RISK ADVISORIES AND RISK ASSESSMENT CASE STUDIES

Lawyers must be savvy, sharp-witted explorers of information, using experience,

intelligence, research, rules and guidelines and common sense to practise defensively and manage the risks of providing legal services to diverse clients and their circumstances. Two new Federation of Law Societies’ resources assist lawyers working in practice areas in which they may be vulnerable to criminals, including those who hope to dupe lawyers into assisting with money-laundering and terrorist financing schemes: [Risk Advisories for the Legal Profession](#) (December 2019) and [Risk Assessment Case Studies for the Legal Profession](#) (February 2020).

**Risk advisories** – The December 2019 risk advisories address risks in five areas:

- real estate
- shell corporations
- private lending
- trusts
- litigation.

Each risk advisory includes a checklist with two main parts: (1) client risks and (2) transaction risks. As reports by Peter M. German, QC (retired RCMP deputy commissioner) and an expert panel led by Maureen Maloney, QC (SFU professor and former deputy attorney general) have detailed, real estate is a vulnerable sector. Accordingly, below are some extracts edited from the real estate risk advisory.

**Real estate client risks** – Some examples of real estate client risks may include any of the following:

- The client uses a post office box or general delivery address where other options are available.
- A party to the transaction is a foreign buyer, either an individual or a company, notable especially if on a watch list, whose only connection to Canada is the real estate transaction.
- The client refuses to provide their own name on documents or uses different names on offers to purchase, closing documents and deposit receipts.
- The lawyer experiences difficulty obtaining necessary, reliable information to identify the client and verify the client’s identity.
- The client insists on choosing the agent if an agent is being used to verify identity.

- The client does not care about the property, price, mortgage interest rate, legal fees or brokerage fees, and offers to pay higher than usual legal fees.
- The client is out of sync with the property (e.g., occupation, personal wealth, level of sophistication).
- A stranger who appears to control the client attends to sign documents.
- The client may be contacted only or primarily by email.
- The company purchasing the real estate has a complex ownership structure.
- The head office of a corporate client is or has been recently changed to a non-existent address or one that is highly unusual or lacks credible explanation.
- The client has been named in the media as being involved with criminal organizations and is purchasing a residential property.

**Real estate transaction risks** – Some examples of real estate transaction risks may include the following:

- Funds are directed to parties with no apparent connection to the borrower or the property.
- Repeat activity occurs on a single property or for a single client. The title shows one or more recent transfers, mortgages or discharges.
- The transaction location is distant from the lawyer's office.
- A purchaser of income-generating property has no concern for generating profit by filling vacancies or by adjusting rent or lease rates.
- The sale is presented as a "private agreement" — no agent is involved, or the named agent has no knowledge of the transaction.
- Unusual adjustments are made in favour of the vendor — the transaction involves a large vendor take-back mortgage, or an existing mortgage on a purchased property is assumed by another individual without involvement of a financial institution.
- Transactions involve a power of attorney or are carried out on behalf

of minors, incapacitated persons or others who may not have sufficient economic capacity.

- The transaction involves legal entities when there does not seem to be any relationship between the transaction and the activity carried out by the buying company or when the company has no business activity.
- An accelerated repayment of a loan or mortgage occurs shortly after the deal is completed even if penalties are incurred.
- Transactions are not completed in seeming disregard of a contract clause penalizing the buyer with loss of the deposit if the sale does not go ahead.

The above real estate client risks and transaction risks are not exhaustive; more risks are set out in the actual checklist.

**Risk management case studies** – Next, let's turn to the risk assessment case studies. The case studies feature various scenarios and include commentary and red flags, including an appendix with a quick reference guide of red flags.

The February 2020 case studies have five themes:

- misuse of trust accounts;
- purchases and sales of real estate property and other transactions;
- creation and management of trusts and companies;
- managing client affairs and making introductions;
- disputes and litigation.

The case studies are too long to set out here, but when you review them you will see that many relate to purchase and sale transactions.

I encourage you to review the case studies and the risk advisories, paying particular attention to the areas in which you practise.

#### FOR MORE INFORMATION

If you have questions about client identification and verification or the content of this article, you are welcome to contact me at [bbuchanan@lsbc.org](mailto:bbuchanan@lsbc.org) or 604.697.5816. Please contact an auditor for trust account and general account questions at [trustaccounting@lsbc.org](mailto:trustaccounting@lsbc.org) or 604.697.5810. ❖

## Services for lawyers

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Barbara Buchanan, QC  
Brian Evans  
Claire Marchant  
Edith Szilagy

Practice advisors assist BC lawyers seeking help with:

- Law Society Rules
- *Code of Professional Conduct for British Columbia*
- practice management
- practice and ethics advice
- client identification and verification
- client relationships and lawyer-lawyer relationships
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## [§7.07] BC Code Provisions

Rule 3.2-7 of the *BC Code* states, “A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud.” The commentary to the rule provides additional guidance regarding necessary vigilance and due diligence.

*BC Code* rule 3.2-8 sets out additional obligations when the client is an organization.

Several discipline cases have applied the principle in rule 3.2-7, as recently cited in *LSBC v. Gurney*, 2017 LSBC 15 at para. 79:

[W]here the circumstances of a proposed transaction are such that a lawyer should reasonably be suspicious that there are illegal activities involved under Canadian law or the laws of other jurisdictions, it is professional misconduct to become involved until such time as inquiries have been made to satisfy the lawyer on an objective test that the transaction is legitimate.

In *Gurney*, a lawyer was found to have committed professional misconduct by failing to make reasonable inquiries about funds he received into his trust account in objectively suspicious circumstances. In its decision, the hearing panel noted that lawyers have a duty to ensure their trust accounts are not misused. This duty requires lawyers to make reasonable inquiries regarding the source of funds being deposited into their trust accounts. A finding of misconduct in such circumstances does not require a finding of illegal activity.

## [§7.08] Proceeds of Crime Provisions in the Criminal Code

In addition to the obligations under the Law Society Rules and the *BC Code*, lawyers should be mindful of the *Criminal Code* provisions about money laundering and possessing the proceeds of crime.

A lawyer who accepts money or property from a client, knowing or being willfully blind or reckless as to the fact that the funds constitute proceeds of crime, may be charged with the offences of possession or laundering (*Criminal Code*, ss. 354(1) and 462.31).

The offence under s. 354(1) is committed when a person “has in his possession any property or thing or any proceeds of any property or thing knowing that all or part of the property or thing or of the proceeds was obtained by or derived indirectly from (a) the commission of an offence punishable by indictment; or (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.”

The offence under s. 462.31 is committed when a person deals with any property, or any proceeds of property, “with the intent to conceal or convert [it], knowing or believing that, or being reckless as to whether, all or part of

[it] was obtained or derived directly or indirectly as a result of (a) the commission in Canada of a designated offence; or (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.” (A “designated offence” is defined in the section and includes any offence that may be prosecuted as an indictable offence under the *Criminal Code*.)

Note that the term “proceeds” includes funds received by a lawyer as a retainer or funds placed into a lawyer’s trust account in order to complete a legal transaction.

If a client asks you for services that seem not to be legal services but are more like banking services, or if you cannot define the legal services you are being retained to carry out, be wary. You must only use your trust account for money directly related to legal services, and you must ensure that no person uses your trust account to deal with the proceeds of crime. Contact a Law Society practice advisor at [practiceadvice@lsbc.org](mailto:practiceadvice@lsbc.org) for advice on how to deal with ambiguous requests for your services.

What should a lawyer do upon learning that funds held in the lawyer’s trust account constitute the proceeds of crime? A lawyer’s options may vary, depending on the facts. Generally, upon the lawyer learning that funds held in trust are the proceeds of crime, a lawyer should promptly:

1. Retain counsel knowledgeable about the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and the *Criminal Code*, including the sections prohibiting possession of and laundering proceeds of crime.
2. Disclose to that counsel the lawyer’s state of knowledge regarding the funds, and confirm that information in writing. These steps would evidence the lawyer’s intention to retain the funds in the public interest until the court determines who is entitled to the funds.
3. Advise the client that the lawyer is holding the funds in trust and that the funds will be released from trust only by court order.
4. Advise the client that the lawyer is withdrawing from acting and that the client should retain independent counsel.
5. If a third party is involved for whose benefit the funds are being held, and the client refuses to authorize the lawyer to disclose to the third party the reason that the lawyer continues to hold the funds in trust, the lawyer must maintain confidentiality respecting the tainted nature of the funds, and advise the third party to seek an explanation directly from the client. If the third party does not have counsel, the lawyer must urge the third party to seek independent legal representation.

6. Contact the Lawyers Indemnity Fund to inquire whether a report is required. This will depend on the particular facts.
7. Contact a Law Society practice advisor for ethical advice regarding the lawyer's course of action. See *BC Code* rules 3.2-7 to 3.2-8, sections 3.3 (confidentiality), section 3.4 (conflicts), section 3.7 (withdrawal), rule 7.2-9, section 7.8 and Law Society Rule 3-109.