The Law Society of British Columbia

Agenda

Benchers

Date:	Friday, July 12, 2019
Time:	**7:30 am** Continental breakfast **8:30 am** Call to order
Location:	Bencher Room, 9th Floor, Law Society Building
Recording:	***Benchers, staff and guests should be aware that a digital audio recording is made at each Benchers meeting to ensure an accurate record of the proceedings.***

RECOGNITION		
1	2019 Rule of Law Essay Contest: Presentation of Co-Winners	
CONSENT AGENDA: Any Bencher may request that a consent agenda item be moved to the regular agenda by notifying the President or the Manager, Governance & Board Relations prior to the meeting.		
2	Minutes of June 8, 2019 meeting (regular session)	
3	External Appointment: Vancouver Airport Authority	
4	AGM Rule Amendments	
5	Extension of Time to File for a Review of a Decision of a Hearing Panel – Policy Issues Arising from the Johnson Decision	
REPORTS		
6	President's Report	Nancy G. Merrill, QC
7	CEO's Report	Don Avison
8	Briefing by the Law Society's Member of the Federation Council	Craig Ferris, QC

The Law Society of British Columbia

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GUEST PRESENTATION		
9	Civility and its Measurable, Tangible Benefits to an Organization and the Practice of Law	Dr. Lew Bayer
DISCUSSION/DECISION		
10	Bencher Code of Conduct	Steven McKoen, QC
11	Executive Committee Elections	Steven McKoen, QC
12	Anti-Money Laundering and Terrorist Financing (Cash Transactions, Trust Accounts, and Client Identification and Verification)	Don Avison
13	Amendments to Rule 4-55 (Investigation of Books and Accounts): Policy Considerations	Gurprit Bains
UPDATES		
14	2019 May YTD Financial Report	Jeanette McPhee
15	Mid-Year Advisory Committee Reports • Equity, Diversity and Inclusion Advisory Committee • Lawyer Education Advisory Committee • Rule of Law and Lawyer Independence Advisory Committee • Truth and Reconciliation Advisory Committee • Mental Health Task Force	 Jasmin Ahmad Tony Wilson, QC Jeff Campbell, QC Dean Lawton, QC Brook J. Greenberg
16	Report from Ad Hoc Bencher Election Working Group	Nancy G. Merrill, QC
17	Report on Outstanding Hearing & Review Decisions *(To be circulated at the meeting)*	Craig Ferris, QC
FOR INFORMATION		
18	Letter from David Stuart: Commemorative Certificate Luncheon	

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19	Pro Bono Award Criteria	
20	Recognition of Mental Health Task Force Efforts – award given to Brook Greenberg	
21	Three Month Bencher Calendar – July to September 2019	
IN CAMERA		
22	Litigation Report – July 2019	Tara McPhail
23	Other Business	

The Law Society of British Columbia

Minutes

Benchers

Date:	Saturday, June 08, 2019	
Present:	Nancy G. Merrill, QC, President	Geoffrey McDonald
	Craig Ferris, QC, 1st Vice-President	Christopher McPherson, QC
	Dean P.J. Lawton, QC, 2nd Vice-President	Jacqui McQueen
	Jasmin Ahmad	Phil Riddell, QC
	Jeff Campbell, QC	Elizabeth Rowbotham
	Jennifer Chow, QC	Mark Rushton
	Barbara Cromarty	Karen Snowshoe
	Anita Dalakoti	Michelle D. Stanford, QC
	Jeevyn Dhaliwal	Sarah Westwood
	Martin Finch, QC	Michael Welsh, QC
	Brook Greenberg	Tony Wilson, QC
	Lisa Hamilton, QC	Guangbin Yan
	Roland Krueger, CD	Heidi Zetzsche
	Jamie Maclaren, QC	
	Claire Marshall	
Unable to Attend:	Pinder Cheema, QC	
	Steven McKoen, QC	
	Carolynn Ryan	

Public Session – Staff Attendance:

Staff:	Don Avison	Jason Kuzminski
	Natasha Dookie	Michael Lucas
	Su Forbes, QC	Jeanette McPhee
	Kerryn Garvie	Alan Treleaven
	Jeffrey Hoskins, QC	Adam Whitcombe, QC

Guests:	Lynne Charbonneau	Member, Futures Task Force, Law Society of BC
	Ross F. Earnshaw	President, Federation of Law Societies of Canada
	Richard Fyfe, QC	Deputy Attorney General of BC, Ministry of Justice, representing the Attorney General
	Dr. Peter German, QC	Principal, Peter German and Associates
	The Honourable Heather J. Holmes	Associate Chief Justice of the Supreme Court of British Columbia
	Shannon Salter	Chair, Civil Resolution Tribunal
	Frederica Wilson	Deputy CEO, Federation of Law Societies of Canada

CONSENT AGENDA

1. Minutes of May 3, 2019 meeting (regular session)

The minutes of the meeting held on May 3, 2019 were approved as circulated.

2. Minutes of May 3, 2019 meeting (*in camera* session)

The minutes of the *in camera* meeting held on May 3, 2019 were approved as circulated.

3. External Appointments: Legal Services Society Appointment

The following resolution was passed unanimously and by consent.

> *BE IT RESOLVED* to appoint Karen Christiansen, CPA, FCA to the Legal Services Society Board for a term of three years.

REPORTS

4. President's Report

Ms. Merrill reported on her attendance at the 14th Annual International Bar Association Bar Leaders conference in Budapest, Hungary on 22-23 May, 2019. Some areas covered included countries with or without mandatory professional liability insurance, work being done on harassment and bullying, and its overlap with mental health.

Ms. Merrill also referred to the recent publication of the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, and indicated thought would be given as to next steps. She attended various other events, including call ceremonies in Victoria and Vancouver, and formed a selection committee to review submissions and choose a design for the Law Society Awards. Finally, Ms. Merrill indicated the Ad Hoc Bencher Election Working Group had met and that she would report on that in more detail at the next Bencher meeting on July 12.

5. CEO's Report

Mr. Avison reported on various meetings that he and Ms. Merrill had attended with provincial Ministers, in particular in relation to anti-money laundering and legal aid. He said the Law Society would also be appearing before the Standing Committee on Finance the following week and Ms. Rowbotham would be attending on behalf of the Law Society Benchers.

Mr. Avison referred to the recent referendum proposing changes to the general meeting rules and the positive result, and indicated the changes would be made in time for the annual general meeting in the fall.

A number of Benchers and staff had volunteered their time recently to teach ethics courses as part of the Professional Legal Training Course and Mr. Avison expressed his thanks for their participation.

Mr. Avison then discussed the findings in the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls and said the Truth and Reconciliation Advisory Committee had a preliminary discussion about the report. Further discussions would take place and consideration would be given as to how the recommendations could inform cultural competency training and create expectations for the entire profession.

6. Remarks from President, Federation of Law Societies of Canada

Ross Earnshaw began with introductory remarks about the Federation of Law Societies of Canada and the role it plays relative to the provincial and territorial law societies. He described the goals of the Federation as facilitating a harmonized approach to national issues and providing a vehicle for collective action by the law societies. He indicated that CanLII, which provides free online access to legal information, was a success story of collaboration at the national level,.

Mr. Earnshaw then spoke about each of the three key priorities for the Federation; anti-money laundering, taking another look at the National Committee on Accreditation system, and truth and reconciliation.

Finally, Mr. Earnshaw spoke about the valuable contribution that Law Society of BC Benchers, Mr. Avison and other staff have made to various Federation initiatives over the years and the contribution they continue to make.

7. Update of Federation Anti-Money Laundering Activities

Frederica Wilson, Deputy CEO of the Federation of Law Societies of Canada, provided an update on the federation's engagement with the federal government on anti-money laundering. Ms. Wilson is co-chairing a joint working group on anti-money laundering. Representatives from the Law Society of BC will take part and its first meeting is on June 26. Nine objectives have been identified, including strengthening lines of communication and sharing trends on data.

DISCUSSION/DECISION

8. Benchers' Nominee for 2020 Second Vice-President

Ms. Merrill announced that two candidates had put their names forward for the position of the Benchers' nominee for 2nd Vice-President for 2020. She indicated voting would take place electronically and that an election would be held starting June 17 for a period of two weeks.

9. Equity and Diversity Advisory Committee's Proposed Name Change

Jasmin Ahmad, Chair of the Equity & Diversity Advisory Committee, introduced and spoke to the item. The Committee recommended that its name be changed to add "inclusion", to make the name of the Committee more consistent with its mandate and signal to the public the importance of inclusion to the legal profession. Ms. Ahmad described inclusion as creating an environment where people feel welcome, supported, valued and given the opportunity to fully participate.

The recommendation before Benchers for decision was as follows:

BE IT RESOLVED:

> The Equity and Diversity Advisory Committee change the Committee name to the "Equity, Diversity and Inclusion Committee" and update the Committee's Terms of Reference as required.

Ms. Ahmad put forward a motion to amend the resolution that was before the Benchers to include "equity" in the name of the Law Society's Diversity and Inclusion award.

The resolution, including the amendment stated above, was passed unanimously.

10. Executive Committee Election Rules

The Governance Committee's memorandum on the Executive Committee election rules was before the Benchers for discussion only. Claire Marshall, member of the Governance Committee, spoke to the item.

Ms. Marshall indicated she had consulted with other appointed Benchers. They were also in support of the Governance Committee's recommendation to amend the Executive Committee election rules to bring consistency to how appointed Benchers are elected to the Executive Committee.

The Governance Committee's recommendations are as follows:

BE IT RESOLVED TO:

a. Amend Rule 1-41(1) to recognize that there are four Benchers to be elected under the Rule.
b. Reconcile the voting methods described in the Rule such that the voting for both the elected and appointed Bencher positions, if necessary, occurs in the manner provided for the elected Bencher positions.
c. Clarify the processes for nominating elected and appointed Benchers such that they are consistent.
d. While the elected and appointed Benchers would continue to nominate their respective candidates, if a vote for the elected Bencher and appointed Bencher positions on the Executive is required, all Benchers, elected and appointed, would eligible to vote for all four positions.

Some Benchers expressed concerns about the optics of allowing elected Benchers to vote for which appointed Bencher(s) should serve on the Executive Committee and thought it was important to preserve the independence of appointed Benchers. Conversely, it was recognized that with such a small group of appointed Benchers it may be problematic if more than one appointed Bencher wants to put their name forward to be on the Executive Committee and only appointed Benchers are able to vote in that election.

Mr. Riddell commented that the issues raised were discussed by the Governance Committee and the Committee's view was that all Benchers are equal and there was no need to continue to differentiate between appointed and elected Benchers.

The item will be on the July 12, 2019 Bencher meeting agenda for decision.

11. Bencher Code of Conduct

Phil Riddell, QC, member of the Governance Committee, introduced and spoke to the item on behalf of the Governance Committee. He reiterated the item was on the agenda for discussion only and proposed updates to the existing Bencher Code of Conduct.

Benchers sought clarification on a number of matters, including the nature and description of conflicts of interest (e.g. personal or professional, and whether "substantial" conflict provides enough guidance), and the prohibition preventing former Benchers from representing the Law Society in discipline matters.

Benchers agreed the draft Code of Conduct and comments raised by Benchers at the meeting would go back to the Governance Committee for further consideration before coming back to Benchers for decision at the July 12, 2019 Bencher meeting.

GUEST PRESENTATIONS

12. Dr. Peter German, QC – Phase Two Report – Session with Benchers

Dr. Peter German, QC began by providing an overview and timeline of anti-money laundering issues in British Columbia, work that has been done to investigate the problems in this area and two reports he has published on the topic (*Dirty Money - Part 1* and *Dirty Money – Part 2*).

Dr. German spoke about his work and the findings in each of the two reports. The focus of the first report was money laundering in lower mainland casinos and the focus of the second report was BC real estate, luxury vehicle sales and horse racing. He said lawyers touch on so many different aspects of transactions (e.g. real estate and the use of trust accounts). One solution may be for there to be minimal reporting of financial transactions by lawyers (e.g. trust ledgers), which is already occurring in the United States and in Australia. In the United Kingdom, a special body exists to serve as a repository for reporting by lawyers. Dr. German invited lawyers to come up with a workaround or solution to make financial transactions more transparent.

UPDATES

13. Legal Aid Advisory Committee: Mid-Year Report

Ms. Merrill, Chair of the Legal Aid Advisory Committee, thanked committee members and staff for their work to date. She indicated steps had been taken to form a legal aid coalition and that further work would take place later in the month. Ms. Merrill then reported that the Committee had considered Resolution 2 from the 2018 Annual General Meeting and discussed whether legal aid should be administered independent of government or what such independence would look like. Regarding an economic analysis of legal aid, Ms. Merrill said the Committee has not moved forward with this topic because better data collection is required to inform the work.

Ms. Merrill said the Committee was seeking Bencher approval to remove two items from the Committee's mandate:

- Mandate Item 2(b)(vi): Working with government, *the courts and the profession about ways to reduce the time and cost associated with mega-trials*.
- Mandate Item 2(b)(vii): *Working with the courts to determine how active case management might be used to support a more efficient and cost effective litigation system, thereby making legal aid more sustainable*.

The motion to remove both of the above items from the Committee's mandate was passed unanimously.

Finally, Ms. Merrill indicated that advancing the work of the legal aid coalition, and lobbying government to properly fund legal aid and educate the public through a government relations campaign would be the focus of the Committee's work for the balance of the year.

14. Access to Legal Services Advisory Committee: Mid-Year Report

Michelle Stanford, QC, Chair of the Access to Legal Services Advisory Committee, provided an update on the topics the Committee is considering in 2019.

First, the Committee continued work from 2017 on developing a proof-of-concept model for a non-profit legal services delivery program. The Committee sought Bencher approval to consult with lawyers, firms and justice system stakeholders for the purposes of obtaining better information regarding the potential market for services in the area of family law and immigration to people who struggle to access the existing services lawyers provide and which might usefully be provided as a non-profit "law firm" model. The motion to approve the Committee's recommendation was passed unanimously.

Ms. Stanford spoke about optional questions added to the Annual Practice Declaration about pro bono work. The Committee intends to consider data gathered from the addition of these questions with a view to being able to provide better advice to the Benchers regarding what the Law Society can do to foster greater access to lawyers by members of the public who, at present, might struggle to access the services of a lawyer. Ms. Stanford also reported that it provided advice to the Executive Committee about establishing an award for outstanding contribution to pro bono work, and the award was approved by Benchers at the May 3 meeting.

Finally, Ms. Stanford provided an update on the Access to Justice funding the Law Society provides to the Law Foundation and recognized Wayne Robertson, QC's contribution and commitment to the Fund over the years.

15. Report on Outstanding Hearing & Review Decisions

Mr. Ferris provided an update on outstanding hearing and review decisions and thanked Benchers for completing their reports on time.

FOR INFORMATION

16. IBA Report on Bullying and Sexual Harassment in the Legal Profession

There was no discussion on this item.

17. Law Society Submission to 2019 Judicial Compensation Committee

There was no discussion on this item.

18. Canadian Military Memorial Registration: Law Society Honor Roll

Mr. Krueger informed Benchers that he had prepared a submission regarding the Law Society of BC Honor Roll and sent it to Veterans Affairs Canada for publication on its website. The Law Society Honor Roll would now be searchable under the Canadian Military Memorials Database.

19. Three Month Bencher Calendar – June to August 2019

There was no discussion on this item.

KG
2019-06-08

REDACTED MATERIALS

REDACTED MATERIALS

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The Law Society of British Columbia

Memo

To: Benchers
From: Jeffrey G. Hoskins, QC for Act and Rules Committee
Date: **June 19, 2019**
Subject: **General meeting rules**

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1. As you know, members voting in the referendum in May have approved major changes to the way that Law Society general meetings are conducted. I attach the notice to the profession "Proposed Changes to General Meeting Reform" describing the changes that were proposed.

2. In order to implement the changes in time for this Fall's Annual General Meeting, the Benchers will need to amend the applicable rules at the July meeting. I attach proposed amendments to give effect to the changes, both redlined and clean versions. The Act and Rules Committee recommends adoption.

3. I also attach a timeline applying the proposed rules to demonstrate how they would work. The Executive Committee has set the date for the AGM this year for Wednesday, October 2.

4. Note that the timeline is adjusted somewhat for flexibility and to allow time for administrative processes. We have also used multiples of 7 where possible so that deadlines would fall on the same day of the week and deadlines arriving on a weekend can be avoided.

5. A suggested resolution to effect the mandated changes is attached.

Drafting notes

6. ***Rule 1-8(5), (6.1), (7) and (9)*** Rather than repeat the phrase "make available to Benchers and members in good standing by electronic or other means" three times, the first three subrules require the Executive Director to "issue" certain notices and other documents. The requirement to make available, etc., is in subrule (9).

7. ***Rule 1-8(6.1)*** Member resolutions are to be published by the Law Society as they are received. This is to enable discussion and possibly avoid redundant resolutions. The required timing is stated as "promptly" to indicate that without putting undue pressure on staff as with a specified maximum time.

8. ***Rule 1-8(6.2)*** The period between closing of resolutions and finalizing the questions for advance voting is to allow further discussion and possible amendment or withdrawal of resolutions. That can be done independent of the Law Society and needs no permission or regulation in the rules. However, this provision is necessary so that the Law Society is formally notified in writing of the final version of the resolution to be voted on in time for the voting to begin.

9. ***Rule 1-8(7)*** The second notification a requirement to give notice of advance voting "if it is permitted" to retain flexibility. In some cases, particularly special general meetings, advance voting may not be appropriate.

10. ***Rule 1-9*** The discretion of the Benchers to allow attendance at general meetings via internet is not precluded. That possibility is open as an option in the future. In the meantime, the Benchers can decline to exercise the discretion.

11. ***Rule 1-13(2)*** This provision creates a new item: a non-voting member card (rather than voting card) for members who have advance voted but show up at the GM. They are still entitled to attend and to speak. Also, if there is ever a contested election for 2nd Vice-President, all members present are entitled to vote.

12. ***Rule 1-13(12)*** The Committee noted in passing that this provision, which assigns the setting of the agenda for general meetings is inconsistent with Rule 1-51(f), which has the Executive Committee assisting the President and Executive Director with setting the agenda. The Committee did not consider it appropriate to the current task to resolve the conflict, but wanted to bring it to the attention of the Benchers to be dealt with in due course.

13. ***Rule 1-13.1*** A new rule governing advance voting online is added. The provision based fairly closely on the current rules for electronic voting in elections. Subrule (2) does not permit advance voting on some resolutions but not others. That would defeat the purpose of allowing members to vote without having to attend the meeting.

14. ***Rule 1-13.2*** Part of Rule 1-13 dealing with voting at a general meeting is split off into a separate rule after the advance voting, as it is chronologically. These provisions are not changed significantly.

Conclusion

15. The Committee may recommend the amendments, with or without changes to the Benchers for adoption at the July meeting.

Attachments: Notice
drafts
timeline
resolution

JGH

The Law Society of British Columbia

Proposed Changes to General Meeting Reform

To address issues with the existing procedure for the conduct of general meetings, the Benchers propose to amend the Law Society Rules to permit online voting in advance of general meetings and to streamline the procedure at general meetings.

To implement the proposed online voting, members would be able submit resolutions for a 30-day period in advance of the annual general meeting, which would be published on the Law Society website when received.

Following the 30-day period there would be a 15-day period during which members may propose amendments to the resolutions received during the 30-day period.

At any time during the initial 30-day period or the subsequent 15-day period, a resolution may be amended or withdrawn only by the member who submitted it. No new resolutions may be proposed during the 15-day subsequent period. Following the 15-day subsequent period, no further amendments to resolutions would be permitted, including at the meeting.

Online voting will commence after the completion of the 15-day subsequent period. Members who vote in advance will be considered part of the quorum for the meeting and may only vote once, either online or in person.

Robert's Rules of Order Newly Revised currently apply to our AGMs, but are incompatible with implementing the foregoing procedures.

LAW SOCIETY RULES

PART 1 – ORGANIZATION

Division 1 – Law Society

Meetings

Annual general meeting

1-8 (1) The Benchers must hold an annual general meeting of the members of the Society each year.

(2) Subject to subrule (3) and Rule 1-9 *[Telephone connections]*, the Executive Committee may determine the place and time of the annual general meeting.

(3) Unless the Benchers direct otherwise, the President must preside at the annual general meeting from a location in the City of Vancouver.

(4) At the annual general meeting, the Benchers must present a report of their proceedings since the last annual general meeting.

(5) At least 60 days before an annual general meeting, the Executive Director must~~, by electronic or other means~~, ~~distribute~~ issue a notice of the date and time of the annual general meeting. ~~to Benchers and members of the Society in good standing a notice of the date and time of the meeting.~~

(6) In order to be considered at the annual general meeting, a resolution must be

(a) signed by at least 2 members of the Society in good standing, and

(b) received by the Executive Director at least ~~40~~ 35 days before the annual general meeting.

(6.1) On receipt of a resolution under subrule (6), the Executive Director must promptly issue a notice of the resolution, including the text of the resolution and the names of the 2 members who signed it.

(6.2) Not later than 21 days before the annual general meeting, the 2 members who signed a resolution submitted under subrule (6) may, by notifying the Executive Director in writing,

(a) withdraw the resolution, or

(b) make changes to the resolution.

LAW SOCIETY RULES

(7) Before advance voting is permitted under Rule 1-13.1 and ~~At~~ at least ~~21~~ 16 days before an annual general meeting,~~means, make available to Benchers and members of the Society in good standing~~ the Executive Director must issue

(a) ~~-~~a notice containing the following information:

(i) the locations at which the meeting is to be held, ~~and before an annual general meeting, the Executive Director must, by electronic or other~~

(ii) each resolution received in accordance with subrule~~s~~ (6), with any changes submitted under subrule (6.2), unless the resolution has been withdrawn under that subrule, and

(iii) notice of advance voting if it is to be permitted under Rule 1-13.1 *[Voting in advance of general meeting]*, and

(b) the audited financial statement of the Society for the previous calendar year.

(8) The accidental failure to comply with any requirement under subrule (5), (6.1) or (7) does not invalidate anything done at the annual general meeting.

(9) A notice or other document required to be issued under this rule must be made available to Benchers and members in good standing by electronic or other means.

Telephone and internet connections

1-9 (3) The local chair must record the names of those in attendance and, unless the Executive Director directs otherwise, may dispense with registration and voting, non-voting and student cards under Rule 1-13 *[Procedure at general meeting]*.

Special general meeting

1-11 (5) At least 21 days before a special general meeting, the Executive Director must, by electronic or other means, distribute to Benchers and members of the Society in good standing

(a) a notice of the meeting stating the business that will be considered at the meeting, and

(b) any resolution to be voted on under Rule 1-13.1 *[Voting in advance of general meeting]*.

Procedure at general meeting

1-13 (1) Benchers, members of the Society in good standing and articled students are entitled to be present and to speak at a general meeting.

(1.1) Despite subrule (1), a person participating in a general meeting by way of internet connection is not entitled to speak at the meeting.

LAW SOCIETY RULES

(2) The Executive Director must register all persons attending a general meeting as follows:

(a) members of the Society in good standing who have not previously voted on any resolution under Rule 1-13.1 *[Voting in advance of general meeting]*, who must be given a voting card;

(a.1) members of the Society in good standing who have previously voted on any resolution under Rule 1-13.1, who must be given a non-voting member card;

(b) articled students, who must be given a student card;

(c) appointed Benchers and persons given permission to attend the meeting by the President, who may be given a card for identification only.

(3) As an exception to subrule (2), the Executive Committee may authorize the Executive Director to dispense with registration or voting and student cards at a special general meeting.

(4) At a general meeting, the President may allow a person who is not a Bencher, a member in good standing ~~in possession of a voting~~ or a student ~~card~~ to speak.

(5) Subject to subrules (6) and (7), in the absence of the President, the First Vice-President or the Second Vice-President must preside at a general meeting and assume the duties of the President under Rules 1-8 to 1-13.

(6) In the absence of the President and Vice-Presidents, one of the other Benchers present must preside at a general meeting and assume the duties of the President under Rules 1-8 to 1-13.

(7) The members of the Society present at a general meeting must choose one of their number to preside at the meeting if

(a) no Bencher is present 30 minutes after the time appointed for holding the meeting, or

(b) all Benchers present are unwilling to preside.

(8) At the beginning of the meeting, the President must declare whether or not a quorum is present.

(9) If a quorum is not present 30 minutes after the time appointed for a general meeting, the meeting

(a) if convened at the written request of members, is terminated, or

(b) in any other case, may be adjourned to a specified place and a new date within one week, as determined by the President.

LAW SOCIETY RULES

(10) No business, other than the election of a presiding Bencher and the adjournment or termination of the meeting, can be begun unless and until a quorum is present.

(11) If the President has declared that a quorum is present, a quorum is deemed to remain present until a member present at the meeting challenges the quorum.

(12) The Executive Committee is authorized to set the agenda for a general meeting.

(12.1) A resolution on which members have voted in advance of the general meeting must not be amended, postponed or referred at the general meeting.

(13) ~~A dispute concerning the~~The President must decide questions of procedure to be followed at a general meeting not provided for in the Act or these Rules~~ is to be resolved in accordance with the most recent edition of *Robert's Rules of Order Newly Revised*~~.

(14) When a decision of the President is appealed, the President must call a vote of all members present, without debate, on whether they are in favour of or opposed to sustaining the President's decision.

(15) to (17) [moved to Rule 1-13.2]

(18) A general meeting may be adjourned from time to time and from place to place, but no business can be transacted at an adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

Voting in advance of general meeting

1-13.1 (1) The Benchers may authorize the Executive Director to permit members of the Society in good standing to vote by electronic means on general meeting resolutions in advance of the general meeting.

(2) When advance voting is permitted under subrule (1), all members of the Society in good standing must have the opportunity to vote by electronic means on all general meeting resolutions.

(3) The Executive Director

(a) may retain a contractor to assist in any part of electronic voting on general meeting resolutions,

(b) must ensure that votes cast electronically in a secret ballot remain secret, and

(c) must take reasonable security measures to ensure that only members entitled to vote can do so.

(4) A ballot on a general meeting resolution may be produced electronically, and to cast a valid vote, a member must indicate his or her vote in accordance with instructions accompanying the ballot.

(5) The period of voting in advance of a general meeting must be at least 15 days ending at the close of business on the last business day before the general meeting.

(6) A person who has voted electronically in advance of the meeting is present at the meeting for the purpose of calculation of a quorum under Rule 1-12 *[Quorum]*.

Voting at general meeting

1-13.2 (1~~5~~) A member of the Society in good standing who is present at a general meeting and has not previously voted on any resolution under Rule 1-13.1 *[Voting in advance of general meeting]* is entitled to one vote.

(~~15.1~~2) A member of the Society must not

(a) cast a vote or attempt to cast a vote that he or she is not entitled to cast, or

(b) enable or assist a person

(i) to vote in the place of the member, or

(ii) to cast a vote that the person is not entitled to cast.

(~~16~~3) Voting at a general meeting must be by show of voting cards, or by show of hands if voting cards have not been issued, unless the President orders a secret ballot.

(~~17~~4) A member of the Society is not entitled to vote by proxy.

Elections

Second Vice-President-elect

1-19 (1) The election of a Second Vice-President-elect is held at the annual general meeting each year.

(2) A nomination for election as Second Vice-President-elect is valid only if

(a) the nominator is a member of the Society in good standing,

(b) the candidate is a Bencher and a member of the Society in good standing, and

(c) the candidate consents to the nomination.

(3) All members of the Society in good standing in attendance are entitled to vote for Second Vice-President-elect.

(4) A vote for Second Vice-President-elect must be conducted by secret ballot.

LAW SOCIETY RULES

(5) If only one candidate is nominated, the President must declare that candidate the Second Vice-President elect.

LAW SOCIETY RULES

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Division 1 – Law Society

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(3) Unless the Benchers direct otherwise, the President must preside at the annual general meeting from a location in the City of Vancouver.

(4) At the annual general meeting, the Benchers must present a report of their proceedings since the last annual general meeting.

(5) At least 60 days before an annual general meeting, the Executive Director must , issue a notice of the date and time of the annual general meeting.

(6) In order to be considered at the annual general meeting, a resolution must be

(a) signed by at least 2 members of the Society in good standing, and

(b) received by the Executive Director at least 35 days before the annual general meeting.

(6.1) On receipt of a resolution under subrule (6), the Executive Director must promptly issue a notice of the resolution, including the text of the resolution and the names of the 2 members who signed it.

(6.2) Not later than 21 days before the annual general meeting, the 2 members who signed a resolution submitted under subrule (6) may, by notifying the Executive Director in writing,

(a) withdraw the resolution, or

(b) make changes to the resolution.

(7) Before advance voting is permitted under Rule 1-13.1 and at least 16 days before an annual general meeting, the Executive Director must issue

(a) a notice containing the following information:

(i) the locations at which the meeting is to be held,

LAW SOCIETY RULES

(ii) each resolution received in accordance with subrule (6), with any changes submitted under subrule (6.2), unless the resolution has been withdrawn under that subrule, and

(iii) notice of advance voting if it is to be permitted under Rule 1-13.1 *[Voting in advance of general meeting]*, and

(b) the audited financial statement of the Society for the previous calendar year.

(8) The accidental failure to comply with any requirement under subrule (5), (6.1) or (7) does not invalidate anything done at the annual general meeting.

(9) A notice or other document required to be issued under this rule must be made available to Benchers and members in good standing by electronic or other means.

Telephone and internet connections

1-9 (3) The local chair must record the names of those in attendance and, unless the Executive Director directs otherwise, may dispense with registration and voting, non-voting and student cards under Rule 1-13 *[Procedure at general meeting]*.

Special general meeting

1-11 (5) At least 21 days before a special general meeting, the Executive Director must, by electronic or other means, distribute to Benchers and members of the Society in good standing

(a) a notice of the meeting stating the business that will be considered at the meeting, and

(b) any resolution to be voted on under Rule 1-13.1 *[Voting in advance of general meeting]*.

Procedure at general meeting

1-13 (1) Benchers, members of the Society in good standing and articled students are entitled to be present and to speak at a general meeting.

(1.1) Despite subrule (1), a person participating in a general meeting by way of internet connection is not entitled to speak at the meeting.

(2) The Executive Director must register all persons attending a general meeting as follows:

(a) members of the Society in good standing who have not previously voted on any resolution under Rule 1-13.1 *[Voting in advance of general meeting]*, who must be given a voting card;

LAW SOCIETY RULES

(a.1) members of the Society in good standing who have previously voted on any resolution under Rule 1-13.1, who must be given a non-voting member card;

(b) articled students, who must be given a student card;

(c) appointed Benchers and persons given permission to attend the meeting by the President, who may be given a card for identification only.

(3) As an exception to subrule (2), the Executive Committee may authorize the Executive Director to dispense with registration or voting and student cards at a special general meeting.

(4) At a general meeting, the President may allow a person who is not a Bencher, a member in good standing or a student to speak.

(5) Subject to subrules (6) and (7), in the absence of the President, the First Vice-President or the Second Vice-President must preside at a general meeting and assume the duties of the President under Rules 1-8 to 1-13.

(6) In the absence of the President and Vice-Presidents, one of the other Benchers present must preside at a general meeting and assume the duties of the President under Rules 1-8 to 1-13.

(7) The members of the Society present at a general meeting must choose one of their number to preside at the meeting if

(a) no Bencher is present 30 minutes after the time appointed for holding the meeting, or

(b) all Benchers present are unwilling to preside.

(8) At the beginning of the meeting, the President must declare whether or not a quorum is present.

(9) If a quorum is not present 30 minutes after the time appointed for a general meeting, the meeting

(a) if convened at the written request of members, is terminated, or

(b) in any other case, may be adjourned to a specified place and a new date within one week, as determined by the President.

(10) No business, other than the election of a presiding Bencher and the adjournment or termination of the meeting, can be begun unless and until a quorum is present.

(11) If the President has declared that a quorum is present, a quorum is deemed to remain present until a member present at the meeting challenges the quorum.

(12) The Executive Committee is authorized to set the agenda for a general meeting.

(12.1) A resolution on which members have voted in advance of the general meeting must not be amended, postponed or referred at the general meeting.

(13) The President must decide questions of procedure to be followed at a general meeting not provided for in the Act or these Rules.

(14) When a decision of the President is appealed, the President must call a vote of all members present, without debate, on whether they are in favour of or opposed to sustaining the President's decision.

(15) to (17) [moved to Rule 1-13.2]

(18) A general meeting may be adjourned from time to time and from place to place, but no business can be transacted at an adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

Voting in advance of general meeting

1-13.1 (1) The Benchers may authorize the Executive Director to permit members of the Society in good standing to vote by electronic means on general meeting resolutions in advance of the general meeting.

(2) When advance voting is permitted under subrule (1), all members of the Society in good standing must have the opportunity to vote by electronic means on all general meeting resolutions.

(3) The Executive Director

(a) may retain a contractor to assist in any part of electronic voting on general meeting resolutions,

(b) must ensure that votes cast electronically in a secret ballot remain secret, and

(c) must take reasonable security measures to ensure that only members entitled to vote can do so.

(4) A ballot on a general meeting resolution may be produced electronically, and to cast a valid vote, a member must indicate his or her vote in accordance with instructions accompanying the ballot.

(5) The period of voting in advance of a general meeting must be at least 15 days ending at the close of business on the last business day before the general meeting.

(6) A person who has voted electronically in advance of the meeting is present at the meeting for the purpose of calculation of a quorum under Rule 1-12 *[Quorum]*.

LAW SOCIETY RULES

Voting at general meeting

1-13.2 (1) A member of the Society in good standing who is present at a general meeting and has not previously voted on any resolution under Rule 1-13.1 *[Voting in advance of general meeting]* is entitled to one vote.

(2) A member of the Society must not

(a) cast a vote or attempt to cast a vote that he or she is not entitled to cast, or

(b) enable or assist a person

(i) to vote in the place of the member, or

(ii) to cast a vote that the person is not entitled to cast.

(3) Voting at a general meeting must be by show of voting cards, or by show of hands if voting cards have not been issued, unless the President orders a secret ballot.

(4) A member of the Society is not entitled to vote by proxy.

Elections

Second Vice-President-elect

1-19 (1) The election of a Second Vice-President-elect is held at the annual general meeting each year.

(2) A nomination for election as Second Vice-President-elect is valid only if

(a) the nominator is a member of the Society in good standing,

(b) the candidate is a Bencher and a member of the Society in good standing, and

(c) the candidate consents to the nomination.

(3) All members of the Society in good standing in attendance are entitled to vote for Second Vice-President-elect.

(4) A vote for Second Vice-President-elect must be conducted by secret ballot.

(5) If only one candidate is nominated, the President must declare that candidate the Second Vice-President elect.

SAMPLE TIMELINE

AGM OCTOBER 2, 2019

DATE	EVENT	RULE
Friday, August 2	First meeting notice * date and time * call for resolutions	1-8(5)
Wednesday, August 28	Last day to submit resolutions	1-8(6)
Wednesday, September 11	Last day to change or withdraw resolutions	1-8(6.2)
Monday, September 16	Second meeting notice ***** locations * resolutions in final form * advance voting instructions * audited financial statements	1-8(7)
Tuesday, September 17	Online voting begins	1-13.1(4)
Tuesday, October 1	Online voting ends	1-13.1(4)
Wednesday, October 2	Annual General Meeting	

Dates in **boldface** are fixed; others are the last available date.

GENERAL MEETINGS

SUGGESTED RESOLUTION:

BE IT RESOLVED to amend the Law Society Rules as follows:

1. In Rule 1-8, by rescinding subrules (5) to (8) and substituting the following:

(5) At least 60 days before an annual general meeting, the Executive Director must, issue a notice of the date and time of the annual general meeting.

(6) In order to be considered at the annual general meeting, a resolution must be

(a) signed by at least 2 members of the Society in good standing, and

(b) received by the Executive Director at least 35 days before the annual general meeting.

(6.1) On receipt of a resolution under subrule (6), the Executive Director must promptly issue a notice of the resolution, including the text of the resolution and the names of the 2 members who signed it.

(6.2) Not later than 21 days before the annual general meeting, the 2 members who signed a resolution submitted under subrule (6) may, by notifying the Executive Director in writing,

(a) withdraw the resolution, or

(b) make changes to the resolution.

(7) Before advance voting is permitted under Rule 1-13.1 *[Voting in advance of general meeting]* and at least 16 days before an annual general meeting, the Executive Director must issue

(a) a notice containing the following information:

(i) the locations at which the meeting is to be held,

(ii) each resolution received in accordance with subrule (6), with any changes submitted under subrule (6.2), unless the resolution has been withdrawn under that subrule, and

(iii) notice of advance voting under Rule 1-13.1 if it is to be permitted, and

(b) the audited financial statement of the Society for the previous calendar year.

(8) The accidental failure to comply with any requirement under subrule (5), (6.1) or (7) does not invalidate anything done at the annual general meeting.

(9) A notice or other document required to be issued under this rule must be made available to Benchers and members in good standing by electronic or other means.;

2. In Rule 1-9, by rescinding subrule (3) and substituting the following:

(3) The local chair must record the names of those in attendance and, unless the Executive Director directs otherwise, may dispense with registration and voting, non-voting and student cards under Rule 1-13 *[Procedure at general meeting]*.

3. In Rule 1-11, by rescinding subrule (5) and substituting the following:

(5) At least 21 days before a special general meeting, the Executive Director must, by electronic or other means, distribute to Benchers and members of the Society in good standing

(a) a notice of the meeting stating the business that will be considered at the meeting, and

(b) any resolution to be voted on under Rule 1-13.1 *[Voting in advance of general meeting]*.

4. In Rule 1-13, by rescinding subrules (2), (4), (13) and (15) to (17) and substituting the following:

(2) The Executive Director must register all persons attending a general meeting as follows:

(a) members of the Society in good standing who have not previously voted on any resolution under Rule 1-13.1 *[Voting in advance of general meeting]*, who must be given a voting card;

(a.1) members of the Society in good standing who have previously voted on any resolution under Rule 1-13.1, who must be given a non-voting member card;

(b) articled students, who must be given a student card;

(c) appointed Benchers and persons given permission to attend the meeting by the President, who may be given a card for identification only.

(4) At a general meeting, the President may allow a person who is not a Bencher, a member in good standing or a student to speak.

(12.1) A resolution on which members have voted in advance of the general meeting must not be amended, postponed or referred at the general meeting.

(13) The President must decide questions of procedure to be followed at a general meeting not provided for in the Act or these Rules.

5. By adding the following rules:

Voting in advance of general meeting

1-13.1(1) The Benchers may authorize the Executive Director to permit members of the Society in good standing to vote by electronic means on general meeting resolutions in advance of the general meeting.

(2) When advance voting is permitted under subrule (1), all members of the Society in good standing must have the opportunity to vote by electronic means on all general meeting resolutions.

(3) The Executive Director

(a) may retain a contractor to assist in any part of electronic voting on general meeting resolutions,

(b) must ensure that votes cast electronically in a secret ballot remain secret, and

(c) must take reasonable security measures to ensure that only members entitled to vote can do so.

(4) A ballot on a general meeting resolution may be produced electronically, and to cast a valid vote, a member must indicate his or her vote in accordance with instructions accompanying the ballot.

(5) The period of voting in advance of a general meeting must be at least 15 days ending at the close of business on the last business day before the general meeting.

(6) A person who has voted electronically in advance of the meeting is present at the meeting for the purpose of calculation of a quorum under Rule 1-12 *[Quorum]*.

Voting at general meeting

1-13.2(1) A member of the Society in good standing who is present at a general meeting and has not previously voted on any resolution under Rule 1-13.1 *[Voting in advance of general meeting]* is entitled to one vote.

(2) A member of the Society must not

(a) cast a vote or attempt to cast a vote that he or she is not entitled to cast, or

(b) enable or assist a person

(i) to vote in the place of the member, or

(ii) to cast a vote that the person is not entitled to cast.

(3) Voting at a general meeting must be by show of voting cards, or by show of hands if voting cards have not been issued, unless the President orders a secret ballot.

(4) A member of the Society is not entitled to vote by proxy.

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

The Law Society of British Columbia

Extension of time to file for a review of a decision of a hearing panel – policy issues arising from the decision in *Law Society of BC v. Johnson*

June 27, 2019

Prepared for: Benchers

Prepared by: Executive Committee

Purpose: Decision

Purpose

1. The memorandum outlines recommendations from the Executive Committee regarding three policy issues arising from the decision in *Law Society of BC v. Johnson*, 2015 LSBC 40 ("*Johnson*"), which held that a lawyer can apply to extend the period of time in which to initiate a review of a decision of a hearing panel.

2. Specifically, before the Act and Rules Committee can commence drafting a rule in response to the *Johnson* decision, the Benchers must provide guidance on the three identified policy issues. Having considered the matter, the Executive Committee recommendations described below address the following:

    - the duration of the extension of time in which a review of a hearing panel's decision can be initiated,

    - whether the rules should provide specific criteria that should be considered when evaluating whether an extension should be granted, and

    - who should be responsible for making the decision on any requests for extension of time.

Background: the decision in *Johnson*

3. The *Johnson* decision addressed the issue of whether Mr. Johnson, a lawyer, should be permitted to initiate a review of a hearing panel's decision several weeks past the 30-day statutory period for doing so.[1]

4. Neither the *Legal Profession Act* (the "*LPA*") nor the Law Society Rules explicitly provide for an extension of time to allow for late filing. In the absence of a process to extend time or dismiss the application for lateness, the matter was referred to a full quorum of the Benchers (a review panel) to determine whether the Law Society has any jurisdiction under s. 47 of the *LPA* and the Rules to extend time and, if so, whether time should be extended in Mr. Johnson's case.

5. The Benchers issued their decision in August 2015 [See *Law Society of British Columbia v. Johnson*, 2015 LSBC 40]. The majority found there was jurisdiction to extend the time to apply for a review of a decision of the hearing panel.[2] Further, based on the

[1] Section 47(1) of the *Legal Profession Act* stipulates that: "Within 30 days after being notified of the decision of a panel under section 22 (3) or 38 (5), (6) or (7), the applicant or respondent may apply in writing for a review on the record by a review board."

[2] In *Johnson*, the majority found that Rule 5-12 [*Application to vary certain orders*] allows the extension of time to file because the time limit in section 47 of the *LPA* and the Rules is a "condition" that can be varied under Rule 5-12. The Benchers also relied on case law that supported their position that an extension of the time was a matter of

application of criteria developed in the Court of Appeal in relation to the exercise of their discretion in extending time, the majority found that Mr. Johnson should be granted an extension.

6. Although the *Johnson* decision established that the time for initiating a review may be extended in the appropriate circumstances, it also revealed that both the availability of an extension of time and the procedure for applying for such an extension are not apparent in the *LPA* or the Rules. A party not familiar with Law Society jurisprudence would likely conclude that no extension is available.

7. Following the release of the *Johnson* decision, the matter was referred to the Act and Rules Committee by discipline counsel on the basis that the decision in *Johnson* required a reconsideration in the Rules.

The Problem

8. In late 2016, the Act and Rules Committee began to consider how to amend the Rules to give effect to the *Johnson* decision. On review, the Committee concluded that, although *Johnson* established that it was possible to extend the 30-day time period in which to initiate a review, the issues of when and how such an extension should operate and who should decide were not addressed in any detail in the decision.

9. The Act and Rules Committee concluded that these were policy issues that require decision by the Benchers rather than by the Act and Rules Committee.

10. The matter was referred back to policy staff. Given the number of policy issues from the strategic plan that were currently underway, and given that the power to make a request for an extension of time had been established through the hearing decision and the issue in question was simply how to reflect that decision in the rules, other matters took priority in the deployment of resources within the department. The analysis was completed earlier this year and the Executive Committee has considered the policy issues relating to Rule changes on the three key issues:

    a. the appropriate *duration* of an extension of time in which a review of a hearing panel decision can be initiated;

    b. whether the Rules should contain *criteria* that may, or must, be considered in granting or refusing an extension or whether criteria should be developed through the jurisprudence; and

practice or procedure delegated to the Benchers and about which the Benchers have made rules. See *Johnson* at paras. 46-47.

c. who the appropriate *decision maker* should be.

11. The Executive Committee's recommendations are outlined below and, if approved by the Benchers, the Act and Rules Committee will be able to continue their consideration and draft a new rule.

Discussion

Issue 1: What should be the duration of the extension of time in which to initiate a review?

12. The *Johnson* decision established that the statutorily mandated 30-day period in which to initiate a review can be extended. However, the decision did not provide any commentary as to the duration of such an extension.

13. There are two possible approaches. The first involves an approach that permits a "discretionary" or "flexible" extension, one that does not place a limit on the time period in which an extension can be sought. The second is a time-limited extension, which would limit the duration of the extension period.

Option 1: Open-ended extension

14. In the majority of statutory schemes in which a body has the power to extend the time to file for a review or appeal, *no limits* are placed on the duration of the extension period.

15. For example, the *Workers Compensation Act* permits the appeal of a final decision of a review officer within 30 days of the decision. The chair may extend the time for filing a notice of appeal. The statute does not limit the duration of this extension:

> **Time limit for appeal**
>
> **243** (1) A notice of appeal respecting a decision referred to in section 239 must be filed within 30 days after the decision being appealed was made.
>
> […]
>
> (3) On application, and where the chair is satisfied that
>
> (a) special circumstances existed which precluded the filing of a notice of appeal within the time period required in subsection (1) or (2), and
>
> (b) an injustice would otherwise result,
>
> the chair may extend the time to file a notice of appeal even if the time to file has expired.

16. Similarly, the *Health Professions Act* enables a complainant to apply to the review board for a review of an inquiry committee decision within 30 days. The statute allows for an

extension of the time, but does not establish a limit on the duration of the extension period:

> **Procedural requirements — application for review**
>
> **50.61** (4) On application, the review board may extend the time for filing an application for review under this Part, even if the time for filing an application has expired, if the review board is satisfied that special circumstances exist.

17. The *Administrative Tribunals Act* provides that an application for judicial review of a final decision of the tribunal must be commenced within 60 days of the decision being issued. Extensions of time to apply for a review may be granted. Again, the statute places no time limits on the duration of the extension:

> **Time limit for judicial review**
>
> **57** (1) Unless this Act or the tribunal's enabling Act provides otherwise, an application for judicial review of a final decision of the tribunal must be commenced within 60 days of the date the decision is issued.
>
> (2) Despite subsection (1), either before or after expiration of the time, the court may extend the time for making the application on terms the court considers proper, if it is satisfied that there are serious grounds for relief, there is a reasonable explanation for the delay and no substantial prejudice or hardship will result to a person affected by the delay.

Option 2: Time-restricted extension

18. Few legislative schemes prescribing a limit on the duration of the period in which an extension of time to initiate a review or appeal can be sought. This is clearly the less common approach in BC, where research failed to locate any examples a time-restricted extension.

19. A time-restricted extension period is, however, found in the federal *Income Tax Act*, whereby a taxpayer may apply to the Minister to extend time for serving a notice of objection to an assessment. The statute limits the extension to one year after the expiration of the period in which the notice of objection should have been filed.

> **Extension of time by Minister**
>
> **166.1** (1) Where no notice of objection to an assessment has been served under section 165, nor any request under subsection 245(6) made, within the time limited by those provisions for doing so, the taxpayer may apply to the Minister to extend the time for serving the notice of objection or making the request.
>
> **When order to be made**

> **(7)** No application shall be granted under this section unless
>
> (a) the application is made within one year after the expiration of the time otherwise limited by this Act for serving a notice of objection or making a request, as the case may be; and [..]
>
> (b) the taxpayer demonstrates that
>
> (i) within the time otherwise limited by this Act for serving such a notice or making such a request, as the case may be, the taxpayer
>
> (A) was unable to act or to instruct another to act in the taxpayer's name, or
>
> (B) had a *bona fide* intention to object to the assessment or make the request,
>
> (ii) given the reasons set out in the application and the circumstances of the case, it would be just and equitable to grant the application, and
>
> (iii) the application was made as soon as circumstances permitted.

Recommendation

20. After analysis, the Committee recommends that there be an open-ended extension on the 30-day period in which to initiate a review of a hearing panel's decision, keeping in line with other statutory schemes in BC. The length of a delay in making the application for extension could, of course, be expected to be a factor in the exercise of the discretion sought to be exercised.

Issue 2: Should the Rules prescribe criteria for exercising discretion to grant an extension or should criteria be developed through jurisprudence?

21. In finding that an extension of time in which to initiate a review may be granted, the *Johnson* decision emphasized that the exercise of this discretion should be based on criteria that are known and understood.

22. The majority in *Johnson* applied the factors set out in *Davies v. CIBC*, (1987) 15 BCLR (2d) (CA) ("*Davies v. CIBC*"), Court of Appeal jurisprudence that guides the Court in determining whether to grant an extension of time for an appeal:

> [52] We are of the view that the exercise of the discretion should be used in a principled manner on criteria that are known and understood. The Court of Appeal criteria are appropriate guide posts and a flexible application of them is appropriate. Those criteria are:
>
> (a) whether there was a bona fide intention to appeal within the time for

bringing the appeal;
(b) when the applicants informed the respondent of their intention to appeal;
(c) whether there would be prejudice to the respondent if an extension were granted;
(d) whether there is merit in the appeal; and
(e) whether it is in the interests of justice that an extension be granted.

23. There are two possible approaches as to how the exercise of this discretion should be articulated – if at all – in the Rules themselves.

Option 1: Leave criteria to be developed in the jurisprudence

24. One approach is *not* to list criteria in the Rules to govern the exercise of discretion in relation to an extension of time, but instead, rely on the jurisprudence to develop the relevant factors.

25. Some statutory regimes that allow for extensions of time for an appeal or review take this approach. For example, the *Employment Standards Act*, which permits an appeal of the director's decision to the tribunal within 30 days, simply states that the tribunal may extend the time period for requesting the appeal even though the period has expired.[3] How this discretion is exercised is not detailed in the Act or regulations – that is, there is no list of enumerated factors that must be considered. Rather, the factors are articulated in the case law.[4]

26. The *Court of Appeal Act* is also silent as to what factors should be applied when the Court considers whether to grant an extension for bringing an appeal.[5] Rather, the criteria that guide whether an extension of time is granted are laid out in *Davies v. CIBC*, as noted above.

27. In *Johnson*, the Benchers did not provide clear reasons as to why they relied on Court of Appeal jurisprudence. However, the majority did note that, rather than applying to an internal Law Society review of a decision made by a hearing panel, lawyers also have the opportunity to appeal to the Court of Appeal under s. 28 of the *LPA*.[6] The Benchers may

[3] *Employment Standards Act, s. 109(1)(b).*
[4] See for example *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2013 BCSC 1499 at para. 28.
[5] The Act simply states "A justice may extend or shorten the time within which an appeal to the court or application for leave to appeal may be brought. The power to extend time may be exercised even though the application for the extension or the order granting the extension is made after the expiry of the period of time in respect of which the application to extend is made." *Court of Appeal Act*, s. 10
[6] See *Johnson* at para. 44.

have been suggesting that it is advantageous to seek congruency between the two avenues for review as to the criteria that are applied when considering an extension of time.

28. Notably, the Law Society has relied on the development of jurisprudence with respect to other discretionary decisions under the Rules, such as applications for adjournments and stays of penalties.

Option 2: Enumerate criteria in the new rule

29. An alternative approach is to enumerate criteria to guide the exercise of discretion in the Rules.

30. This is the approach taken in the *Health Professions Act* and the *Workers Compensation Act*, which both stipulate a requirement for "special circumstances to exist" for granting an extension of the time to initiate a review or appeal. The *Administrative Tribunals Act* also enumerates criteria in relation to granting an extension of the time to apply for a judicial review, namely: there are serious grounds for relief, there is a reasonable explanation for the delay and no substantial prejudice or hardship will result to a person affected by the delay. As noted above, the federal *Income Tax Act* relies on enumerated criteria to grant extensions: the individual was unable to act or instruct another to act in his or her name or the individual had a *bona fide* intention to make a request for the extension of time; it would be just and equitable to grant the application, and; the application was made as soon as circumstances permitted.

31. If this option is pursued, then it should also be confirmed that the criteria in *Davies v. CIBC* are the appropriate ones. Notably, the *Johnson* decision has already set precedent in this regard by considering and applying these criteria.[7]

Recommendation

32. After analysis, the Executive Committee recommends that the criteria for exercising discretion to grant an extension should be developed through jurisprudence rather than being enumerated at the outset in the new rule. Doing so will allow for flexibility in applying the new rule and is in line with the Law Society's typical approach to other discretionary decisions under the Rules.

Issue 3: Who is the appropriate decision maker for granting an extension of time?

33. As there was no pre-existing process to extend the 30-day period in which to initiate a review, the *Johnson* matter was referred to a full quorum of seven Benchers (now replaced by a Review Board of 5 members). However, adopting rules to govern the

[7] See *Johnson* at para. 52.

granting of extensions of time can not only provide guidance to parties seeking to attain or resist an extension, it can provide a more appropriate decision-maker than a review board, which can prove unwieldy to manage.

34. Therefore, a decision needs to be made as to who the appropriate decision maker should be.

35. Currently, other preliminary decisions under the Rules are made by the President. The President is free to assign the decision to another Bencher, such as the Chambers Bencher.[8]

36. Rule 5-19(2) is the rule governing the initiation of a review of a disciplinary decision, as was the case in *Johnson*. It provides that the respondent may initiate a review by delivering a notice of review to the *President* and discipline counsel. In fact, all reviews initiated pursuant to Rule 5-19 require delivery of notice to the President. It makes sense that the President should be the individual responsible for making any decisions further to a review being initiated, such as a request for extension of time.

Recommendation

37. After analysis, the Committee recommends that the President (or President's designate) be delegated the task of making decisions on granting the extension of time, which parallels and maintains consistency with other Law Society Rules on preliminary decision-making.

Conclusion and Recommendations

38. The *Johnson* decision established that the time period for requesting review of a hearing panel's decision may be extended. Given that the availability of an extension is not evident from a plain reading of either the *LPA* or the Rules, the Rules should be amended to ensure it is clear to the profession that such an extension is possible.

39. As described above, the Committee recommends the Benchers approve in principle that:

    a. there be an open-ended extension on the 30-day period in which to initiate a review of a hearing panel's decision;

    b. criteria for exercising discretion to grant an extension be developed through jurisprudence; and

[8] For example, the President or President's designate is responsible for making many preliminary decisions during the credentials hearings process (e.g. Rules 2-94, 2-95, 2-96) and discipline hearings process (e.g. Rules 4-35, 4-40).

c. the President (or President's designate) is the appropriate decision maker for any requests for extension of time;

and further recommends that the matter be returned to the Act and Rules committee to prepare rules to reflect these policy directions.

The Law Society of British Columbia

CEO's Report to the Benchers

July 12, 2019

Prepared for: Benchers

Prepared by: Don Avison

1. Update on Bill C-75, An Act to Amend the Criminal Code, the Youth Criminal Justice Act and other Acts

At the end of the recent session of Parliament, Bill C-75 was passed. The legislation increases potential penalties for summary conviction offences and, in addition, restricts agent participation in representing persons charged with such offences. The Federation had sought amendments that would have clarified the continuing capacity of law students, articled students and – where applicable – of paralegals to appear before courts on contested summary conviction matters. The passage of the Bill without those amendments now creates a situation where students may not be able to appear as agents unless the Province has put an Order-in-Council in place authorizing such appearances.

In the days following passage of the Bill, President Merrill wrote to the Attorney General asking that action be taken to provide clarity regarding the continuing capacity of law students / articled students to appear in contested matters. Discussions are also taking place at the senior official level.

We will be keeping the Federation informed of our communications with the Government of British Columbia as there is a desire to bring some consistency to the messaging on this with all provincial/territorial governments.

2. Status of Federal Government / Federation AML Discussions

At the Parksville Retreat, Federation President Ross Earnshaw, QC indicated that the Government of Canada's Finance and Justice Departments would be meeting with Federation representatives to discuss our shared commitment to addressing money laundering and terrorist financing. The first of those meetings recently took place in Ottawa where the Federation was represented by Federation Deputy CEO Frederica Wilson, Jim Varro of the Law Society of Ontario, Brenda Grimes, QC of the Law Society of Newfoundland, Gurprit Bains of the Law Society of British Columbia and Lise Tremblay of the Barreau du Québec.

The first meeting was mostly exploratory. Benchers can expect to receive regular updates on the status of this work.

3. Provincial Government Engagement

President Merrill and I have had a significant level of contact with several cabinet ministers and MLAs over the past several months, focusing on positive developments/discussions regarding improvements to legal aid, the Law Society's trust audit and AML initiatives, work that has been undertaken to address recommendations of the Truth and Reconciliation Commission, and other priorities linked to the Society's strategic plan.

Meetings have now been scheduled for late August with Green Party leader Andrew Weaver and there are also sessions scheduled with the Liberal and NDP caucuses in Victoria in October of 2019.

4. Status Updates – Various Matters

a. Budget Development Process – Work on the 2020 proposed Law Society budget is well underway and will come before Benchers at the September meeting;

b. Federation Fall Conference and Meetings – The focus for this year's conference will be on mental health and wellness. BC is closely involved in the work of the planning committee;

c. Public Inquiry – We expect to have more news soon regarding process and timelines. Ludmila Herbst, QC has been retained by the Law Society;

d. The 2019 Rule of Law Lecture – This year's event, featuring former Chief Justice McLachlin and Richard Peck, QC was a tremendous success. Transcripts of the proceedings will be prepared and distributed;

e. Organizational Changes – As indicated at the June Bencher meeting, some additional announcements will be made regarding title/role changes within the organization; and,

f. Law Society Retreat – We have received substantial positive commentary on the Parksville Retreat. Planning for 2020 at Whistler has commenced and Mr. Lawton, QC is already giving shape to the proposed program.

Don Avison
Chief Executive Officer

The Law Society of British Columbia

Memo

To:	Benchers
From:	Governance Committee
Date:	July 3, 2019
Subject:	A Bencher Code of Conduct

At the June Bencher meeting, the Benchers had an opportunity to review and discuss a Bencher Code of Conduct proposed by the Governance Committee. The revised proposed Code of Conduct reflects the Committee's consideration of the comments, observations and suggestions from the Benchers at that meeting. The changes from the previous version are redlined in the version found in Appendix A and a clean copy is attached as Appendix B.

The proposed Code of Conduct continues to be based on the Committee's consideration of the several roles that the Benchers fulfill, created conflict of interest guidelines that more comprehensively and specifically the cover the conduct of Benchers and added guidelines for what the Benchers should expect when acting in their capacity as legislators. The Committee does note that the conduct of Benchers in their role as adjudicators is covered comprehensively in the Code of Professional and Ethical Responsibilities for Tribunal Adjudicators approved by the Benchers at their December 2017 meeting.

As this is the second reading of the proposed Code by the Benchers, the Committee recommends adoption of the Code as presented.

Be it resolved that the Code of Conduct in Appendix B be approved and adopted.

Bencher Code of Conduct

Benchers fulfill several roles

1. The first role is as a governor of the Law Society responsible for governing and administering the affairs of the Law Society and taking such action as they consider necessary for the promotion, protection, interest or welfare of the Law Society.[1]

2. The second is as a legislator making Rules for the governing of the Law Society, lawyers, law firms, articled students and applicants, and for the carrying out of the Legal Profession Act[2] and prescribing a Code of Professional Conduct that expresses the views of the Benchers about standards that British Columbia lawyers must meet in fulfilling their professional obligations.[3]

3. The third role is as participants in our regulatory decisions and as members of panels, conduct reviews and conduct meetings.[4]

4. The fourth role is as confidential advisors to members of the profession in relation to matters involving professional conduct or the practice of law.

5. In these several capacities, it is the Benchers' duty to abide by the Legal Profession Act, the Law Society Rules and the Code of Professional Conduct, and faithfully discharge their duties as Benchers, according to the best of their ability; and to uphold the objects of the Law Society and ensure that they are guided by the public interest in the performance of their duties.[5]

Conflicts of Interest

6. Benchers are expected to avoid conflicts of interest to assure the public and the profession that both policy and adjudicative decision-making are being made free from external or improper interest, favour or bias. However, from time to time Benchers may have a conflict between their various roles at the Law Society and

[1] Legal Profession Act, s. 4(2)
[2] Legal Profession Act, s.11(1)
[3] Introduction to the Code of Profession Conduct
[4] Credentials Committee, Rule 2-50, Practice Standards, Rule 3-15, Discipline Committee, Rule 4-2, Complainants' Review Committee, Rule 3-13, Hearing Panels, Rule 5-2, Conduct Reviews, Rule 4-11, Conduct Meetings, Rule 4-10. The separate Code of Professional and Ethical Responsibilities for Tribunal Adjudicators covers the duties of Benchers when participating in regulatory decisions.
[5] Oath of Office, Rule 1-3

other interests. Managing conflicts fairly, effectively and transparently serves the public interest.

7. A Bencher may have a conflict of interest where the Bencher has a personal interest, either pecuniary or non-pecuniary, not shared by others in the outcome of a decision. Upon recognizing a conflict of interest exists, a Bencher should disclose the conflict of interest and refrain from voting on and not participate, by leaving the meeting, in the consideration or discussion in the decision giving rise to the conflict.

8. A Bencher may have a conflict of duty when that duty to the Law Society may conflict with duties to another organization. Benchers will often encounter this situation, as Benchers sit on other boards or are involved with other organizations from time to time. When a specific conflict of duty arises, the Bencher should disclose the conflict of duty and, subject to section 10, may still participate in any decision-making.

9. A Bencher should withdraw from a role with another organization or outside activity or resign as a Bencher where participation in an organization or outside activity places a Bencher in a substantial or ongoing conflict between the Bencher's duties to the Law Society and the duties to another organization or the requirements of an outside activity such that the conflict materially interferes with Bencher fulfilling the duties associated with that position,

10. A Bencher should take care to avoid the perception of a conflict of interest or a conflict of duty. When a perceived conflict of interest or duty may exist with respect to a decision, the Bencher should consider whether continued participation in any decision-making as a Bencher is consistent with the Bencher's duties to the Law Society and act accordingly.

Conduct as Governors

Transactions that may benefit a Bencher or a Bencher's firm

11. The Benchers recognize the importance of avoiding even the appearance of conflicts of interest. However, it is in the interests of the Law Society and the legal profession as a whole that the Law Society obtain competent and cost-effective legal services from practitioners whose skills, training and experience are appropriate to the task. The Law Society may retain the legal services of a member of a Bencher's firm, with the approval of the Executive Director or the Executive

Committee as provided in the Rules[6]. But a Bencher must not participate in any way in a decision to retain the services of a member of the Bencher's firm.

Bencher Staff Relations

12. The Benchers are responsible for governing the affairs of the Law Society and for promoting and protecting the interests and welfare of the Law Society. The Executive Director, management and staff are responsible for the day-to-day management and co-ordination of all aspects of the operation, administration, finance, organization, supervision and maintenance of Law Society activities. The relationship among Benchers, management and staff should be one of trust in each other, respect for the distinct roles of Benchers, management and staff, and recognition that everyone at the Law Society is engaged with and has a role in protecting the public interest in the administration of justice.

13. All authority and accountability of Law Society management and staff to the Benchers is through the authority and accountability of the Executive Director, who is accountable to the Benchers, and Benchers should take care not to compromise the Executive Director's authority and accountability in dealing with management and staff.

Conduct as Legislators

14. Benchers are given the authority under the Legal Profession Act to make rules for the governing of those persons who are subject to Act, and for the carrying out of the Act.[7]

15. As a result, the legislature has delegated to the Benchers the authority to govern the professional activities of those persons who are subject to the Act, as well as managing the Society and seeing the requirements of the Legal Profession Act are fulfilled. In enacting, rescinding or amending proposed rules, the Benchers must ensure they have:

    a) a clear and comprehensive understanding, based on evidence and analysis, of the problem or issue and that intervention by the Law Society is needed to address the problem or issue;

[6] Rules 1-48(1) and 1-51(a)
[7] LPA, s.11(1). Section 11(5) provides that no approval other than that of the Benchers is required to enact, rescind or amend a rule.

b) sufficient information demonstrating through evidence and analysis that a rule is the best means to address the problem or issue;

c) evidence that, where appropriate, engagement and consultation with stakeholders has occurred and been considered;

d) sufficient understanding of the potential positive and negative effects, including costs and benefits, of a proposed rule on the delivery of legal services, access to justice and the public interest in the administration of justice and the operations of the Society; and

e) an effective method for evaluating whether the proposed rule successfully addressed the problem or issue.

Appearing as Counsel

16. A person must not appear as counsel for any party in a Law Society proceeding for three years after the later of:

    a. ceasing to be ~~serving as~~ a Bencher, or

    b. the completion of a hearing in which the person was a member of the panel.

17. A member of a committee must not appear personally on behalf of a member or the Law Society in any proceeding that relate to the work of that committee.

18. Former Benchers ~~should~~ must not be retained to represent the Law Society in discipline or credentials matters.

19. A current Bencher must not appear before the courts on behalf of a member or the Law Society in a discipline or~~,~~ credentials ~~or Special Compensation Fund~~ matter.

Appearing as a Witness

20. A Bencher who gives evidence in court on a matter of legal ethics must make clear to all parties and to the court that the Bencher speaks to his or her own understanding of matters in issue and is not a spokesperson for the Law Society.

Conduct as Confidential Advisors

Confidentiality when giving practical or ethical advice

21. When Benchers and Life Benchers give practical or ethical advice in their capacity as Benchers, they have a discretion to keep confidential information that they would

otherwise have to disclose or report under the Code of Professional Conduct, s.7.1-3, other than information about a shortage of trust funds.

Annual Disclosure

Annual Disclosure Requirement

22. Each Bencher must annually:

a) review the Code of Conduct and agree to act in accordance with the letter and spirit of the Code; and

b) disclose:

(1) any organization of which the Bencher is a director or the controlling mind, or

(2) any activities in which the Bencher is engaged,

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the objects or purpose of which substantially relates to provision of legal services in BC.

The Law Society of British Columbia

Executive Committee Election Rules

Committee: Governance Committee

Steven R. McKoen, QC (Chair)
Pinder K. Cheema, QC (Vice-Chair)
Jasmin Z. Ahmad
Craig Ferris, QC
Claire Marshall
Linda I. Parsons, QC
Philip A. Riddell, QC

May 27, 2019

Prepared for:	Benchers
Prepared by:	Staff
Purpose:	Discussion/Decision

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Background

Rule 1- 41

1. The Executive Committee is the only Law Society committee that is not populated by the President under Rule 1-49.

2. Rule 1-41 sets out a procedure for the election of three elected Benchers and a procedure for the election of one appointed Bencher to the Executive Committee.

3. For the three elected Benchers, the Rule provides that all persons elected as a Bencher for a term that includes the calendar year for which members of the Executive Committee are to be elected are eligible for election. Nominations for election to the Executive Committee must be in by November 22. If more than three Benchers are nominated, there must be an election and ballots must be returned by a date no later than December 6. All Benchers are entitled to participate in the election of the three elected Benchers.

4. For the appointed Bencher, the Rule provides that all appointed Benchers appointed for a term that includes all or part of the calendar year for which members of the Executive Committee are eligible for election. At the last regular meeting of the Benchers in each calendar year, the appointed Benchers must elect one appointed Bencher to serve as a member of the Executive Committee for the following calendar year. Only the appointed Benchers are entitled to vote in this election.

The Development of the Current Rule

5. The current Rule has its origins with the 1995 Report of the Committee on the Roles on the Executive Committee and the Treasurer's Committee (the "Role Committee").

6. That report recommended an annual election of four Benchers to the Executive Committee and that the Executive Committee be made up as follows:

   a) the Treasurer, Deputy Treasurer and Assistant Deputy Treasurer,

   b) the Assistant Deputy Treasurer-elect, if not otherwise a member of the Committee,

   c) three Benchers elected by all the Benchers, and

   d) one lay Bencher elected by the lay Benchers.

7. In support of the recommendations, the Role Committee noted that allowing all the Benchers to select the elected members of the Executive would give the Benchers more connection with the

Executive Committee and making the resulting elected Executive Committee more accountable to the Benchers as a whole.

8. The Role Committee did consider whether it was appropriate to allow the lay Bencher representative to be elected by all the Benchers, but concluded that it was more in keeping with the tradition of independence of the public input on the Benchers to allow the lay Benchers to make the choice alone. The Role Committee also suggested that the election of the Executive Committee occur at the first meeting of the Benchers in each calendar year. This would allow newly elected Benchers to participate in the process, but would allow for the establishment of a new Executive Committee early in the year. Finally, it recommended that the election be conducted by secret ballot.

9. As a result, then Rule 55 was proposed at the December 1995 Bencher meeting and adopted at the January and March1996 Bencher meetings.

10. In 1997, it was noted that while the Rule provided that all Benchers were eligible for election, except the excluded Benchers, there was no Rule providing for the selection or nomination of candidates for election. The Rules were amended to provide that all elected Benchers were candidates in the election unless *"the Bencher has instructed the Secretary in writing to delete the Bencher's name from the ballot."* While this amendment declared all elected Benchers were candidates unless they said otherwise, it left the nomination or candidacy of the lay Benchers candidates indeterminate. The 1997 amendments also provided that a ballot must be rejected unless it contains votes for the same number of candidates as there are positions to be filled, and also defined a counting method such that the candidates with the most votes, up to the number of positions to be filled, were elected.

11. In November 1998, the Benchers again made a number of amendments to the Executive Committee election rule. A specific nominating process was implemented requiring nominations to be made a last regular meeting of the Benchers in the year before the election and provided for a mail ballot in the event there were more than three nominations, which was to be returned no earlier than January 7. The amendments also provided for a resolution in the event of a tie vote.

12. The next amendments were made almost a decade later. In 2007, the Rules was amended to move the election into the year preceding the year in which the Executive Committee would serve, along with consequential changes to the nominating and voting process. The amendments also removed the specific reference to excluding the President, Vice-Presidents and lay Benchers from the election for the three Bencher members under subrule (1).

13. The next major amendment was in 2009. This reconciled the appointed Bencher election period with that for the elected Bencher positions on the Executive Committee.

Issues

Rule 1-41(1)

14. This subrule states that the Benchers must elect three Benchers to serve as members of the Executive Committee for each calendar year. As the Roles Committee recommended, there is actually an annual election of four Benchers to the Executive Committee and the Rule makes this so. While all the Benchers must elect three Benchers to serve on the Executive Committee, a subset of the Benchers must elect a fourth Bencher to serve on the Executive Committee. As a result, the subrule should say that the Benchers must elect four Benchers to serve as members of the Executive Committee.

Election Methods

15. The vote, if required, for the three elected Benchers is conducted by ballot, which must be returned no later than December 6. Although not expressly stated, the Rule contemplates that ballots will be made available to all Benchers sometime between November 22 and no later than December 6.

16. The vote, if required, for the appointed Bencher is also to be conducted by ballot but the vote must occur at the last regular meeting of the Benchers in each calendar year and appointed Benchers must be present at the meeting to participate.

17. The discrepancy in the voting methods is difficult to justify on a principled basis. While all Benchers in office on the date set for return of ballots are eligible to vote for up to close to two weeks, during which both elected and appointed Benchers have the opportunity to complete a ballot and return it, the vote for the appointed Bencher is limited to Benchers present at the last Bencher meeting of the year and must be completed on that day.

Nominations

18. The Rule 1-41(3) provides that nominations for election to the Executive Committee must be made by November 22. While stated broadly enough to encompass nominations for the appointed Bencher position as well as the elected Bencher positions, the placement of this subrule immediately following Rule 1-41(2) dealing with eligibility for election as an elected Bencher does tend to hide this fact.

Who Votes for Whom

19. The final consideration is the asymmetry in the voting. Under the Rule, all Benchers, elected and appointed, may vote for up to 3 candidates for the elected Bencher seats on the Executive Committee. However, only the appointed Benchers vote for the single appointed Bencher seat.

20. The Role Committee commented on their decision to recommend the asymmetry in voting.

> *It might also be appropriate to allow the lay Bencher representative to be elected by all the Benchers, but it is more in keeping with the tradition of independence of the public input on the Benchers to allow the lay Benchers to make the choice alone.*
>
> *Three other Benchers would then be elected by all the Benchers, including the Treasurer's Committee and the lay Benchers. The inclusion of lay Benchers in this electorate would be consistent with section 6(3) of the Legal Profession Act which gives lay Benchers "all the rights and duties of an elected Benchers." Also, it might be perceived as inconsistent with the spirit of lay participation to deny the lay Benchers a say in the election of almost half of the Executive Committee.*

21. At the Bencher meeting in December 1995, it was suggested that it should not appear that the lawyers among the Benchers were choosing the member of the public who participates at that level. The lay Benchers should make that decision themselves

22. The reference to section 6(3) of the Act[1] by the Roles Committee highlights the issue here. While some distinctions are made throughout the Act and Rules between elected and appointed Benchers, all Benchers have the same rights and duties.

23. In particular, section 4(2) does not say *"The **elected benchers** govern and administer the affairs of the society and may take any action they consider necessary for the promotion, protection, interest or welfare of the society."* It says *"The **benchers** govern and administer the affairs of the society and may take any action they consider necessary for the promotion, protection, interest or welfare of the society."* Given that broad statement of authority, drawing a distinction between the role of an elected Bencher and the role of an appointed Bencher should only be made if necessary to accomplish some particular end that requires making that distinction.

24. Rule 1-50(1) requires that the Executive Committee must have one appointed Bencher as a member. While the nomination for that appointed Bencher position is obviously limited to appointed Benchers, the original concern about limiting voting for that position to the appointed Benchers in keeping with the tradition of independence of the public input on the Benchers seems out of place in 2019.

[1] Now section 5(3)

Recommendations

25. The Committee makes the following recommendations regarding the Executive Committee election:

    a. Amend Rule 1-41(1) to recognize that there are four Benchers to be elected under the Rule.

    b. Reconcile the voting methods described in the Rule such that the voting for both the elected and appointed Bencher positions, if necessary, occurs in the manner provided for the elected Bencher positions.

    c. Clarify the processes for nominating elected and appointed Benchers such that they are consistent.

    d. While the elected and appointed Benchers would continue to nominate their respective candidates, if a vote for the elected Bencher and appointed Bencher positions on the Executive is required, all Benchers, elected and appointed, would eligible to vote for all four positions.

Resolutions

1. Be it resolved that the Benchers approve amending Rule 1-41:

    a. To recognize that there are four Benchers to be elected under the Rule;

    b. To reconcile the voting methods described in the Rule such that the voting for both the elected and appointed Bencher positions, if necessary, occurs in the manner provided for the elected Bencher positions; and

    c. To clarify the processes provided for in the Rule for nominating elected and appointed Benchers such that they are consistent.

2. Be it resolved that the Benchers approve amending Rule 1-41:

    a. To provide that, if a vote for the appointed Bencher position on the Executive is required, all Benchers, elected and appointed, would eligible to vote for the appointed Bencher to sit on the Executive Committee.

The Law Society of British Columbia

Memo

To:	Benchers
From:	Jeffrey G. Hoskins, QC for Act and Rules Committee
Date:	July 4, 2019
Subject:	**Anti-Money Laundering and Terrorist Financing: cash transaction, trust account and client identification rules**

1. In October 2018 the Federation of Law Societies' Anti-Money Laundering and Terrorist Financing Working Group issued its final report on changes to the model rules intended to enable law societies to better combat money laundering through the legal profession in Canada. The report and the model rules included in the report have since been adopted by the Federation Council and referred to the law societies for implementation.

2. The report comprises three major parts. The first deals with the regulation of cash transactions; the second with trust accounting, specifically the use of lawyer trust accounts; and the third with the most complex topic, client identification and verification ("CIV"). I have attached a copy of the report for your reference.

3. The Working Group subsequently, in February 2019, issued a document entitled "Guidance for the Legal Profession: Your Professional Responsibility to Avoid Facilitating or Participating in Money Laundering and Terrorist Financing," which is intended to assist lawyers and law firms in complying with the requirements of the model rules. I have attached a document for your reference.

4. The Act and Rules Committee has considered amendments to the BC Law Society Rules to give effect to the Federation model rules. I attach redlined and clean versions of the proposed amendments. I also attach a suggested resolution to effect changes for each of the three parts of the report. The third resolution, which deals with CIV, is stated to take effect January 1, 2020 to allow time for the Law Society and affected lawyers and law firms to implement procedures to comply with the new provisions. The other resolutions are to take effect on adoption. The Act and Rules Committee recommends adoption of all three resolutions.

5. When these rules were first proposed in the form of Model Rules, the Act and Rules Committee of the day considered the original model at a number of meetings and produced a set of rules that it felt was a better fit with the LSBC Rules than the Model Rules, and addressed some issues that were not included in the Model Rules at the time. As a result, today's Act and Rules Committee has taken care to ensure to recommend that the Benchers adopt rule changes that are at least as effective as the model rules adopted by other law societies while respecting the integrity of the existing BC rules.

6. In some places, the language has been tweaked to refer to law firms as well as individual lawyers to reflect the fact that the Law Society now regulates law firms and can adopt rules that are directly mandatory on the firms.

Drafting notes

7. **Rule 1, definition of "trust funds"** This definition is narrowed so that money received that is not "directly related to legal services" is not considered trust funds. That will assist in prohibiting the use of a trust account for non-law-related transactions.

8. **Rule 3-53 *[Definitions]*** This rule is expanded to include new definitions in the model rules. The definition of "public body" is broadened somewhat in accordance with the model rules. The reference to the BC *Freedom of Information and Protection of Privacy Act* is retained as appropriate to BC legislation and to avoid a complicated list of institutions.

9. **Rule 3-58.1 *[Trust account only for legal services]*** This provision from the model rules is inserted after "Deposit of trust funds" and before "Cash transactions" to expressly prohibit the use of trust accounts for non-law-related transactions. The clear heading is intended to assist getting out the message that broad use of trust accounts is not permitted.

10. **Rule 3-59 *[Cash transactions]*** This rule follows the language of the model rule fairly closely while maintaining the more usual order of establishing the application of the rule before stating the substance.

    - **(2)(a)** This provision is deleted to be consistent with the model rules. The provision provided an exemption from the cash transaction rules for in-house counsel that was peculiar to BC and has never been included in the model rules. This requires a consequential amendment to Rule 3-70 *[Records of cash transactions]*.

- **(2)(b)** This provision has been discussed previously by the Benchers. The Committee advances two options for the Benchers' decision. Option 1 is the Committee's original proposal; Option 2 addresses concerns raised by some Benchers. It would restore the current express exemption from the cash transaction rules for cash received or accepted pursuant to a court order. The exemption would be narrowed to apply only to "cash that has been seized by a peace officer, law enforcement agency or the agent of the Crown in an official capacity."

- **(5)** The model rules do not permit lawyers to refund any amount of money received in cash except also in cash. The current BC rule allows refunds under $1,000. The proposed amendment brings LSBC in line with the model rules.

11. **Rule 3-98** ***[Definitions]***

- **"client"** Note that the current definition of "client" includes others represented by a client, as normally defined, and individuals who instruct the lawyer on behalf of a client. This makes it unnecessary to refer to those additional persons repeatedly throughout the CIV rules.

- **"funds"** The model rule definition of "funds" is almost the same as the definition of "money" in this existing BC rule. This definition is significantly broader than the LSBC Rule 1 definition of "funds". The Committee considered adopting the model rule definition, but noted that there are 142 uses of the term "funds" throughout the Law Society Rules. We would have to consider amending rules about TAF, payment of fines, monetary judgments, EFT and a number of other areas if we went that route. As a result, the Committee recommends keeping the definition of "money" for the CIV rules and using that term to mean the broader range of financial assets. The result is the same coverage as the model rules, but with different words.

- **"public body"** The current Law Society Rules use the term "public body" in the context of the cash transaction rules and "public authority" in the context of CIV rules. There does not seem to be any principled reason for the difference, and it could lead to confusion. The Committee recommends adopting one definition of "public body" in Rule 3-53, in the cash transaction area, and adopting it by reference in Rule 3-98 for the CIV area.

12. **Rule 3-99(2.1)** ***[Application]*** This subrule is proposed to clarify the existing exemption to the CIV rules and is substantively consistent with the model rules.

13. **Rule 3-104** ***[Use of an agent for client verification]*** The model rule appears to require the use of an agent to verify the identity of a client outside Canada, even if the client is in the presence of the lawyer. The recommended provision clarifies that the requirement to use an agent for CIV occurs only when the client is both not before the lawyer and out of the country. Otherwise, the lawyer has the option of using an agent or complying personally.

14. **Rule 3-109** ***[Criminal activity, duty to withdraw]*** The Committee recommends additions to the heading and body of this rule to emphasize that the lawyer's duty to withdraw from representing a client rather than facilitate criminal activity arises at any time that the lawyer learns of the fraud or other illegal conduct.

Recommendation

15. The Act and Rules Committee recommends that the Benchers

    a. choose between Options 1 and 2 under Rule 3-59(2); and

    b. adopt the attached rule amendments by approving the three suggested resolutions.

Attachments: Working Group report
"Guidance for the Legal Profession"
draft amendments
3 suggested resolutions

JGH

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

Anti-Money Laundering and Terrorist Financing Working Group

Final Report on the Model Rules

Amended October 1, 2018

INTRODUCTION

1. The Federation of Law Societies of Canada and its member law societies have been actively engaged in the fight against money laundering and the financing of terrorist activities for more than 15 years. Ensuring effective anti-money laundering and terrorist financing rules and regulations for the legal profession continues to be a strategic priority of the Federation.

2. Two model rules, aimed at limiting the handling of cash by members of the legal profession and ensuring legal counsel engage in due diligence in identifying their clients, have been the cornerstone of the regulators' anti-money laundering and anti-terrorism financing initiatives. The No Cash and Client Identification and Verification Model Rules (the "Model Rules") adopted in 2004 and 2008 respectively have been implemented by all Canadian law societies.

3. In October 2016, the Federation Council asked the CEOs Forum to establish a working group of senior staff to review the Model Rules. The Council recognized that a review of the Model Rules was overdue, particularly in light of a number of developments on the anti-money laundering and counter-terrorist financing landscape, including amendments to federal anti-money laundering and terrorist financing regulations, and the report of the mutual evaluation of Canada's federal anti-money laundering regime by the Financial Action Task Force ("FATF").

4. The Anti-Money Laundering and Terrorist Financing Working Group (the "Working Group") is co-chaired by Jim Varro, Director, Office of the CEO at the Law Society of Ontario and Frederica Wilson, Executive Director, Regulatory Policy and Public Affairs and Deputy CEO at the Federation. The other members of the Working Group are:

    - Susan Robinson – Executive Director, Law Society of Prince Edward Island
    - Chioma Ufodike – Manager, Trust Safety, Law Society of Alberta
    - Elaine Cumming – Professional Responsibility Counsel, Nova Scotia Barristers' Society
    - Deb Armour – Chief Legal Officer, Law Society of British Columbia
    - Jeanette McPhee – CFO and Director of Trust Regulation, Law Society of British Columbia
    - Leah Kosokowsky – Director, Regulation, Law Society of Manitoba
    - Anthony Gonsalves – Team Manager, Professional Regulation, Law Society of Ontario
    - Sylvie Champagne – Secrétaire de l'Ordre et Directrice du contentieux, Barreau du Québec
    - Nicholas Handfield – Chef, Services juridiques et relations institutionnelles, Chambre des notaires de Québec
    - Brenda Grimes – Executive Director, Law Society of Newfoundland and Labrador

5. From October 2017 until mid-March 2018 the Working Group held a consultation on a number of proposed amendments to the Model Rules and the introduction of a new Trust Accounting Model Rule. The Working Group received comments on the proposed rule changes from nine of the 14 law societies, the Canadian Bar Association, the Ontario Bar Association and several individual lawyers. In addition to providing feedback on the amendments proposed by the Working Group and on the proposed new Trust Accounting Model Rule, a number of commentators recommended other changes to the rules. Where such additional changes were consistent with ones explored in the consultation, or were simple matters of wording, the Working Group has responded to them in the final amendments. There were, however, some recommendations that were outside the scope of the consultation. That development, together with the fact that the government introduced new amendments to the federal anti-money laundering regulations part-way through the consultation period that are relevant to the rules, led the Working Group to conclude that there would be merit in a second, focused review of the rules in the near future. Finally, the Working Group's research highlighted the potential value of a risk-based approach to law societies' anti-money laundering and anti-terrorism financing regulation. The Working Group suggests that the Federation may wish to consider a move in that direction in the future.

6. The final proposed amendments and the new trust accounting rule for approval by the Council are set out in full in appendices to this report. The proposed amendments and new rule, the rationale for them and a summary of the feedback received together with the Working Group's response to the feedback are discussed in the body of the report.

NO CASH MODEL RULE

Definitions

7. In its consultation report, the Working Group proposed the addition of several definitions to the No Cash rule. Those additions have been maintained, but additional changes have been made to the definitions section to ensure consistency with the definitions in the Client Identification and Verification rule. This includes revisions to the definitions of "financial institution" and "public body" and the addition of a definition of "financial services cooperative".

Exceptions

8. To reflect the intention to restrict the situations in which legal counsel can accept large amounts of cash, the Working Group had recommended the deletion of some of the exceptions in the rule. In response to feedback from a number of law societies and others, the Working Group reconsidered some of the proposed amendments to the circumstances in which legal counsel may accept more than $7,500 in cash. It is now proposed that exceptions for cash received from a peace officer, law enforcement agency or other agent of the Crown and to pay bail be maintained. The only exception that has been eliminated is that relating to cash received pursuant to a court order.

Other Amendments

9. The Working Group has maintained amendments to section 1 of the rule to clarify the amount of cash a lawyer may accept. The rule now specifies that a lawyer must not accept cash in an amount greater than $7,500. In response to feedback received during the consultation, the section has also been amended to delete the words “or transaction”. The Working Group agreed that it is clearer to tie the cash limit to client matters. Pursuant to the amended rule, legal counsel may not accept cash in an aggregate amount greater than $7,500 for any one client matter.

10. Also for greater clarity, the Working Group has removed the words “from a person” from section 1 and has changed “shall” to “must” or “will” (as appropriate) throughout the rule.

CLIENT IDENTIFICATION AND VERIFICATION RULE

Definitions

11. The Working Group is proposing a number of amendments to the definitions in the Client Identification and Verification rule, primarily to align with amended definitions in the federal regulations where similar terms are used in the Model Rule. These include the addition of definitions of “credit union central”, “disbursements”, “expenses”, “financial services cooperative” and “professional fees” and the deletion of the definition of “proceedings”. Amendments are also proposed to existing definitions including “financial institution”, “funds”, “public body”, and “securities dealer”. With the exception of additional changes to ensure the definitions refer to provinces and territories, the amendments to the definitions are unchanged from the version contained in the consultation document.

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

Requirement to Identify Client

13. One of the amendments proposed in the consultation was the addition of language to subsection 2(1) of the client identification rule to situate the requirements of the section in the broader context of lawyers’ due diligence obligations. The amended provision reads (new language underlined):

> 2(1) Subject to subsection (3), a lawyer who is retained by a client to provide legal services must comply with the requirements of this Rule in keeping with the lawyer’s obligation to know their client, understand the client’s dealings in relation to the retainer with the client and manage any risks arising from the professional business relationship with the client.

14. The proposed amendment attracted comments from several law societies, most asking for clarification about the extent of the obligations referred to and one law society questioning whether the additional language would create “unintended conduct obligations for lawyers.” The members of the Working Group note that the additional language is intended to articulate existing obligations not create new ones. The Working Group considers it important to remind members of the profession that they have obligations beyond the specific duties set out in the rule and that the provisions in the rule must be understood in light of those obligations. The Working Group is recommending that the amendment be made, but recognizes that members of the profession will need guidance to fully understand their obligations. Guidance on this issue will be included in the guidelines and educational material for the profession that the Working Group is preparing.

15. Section 3 of the rule has been reorganized to clarify the information that legal counsel must obtain and record to identify clients who are individuals. The provisions addressing individuals and those addressing organizations have been separated and minor amendments have been made to the wording of the section.

Verification of Client Identity - Exemptions

16. In the consultation report, the Working Group proposed deleting certain exemptions to the obligation to verify client identity when a lawyer “engages in or gives instructions in respect of the receiving, paying or transferring of funds.” In response to feedback received during the consultation the Working Group has decided to recommend deleting only two of the existing exemptions: those dealing with funds paid or received pursuant to a court order or a settlement of any legal or administrative proceeding (subsections 5 (2)(d) (the first phrase) and (e)). It is the view of the members of the Working Group that there is some risk of money laundering in both cases and that eliminating the exemptions will not cause significant inconvenience to lawyers or their clients.

17. Prompted by feedback during the consultation from a number of sources questioning the exemption for electronic funds transfers (“EFTs”), the Working Group also considered whether it should recommend the deletion of that exemption. Under the existing rule, members of the legal profession are not required to verify the identity of a client when the financial transactions in which they are involved, or about which they provide instructions, are done by EFT. The primary rationale for the exception is that financial institutions, which conduct EFTs, assert extensive controls over these transactions. Pursuant to the definition of “electronic funds transfer” in the rule, only EFTs conducted by financial institutions are covered by the exemption. In addition, as the definition makes clear, neither the sending nor receiving account holders handle or control the transfer of the funds. Finally, the rule requires that the EFT transmission records contain important identifying information including the date of the transfer, the amount, and the names of the sending and receiving account holders and the parties or persons conducting and receiving the EFT.

18. Although the Working Group did not propose any change to this exemption, some commentators raised concerns about the possible breadth of the exemption and suggested that they present a risk of money laundering or terrorism financing activities even with the monitoring and controls placed on EFTs by financial institutions. The

Working Group agrees that there is merit in considering whether to remove the exemption, but in order to ensure that there is appropriate consultation on the issue, has decided to defer a decision on a possible recommendation to the next phase of its work. In the meantime the Working Group is recommending minor amendments to sections 4 and 5 of the rule to more clearly identify the EFT exemption.

Verification of Client Identity – Obligations

19. The Working Group consulted on a number of amendments to the provisions relating to the requirement to verify identity. Most were based on changes to the federal regulations, including a recommendation to remove the "reasonable measures" standard from the client verification provisions (subsection 6(1)). Another reflected the Working Group's view that due diligence in knowing the client, their business, and how it intersects with the lawyer's services, should include an inquiry into the source of funds involved in a transaction (subsection 6(1)(a)).

20. Although some respondents to the consultation expressed concern about the removal of the "reasonable measures" standard from subsection 6(1), the proposed change was generally well received. One of the concerns expressed was that the change could limit access to justice in some circumstances. The members of the Working Group note that the requirement to verify identity of clients does not apply in every lawyer-client relationship, but only when the receipt, payment or transfer of funds is involved. In addition there are a number of options for satisfying the verification requirement. In the view of the members of the Working Group, the requirements will increase the effectiveness of the rules in managing the risks of money laundering and terrorism financing activities, and are unlikely to create a barrier to the provision of legal services.

21. Questions were, however, raised about the proposed new requirement to obtain information about the source of funds (subsection 6(1)(a)). As drafted, the revised provision will require counsel to inquire into the source of funds involved in the financial transaction that triggers the verification requirement. To respond to feedback from the consultation and to ensure legal counsel understand the scope of this new obligation, the Working Group will provide additional guidance in the guidelines being prepared for the profession on the rules.

22. There were also questions about the meaning of "independent source documents" referred to in the version of subsection 6(1)(b) contained in the consultation report. Changes have been made to this section to clearly identify the requirement to verify identity using the documents or information specified in what is now subsection 6(6) of the rule.

Verification of Client Identity - Methods

23. Proposed changes to the methods that can be used to verify the identity of clients prompted numerous questions. A number of respondents concluded, for example, that the amendments would require all client verification to be done in person (eliminating the use of agents) and others raised concerns about the potential impact of the changes to verification methods in circumstances that would not actually trigger the verification requirement. The Working Group has made a number of changes to the final proposed

amendments to clarify their intent, and will provide detailed guidance in the materials being prepared for the profession on when they must simply *identify* their clients (or third parties) and when they must *verify* the client's (or third parties') identity.

24. New provisions have been added at subsections 6(2) and 6(3) to make it clear that counsel *may* use an agent in any circumstances to obtain the required verification information and *must* use an agent when a client is not physically present in Canada. In all cases, the lawyer must have a written agreement with the agent, and upon receiving from the agent the information obtained to verify identity, must review it to ensure that it is valid and current.

25. Additional amendments to the provisions on the use of an agent that were made to respond to changes to the corresponding provisions in the federal regulations are unchanged from the consultation report. Key changes include

    (i) a requirement to satisfy oneself that the information obtained through an agent is valid,
    (ii) the ability to rely on an agent's previous verification in the circumstances set out, and
    (iii) no requirement for subsequent verification unless there are doubts about the information related to the original verification (the test before was 'if the lawyer recognizes the person').

26. Although the amendments to the provisions outlining the methods that may be used to verify identity (subsection 6(6)) are largely unchanged following the consultation, the Working Group has revised the heading of the section to more clearly indicate that it sets out the documents and information that can be used. In response to feedback received from the consultation about unfairness to lawyers in small firms or those that are not affiliated with other firms, the Working Group has removed a proposed amendment that would have permitted reliance on previous verification by an affiliated firm.

27. The amended rule will require the identity of clients who are individuals to be verified in one of the following ways:

    (i) by reference to a current government issued photo identification document;
    (ii) by reference to information in an individual's credit file; or
    (iii) by a dual process method using information from a reliable source confirming the client's name and address, name and date of birth, or existence of a deposit account, credit card, or loan in the client's name.

28. Additional amendments speak to verifying the identity of individuals under the age of 15. In the case of those under the age of 12, it is the identity of the parent or guardian that must be verified. For those between 12 and 15, identity may be verified by referring to information from a reliable source that contains the name and address of one of the child's parents and confirming that it is the child's address.

Identifying Directors, Shareholders and Owners of Organizations

29. The consultation report contained several significant amendments to the requirements relating to identity verification for clients that are organizations (subsection 6(7)), including a proposal to delete the "reasonable efforts" standard, creating a requirement to *obtain*, rather than simply to *make reasonable efforts to obtain*, the names of all directors of an organization, and the names and addresses of the owners. Tracking changes to the federal regulations, the proposed amendments also introduced a requirement to "take reasonable measures to confirm the accuracy of the information obtained." Responding to a criticism of both the law societies' rules and the federal regulations, the Working Group also proposed the addition of a requirement to obtain beneficial ownership information. Although these amendments elicited less feedback than anticipated, some respondents raised serious concerns. One law society suggested that "these proposed amendments would place an incredibly onerous responsibility on lawyers and might in fact be impossible to comply with in certain circumstances."

30. The Working Group understands these concerns and in the consultation report acknowledged the potential challenges to compliance with the beneficial ownership requirement, writing that "in the absence of a robust corporate registry system that includes beneficial ownership information, complying with this requirement may sometimes be difficult." This concern was repeated in submissions of the Federation to the House of Commons Standing Committee on Finance in the spring, in which the Federation called for the creation of publicly accessible registries of beneficial owners. Despite these concerns, the Working Group initially concluded that as drafted, the amendments set a reasonable requirement and specifically acknowledge that it may not be possible to obtain the information. However, additional feedback from the law societies has persuaded the Working Group that in the absence of publicly accessible information on beneficial owners, a mandatory requirement in the rule would be neither appropriate nor effective. The Working Group has therefore revised the proposed amendment to subsection 6(7) to require legal counsel to "make reasonable efforts" to obtain the names and addresses of persons who own or control 25% or more of an organization. As obtaining the corresponding information for the beneficiaries and settlors of trusts would pose similar challenges, the "reasonable efforts" standard will apply to this requirement as well.

31. The changes to subsection 6(7) have necessitated changes to other subsections of the rule to ensure an effective requirement. Pursuant to the revised subsection 6(10), when legal counsel are not able to obtain the prescribed information on the directors, trustees and owners of organizations they must "take reasonable measures to ascertain the identity of the most senior managing officer of the organization." The original proposal to require counsel to also "treat the activities in respect of that organization as requiring ongoing monitoring…" has been replaced with a requirement to determine whether the information received from the client in respect of their activities and funds, and the client's instructions are consistent with the purpose of the retainer and the other information obtained under the rule. The revised provision would also require counsel to assess whether there is a risk that they might be assisting in or encouraging fraud or other illegal conduct.

32. The members of the Working Group believe that it is essential that the regulators address the money laundering and terrorism financing risks present in legal practice through robust rules that will assist legal counsel in avoiding unwitting involvement in these illegal activities. The potential for individuals to hide their identity as the actual owners of organizations has been identified as presenting a significant risk for money laundering and the financing of terrorist activities, and the Working Group remains convinced that requiring legal counsel to identify those who own or control organizations is necessary. For that reason the Working Group recommends that the Federation revisit the proposal for a mandatory requirement to obtain beneficial ownership information if and when publicly accessible registries are created.

Timing of Verification

33. Proposals made to address concerns raised by some law societies about the length of time permitted for verifying the identity of an organization after engaging in or giving instructions in the matter have not been changed. Although the Working Group did receive some feedback questioning the move from a 60 to a 30 day deadline for verification, most of the feedback was supportive of the amendment. The members of the Working Group also concluded that the shorter deadline, which is consistent with the federal regulations, is more consistent with the purpose of the provision.

34. Two additional amendments related to subsequent verification are also recommended for approval (see subsections 6(12) and 6(14)). For both individuals and organizations, a lawyer who has previously verified the individual or organizational client need not do so again “unless the lawyer has reason to believe the information, or the accuracy of it, has changed.” These changes were included in the consultation report, but minor changes have been made to the wording to ensure consistency between the two subsections.

Ongoing Monitoring

35. In its consultation, the Working Group proposed the addition of a new provision requiring ongoing monitoring of clients (section 10) to determine whether the client’s information and instructions are consistent with the purpose of the retainer and to ensure the lawyer is not assisting in or encouraging dishonesty, fraud, crime or illegal conduct. The proposal was prompted by a provision in the federal regulations relating to ongoing monitoring of the business relationship with a client in the context of assessing risks relating to money laundering associated with the relationship. The Working Group also proposed the addition of a reference to ongoing monitoring to the provision requiring a lawyer to withdraw from representation of the client if, once retained, the lawyer becomes aware that they would be assisting the client in fraud or other illegal conduct.

36. Respondents to the consultation flagged the need for clarity about the steps lawyers will be expected to take to comply with the ongoing monitoring provision and the circumstances in which the requirement will apply. The Working Group agrees that guidance on the application of the section is needed and will provide it in the materials for the profession that are being prepared.

37. Concern was also expressed about the fact that one of the identified purposes of ongoing monitoring is “ensuring that the lawyer is not assisting in or encouraging

dishonesty, fraud, crime or illegal conduct." It was suggested that this sets too high a standard. The Working Group notes that members of the legal profession are bound by rules of professional conduct not to "knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct." To address the concerns that were raised in the consultation, the provision has been amended to be consistent with the existing professional conduct obligation.

Other amendments

38. The Working Group is proposing a few other minor amendments for greater clarity and consistency. These include the substitution of "must" or "will" for the word "shall" as appropriate throughout the rule.

TRUST ACCOUNTING MODEL RULE

39. The consultation report included a new trust accounting model rule intended to restrict the use of lawyers' trust accounts to purposes directly connected to the provision of legal services. As noted in the report, a number of law societies already have such rules. In the view of the Working Group, allowing members of the legal profession to use their trust accounts for purposes unrelated to the provision of legal services unnecessarily increases the risk of money laundering or other illegal activity even when the money in question is not cash.

40. The proposed rule was generally well received, but there were some criticisms and questions about the drafting. The Working Group has redrafted the rule in response. In keeping with the general drafting style of law society rules and regulations, the proposed new model rule now makes it clear that the obligations are imposed on individual lawyers. In response to concerns that the commentary seemed to impose additional obligations on lawyers, it has been removed in the final draft. The Working Group will instead provide guidance on the rule in the guidelines for the profession that are being prepared. Finally, a definition of "money" has been added to the rule for clarity. The proposed rule now reads as follows:

Definitions

"money" includes cash, cheques, drafts, credit card transactions, post office orders, express and bank money orders and electronic transfer of deposits at financial institutions

1. A lawyer must pay into and withdraw from, or permit the payment into or withdrawal from, a trust account only money that is directly related to legal services that the lawyer or the lawyer's law firm is providing.

2. A lawyer must pay out money held in a trust account as soon as practicable upon completion of the legal services to which the money relates.

Model Rule on Cash Transactions

"cash" means coins referred to in section 7 of the *Currency Act*, notes issued by the Bank of Canada pursuant to the *Bank of Canada Act* that are intended for circulation in Canada and coins or bank notes of countries other than Canada;

"disbursements" means amounts paid or required to be paid to a third party by the lawyer or the lawyer's firm on a client's behalf in connection with the provision of legal services to the client by the lawyer or the lawyer's firm which will be reimbursed by the client;

"expenses" means costs incurred by a lawyer or law firm in connection with the provision of legal services to a client which will be reimbursed by the client including such items as photocopying, travel, courier/postage, and paralegal costs;

"financial institution" means

(a) a bank that is regulated by the *Bank Act,*
(b) an authorized foreign bank within the meaning of section 2 of the *Bank Act* in respect of its business in Canada,
(c) cooperative credit society, savings and credit union or caisse populaire that is regulated by a provincial or territorial Act,
(d) an association that is regulated by the *Cooperative Credit Associations Act* (Canada),
(e) a financial services cooperative,
(f) a credit union central,
(g) a company that is regulated by the *Trust and Loan Companies Act* (Canada),
(h) a trust company or loan company that is regulated by a provincial or territorial Act,

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

(j) a subsidiary of the financial institution whose financial statements are consolidated with those of the financial institution.

"financial services cooperative" means a financial services cooperative that is regulated by *An Act respecting financial services cooperatives*, CQLR, c. C-67.3, or *An Act respecting the Mouvement Desjardins*, S.Q. 2000, c.77, other than a caisse populaire.

"funds" means cash, currency, securities and negotiable instruments or other financial instruments that indicate the person's title or right to or interest in them;

"professional fees" means amounts billed or to be billed to a client for legal services provided or to be provided to the client by the lawyer or the lawyer's firm;

"public body" means

(a) a department or agent of Her Majesty in right of Canada or of a province or territory,

(b) an incorporated city, town, village, metropolitan authority, township, district, county, rural municipality or other incorporated municipal body in Canada or an agent in Canada of any of them,

(c) a local board of a municipality incorporated by or under an Act of a province or territory of Canada including any local board as defined in the *Municipal Act* (Ontario) [or equivalent legislation] or similar body incorporated under the law of another province or territory,

(d) an organization that operates a public hospital authority and that is designated by the Minister of National Revenue as a hospital under the *Excise Tax Act* (Canada) or an agent of the organization,

(e) a body incorporated by or under an Act of a province or territory of Canada for a public purpose, or

(f) a subsidiary of a public body whose financial statements are consolidated with those of the public body.

1. A lawyer must not receive or accept cash in an aggregate amount ~~of~~ greater than $7,500 Canadian in respect of any one client matter.

2. For the purposes of this rule, when a lawyer receives or accepts cash in a foreign currency the lawyer will be deemed to have received or accepted the cash converted into Canadian dollars at

    (a) the official conversion rate of the Bank of Canada for the foreign currency as published in the Bank of Canada's Daily Noon Rates that is in effect at the time the lawyer receives or accepts the cash, or
    (b) if the day on which the lawyer receives or accepts cash is a holiday, the official conversion rate of the Bank of Canada in effect on the most recent business day preceding the day on which the lawyer receives or accepts the cash.

3. Section 1 applies when a lawyer engages on behalf of a client or gives instructions on behalf of a client in respect of the following activities:

    (a) receiving or paying funds;
    (b) purchasing or selling securities, real properties or business assets or entities;
    (c) transferring funds by any means.

4. Despite section 3, section 1 does not apply when the lawyer receives cash in connection with the provision of legal services by the lawyer or the lawyer's firm

    (a) from a financial institution or public body,
    (b) from a peace officer, law enforcement agency or other agent of the Crown acting in his or her official capacity,
    (c) pursuant to pay a fine, penalty, or bail, or
    (d) for professional fees, disbursements, or expenses, provided that any refund out of such receipts is also made in cash.

Model Rule on Recordkeeping Requirements for Cash Transactions

"cash" means coins referred to in section 7 of the *Currency Act*, notes issued by the Bank of Canada pursuant to the *Bank of Canada Act* that are intended for circulation in Canada and coins or bank notes of countries other than Canada;

"money" includes cash, cheques, drafts, credit card sales slips, post office orders and express and bank money orders.

1. Every lawyer, in addition to existing financial recordkeeping requirements to record all money and other property received and disbursed in connection with the lawyer's practice, shall maintain

    (a) a book of original entry identifying the method by which money is received in trust for a client, and

    (b) a book of original entry showing the method by which money, other than money received in trust for a client, is received.

2. Every lawyer who receives cash for a client shall maintain, in addition to existing financial recordkeeping requirements, a book of duplicate receipts, with each receipt identifying the date on which cash is received, the person from whom cash is received, the amount of cash received, the client for whom cash is received, any file number in respect of which cash is received and containing the signature authorized by the lawyer who receives cash and of the person from whom cash is received.

3. The financial records described in paragraphs 1 and 2 may be entered and posted by hand or by mechanical or electronic means, but if the records are entered and posted by hand, they shall be entered and posted in ink.

4. The financial records described in paragraphs 1 and 2 shall be entered and posted so as to be current at all times.

5. A lawyer shall keep the financial records described in paragraphs 1 and 2 for at least the six year period immediately preceding the lawyer's most recent fiscal year end. [This paragraph does not apply to lawyers in Quebec as the Barreau requires that such records be retained without any limitation.]

Model Rule on Cash Transactions

"cash" means coins referred to in section 7 of the *Currency Act*, notes issued by the Bank of Canada pursuant to the *Bank of Canada Act* that are intended for circulation in Canada and coins or bank notes of countries other than Canada;

"disbursements" means amounts paid or required to be paid to a third party by the lawyer or the lawyer's firm on a client's behalf in connection with the provision of legal services to the client by the lawyer or the lawyer's firm which will be reimbursed by the client;

"expenses" means costs incurred by a lawyer or law firm in connection with the provision of legal services to a client which will be reimbursed by the client including such items as photocopying, travel, courier/postage, and paralegal costs;

"financial institution" means

(a) a bank that is regulated by the *Bank Act,*
(b) an authorized foreign bank within the meaning of section 2 of the *Bank Act* in respect of its business in Canada,
(c) cooperative credit society, savings and credit union or caisse populaire that is regulated by a provincial or territorial Act,
(d) an association that is regulated by the *Cooperative Credit Associations Act* (Canada),
(e) a financial services cooperative,
(f) a credit union central,
(g) a company that is regulated by the *Trust and Loan Companies Act* (Canada),
(h) a trust company or loan company that is regulated by a provincial or territorial Act,

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

(j) a subsidiary of the financial institution whose financial statements are consolidated with those of the financial institution.

"financial services cooperative" means a financial services cooperative that is regulated by *An Act respecting financial services cooperatives*, CQLR, c. C-67.3, or *An Act respecting the Mouvement Desjardins*, S.Q. 2000, c.77, other than a caisse populaire.

"funds" means cash, currency, securities and negotiable instruments or other financial instruments that indicate the person's title or right to or interest in them;

"professional fees" means amounts billed or to be billed to a client for legal services provided or to be provided to the client by the lawyer or the lawyer's firm;

"public body" means

(a) a department or agent of Her Majesty in right of Canada or of a province or territory,

(b) an incorporated city, town, village, metropolitan authority, township, district, county, rural municipality or other incorporated municipal body in Canada or an agent in Canada of any of them,

(c) a local board of a municipality incorporated by or under an Act of a province or territory of Canada including any local board as defined in the *Municipal Act* (Ontario) [or equivalent legislation] or similar body incorporated under the law of another province or territory,

(d) an organization that operates a public hospital authority and that is designated by the Minister of National Revenue as a hospital under the *Excise Tax Act* (Canada) or an agent of the organization~~.~~,

(e) a body incorporated by or under an Act of a province or territory of Canada for a public purpose, or

(f) a subsidiary of a public body whose financial statements are consolidated with those of the public body.

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

2. For the purposes of this rule, when a lawyer receives or accepts cash in a foreign currency ~~from a person~~ the lawyer ~~shall~~will be deemed to have received or accepted the cash converted into Canadian dollars at

    (a) the official conversion rate of the Bank of Canada for the foreign currency as published in the Bank of Canada's Daily Noon Rates that is in effect at the time the lawyer receives or accepts the cash, or
    (b) if the day on which the lawyer receives or accepts cash is a holiday, the official conversion rate of the Bank of Canada in effect on the most recent business day preceding the day on which the lawyer receives or accepts the cash.

3. ~~Paragraph~~Section 1 applies when a lawyer engages on behalf of a client or gives instructions on behalf of a client in respect of the following activities:

    (a) receiving or paying funds;
    (b) purchasing or selling securities, real properties or business assets or entities;
    (c) transferring funds by any means.

4. Despite ~~paragraph~~section 3, ~~paragraph~~section 1 does not apply when the lawyer receives cash in connection with the provision of legal services by the lawyer or the lawyer's firm

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

~~(a) pursuant to a court order, or to pay a fine or penalty, or~~

~~(b) in an amount of $7,500 or more for professional fees, disbursements, expenses or bail, provided that any refund out of such receipts is also made in cash.~~

Model Rule on Recordkeeping Requirements for Cash Transactions

"cash" means coins referred to in section 7 of the *Currency Act*, notes issued by the Bank of Canada pursuant to the *Bank of Canada Act* that are intended for circulation in Canada and coins or bank notes of countries other than Canada;

"money" includes cash, cheques, drafts, credit card sales slips, post office orders and express and bank money orders.

1. Every lawyer, in addition to existing financial recordkeeping requirements to record all money and other property received and disbursed in connection with the lawyer's practice, shall maintain

    (a) a book of original entry identifying the method by which money is received in trust for a client, and

    (b) a book of original entry showing the method by which money, other than money received in trust for a client, is received.

2. Every lawyer who receives cash for a client shall maintain, in addition to existing financial recordkeeping requirements, a book of duplicate receipts, with each receipt identifying the date on which cash is received, the person from whom cash is received, the amount of cash received, the client for whom cash is received, any file number in respect of which cash is received and containing the signature authorized by the lawyer who receives cash and of the person from whom cash is received.

3. The financial records described in paragraphs 1 and 2 may be entered and posted by hand or by mechanical or electronic means, but if the records are entered and posted by hand, they shall be entered and posted in ink.

4. The financial records described in paragraphs 1 and 2 shall be entered and posted so as to be current at all times.

5. A lawyer shall keep the financial records described in paragraphs 1 and 2 for at least the six year period immediately preceding the lawyer's most recent fiscal year end. [This paragraph does not apply to lawyers in Quebec as the Barreau requires that such records be retained without any limitation.]

Federation of Law Societies of Canada
Fédération des ordres professionnels de juristes du Canada

Model Rule on Client Identification and Verification

Definitions

1. In this Rule,

"credit union central" means a central cooperative credit society, as defined in section 2 of the *Cooperative Credit Associations Act*, or a credit union central or a federation of credit unions or caisses populaires that is regulated by a provincial or territorial Act other than one enacted by the legislature of Quebec.

"disbursements" means amounts paid or required to be paid to a third party by the lawyer or the lawyer's firm on a client's behalf in connection with the provision of legal services to the client by the lawyer or the lawyer's firm which will be reimbursed by the client;

"electronic funds transfer" means an electronic transmission of funds conducted by and received at a financial institution or a financial entity headquartered in and operating in a country that is a member of the Financial Action Task Force, where neither the sending nor the receiving account holders handle or transfer the funds, and where the transmission record contains a reference number, the date, transfer amount, currency and the names of the sending and receiving account holders and the conducting and receiving entities.

"expenses" means costs incurred by a lawyer or law firm in connection with the provision of legal services to a client which will be reimbursed by the client including such items as photocopying, travel, courier/postage, and paralegal costs;

"financial institution" means

(a) a bank that is regulated by the *Bank Act,*

(b) an authorized foreign bank within the meaning of section 2 of the *Bank Act* in respect of its business in Canada,

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

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

(e) a financial services cooperative,

(f) a credit union central,

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

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

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

(j) a subsidiary of the financial institution whose financial statements are consolidated with those of the financial institution.

"financial services cooperative" means a financial services cooperative that is regulated by *An Act respecting financial services cooperatives*, CQLR, c. C-67.3, or *An Act respecting the Mouvement Desjardins*, S.Q. 2000, c.77, other than a caisse populaire.

"funds" means cash, currency, securities and negotiable instruments or other financial instruments that indicate the person's title or right to or interest in them;

"lawyer" means, in the Province of Quebec, an advocate or a notary and, in any other province or territory, a barrister or solicitor;

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

"professional fees" means amounts billed or to be billed to a client for legal services provided or to be provided to the client by the lawyer or the lawyer's firm;

“public body” means

(a) a department or agent of Her Majesty in right of Canada or of a province or territory,

(b) an incorporated city, town, village, metropolitan authority, township, district, county, rural municipality or other incorporated municipal body in Canada or an agent in Canada of any of them,

(c) a local board of a municipality incorporated by or under an Act of a province or territory of Canada including any local board as defined in the *Municipal Act* (Ontario) [or equivalent legislation] or similar body incorporated under the law of another province or territory,

(d) an organization that operates a public hospital authority and that is designated by the Minister of National Revenue as a hospital under the *Excise Tax Act* (Canada) or an agent of the organization,

(e) a body incorporated by or under an Act of a province or territory of Canada for a public purpose, or

(f) a subsidiary of a public body whose financial statements are consolidated with those of the public body.

“reporting issuer" means an organization that is a reporting issuer within the meaning of the securities laws of any province or territory of Canada, or a corporation whose shares are traded on a stock exchange that is designated under section 262 of the Income Tax Act (Canada) and operates in a country that is a member of the Financial Action Task Force, and includes a subsidiary of that organization or corporation whose financial statements are consolidated with those of the organization or corporation.

"securities dealer" means persons and entities authorized under provincial or territorial legislation to engage in the business of dealing in securities or any other financial instruments or to provide portfolio management or investment advising services, other than persons who act exclusively on behalf of such an authorized person or entity.

Requirement to Identify Client

2. (1) Subject to subsection (3), a lawyer who is retained by a client to provide legal services must comply with the requirements of this Rule in keeping with the lawyer's obligation to know their client, understand the client's financial dealings in relation to the retainer with the client and manage any risks arising from the professional business relationship with the client.

(2) A lawyer's responsibilities under this Rule may be fulfilled by any member, associate or employee of the lawyer's firm, wherever located.

(3) Sections 3 through 10 do not apply to

(a) a lawyer when he or she provides legal services or engages in or gives instructions in respect of any of the activities described in section 4 on behalf of his or her employer;

(b) a lawyer

(i) who is engaged as an agent by the lawyer for a client to provide legal services to the client, or

(ii) to whom a matter for the provision of legal services is referred by the lawyer for a client, when the client's lawyer has complied with sections 3 through 10,

or,

(c) a lawyer providing legal services as part of a duty counsel program sponsored by a non-profit organization, except where the lawyer engages in or gives instructions in respect of the receiving, paying or transferring of funds other than an electronic funds transfer.

3. A lawyer who is retained by a client as described in subsection 2(1) must obtain and record, with the applicable date, the following information:

(1) for individuals:

(a) the client's full name,

(b) the client's home address and home telephone number,

(c) the client's occupation or occupations, and

(d) the address and telephone number of the client's place of work or employment, where applicable;

(2) for organizations:

(a) the client's full name, business address and business telephone number,

(b) other than a financial institution, public body or reporting issuer, the organization's incorporation or business identification number and the place of issue of its incorporation or business identification number, if applicable,

(c) other than a financial institution, public body or a reporting issuer, the general nature of the type of business or businesses or activity or activities engaged in by the client, where applicable, and

(d) the name and position of and contact information for the individual who is authorized to provide and gives instructions to the lawyer with respect to the matter for which the lawyer is retained,

(3) if the client is acting for or representing a third party, information about the third party as set out in subsections (1) or (2) as applicable.

When Verification of Client Identity Required

4. Subject to section 5, section 6 applies where a lawyer who has been retained by a client to provide legal services engages in or gives instructions in respect of the receiving, paying or transferring of funds.

Exemptions re: certain funds

5. Section 6 does not apply

(1) where the client is a financial institution, public body or reporting issuer,

(2) in respect of funds,

(a) paid by or to a financial institution, public body or a reporting issuer;

(b) received by a lawyer from the trust account of another lawyer;

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

(d) paid or received to pay a fine, penalty, or bail; or

(e) paid or received for professional fees, disbursements, or expenses;

(3) to an electronic funds transfer.

Requirement to Verify Client Identity

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

(a) obtain from the client and record, with the applicable date, information about the source of funds described in section 4, and

(b) verify the identity of the client, including the individual(s) described in paragraph 3(2)(d), and, where appropriate, the third party using the documents or information described in subsection (6).

Use of Agent

(2) A lawyer may rely on an agent to obtain the information described in subsection (6) to verify the identity of an individual client, third party or individual described in paragraph 3(2)(d) provided the lawyer and the agent have an agreement or arrangement in writing for this purpose as described in subsection (4).

(3) Notwithstanding subsection (2), where an individual client, third party or individual described in paragraph 3(2)(d) is not physically present in Canada, a lawyer must rely on an agent to obtain the information described in subsection (4) to verify the person's identity provided the lawyer and the agent have an agreement or arrangement in writing for this purpose as described in subsection (4).

Agreement for Use of Agent

(4) A lawyer who enters into an agreement or arrangement referred to in subsection (2) or (3) must:

(a) obtain from the agent the information obtained by the agent under that agreement or arrangement; and

(b) satisfy themselves that the information is valid and current and that the agent verified identity in accordance with subsection (6).

(5) A lawyer may rely on the agent's previous verification of an individual client, third party or an individual described in paragraph 3(2)(d) if the agent was, at the time they verified the identity,

(a) acting in their own capacity, whether or not they were required to verify identity under this Rule, or

(b) acting as an agent under an agreement or arrangement in writing, entered into with another lawyer who is required to verify identity under this Rule, for the purpose of verifying identity under subsection (6).

Documents and information for verification

(6) For the purposes of paragraph (1)(b), the client's identity must be verified by referring to the following documents, which must be valid, original and current, or the following information, which must be valid and current, and which must not include an electronic image of a document:

(a) if the client or third party is an individual,

(i) an identification document containing the individual's name and photograph that is issued by the federal government, a provincial or territorial government or a foreign government, other than a municipal government, that is used in the presence of the individual to verify that the name and photograph are those of the individual;

(ii) information that is in the individual's credit file if that file is

located in Canada and has been in existence for at least three years that is used to verify that the name, address and date of birth in the credit file are those of the individual;

(iii) any two of the following with respect to the individual:

(A) Information from a reliable source that contains the individual's name and address that is used to verify that the name and address are of those of the individual;

(B) Information from a reliable source that contains 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, or

(C) Information that contains the individual's name and confirms that they have a deposit account or a credit card or other loan amount with a financial institution that is used to verify that information.

(b) For the purposes of clauses (6)(a)(iii)(A) to (C), the information referred to must be from different sources, and the individual, lawyer and agent cannot be a source.

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

(d) To verify the identity of an individual who is a least 12 years of age but not more than 15 years of age, the lawyer may refer to information under clause (6)(a)iii(A) that contains the name and address of one of the individual's parents or their guardian and verifying that the address is that of the individual.

(e) if the client or third party is an organization such as a corporation or society that is created or registered pursuant to legislative authority, a written confirmation from a government registry as to the existence, name and address of the organization, including the names of its directors, where applicable, such as

(i) a certificate of corporate status issued by a public body,

(ii) a copy obtained from a public body of a record that the organization is required to file annually under applicable legislation, or

(iii) a copy of a similar record obtained from a public body that confirms the organization's existence; and

(f) if the client or third party is an organization, other than a corporation or society, that is not registered in any government registry, such as a trust or partnership, a copy of the organization's constating documents, such as a trust or partnership agreement, articles of association, or any other similar record that confirms its existence as an organization.

Requirement to Identify Directors, Shareholders and Owners

(7) When a lawyer is engaged in or gives instructions in respect of any of the activities in section 4 for a client or third party that is an organization referred to in paragraph (6)(e) or (f), the lawyer must:

(a) obtain and record, with the applicable date, the names of all directors of the organization, other than an organization that is a securities dealer; and

(b) make reasonable efforts to obtain, and if obtained, record with the applicable date,

(i) the names and addresses of all persons who own, directly or indirectly, 25 per cent or more of the organization or of the shares of the organization,

(ii) the names and addresses of all trustees and all known beneficiaries and settlors of the trust, and

(iii) in all cases, information establishing the ownership, control and structure of the organization.

(8) A lawyer must take reasonable measures to confirm the accuracy of the information obtained under subsection (7).

(9) A lawyer must keep a record, with the applicable date(s), that sets out the information obtained and the measures taken to confirm the accuracy of that information.

(10) If a lawyer is not able to obtain the information referred to in subsection (7) or to confirm the accuracy of that information in accordance with subsection (8), the lawyer must

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

(b) determine whether

(i) the client's information in respect of their activities,

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

(iii) the client's instructions in respect of the transaction,

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

(c) assess whether there is a risk that the lawyer may be assisting in or encouraging fraud or other illegal conduct; and

(d) keep a record, with the applicable date, of the results of the determination and assessment under paragraphs (b) and (c).

Timing of Verification for Individuals

(11) A lawyer must verify the identity of

(a) a client who is an individual, and

(b) the individual(s) authorized to provide and giving instructions on behalf of an organization with respect to the matter for which the lawyer is retained,

upon engaging in or giving instructions in respect of any of the activities described in section 4.

(12) Where a lawyer has verified the identity of an individual, the lawyer is not required to subsequently verify that same identity unless the lawyer has reason to believe the information, or the accuracy of it, has changed.

Timing of Verification for Organizations

(13) A lawyer must verify the identity of a client that is an organization upon engaging in or giving instructions in respect of any of the activities described in section 4, but in any event no later than 30 days thereafter.

(14) Where the lawyer has verified the identity of a client that is an organization and obtained information pursuant to subsection (7), the lawyer is not required to subsequently verify that identity or obtain that information, unless the lawyer has reason to believe the information, or the accuracy of it, has changed.

Record keeping and retention

7. (1) A lawyer must obtain and retain a copy of every document used to verify the identity of any individual or organization for the purposes of subsection 6(1).

(2) The documents referred to in subsection (1) may be kept in a machine-readable or electronic form, if a paper copy can be readily produced from it.

(3) A lawyer must retain a record of the information, with the applicable date, and any documents obtained for the purposes of section 3, subsection 6(7) and subsection 10(2) and copies of all documents received for the purposes of subsection 6(1) for the longer of

(a) the duration of the lawyer and client relationship and for as long as is necessary for the purpose of providing service to the client, and

(b) a period of at least six years following completion of the work for which the lawyer was retained.

Application

8. Sections 2 through 7 of this Rule do not apply to matters in respect of which a lawyer was retained before this Rule comes into force but they do apply to all matters for which he or she is retained after that time regardless of whether the client is a new or existing client.

Criminal activity, duty to withdraw at time of taking information

9. (1) If in the course of obtaining the information and taking the steps required in section 3 and subsections 6(1), (7) or (10), a lawyer knows or ought to know that he or she is or would be assisting a client in fraud or other illegal conduct, the lawyer must withdraw from representation of the client.

(2) This section applies to all matters, including new matters for existing clients, for which a lawyer is retained after this Rule comes into force.

Monitoring

10. During a retainer with a client in which the lawyer is engaged in or gives instructions in respect of any of the activities described in section 4, the lawyer must:

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

(a) determining whether

(i) the client's information in respect of their activities,

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

(iii) the client's instructions in respect of transactions

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

(b) assessing whether there is a risk that the lawyer may be assisting in or encouraging fraud or other illegal conduct; and

(2) keep a record, with the applicable date, of the measures taken and the information obtained with respect to the requirements of paragraph (1)(a) above.

Duty to withdraw

11. (1) If while retained by a client, including when taking the steps required in section 10, a lawyer knows or ought to know that he or she is or would be assisting the client in fraud or other illegal conduct, the lawyer must withdraw from representation of the client.

Application

(2) This section applies to all matters for which a lawyer was retained before this Rule comes into force and to all matters for which he or she is retained after that time.

Federation of Law Societies of Canada
Fédération des ordres professionnels de juristes du Canada

Model Rule on Client Identification and Verification Requirements

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

Definitions

1. In this Rule,

"credit union central" means a central cooperative credit society, as defined in section 2 of the *Cooperative Credit Associations Act*, or a credit union central or a federation of credit unions or caisses populaires that is regulated by a provincial Act other than one enacted by the legislature of Quebec.

"disbursements" means amounts paid or required to be paid to a third party by the lawyer or the lawyer's firm on a client's behalf in connection with the provision of legal services to the client by the lawyer or the lawyer's firm which will be reimbursed by the client;

"electronic funds transfer" means an electronic transmission of funds conducted by and received at a financial institution or a financial entity headquartered in and operating in a country that is a member of the Financial Action Task Force, where neither the sending nor the receiving account holders handle or transfer the funds, and where the transmission record contains a reference number, the date, transfer amount, currency and the names of the sending and receiving account holders and the conducting and receiving entities.

"expenses" means costs incurred by a lawyer or law firm in connection with the provision of legal services to a client which will be reimbursed by the client including such items as photocopying, travel, courier/postage, and paralegal costs;

"financial institution" means

(a) a bank that is regulated by the *Bank Act*,

(b) an authorized foreign bank within the meaning of section 2 of the *Bank Act* in respect of its business in Canada ~~or a bank to which the *Bank Act* applies,~~ ,

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

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

(e) a financial services cooperative,

(f) a credit union central,

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

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

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

(j) a subsidiary of the financial institution whose financial statements are consolidated with those of the financial institution.

"financial services cooperative" means a financial services cooperative that is regulated by *An Act respecting financial services cooperatives*, CQLR, c. C-67.3, or *An Act respecting the Mouvement Desjardins*, S.Q. 2000, c.77, other than a caisse populaire.

"funds" means cash, currency, securities and negotiable instruments or other financial instruments that indicate the person's title or right to or interest in them;

"lawyer" means, in the Province of Quebec, an advocate or a notary and, in any other province, a barrister or solicitor;

"organization" means a body corporate, partnership, fund, trust, co-operative or an

unincorporated association;

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

"professional fees" means amounts billed or to be billed to a client for legal services provided or to be provided to the client by the lawyer or the lawyer's firm;

"public body" means

(a) a department or agent of Her Majesty in right of Canada or of a province or territory,

(b) an incorporated city, town, village, metropolitan authority, township, district, county, rural municipality or other incorporated municipal body in Canada or an agent in Canada of any of them,

(c) a local board of a municipality incorporated by or under an Act of a province or territory of Canada including any local board as defined in the *Municipal Act* (Ontario) [or equivalent legislation] or similar body incorporated under the law of another province or territory,

(d) an organization that operates a public hospital authority and that is designated by the Minister of National Revenue as a hospital under the *Excise Tax Act* (Canada) or an agent of the organization,

(e) a body incorporated by or under an Act of a province or territory of Canada for a public purpose, or

(f) a subsidiary of a public body whose financial statements are consolidated with those of the public body.

"reporting issuer" means an organization that is a reporting issuer within the meaning of the securities laws of any province or territory of Canada, or a corporation whose shares are traded on a stock exchange that is designated under section 262 of the Income Tax Act (Canada) and operates in a country that is a member of the

Financial Action Task Force, and includes a subsidiary of that organization or corporation whose financial statements are consolidated with those of the organization or corporation.

"securities dealer" means ~~a person or entity that is~~persons and entities authorized under provincial or territorial legislation to engage in the business of dealing in securities or any other financial instruments or to provide portfolio management or investment advising services~~.~~, other than persons who act exclusively on behalf of such an authorized person or entity.

~~Client Identity~~Requirement to Identify Client

2. (1) Subject to subsection (3), a lawyer who is retained by a client to provide legal services must comply with the requirements of this Rule~~.~~ in keeping with the lawyer's obligation to know their client, understand the client's financial dealings in relation to the retainer with the client and manage any risks arising from the professional business relationship with the client.

(2) A lawyer's responsibilities under this Rule may be fulfilled by any member, associate or employee of the lawyer's firm, wherever located.

(3) Sections 3 through ~~9~~ 10 do not apply to

(a) a lawyer when he or she provides legal services or engages in or gives instructions in respect of any of the activities described in section 4 on behalf of his or her employer;

(b) a lawyer

(i) who is engaged as an agent by the lawyer for a client to provide legal services to the client, or

(ii) to whom a matter for the provision of legal services is referred by the lawyer for a client, when the client's lawyer has complied with sections 3 through ~~9~~10,

or,

(c) a lawyer providing legal services as part of a duty counsel program sponsored by a non-profit organization, except where the lawyer engages in or gives instructions in respect

of the receiving, paying or transferring of funds other than an electronic funds transfer.

3. A lawyer who is retained by a client as described in ~~section~~subsection 2(1) ~~shall~~must obtain and record, with the applicable date, the following information:

(1) for individuals:

(a) the client's full name,

(b) the client's home address and home telephone number,

(c) the client's occupation or occupations, and

(d) the address and telephone number of the client's place of work or employment, where applicable;

(2) for organizations:

(a) the client's full name, business address and business telephone number, ~~if applicable,~~

~~(b)~~(a) ~~if the client is an individual, the client's home address and home telephone number,~~

(b) ~~if the client is an organization,~~ other than a financial institution, public body or reporting issuer, the organization's incorporation or business identification number and the place of issue of its incorporation or business identification number, if applicable,

~~(a) if the client is an individual, the client's occupation or occupations,~~

~~(b) if the client is an organization,~~

(c) other than a financial institution, public body or a reporting issuer, the general nature of the type of business or businesses or activity or activities engaged in by the client, where applicable, and

(d) the name and position of and contact information for the individual who is authorized to provide and gives instructions to the lawyer with respect to the matter for which the lawyer is retained,

(3) if the client is acting for or representing a third party, information about the third party as set out in ~~paragraphs (a) to (f~~subsections (1) or (2) as applicable.

When Verification of Client Identity ~~and Verification~~Required

4. Subject to section 5, section 6 applies where a lawyer who has been retained by a client to provide legal services engages in or gives instructions in respect of the receiving, paying or transferring of funds~~, other than an electronic funds transfer~~.

Exemptions re: certain funds

5. ~~(1)~~ Section 6 does not apply

(1) where the client is a financial institution, public body or reporting issuer~~.~~,

(2) ~~Section 6 does not apply~~ in respect of funds,

(a) paid by or to a financial institution, public body or a reporting issuer;

~~(a)~~ received by a lawyer from the trust account of another lawyer~~;~~

(b) ;

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

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

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

~~(d)~~(e) paid or received for professional fees, disbursements, or expenses ~~or bail.~~;

(3) to an electronic funds transfer.

Requirement to Verify Client Identity

6. (1) When a lawyer is engaged in or gives instructions in respect of any of the activities described in section 4, ~~including non-face-to-face transactions, the lawyer shall take reasonable steps to verify the identity of the client, including the individual(s) described in section 3, clause (f)(ii), and, where appropriate, the third~~

~~party, using what the lawyer reasonably considers to be reliable, independent source documents, data or information.~~ the lawyer must

(a) ~~Examples~~ obtain from the client and record, with the applicable date, information about the source of funds described in section 4, and

~~(a)~~(b) verify the identity of the client, including the individual(s) described in paragraph 3(2)(d), and, where appropriate, the third party using the documents or information described in subsection (6). ~~independent source documents~~

Use of Agent

~~(2) For the purposes of subsection (1), independent source documents may include:~~

(2) A lawyer may rely on an agent to obtain the information described in subsection (6) to verify the identity of an individual client, third party or individual described in paragraph 3(2)(d) provided the lawyer and the agent have an agreement or arrangement in writing for this purpose as described in subsection (4).

(3) Notwithstanding subsection (2), where an individual client, third party or individual described in paragraph 3(2)(d) is not physically present in Canada, a lawyer must rely on an agent to obtain the information described in subsection (4) to verify the person's identity provided the lawyer and the agent have an agreement or arrangement in writing for this purpose as described in subsection (4)

Agreement for Use of Agent

(4) A lawyer who enters into an agreement or arrangement referred to in subsection (2) or (3) must:

(a) obtain from the agent the information obtained by the agent under that agreement or arrangement; and

(b) satisfy themselves that the information is valid and current and that the agent verified identity in accordance with subsection (6).

(5) A lawyer may rely on the agent's previous verification of an individual client, third party or an individual described in paragraph 3(2)(d) if the agent was, at the time they verified the identity,

(a) acting in their own capacity, whether or not they were required to verify identity under this Rule, or

(b) acting as an agent under an agreement or arrangement in writing, entered into with another lawyer who is required to verify identity under this Rule, for the purpose of verifying identity under subsection (6).

Documents and Information for Verification

(6) For the purposes of paragraph (1)(b), the client's identity must be verified by referring to the following documents, which must be valid, original and current, or the following information, which must be valid and current, and which must not include an electronic image of a document:

(a) if the client or third party is an individual, ~~valid original government issued~~

(i) an identification~~, including a driver's licence, birth certificate,~~ document containing the individual's name and photograph that is issued by the federal government, a provincial or territorial ~~health insurance~~government or a foreign government, other than a municipal government, that is used in the presence of the individual to verify that the name and photograph are those of the individual;

(ii) information that is in the individual's credit file if that file is located in Canada and has been in existence for at least three years that is used to verify that the name, address and date of birth in the credit file are those of the individual;

(iii) any two of the following with respect to the individual:

(A) Information from a reliable source that contains the individual's name and address that is used to verify that the

name and address are of those of the individual;

(B) Information from a reliable source that contains 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, or

~~(A)~~(C) Information that contains the individual's name and confirms that they have a deposit account or a credit card ~~[if such use of the card is not prohibited by the applicable provincial or territorial law], passport or similar record;~~or other loan amount with a financial institution that is used to verify that information.

(b) For the purposes of clauses (6)(a)(iii)(A) to (C), the information referred to must be from different sources, and the individual, lawyer and agent cannot be a source.

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

(d) To verify the identity of an individual who is a least 12 years of age but not more than 15 years of age, the lawyer may refer to information under clause 6(a)(iii)(A) that contains the name and address of one of the individual's parents or their guardian and verifying that the address is that of the individual.

~~(a)~~(e) if the client or third party is an organization such as a corporation or society that is created or registered pursuant to legislative authority, a written confirmation from a government registry as to the existence, name and address of the organization, including the names of its directors, where applicable, such as

(i) ~~(i)~~ a certificate of corporate status issued by a public body,

(ii) ~~(ii)~~ a copy obtained from a public body of a record that the organization is required to file annually under applicable legislation, or

(iii) a copy of a similar record obtained from a public body that confirms the organization's existence; and

~~(b)~~(f) ~~(c)~~ if the client or third party is an organization, other than a corporation or society, that is not registered in any government registry, such as a trust or partnership, a copy of the organization's constating documents, such as a trust or partnership agreement, articles of association, or any other similar record that confirms its existence as an organization.

Requirement to Identify Directors, Shareholders and Owners

~~(3~~

(7) When a lawyer is engaged in or gives instructions in respect of any of the activities in section 4 for a client or third party that is an organization referred to in ~~subsection~~ paragraph ~~(2)(b~~(6)(e) or (~~c~~f), the lawyer ~~shall make reasonable efforts to~~must

(a) obtain and ~~if obtained,~~ record, with the applicable date,

~~(a)~~ the ~~name and occupation~~names of all directors of the organization, other than an organization that is a securities dealer~~,~~; and

(b) make reasonable efforts to obtain, and if obtained, record with the applicable date,

~~(b)~~ (i) the ~~name, address~~names and ~~occupation~~addresses of all persons who own, directly or indirectly, 25 per cent or more of the organization or of the shares of the organization~~.~~,

~~(5)~~ (ii) the names and addresses of all trustees and ~~shall include~~

~~(a) the name, profession~~all known beneficiaries and ~~address~~settlors of the ~~person providing the attestation;~~

~~(c)~~ ~~(b) the signature of the person providing the attestation;~~trust, and

~~(d)~~ ~~(c)~~ (iii) in all cases, information establishing the ~~type~~ownership, control and ~~number~~structure of the ~~identifying document provided by the client, third party or instructing individual(s).~~organization.

(~~6~~8) ~~For~~A lawyer must take reasonable measures to confirm the ~~purpose~~

ofaccuracy of the information obtained under subsection (4), a guarantor must be a person employed in one of the following occupations in Canada:7).

(a) dentist;

(b) medical doctor;

(c) chiropractor;

(d) judge;

(e) magistrate;

(f) lawyer;

(g) notary (in Quebec);

(h) notary public;

(i) optometrist;

(j) pharmacist;

(k) professional accountant (APA [Accredited Public Accountant], CA [Chartered Accountant], CGA [Certified General Accountant], CMA [Certified Management Accountant], PA [Public Accountant] or RPA [Registered Public Accountant]);

(l) professional engineer (P.Eng. [Professional Engineer, in a province other than Quebec] or Eng. [Engineer, in Quebec]);

(m) veterinarian;

(n) peace officer;

(o) paralegal licensee in Ontario;

(p) nurse; or

(q) school principal.

Use of Agent

(79) A lawyer may, and where an individual client, third party or individual

~~described in s. 3 clause (f)(ii) is not physically present and is outside of Canada, shall, rely on an agent~~must keep a record, with the applicable date(s), that sets out

(a) the efforts made under paragraph 7(b), and

(b) ~~information obtained and~~ the measures taken to confirm the accuracy of the~~at~~ information obtained under section (7).

(10) If a lawyer is not able to obtain the information ~~described~~referred to in subsection (~~2) to verify the person's~~7) or to confirm the~~at~~ accuracy of that information in accordance with subsection (8), the lawyer must

(a) take reasonable measures to ascertain the identity~~, which may include, where applicable, an attestation described in~~ of the most senior managing officer of the organization; and

(b) determine whether

(i) the client's information in respect of their activities,

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

(iii) the client's instructions in respect of the transaction

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

(c) assess whether there is a risk that the lawyer may be assisting in or encouraging fraud or other illegal conduct; and

(d) keep a record, with the applicable date, of the results of the determination and assessment under paragraphs (b) and (c).~~treat the activities in respect of that organization as requiring ongoing monitoring and if necessary take the steps such monitoring may require, as described in sections 10 of this section, provided the lawyer and the agent have an agreement or arrangement in writing~~Rule.

~~**for** this purpose.~~

~~(a) A lawyer who enters into an agreement or arrangement referred to in subsection (7) shall obtain from the agent the~~

~~information obtained by the agent under that agreement or arrangement.~~

Timing of Verification for Individuals

(11) A lawyer ~~shall~~must verify the identity of

(a) a client who is an individual, and

(b) the individual(s) authorized to provide and giving instructions on behalf of an organization with respect to the matter for which the lawyer is retained,

upon engaging in or giving instructions in respect of any of the activities described in section 4.

(12) Where a lawyer has verified the identity of an individual, the lawyer is not required to subsequently verify that same identity ~~if the lawyer recognizes that person~~unless the lawyer has reason to believe the information, or the accuracy of it, has changed.

Timing of Verification for Organizations

(13) A lawyer ~~shall~~must verify the identity of a client that is an organization ~~within 60 days of~~ upon engaging in or giving instructions in respect of any of the activities described in section 4~~.~~, but in any event no later than 30 days thereafter.

(14) Where the lawyer has verified the identity of a client that is an organization and obtained information pursuant to subsection ~~6(3~~(7), the lawyer is not required to subsequently verify that identity or obtain that information, unless the lawyer has reason to believe the information, or the accuracy of it, has changed.

Record keeping and retention

7. (1) A lawyer ~~shall~~must obtain and retain a copy of every document used to verify the identity of any individual or organization for the purposes of ~~section~~subsection 6(1).

(2) The documents referred to in subsection (1) may be kept in a

machine-readable or electronic form, if a paper copy can be readily produced from it.

(3) A lawyer ~~shall~~must retain a record of the information, with the applicable date, and any documents obtained for the purposes of ~~sections 3~~section 3, subsection 6(7) and ~~6(3~~subsection 10(2) and copies of all documents received for the purposes of ~~section~~subsection 6(1) for the longer of

(a) ~~(a)~~ the duration of the lawyer and client relationship and for as long as is necessary for the purpose of providing service to the client, and

(b) ~~(b)~~ a period of at least six years following completion of the work for which the lawyer was retained.

Application

8. Sections 2 through 7 of this Rule do not apply to matters in respect of which a lawyer was retained before this Rule comes into force but they do apply to all matters for which he or she is retained after that time regardless of whether the client is a new or existing client.

Criminal activity, duty to withdraw at time of taking information

9. (1) If in the course of obtaining the information and taking the steps required in ~~sections~~section 3 and subsections 6(1), ~~or~~ (~~3~~7) or (10), a lawyer knows or ought to know that he or she is or would be assisting a client in fraud or other illegal conduct, the lawyer must withdraw from representation of the client.

(2) This section applies to all matters, including new matters for existing clients, for which a lawyer is retained after this Rule comes into force.

~~Criminal activity, duty~~
Monitoring

10. During a retainer with a client in which the lawyer is engaged in or gives instructions in respect of any of the activities described in section 4, the lawyer must:

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

(a) determining whether

(i) the client's information in respect of their activities,

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

(iii) the client's instructions in respect of transactions

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

(b) assessing whether there is a risk that the lawyer may be assisting in or encouraging ~~dishonesty, fraud, crime~~ or other illegal conduct; and

(2) keep a record, with the applicable date, of the measures taken and the information obtained with respect to the requirements of paragraph (1)(a) above.

Duty to Withdraw ~~after being retained~~

~~10.~~

11. (1) If while retained by a client, including when taking the steps required in section 10, a lawyer knows or ought to know that he or she is or would be assisting the client in fraud or other illegal conduct, the lawyer must withdraw from representation of the client.

Application

(2) This section applies to all matters for which a lawyer was retained before this Rule comes into force and to all matters for which he or she is retained after that time.

Federation of Law Societies of Canada
Fédération des ordres professionnels de juristes du Canada

MODEL TRUST ACCOUNTING RULE

Definitions

"money" includes cash, cheques, drafts, credit card transactions, post office orders, express and bank money orders, and electronic transfer of deposits at financial institutions

1. A lawyer must pay into and withdraw from, or permit the payment into or withdrawal from, a trust account only money that is directly related to legal services that the lawyer or the lawyer's law firm is providing.

2. A lawyer must pay out money held in a trust account as soon as practicable upon completion of the legal services to which the money relates.

Anti-Money Laundering and Terrorist Financing Working Group

Guidance for the Legal Profession

Your Professional Responsibility to Avoid Facilitating or Participating in Money Laundering and Terrorist Financing

February 19, 2019

Table of Contents

Chapter 1: About This Guidance

Money laundering and terrorist financing, both offences under the *Criminal Code*, are on the rise in Canada. Because of the risks posed by money laundering and terrorist financing, Canada has adopted a comprehensive federal legislative regime to prevent these crimes through the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("PCMLTFA") requiring designated individuals and institutions to collect and report to a federal government agency[1] information about financial transactions of their clients, including large cash and suspicious financial transactions. Money laundering and terrorist financing affect us all, and the Canadian government makes serious efforts to prevent and prosecute these criminal acts.

Like all people in Canada, legal professionals[2] are subject to the *Criminal Code*, but they are exempted from the federal legislative regime under the PCMLTFA due to constitutional principles that protect the rights of clients and the obligations of legal professionals within their confidential relationships. The PCMLTFA was originally applicable to lawyers and Quebec notaries; this led to litigation launched by the Federation of Law Societies of Canada (the "Federation") and the Law Society of British Columbia, supported by the Canadian Bar Association, challenging the constitutionality of the legislation. The Supreme Court of Canada subsequently recognized that the provisions in the legislation requiring legal counsel to collect and retain information about their clients and their financial transactions and provide that information to government on demand, with expansive government powers to search law offices, provided inadequate protection for solicitor-client privilege and violated the *Canadian Charter of Rights and Freedoms*.[3] However, the legal profession must comply with significant, corresponding obligations to ensure they are not facilitating money-laundering and terrorist financing. These obligations are imposed on legal professionals through the regulatory regimes of Canadian law societies.

Lawyers, Quebec notaries, and paralegals in Ontario are obligated, amongst other duties, to identify and verify the identity of clients, to comply with limits on the amount of cash they may accept, to ensure that trust accounts are used only for the direct purpose of providing legal services, and to withdraw from representing a client if they know, or ought to know, that they would be assisting in criminal activity if they continue the representation. In this sense, the responsibilities of legal professionals go beyond the reporting and other duties of other professions and institutions in Canada under the PCMLTFA.

This Guidance, prepared by the Federation on behalf of all Canadian law societies, describes the responsibilities of Canada's legal professions to ensure they are not facilitating money laundering and terrorist financing. It describes the context for money laundering and terrorist financing in Canada and the sources of the responsibilities to avoid it. The detailed Guidance, which includes red flags and real-life examples, sets

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[1] The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC)

[2] In this Guidance, the term "legal professionals" includes lawyers, Quebec notaries and licensed paralegals in Ontario.

[3] *Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015] 1 SCR 401, 2015 SCC 7 (CanLII).

out the components of the legal professional's duties as contained in updated Model Rules approved on October 19, 2018 by the Federation, for adoption by all Canadian law societies. Additional resources appear at the end of the Guidance, and it is anticipated that over time, more will be added to this section for the benefit of legal professionals.

Avoiding participation in money laundering and terrorist financing is rooted in knowing your client: their identity, their financial dealings in relation to your retainer, and any risks arising from your professional business relationship with them. When working with corporate clients, knowing your client means taking additional steps to ascertain ownership and control of the corporation, and routinely assessing the accuracy of your knowledge about them. Not facilitating money laundering and terrorist financing also means refusing to accept, except in limited circumstances, more than $7,500 in cash from clients or prospective clients. Finally, the fight against money laundering and terrorist financing requires you to be vigilant and exercise judgment about the use of your trust accounts, pursuant to established parameters.

Law societies take their mandate to regulate the legal profession in the public interest seriously. The rules and regulations implemented by provincial and territorial law societies, based on the Federation's Model Rules, exist to address the conduct of legal professionals, and to prevent them from unwitting involvement in money laundering or terrorist financing. Legal professionals are also required to abide by comprehensive rules of professional conduct that include provisions prohibiting them from knowingly assisting in or encouraging any unlawful conduct. Measures to ensure that legal professionals maintain appropriate practice management systems and comply with law society regulations include annual reporting obligations, practice reviews and financial audits. Law societies also have extensive investigatory and disciplinary powers that include the ability to impose penalties up to and including disbarment when members fail to abide by law society rules and regulations. Lawyers, Ontario paralegals, and Quebec notaries who wittingly participate in criminal activity are, of course, subject to criminal charges and sanctions.

While this Guidance discusses the legal profession's vulnerabilities related to money laundering and terrorist financing, these same vulnerabilities could lead to the profession's unwitting participation in other types of fraud or crime. It is important to understand that the duties and responsibilities contained in the Model Rules reflect the unique position of legal professionals in helping the public with their legal needs and in ensuring compliance with the law. By adhering to these fundamental principles, the legal profession helps to prevent all crime, and to maintain public trust in the justice system. Similarly, the Model Rules protect the right of citizens to independent legal counsel, and ensure that counsel can continue to protect the client's privilege.

Chapter 2: Understanding the Problem

Money laundering and the financing of terrorist activities affect us all. When criminals launder their illicit funds through the purchase and sale of properties, it can inflate the selling prices, making it unaffordable for community members to purchase homes. When criminals launder their dirty funds through front companies and sell products at significantly lower prices, legitimate businesses may be unable to compete. When large amounts of criminal proceeds are invested into our economy, currency exchange and interest rates can become volatile. The consequences of money laundering and terrorist financing are vast and significant – it is incumbent on each of us to prevent these criminal offences.

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.[4]

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. Legal professionals should thus be able to determine the potential money laundering or terrorist financing risks posed by a client, as well as the risks presented by the context of their services. Without such risk-based awareness, legal professionals may find themselves participating in criminal activity, whether knowingly, recklessly, or unintentionally.

What is Money Laundering?

The Financial Action Task Force ("FATF"), an international, intra-governmental body combatting money laundering and terrorist financing, defines money laundering as the processing of criminal proceeds to disguise their illegal origin.[5] The *Criminal Code* similarly defines money laundering as the transfer, use, or delivery of property or

[4] The International Bar Association, the American Bar Association, and the Council of Bars and Law Societies of Europe, "A Lawyer's Guide to Detecting and Preventing Money Laundering," October 2014 at p. 24, available online: https://www.anti-moneylaundering.org/AboutAML.aspx#The Guide

[5] Financial Action Task Force, "What is Money Laundering?" online: http://www.fatf-gafi.org/faq/moneylaundering/

proceeds with the intent to conceal or convert the property or proceeds, knowing that they were derived from criminal activity.[6]

Criminal proceeds are typically laundered through a three-stage process: placement, layering, and integration. In the placement stage, the launderer introduces the illegal profits into the financial system (for example, by depositing cash with financial institutions changing currency at currency exchanges, or depositing funds into lawyers trust accounts). In the layering stage, the launderer engages in a series of transactions to distance the funds from their source (for example, by creating trusts or shell companies, buying securities, or buying real estate). Finally, in the integration stage, the launderer integrates the funds into the legitimate economy, i.e. by investment into real estate or business ventures.[7] Money launderers may try to involve lawyers at any of these stages.

The FATF notes that money-laundering proceeds can be generated through a wide range of illegal activity, including illegal arms sales, smuggling, embezzlement, insider trading, and computer fraud schemes.[8] In the Canadian context, a 2015 Department of Finance report identified 21 profit-oriented crimes associated with money-laundering.[9] Those identified as posing a very high threat of money laundering include capital markets fraud, drug trafficking, mortgage fraud, and tobacco smuggling and trafficking. A high threat rating was given to such crimes as currency counterfeiting, human trafficking, illegal gambling, and robbery and theft. Experts have noted that those involved in such crimes range from the "unsophisticated, criminally inclined individuals, including petty criminals and street gang members, to criminalized professionals and organized crime groups."[10]

What is Terrorist Financing?

The FATF does not specifically define the term "terrorist financing." Instead, they urge states to adopt the United Nations International Convention for the Suppression of the Financing of Terrorism (1999), which prohibits any person from providing or collecting funds in order to carry out an offence as defined in related United Nations treaties, or any other act intended to cause death or serious bodily injury, or to any other person not taking any active part in the hostilities in a situation of armed conflict, when the purpose of such act is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing an act.[11]

Sections 83.02-83.04 of the *Criminal Code* define the terrorism financing offences. Collectively they prohibit the provision, collection and use of property to facilitate or carry

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[6] Section 462.31(1) ("Laundering proceeds of crime"), *Criminal Code*, R.S.C. 1985, c. C-46.
[7] What is Money Laundering? *supra* note 2.
[8] *Ibid.*
[9] Finance Canada, *Assessment of Inherent Risks of Money Laundering and Terrorist Financing in Canada, 2015* at p. 19, online: https://www.fin.gc.ca/pub/mltf-rpcfat/mltf-rpcfat-eng.pdf
[10] *Ibid*, at p. 18.
[11] International Convention for the Suppression of the Financing of Terrorism, as adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999, online: http://www.un.org/law/cod/finterr.htm

out any terrorist activity. [12] In a 2015 report, the Department of Finance indicated that terrorist financing activities in Canada may include the payment of travel expenses, the procurement of goods, transferring funds to international locations through banks and other financial entities and the smuggling of bulk cash across borders.[13]

The FATF notes that terrorist financing can be challenging to detect for legal professionals without guidance on relevant typologies or unless acting on specific intelligence provided by the relevant authorities.[14] Because of this, legal professionals should consider consulting the reports regularly published by Canada's Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) on terrorist financing trends and typologies.[15]

[12] Section 83.01(1) ("definition of terrorist activity"), *Criminal Code*, R.S.C. 1985, c. C-46.
[13] *Supra* note 5 at p. 27.
[14] Financial Action Task Force, "Risk-Based Approach Guidance for Legal Professionals," 23 October 2008 at p. 42, available online: http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Legal%20professions.pdf
[15] FINTRAC Typologies and Trends Reports, available online: http://www.fintrac-canafe.gc.ca/publications/typologies/1-eng.asp

Chapter 3: Identifying and Verifying the Identity of Clients

Background to the Client Identification and Verification Rule

When retained to provide legal services, you must acquire basic knowledge about your clients and their financial dealings. The Model Rule requirements may be fulfilled by you, or any partner, associate or employee at your firm.

Legal professionals must identify each client, with limited exemptions. Identification is the process of obtaining and recording basic information about the client. Identification requirements differ slightly depending on whether your client is an individual or an organization. If your client is acting for or representing a third party, identifying information about that third party also must be obtained.

Identification and verification are two separate but related concepts. When you engage in or give instructions in respect of receiving, paying or transferring funds on behalf of a client you must also verify your client's identity. Verification is the process of obtaining information to confirm that the client is who or what they say they are. This involves reviewing independent source document(s) or information and comparing it to the actual client. The identity of a third party on whose behalf the client is acting must also be verified. You must also determine the source of the funds being dealt with.

For clients that are corporations, societies, or unregistered organizations, you are required to verify the identity of the person who instructs you on behalf of the organization. You are also required to make reasonable efforts to obtain information about beneficial owners – persons who own, directly or indirectly, 25% or more of the organization. In the event you are unable to do so, the Model Rule asks you to exercise diligence in determining and assessing potential risks associated with those clients.

Overall, the client identification and verification requirements, as stated in section 2 of the Model Rule, are part of your obligation to know your client, and ensure that you understand the intent and purpose of the legal services for which you have been retained. Reference should be made to *Model Code of Professional Conduct* Rules 3.1-2 (Competence), 3.2-1 (Quality of Service), 3.2-7 (Dishonesty, Fraud by Client or Others), and 3.2-8 (Dishonesty, Fraud when Client an Organization) including their respective commentaries, which elaborate on the standards expected of legal professionals in relationships with clients. The *competent* legal professional, as defined in Rule 3.1-1 is one who, amongst other things, investigates facts, identifies issues, ascertains client objectives, considers possible options, and develops and advises the client on appropriate courses of action. A legal professional's obligation to provide the requisite quality of service mirrors competent service - this includes communicating effectively with the client and ensuring, where appropriate, that all instructions are in writing or confirmed in writing.

Model Code Rule 3.2-7 and section 11(1) of the Client Identification and Verification Model Rule prohibit legal professionals from knowingly assisting in any illegal conduct or doing or omitting to do anything the legal professional knows or ought to know will assist with a crime. The prohibition means being vigilant when engaged in services involving financial transactions. When suspicions or doubts arise about whether the activities of a legal professional might be assisting in crime or fraud, the obligation is to make reasonable inquiries to obtain information about the subject matter and objectives of the retainer and record it, and to consider whether withdrawal is required. By complying with the Model Rule and the *Model Code*, you will provide the appropriate services to clients, managing both their expectations and your duties, in a responsible and professional way.[16]

Guidance to the Client Identification and Verification Rule

Exemptions

Not all client relationships are captured by the Model Rule. For example, if you only provide legal services to your employer as in-house or corporate counsel, you are exempt from the requirements to identify the client and to verify the client's identity. Similarly, if you provide legal services through a duty counsel program you are exempted from the verification requirements, except when engaging in, or giving instructions in respect of, the receiving, paying, or transferring of funds. You also are exempted if you are engaged to act as an agent by another legal professional, or when another legal professional has referred a matter to you, provided the other legal professional has complied with the identification and verification requirements.

Other exemptions apply when the funds are from certain sources. The *Model Rule* does not apply to funds received by a legal professional when those funds are:

- from the trust account of anther legal professional;
- paid or received to pay a fine, penalty or bail or for professional fees; disbursements and expenses;
- paid by or to a financial institution, public body, or reporting issuer; or
- an electronic transfer of funds (EFT).

The Model Rule's definition of "electronic funds transfer" specifies that only EFTs conducted by and received at financial institutions headquartered and operating in a country that is a member of the FATF is covered by the exemption. Further, neither the sending nor receiving account holders may handle or transfer the funds. The Model Rule requires that the EFT transmission records contain a reference number, the date, transfer amount, currency, and the names of the sending and receiving account holders and the financial institutions conducting and receiving the EFT. This exemption will likely

[16] This portion of the Guidance is informed by guidance published by FINTRAC, found at: http://www.fintrac-canafe.gc.ca/guidance-directives/1-eng.asp

be subject to future review, as current developments or changes in the financial landscape may warrant a change in this approach.

The previous version of the Model Rule had exemptions for funds paid pursuant to a court order and paid or received pursuant to the settlement of any legal or administrative proceedings. Those exemptions have been removed. In the common situation, the funds in these circumstances are paid from one party to another and to the extent the funds flow through the legal professional's trust account, there is a risk that these types of payments could be in aid of schemes to launder money. To the extent that funds are paid into court as seized funds under forfeiture legislation and then released by the court pursuant to judicial order, it is suggested that these funds would fall under the exemption relating to a law enforcement agency or other public official acting in their official capacity.

Identification Requirements

You must identify all clients regardless of the nature of the legal services you are providing, subject to limited exemptions. You are not required to identify your client when providing services to your employer as in-house counsel, when acting as an agent for another legal professional, or when providing legal services to a client referred by another legal professional who has already identified the client. The identification requirements also do not apply when you are acting ad duty counsel.

Identifying Individuals

When retained by an individual, you must identify the client and record the client's full name, home address and home telephone number, occupation(s), and the address and telephone number of the client's place of work or employment.

Identifying Organizations

When retained by an organization, you must identify it by recording its name, business address and business telephone number, incorporation or business incorporation number, the general nature of its type of business or, and the name, position, and contact information of the individual who is authorized to give you instructions on behalf of the organization with respect to the matter for which you are retained.

Clients Acting For, or Representing, Third Parties

In some circumstances, you may be retained by a client who is acting for, or representing, a third party. In such cases, you must identify the third party, whether it is an individual or an organization.

A third party is a person or organization who instructs another person or organization to conduct an activity or financial transaction on their behalf. When determining whether a third party is giving instructions, it is not about who owns or benefits from the funds, or who is carrying out the transaction or activity, but rather about who gives the instructions to handle the funds or conduct a transaction or particular activity. Ask questions to find out if someone other than your client is pulling the strings. If you determine that the individual or organization who engages you is acting on someone else's instructions, that

someone else is the third party. Determine the relationship between the client and the third party.

Verifying Identity

Individuals

The following sections describe the options available to you when you are required to verify the identity of individual clients or third parties. Verification of identity is required when in the course of providing legal services, you engage in or give instructions in respect of the receiving, paying or transferring of "funds". Note that "funds" is widely defined and would include the transfer of securities. While much of this section describes how to verify a client in a face-to-face situation, you may choose instead to use an agent as described later in this section.

Government-issued Documentation

You may rely on a valid, original and current federal, provincial or territorial government-issued document containing the individual's name and photograph. See Appendix A for examples of acceptable government-issued documents. A foreign government issued photo identification document is acceptable if it is equivalent to a Canadian issued photo identification document listed in Appendix A. Note, however, that photo identification documents issued by any municipal government, whether Canadian or foreign, are not acceptable.

You or your agent must view the original document in the presence of the individual in order to compare them with their photo. The photo identification document must show the individual's name, include a photo of the individual, and have a unique identifier number. It is not acceptable to view photo identification online, through a video conference or through any virtual type of application; nor is a copy or a digitally scanned image of the photo identification acceptable.

Credit Files

Alternatively, you can verify an individual's identity by relying on information that is in their credit file if that file is located in Canada and has been in existence for at least three years. The information in the credit file must match the name, date of birth and address provided by the individual. If any of the information does not match, you must use another method to verify the individual's identity.

Note that a credit assessment is not needed to identify an individual through a credit file. Equifax Canada and TransUnion Canada are Canadian credit bureaus that provide credit file information for identification purposes.

To verify an individual's identity using information in their credit file, you must obtain the information directly from a Canadian credit bureau or a third-party vendor authorized by a Canadian credit bureau to provide Canadian credit information. You cannot rely on a copy of the credit file if provided by the individual. It is acceptable, however, to use an automated system to match the individual's information with the credit file information.

To rely on a credit file search, the search must be conducted at the time of verifying the individual's identity. An historical credit file is not acceptable. To be acceptable as a single source for verification of identity, the credit file must match the name, address, and date of birth that the individual provided, be from Canada, and have been existence for at least three years.

The individual does not need to be physically present at the time you verify their identity through a credit file.

The Dual Process Method

You can also use the dual process method to verify a client's identity, by relying on any two of:

- information from a reliable source that contains the individual's name and address;
- information from a reliable source that contains the individual's name and date of birth; and/or,
- information containing the individual's name that confirms they have a deposit account or credit card or other loan amount with a financial institution.

If using the dual process method, the information referred to must be from different sources. Neither the client (or individual instructing on behalf of the client), nor the legal professional (or the professional's agent) may be a source. The information may be found in documents from these sources or may be information that these sources are able to provide. Information refers to facts provided or learned about an individual and can come from various places, in contrast to a document, which refers to an official record that is either written, printed or electronic that provides evidence or facts.

If a document is used, you or your agent must view a valid, original and current document. Original documents do not include those that have been photocopied, faxed or digitally scanned. If information is used, it must be valid and current. Information found through social media is not acceptable.

The individual does not need to be physically present at the time you verify their identity through the dual process method.

A reliable source is an originator or issuer of information that you trust to verify the identity of the client. To be considered reliable under the Model Rule, the source should be well known and considered reputable. The source providing the information cannot be you, your client, or the individual who is being identified; the source must be independent. For example, reliable sources can be the federal, provincial, territorial and municipal levels of government, Crown corporations, financial entities or utility providers.

If a document is used as part of the dual process method, you must ensure that you see the original paper or electronic document, and not a copy. The original document is the one that the individual received or obtained from the issuer either through posted mail or electronically. For example, an original paper document can be a utility statement mailed to an individual by the utility provider, and it can also be a document that the individual received through email or by downloading it directly from the issuer's website.

The document must appear to be valid and unaltered in order to be acceptable; if any information has been redacted, it is not acceptable.

An individual can email you the original electronic document they received or downloaded, show you the document on their electronic device (for example, a smartphone, tablet, or laptop), print the electronic document received or downloaded from the issuer, or show it to you in the original format such as .pdf (Adobe) or .xps (Microsoft viewer). In practical terms, this means that an individual can:

- show you their original paper utility statement in person or by posted mail;
- email or show you on their electronic device an electronic utility statement downloaded directly from the issuer's website;
- print and show you the statement they downloaded from the issuer; or
- email or show you on their electronic device a mortgage statement received by email from the issuer.

See Appendix B for examples of information and documents that can be used for the dual process method of verifying identity.

Verifying the Identity of Children

The Model Rule requires you to take different steps to verify the identity of an individual who is a child.

If verifying the identity of an individual who is under 12 years of age, you must verify the identity of one of the child's parents or guardians.

If verifying the identity of an individual client who is at least 12 years of age but not more than 15 years of age, you can rely on any two of:

- information from a reliable source that contains the individual's parent or guardian's name and address;
- information from a reliable source that contains the individual's parent or guardian's name and date of birth; and/or,
- information containing the individual's parent or guardian's name that confirms the parent or guardian has a deposit account, credit card, or other loan amount with a financial institution.

If that is not possible, you can rely on information from a reliable source that contains the name and address of the child's parent or guardian and a second reliable source that contains the child's name and date of birth. For example, if the child has a passport, that can be used to ascertain their identity directly; if not, you can rely on the parent's driver's license to verify their common address, and use the child's birth certificate to verify the child's name and date of birth.

Use of an Agent

You may rely on an agent to verify the identity of an individual, including in circumstances where the individual is not physically present in Canada.

An agent can be utilized at any time. You may choose to use an agent if the client or third party is elsewhere in Canada and the method of verification is the use of a federal, provincial or territorial government-issued document containing the client's name and photograph, which must be provided in the client's presence. Other methods, as indicated above, do not require the individual's physical presence and as such an agent may not be necessary. If the client or third party is not physically present in Canada, an agent must be relied upon to verify the individual's identity.

The Model Rule requires that you and your agent have an express agreement or arrangement in writing for such purpose. The agreement need not be in any particular form, and it is up to you to decide on the level of formality required. It may take the form of a letter or email, for example. The agreement should set out in sufficient detail the purpose of the agreement and the expectations of the agent. As the responsibility to verify identity is yours, you – not the client or third party – must choose and retain the agent.

The identity verification information provided by the agent should include the information that you would have obtained and documented had you verified identity through one of the methods described above. As such, when using an agent, your records should include, through the agreement itself and the report from the agent:

- the full name of the agent who verified the individual's identity;
- the agent's status or occupation and business address;
- the client identification method the agent used;
- copies of the information and documents obtained by the agent to verify the individual's identity; and,
- the date on which the agent verified the individual's identity.

You should also note the date you received the verification information from the agent, as this relates to the currency of the identification information that you use and the time within which the verification must occur under the Model Rule.

The information on the client's identity that you obtain from the agent must match what the individual has provided to you when you obtained their basic identification information. You must satisfy yourself that the information is valid (authentic and unaltered) and current (not expired) and that your agent verified the individual client's identity through the methods prescribed by the Model Rule. You may also rely on an agent's previous verification of an individual client if the agent was, at the time that they verified the identity, acting in their own capacity or acting as an agent under an agreement or arrangement in writing with another legal professional who is similarly required to verify identity under the Model Rule.

The Model Rule does not specify who may act as an agent. However, given the responsibilities of the agent, you should ensure that the person engaged is reputable, can be relied upon to understand what is required, can capably carry out the required work to verify identity and will provide the information they have obtained as required under the Model Rule.

Timing for Verifying the Identity of Individual Clients

You are required to verify the identity of an individual (client or third party) upon being retained to engage in, or give instructions in respect of, receiving, paying or transferring funds other than an electronic funds transfer. You are not subsequently required to verify that individual's identity unless you have reason to believe the information, or the accuracy of it, has changed.

Organizations

When retained by an organization to engage in, or give instructions in respect of, receiving, paying or transferring funds other than an electronic funds transfer, you must take certain specified steps to verify the client's identity**.** These additional requirements apply to all organizations with the exception of "financial institutions", "public bodies", and "reporting issuers", as defined in the Model Rule. The requirements to verify the identity of an organization include the requirement to verify the identity of the individual(s) authorized to give instructions on behalf of the organization for the matter for which you are retained.

If retained by a client who is acting for, or representing, a third party that is an organization, you are required to obtain information about that organization, and if applicable, verify the third party's identity, pursuant to your obligation to verify information about clients that are organizations.

In verifying an organization's identity, you have a few options available to you as outlined in the Model Rule. If the organization is created or registered pursuant to legislative authority, you may rely on written confirmation from a government registry as to the existence, name and address of the organization. Documents that you can rely on to confirm the existence of a corporation are: the corporation's certificate of corporate status; a record filed annually under provincial securities legislation; or any other record that confirms the corporation's existence, such as the corporation's published annual report signed by an independent audit firm, or a letter or notice of assessment for the corporation from a municipal, provincial, territorial or federal government. If the organization is not registered in any government registry, you may rely on documents that establish or create the organization; you can rely on a partnership agreement, articles of association, or any other similar record that confirms the entity's existence. You cannot rely on an agent to verify the identity of an organization.

If an electronic version of a record is used to verify the existence of an organization, you must keep a record of the:

- corporation's registration number or the organization's registration number;
- type of record referred to; and
- source of the electronic version of the record**.**

For example, a corporation's name and address and the names of its directors can be obtained from a provincial or federal database such as the Corporations Canada database, which is accessible from Innovation, Science and Economic Development Canada website. This information may also be accessed through a subscription to a corporation searching and registration service.

Ascertaining the Beneficial Ownership of an Organization

Except in the case of an organization that is a securities dealer, you must obtain and record, with the applicable date, the names of all directors of the organization. You are also required to make reasonable efforts to obtain information about the beneficial owners of the organization and about the control and structure of the organization. Identifying beneficial ownership is important in order to remove anonymity and identify the actual individuals behind a transaction. The concealment of the beneficial ownership information of accounts, businesses and transactions (i.e. the persons who own 25% or more) is a technique used in money laundering and terrorist activity financing schemes. Collection and confirmation of beneficial ownership information is an important step in knowing the client and ensuring that the lawyer's work on the transaction is not in aid of money laundering and terrorist financing activity.

Beneficial owners are the actual individuals who are the trustees or known beneficiaries and settlors of a trust, or those who directly or indirectly own or control 25% or more of an organization, such as a corporation, trust or partnership. Another organization cannot be considered the ultimate beneficial owner; the information you must try to obtain is the identity of the actual individuals who are the owners or controllers of the other organization. The purpose of this requirement is for you to obtain sufficient information about the organization's structure so that you know who effectively owns and controls the organization.

The Rule asks you to meet the standard of reasonable efforts to obtain the information. This means applying sound, sensible judgment. Reasonable efforts include searching through as many levels of information as necessary to identify those individuals. In making reasonable efforts to ascertain beneficial ownership, it is important to understand that the names found on legal documentation may not represent the actual owners of an organization. You must exercise judgment in discerning the reasonable efforts that are appropriate for each distinct situation to confirm the accuracy of information obtained, while also considering the risk associated with each situation.

For example, consider the situation where a corporation is governed by a board of directors: you must ascertain both ownership and control of the corporation. You will need to obtain information on the shareholders who own 25% or more of the organization, as they must be recorded as beneficial owners. However, you must also obtain information about the board of directors, who has control of the organization. Once you have obtained information about both shareholders and corporate directors, the Rule also requires you make reasonable efforts to confirm the accuracy of the information pertaining to both ownership and control of the organization.

You may obtain information establishing beneficial ownership, as well as the required control and structure information, from the organization, either verbally or in writing. For example, the organization can:

- provide you with official documentation;
- advise you on the beneficial ownership information, which you can then document for record-keeping purposes; or
- fill out a document that provides the information.

Where the identity of those who own and those who control an organization is not the same, you must consider the ownership and control exercised by both. It is not sufficient to identify only the owners of an organization or those who control it; you must make reasonable efforts to identify both. Remember that you are required to obtain the names and addresses of only those persons who own or control 25% or more of the organization.

If referring to documents or records, the accuracy of the beneficial ownership, as well as ownership, control and structure information related to the organization, may be confirmed by referring to records, such as the:

- Minute book;
- Securities register;
- Shareholders register;
- Articles of incorporation;
- Annual returns;
- Certificate of corporate status;
- Shareholder agreements;
- Partnership agreements; or
- Board of directors' meeting records of decisions.

It is possible for one of these documents to be used to satisfy the two distinct steps, namely to obtain the information and to confirm the accuracy of it. You can also conduct an open-source search, or consult commercially available information. In the case of a trust, the accuracy of the information can be confirmed by reviewing the trust deed, which will provide information on the ownership, control and structure of the trust.

Legal professionals should use their judgment to assess whether the documentation is appropriate. Where possible, official documents, such as a share certificate, should be used to confirm the beneficial ownership information obtained. If no official document exists to confirm accuracy, a signed attestation would be acceptable.

It may not always be possible for you to determine full information totaling 100% of beneficial ownership. For example, a corporation may have several hundred or thousands of shareholders. In these cases, your best efforts might be obtaining general information about the ownership of an organization, which may or may not include the names of the owners with a breakdown of percentages owned.

You must set out the information obtained in a dated record, along with the measures taken to try to confirm the accuracy of that information is required.

If despite your best efforts you are unable to obtain information about the directors, shareholders, and owners of the organization, you must then take reasonable measures to ascertain the identity of the most senior managing officer of the organization, and assess the organizational client's activities in the context of any risks that the transaction(s) may be part of fraudulent or illegal activity. These obligations are responsive to concerns that arise when information cannot be obtained. If the organization's structure is more opaque than transparent, this may be a warning that the organization could be facilitating criminal or other illegal activity.

In ascertaining the identity of the senior managing officer of an organization, you should be aware that this may include, but is not limited to, a director, chief executive officer, chief operating officer, president, secretary, treasurer, controller, chief financial officer, chief accountant, chief auditor or chief actuary, or an individual who performs any of those functions. It may also include any other individual who reports directly to the organization's board of directors, chief executive officer or chief operating officer. In the case of a partnership, the most senior managing officer can be one of the partners. In the case of a trust, the senior managing officer of a trust is the trustee, that is, the person who is authorized to administer or execute on that trust.

The reasonable measures standard ultimately requires you to exercise judgment about the potential risks associated with acting for an organizational client whose ownership, control or structure may not be entirely known to you. Because of this, along with ascertaining the identity of the most senior managing officer, you are also required to determine whether the client's information in respect of their activities, the client's information in respect of the source of funds, and the client's instructions in respect of the transaction are consistent with the purpose of their retainer and the information you have obtained about them. You must assess whether there is a risk that you are assisting in, or encouraging, dishonesty, fraud, crime or illegal conduct. Finally, you are obligated to keep a record, with the applicable date, of the results of these assessments.

Timing for Verifying the Identity of Organizations

The Model Rule requires you to verify the identity of an organization upon being retained to engage in, or give instructions in respect of, receiving, paying or transferring funds other than an electronic funds transfer. In no case may the verification occur more than 30 days after you have been retained. You are not subsequently required to verify that same identity unless you have reason to believe the information, or the accuracy of it, has changed.

Information on the Source of Client Funds

In addition to verifying clients' identities when engaging in, or giving instructions in respect of, receiving, paying or transferring funds on behalf of a client, legal professionals are also required to obtain information about the source of the funds relating to the retainer. This requirement applies to both individual and organizational clients.

The rule requires you to inquire about the expected source and origins of the funds related to the legal services to be provided. This may be apparent from the information obtained from the client for the retainer. In general, you should make sufficient inquiries to assess whether there is anything that suggests the proposed transaction is inconsistent with the client's apparent means, and the circumstances of the transaction.

In making this assessment, depending on the circumstances, you may wish to consider questions such as:

- Is someone other than the client providing information about the source of funds?
- Is the disclosed source consistent with the knowledge about the client's profile and activity?

- Is there anything unusual about the source of the funds in the context of the transaction?

For record-keeping purposes, you should also retain supporting documents that relate to how you determined the source of funds.

Consider these red flags about the source of funds:

- Funds are from, or are sent to, countries with high levels of secrecy;
- The client is not located near you and is asking for types of services that are not common for you to provide, or outside your area(s) of law entirely;
- The client expresses a sense of great urgency and asks you to cut corners;
- The funds received are inconsistent with the client's occupation or socio-economic profile.

Monitoring the Relationship

The Model Rule requires you to exercise vigilance about client relationships that involve the receipt, transfer, or payment of funds. As such, when retained by an individual or organizational client to engage in, or give instructions in respect of, receiving, paying or transferring funds other than an electronic funds transfer, you must monitor the professional business relationship on a periodic basis. This means that during the retainer you must periodically assess whether the client's information in respect of their activities and the source of their funds are consistent with the purpose of the retainer and the information about the client that you have obtained under the rule. You also need to assess whether there is a risk that you might be assisting in fraud or other illegal conduct. The Model Rule requires that you keep a dated record of your client monitoring measures, which may include the steps taken and any information obtained.

It may be useful to conceive of your monitoring requirement as a periodic check-in with a client with whom you have an established, long-term relationship. In other circumstances, the monitoring requirement may be triggered when your client provides you with new facts about their activities or source of funds, or when you are faced with unexpected client behavior.

You should use your discretion in defining the frequency of the monitoring. It will depend on the client, the nature of the work, the anticipated duration of the retainer and the services provided. The frequency of monitoring activities may be determined by any risks you believe arise from the retainer with the client in the context of the requirements of the Model Rule. The responsibilities are similar to those outlined in commentary to

Model Code of Professional Conduct Rule 3.2-7, which set out your obligations not to engage, or to assist a client in engaging, in criminal activity.[17]

On occasion, ongoing monitoring may require taking additional, enhanced measures. This might include:

- obtaining additional information about your client (e.g. occupation, assets, information available through public databases, Internet, etc.);
- obtaining information on the source of funds or source of wealth of your client;
- obtaining information on the reasons for intended or conducted transactions;
- gathering additional documents, data or information; or taking additional steps to verify the documents obtained;
- flagging certain activities that appear to deviate from expectations; or
- reviewing transactions against the usual processes and procedures for such transactions relevant to the legal work for which you are retained.

Record-keeping and Retention

As noted above, the Model Rule requires you to create and maintain certain records and to date those records. This includes a record of information that identifies each client. Where the retainer with the client involves the receipt, payment or transfer of funds, you must also keep records that contain;

- Information that identifies the source of funds;
- Copies in either paper or electronic format of every document used to verify the identity of the client and any third party;
- Information and any related documents on the directors, owners, beneficial owners and trustees, as the case may be, of an organizational client;
- Information and any related documents on the ownership, control and structure of an organizational client;

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[17] **[1]** A legal professional should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.

[2] A legal professional should be alert to and avoid unwittingly becoming involved with a client or others engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these and other criminal activities may be transactions for which legal professionals commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate.

[3] If a legal professional has suspicions or doubts about whether he or she might be assisting a client or others in dishonesty, fraud, crime or illegal conduct, the legal professional should make reasonable inquiries to obtain information about the client or others and, in the case of the client, about the subject matter and objectives of the retainer. These should include verifying who are the legal or beneficial owners of property and business entities, verifying who has the control of business entities, and clarifying the nature and purpose of a complex or unusual transaction where the purpose is not clear. The legal professional should make a record of the results of these inquiries.

- Information and any related documents that confirm the accuracy of the information on directors, owners, beneficial owners and trustees and the ownership, control and structure of an organizational client; and,
- Measures taken and information obtained respecting your monitoring of the professional business relationship with the client.

Client identification and verification of identity records, as well as your records of having taken reasonable measures to obtain beneficial ownership of an organizational client and of your monitoring responsibilities, must be kept for the duration of the client relationship, or for a period of at least six years following the completion of the work for which you were retained, whichever is longer.

Duty to Withdraw Representation

At the core of the Model Rule is the professional responsibility not to participate in, or facilitate, money laundering or terrorist financing.

You must withdraw from representation of a client if, in the course of verifying that client's identity, or monitoring your professional business relationship, you know or ought to know that you are, or would be, assisting a client in fraud or illegal conduct.

Chapter 4: Limitations on Accepting Cash from Clients or Third Parties

Backgrounder to the "No Cash" Rule

There have been limits on amount of cash you may receive from a client since the Model Rule on Cash Transactions (known as the "No Cash" rule) was adopted in 2004. Recent amendments have been made to clarify the $7,500 threshold for accepting cash and the exceptions to the rule. There is also a more robust definition section, explaining terms used in the rule.

The $7500 Threshold

The rule prohibits you from accepting more than $7,500 in cash in respect of one client matter under all circumstances, with limited exception as discussed below. The $7500 threshold applies whether you receive the money in one payment or through aggregate or instalment payments. It also applies whether the cash is received from the client or a third party providing it on behalf of the client.

Consider the following example: A legal professional is acting for a personal representative of an estate who has discovered cash amongst the deceased's possessions and wants the legal professional to deposit the funds in her trust account (the legal professional under the retainer is controlling the estate funds). If the client finds $2,000 in a safety deposit box, that may be deposited in the trust account. If the client finds an additional $8,000, that entire amount cannot be deposited as it would be an aggregate of $10,000. In such a circumstance it would be appropriate to advise the client to:

- open an estate account and deposit the cash into that account; or
- suggest that the client use the cash to get a bank draft payable to the legal professional's firm in trust.

Under the rule, legal professionals:

- cannot accept more than $7,500 cash on a client matter even if there is more than one client on the file. The limit applies with respect to the client matter despite the number of clients.

- cannot accept more than $7,500 from a client if the cash is tendered incrementally for a matter. It is, therefore, important to track receipt of cash to ensure the total received on the client matter does not exceed $7500.

- can accept greater than $7,500 cash from a client for three unrelated matters but only if the amount of cash provided for each individual matter is $7,500 or less.

'Cash' is defined in the rule and includes Canadian coins or banknotes and those of other countries. Note that bank drafts, money orders, electronic or wire transfers of funds are not considered cash for the purposes of the rule.

Foreign Currency

If you are accepting cash in a foreign currency, be aware that under Section 2 of the rule the currency is deemed to be the equivalent of Canadian dollars at the official conversion rate of the Bank of Canada for the foreign currency in effect that day, or on the most recent business day preceding the day on which you receive or accept the cash if the day it is received or accepted is a holiday.

If the amount of foreign currency as converted is greater than $7,500 you are prohibited from accepting it unless one of the exceptions applies.

As more fully discussed below, you should ensure that you and your staff are familiar with the rule, including the treatment of foreign currency.

Application of the Rule and Exceptions

It is important to understand that the rule applies not only to receiving cash from clients, but to the circumstances in which you receive cash on behalf of clients. This means that the rule applies when, on behalf of a client, you engage in or give instructions about receiving or paying funds, purchasing or selling securities, real properties or business assets or entities and transferring funds by any means. 'Funds' are defined in the rule as cash, currency, securities and negotiable instruments or other financial instruments that indicate the person's title or right to or interest in them.

There are limited exceptions to the rule limiting the cash you may receive in relation to a client matter. You may receive more than $7500 in cash in connection with the provision of legal services

- from a financial institution or public body,
- from a peace officer, law enforcement agency or other agent of the Crown acting in his or her official capacity,
- to pay a fine, penalty, or bail, or
- for professional fees, disbursements, or expenses, provided that any refund out of such receipts is also made in cash.

Note that the requirement to refund in cash received for fees, disbursements or expenses applies only when you have received more than $7,500 in cash. Again, 'financial institution', 'public body', 'professional fees', 'disbursements' and 'expenses' are all defined terms in the rule.

The rule covers a broad range of activities. Careful consideration is required before determining that an exception applies. When accepting cash for professional fees, disbursements, expenses or bail, it would be prudent for you to:

- consider the purpose for which cash is received, and document the circumstances and any client instructions;
- ensure that the amount received for a retainer is commensurate with the services to be provided (i.e. do not accept a $50,000 retainer for a $5,000 matter);
- ensure that you keep appropriate records so that, if cash in excess of the limit is received for a retainer but the client later retains new counsel or the first retainer is otherwise terminated, any refund is paid in cash ; and
- ensure that appropriate accounting systems are in place to document and track the cash transactions, in particular when making a deposit of mixed cash and non-cash funds into trust; this could lead to difficulty in monitoring use.

Suggestions for Implementing the Rule in Your Workplace

The following are suggested procedures to assist in implementing the rule in your legal practice:

- Inform staff about the rule and what to do if a client unexpectedly shows up at the office with cash;
- Ensure that file opening procedures include a requirement to comply with the rule, in particular by requiring that you or your colleagues confirm each cash deposit in the trust accounts;
- Ensure that trust accounting procedures require confirmation of rule compliance before paying money out of trust;
- Appoint someone in the firm to ensure that professional and support staff keep up to date with any rule changes;
- Record any exemption from the “No Cash” rule; and
- Provide information about the rule to new and existing clients in retainer letters, on the firm website, and in mail inserts.

The rule also specifies record keeping requirements for cash transactions. Fully complying with these requirements prevents issues arising in the treatment of cash transactions in your practice.

Chapter 5: Proper Use of Your Trust Account

Background to the New Trust Accounting Rule

A new Model Rule now restricts the use of trust accounts to transactions or matters for which the legal professional or the legal professional's firm is providing legal services. This new model rule is a significant control that will help prevent the misuse of trust accounts, as it prohibits the use of your trust account for purposes unrelated to the provision of legal services.

The regulatory experience of law societies has shown that legal professionals sometimes use their trust accounts for purposes unrelated to the provision of legal services, and effectively act as a bank or deposit-taking institution, i.e. holding money for the limited purpose of transferring the trust money from one party to another without the provision of legal services. The use of trust accounts by clients or other parties for transactions that are completely unrelated to any legal services risks facilitating money laundering through transactions deliberately designed to disguise that the source of funds is from criminal activity. For that reason, trust accounts must not be used except when directly related to the legal services being provided by you or your firm.

In the real world: A 2016 discipline decision from the Law Society of British Columbia illustrates the practice and the risks it presents. In *LSBC v. Donald Gurney*, a lawyer used his trust account to transfer almost $26 million in connection with four line of credit agreements in which his client was the sole borrower. There were no legal services provided – only the receipt and disbursement of funds. The disciplinary panel found that Gurney had breached his professional and ethic duties by failing to make reasonable inquiries about the transactions, and by using his trust account as a conduit for funds notwithstanding "the series of transactions being objectively suspicious."

Proper usage of a trust account requires you to monitor its usage and exercise your judgment about appropriate activity. Even when the use of your trust account is related to the provision of legal services, you should ask yourself whether it is appropriate and necessary under the circumstances.

Features of the Model Trust Accounting Rule

'Money' is a defined term and includes cash, cheques, credit card transactions, post office orders, express and bank money orders and electronic transfer of deposits at financial institutions.

Under the rule only money that may be deposited into a trust account is money that is directly related to legal services that you or your firm are providing. The term "legal services", which is not defined in the rule, generally means the application of legal

principles and legal judgement to the circumstances or objectives of a person or entity and can include:

- Giving advice with respect to a person's or entity's legal interests, rights or responsibilities of the person or of another person;
- Selecting, drafting, completing or revising documents that affect or relate to the legal interests, rights or responsibilities of a person or entity;
- Appearing as counsel or advocate for a person or entity in a proceeding before a court or an adjudicative body; and
- Negotiating or settling the legal interests, rights or responsibilities of a person or entity.

Money that is not related to the legal services provided by you or your legal practice may not be placed in a trust account.

In the real world: Ms. G used her trust account to disburse business expenses for a client who owns a marina. Ms. G billed her client for drafting contracts, depositing moorage revenue into trust, paying marina operating expenses via trust cheque and day-to-day bookkeeping services. When asked for an explanation, Ms. G explained that the client did not utilize an accountant because the client wanted to "keep her funds safe."

As set out in the rule, you must pay out any money remaining in trust following the completion of a transaction or matter as soon as practical.

In the spirit of the rule, you should ideally review client trust ledger accounts at least monthly. Every effort should be made to pay funds due to the client and to third parties within one month of all trust conditions being satisfied, and similarly, to swiftly transfer funds to your chequing account upon billing for your legal fees, disbursements or expenses.

Appendix A: Examples of Acceptable Photo Identification Documents

Source: http://www.fintrac-canafe.gc.ca/guidance-directives/client-clientele/Guide11/11-eng.asp

Type of card or document	Issuing jurisdiction and country
Canadian passport	Canada
Permanent resident card	Canada
Citizenship card (issued prior to 2012)	Canada
Secure Certificate of Indian Status	Canada
Driver's licences	
British Columbia Driver's Licence	British Columbia, Canada
Alberta Driver's Licence	Alberta, Canada
Saskatchewan Driver's Licence	Saskatchewan, Canada
Manitoba Driver's Licence	Manitoba, Canada
Ontario Driver's Licence	Ontario, Canada
Québec Driver's Licence	Québec, Canada
New Brunswick Driver's Licence	New Brunswick, Canada
Nova Scotia Driver's Licence	Nova Scotia, Canada
Prince Edward Island Driver's Licence	Prince Edward Island, Canada
Newfoundland and Labrador Driver's Licence	Newfoundland and Labrador, Canada
Yukon Driver's Licence	Yukon, Canada
Northwest Territories Driver's Licence	Northwest Territories, Canada
Nunavut Driver's Licence	Nunavut, Canada
The DND 404 Driver's Licence	The Department of National Defence, Canada
Provincial services cards	
British Columbia Services Card	British Columbia, Canada
Provincial or territorial identity cards	
British Columbia Enhanced ID	British Columbia, Canada
Alberta Photo Identification Card	Alberta, Canada
Saskatchewan Non-driver photo ID	Saskatchewan, Canada
Manitoba Enhanced Identification Card	Manitoba, Canada
Ontario Photo Card	Ontario, Canada
New Brunswick Photo ID Card	New Brunswick, Canada
Nova Scotia Identification Card	Nova Scotia, Canada
Prince Edward Island Voluntary ID	Prince Edward Island, Canada
Newfoundland and Labrador Photo Identification Card	Newfoundland and Labrador, Canada
Yukon General Identification Card	Yukon, Canada

Northwest Territories General Identification Card	Northwest Territories, Canada
Nunavut General Identification Card	Nunavut, Canada

Type of card or international document

United States passport	United States
France driver's licence	France
Australian driver's licence	New South Wales, Australia

Appendix B: Examples of Reliable Sources of Information Under the Dual Process Method to Identify an Individual

Source: http://www.fintrac-canafe.gc.ca/guidance-directives/client-clientele/Guide11/11-eng.asp

Documents or information to verify name and address

1. Issued by a Canadian government body

- Any card or statement issued by a Canadian government body (federal, provincial, territorial or municipal)
    - Canada Pension Plan (CPP) statement
    - Property tax assessment issued by a municipality
    - Provincially-issued vehicle registration
- Benefits statement
    - Federal, provincial, territorial, and municipal levels
- CRA documents:
    - Notice of assessment
    - Requirement to pay notice
    - Installment reminder / receipt
    - GST refund letter
    - Benefits statement

2. Issued by other Canadian sources

- Utility bill (for example, electricity, water, telecommunications)
- Canada 411
- T4 statement
- Record of Employment
- Investment account statements (for example, RRSP, GIC)
- Canadian credit file that has been in existence for at least 6 months
- Product from a Canadian credit bureau (containing two trade lines in existence for at least 6 months)

3. Issued by a foreign government

- Travel visa

Documents or information to verify name and date of birth

1. Issued by a Canadian government body

- Any card or statement issued by a Canadian government body (federal, provincial, territorial or municipal)
    - Canada Pension Plan (CPP) statement of contributions
    - Original birth certificate
    - Marriage certificate or government-issued proof of marriage document (long-form which includes date of birth)
    - Divorce documentation
    - A permanent resident card
    - Citizenship certificate
    - Temporary driver's licence (non-photo)

2. Issued by other Canadian sources

- Canadian credit file that has been in existence for at least 6 months
- Insurance documents (home, auto, life)
- Product from a Canadian credit bureau (containing two trade lines in existence for at least 6 months)

Documents or information to verify name and confirm a financial account

Confirm that the individual has a deposit account, credit card or loan account by means of:

- Credit card statement
- Bank statement
- Loan account statement (for example. mortgage)
- Cheque that has been processed (cleared, non-sufficient funds) by a financial institution
- Telephone call, email or letter from the financial entity holding the deposit account, credit card or loan account.
- Identification product from a Canadian credit bureau (containing two trade lines in existence for at least 6 months)
- Use of micro-deposits to confirm account

How to rely on the credit file for the dual process method

A Canadian credit file that has been in existence for at least 6 months can be referred to as one source to verify name and address, name and date of birth or name and confirmation of a financial account. A second source from the dual process method, for example a CRA notice of assessment, must be relied on to verify the second category of information. In this instance, the two sources are the credit bureau that provided the credit file and CRA as the source of the notice of assessment. The information from these two sources must match the information provided by the individual.

The reference number for a credit file must be unique to the individual and associated to the credit file; it cannot be a reference number created by the legal professional.

Information from a credit bureau can also be obtained if they are acting as an aggregator and compiling original sources, often referred to as tradelines, so long as the identifying information is obtained from those tradelines. In this instance, the credit bureau must provide **two** independent, original tradelines as sources that verify the individual's **name and address**, **name and date of birth** or **name and confirmation of financial account**. Each tradeline is a source, not the credit bureau.

If the full financial account number is not provided because it was truncated or redacted, it is not acceptable. The legal professional must also confirm that each tradeline originates from a different source.

Appendix C: Additional Resources

Canada

The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) website contains links to numerous publications and guidance documents. For example, there is a useful guidance document on Methods of identify individuals and confirm the existence of entities and, for those lawyers practicing in the area of real estate transactions, an operational brief on Indicators of Money Laundering in Financial Transactions Related to Real Estate.

Provincial law societies will have different levels of information available to their members. At the time of publishing this Guidance, the Law Society of British Columbia has published numerous FAQs, Discipline Advisories, and articles in its Bencher Bulletins on topics related to client ID and verification, the "no cash rule", and other red flags that lawyers should watch out for. Similarly, the Law Society of Ontario has a dedicated FAQ page for cash transactions and the Law Society of Alberta has a page dedicated to client ID and verification. Contact your law society for more information.

United States

The American Bar Association, the International Bar Association, and the Council of Bars and Law Societies of Europe co-authored in 2010 a comprehensive guide for lawyers in detecting and preventing money laundering in their practices ("Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing").

Various sections of the ABA have also produced materials that may be useful and relevant. The Criminal Justice Group has formed a Task Force on Gatekeeper Regulation and the Profession. The International Anti-Money Laundering Committee facilitates discussion and examination of issues related to AML through the organization of educational programs and sessions for ABA members.

International

The Financial Action Task Force (FATF) is an international body that sets standards and promotes effective implementation of legal, regulatory and operational measures for combating money laundering and terrorist financing. Their website contains links to various country reports and guidance documents, including their 2008 Risk-Based Guidance for Legal Professionals.

The International Bar Association's (IBA) Anti-Money Laundering Forum is a mechanism that brings together information on AML legislation and compliance requirements, organized by jurisdiction. The IBA Anti-Money Laundering Forum Reading Room contains links to a range of AML resources (presentations, articles, books, websites and media); however, it should be noted that the links do not appear to have been updated since 2012.

The Council of Bars and Law Societies of Europe (CCBE) Anti-Money Laundering Committee follows the work of the FATF and developments in European jurisdictions on AML legislation. The Committee's website contains links to position papers, letters, guides and recommendations, and reports and studies.

LAW SOCIETY RULES

RULE 1 – DEFINITIONS

Definitions

1 In these rules, unless the context indicates otherwise:

"funds" includes current coin, government or bank notes, bills of exchange, cheques, drafts, money orders, charge card sales slips, credit slips and electronic transfers;

"trust funds" ~~includes~~ means funds directly related to legal services provided ~~received in trust~~ 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;

PART 3 – PROTECTION OF THE PUBLIC

Division 7 – Trust Accounts and Other Client Property

Definitions

3-53 In this division,

"cash" means

(a) coins referred to in section 7 of the *Currency Act* (Canada),

(b) notes intended for circulation in Canada issued by the Bank of Canada under the *Bank of Canada Act*, and

(c) coins or bank notes of countries other than Canada;

"cash receipt book" means the book of duplicate receipts referred to in Rule 3-70 (1) *[Records of cash transactions]*;

"client" includes any beneficial owner of funds or valuables received by a lawyer in connection with the lawyer's practice;

"compliance audit" means an examination of a lawyer's books, records and accounts and the answering of questions by lawyers ordered under Rule 3-85 *[Compliance audit of books, records and accounts]*;

LAW SOCIETY RULES

"**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;

"**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;

"**financial institution**" means

(a) an authorized foreign bank within the meaning of section 2 *[Definitions]* of the *Bank Act* (Canada) in respect of its business in Canada or a bank to which the *Bank Act* applies,

(b) a co-operative credit society, savings and credit union or caisse populaire that is regulated by a provincial or territorial Act,

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

(d) a financial services co-operative that is regulated by *An Act respecting financial services cooperatives*, CQLR, c. C-67.3, or *An Act respecting the Mouvement Desjardins*, SQ 2000, c. 77, other than a caisse populaire,

(e) a company to which the *Trust and Loan Companies Act* (Canada) applies,

(f) a trust company or loan company regulated by a provincial or territorial Act,

(g) a ministry, department or agent of Her Majesty in right of Canada or of a province or territory where the ministry, department or agent accepts deposit liabilities in the course of providing financial services to the public, or

(h) a subsidiary of a financial institution whose financial statements are consolidated with those of the financial institution;

"lawyer" includes a law firm;

"**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;

"public body" means

(a) a ministry, ~~or~~ department or agent of Her Majesty in right ~~of the government~~ of Canada or of a province or territory, ~~or~~

(b) a local public body as defined in paragraphs (a) to (c) of the definition in Schedule 1 to the *Freedom of Information and Protection of Privacy Act*, or a similar body incorporated under the law of another province or territory, or~~.~~

(c) a subsidiary of a public body whose financial statements are consolidated with those of the public body.

LAW SOCIETY RULES

Deposit of trust funds

3-58 (1) Subject to subrule (2) and Rule 3-62 *[Cheque endorsed over]*, a lawyer who receives trust funds must deposit the funds in a pooled trust account as soon as practicable.

(2) Despite subrule (1), a lawyer who receives trust funds with instructions to place the funds otherwise than in a pooled trust account may place the funds in a separate trust account in accordance with section 62 (5) *[Interest on trust accounts]* and Rule 3-61 *[Separate trust account]*.

(3) Unless the client instructs otherwise in writing, a lawyer must deposit all trust funds in an account in a designated savings institution.

(4) As soon as it is practicable, a lawyer who deposits into a trust account funds that belong partly to a client and partly to the lawyer or the lawyer's firm must withdraw the lawyer's or firm's funds from the trust account.

Trust account only for legal services

3-58.1 (1) Except as permitted by the Act or these rules or otherwise required by law, a lawyer or law firm must not permit funds to be paid into or withdrawn from a trust account unless the funds are directly related to legal services provided by the lawyer or law firm.

(2) A lawyer or law firm must take reasonable steps to obtain appropriate instructions and pay out funds held in a trust account as soon as practicable on completion of the legal services to which the funds relate.

Cash transactions

3-59 (1) This rule applies ~~to~~ when a lawyer or law firm~~when engaged~~ engages in any of the following activities on behalf of a client, including giving instructions on behalf of a client in respect of those activities:

(a) receiving or paying funds;

(b) purchasing or selling securities, real property or business assets or entities;

(c) transferring funds or securities by any means.

LAW SOCIETY RULES

OPTION 1

(2) Despite subrule (1), ~~This~~ this rule does not apply ~~to~~ when a lawyer or law firm ~~when~~receives or accepts cash in connection with the provision of legal services by the lawyer or law firm

(a) [rescinded]~~engaged in activities referred to in subrule (1) on behalf of his employer, or~~

(b) ~~receiving or accepting cash~~

~~(i)~~ from a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity,

~~(ii) pursuant to the order of a court or other tribunal,~~

(~~iii~~c) to pay a fine~~,~~ ~~or~~ penalty~~,~~ or bail, or

(~~iv~~d) from a ~~savings~~ financial institution or public body.

OPTION 2

(2) Despite subrule (1), ~~This~~ this rule does not apply ~~to~~ when a lawyer or law firm ~~when~~receives or accepts cash in connection with the provision of legal services by the lawyer or law firm

(a) [rescinded]~~engaged in activities referred to in subrule (1) on behalf of his employer, or~~

(b) ~~receiving or accepting cash~~

~~(i)~~ from a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity,

(~~ii~~c) 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,

(~~iii~~d) to pay a fine~~,~~ ~~or~~ penalty~~,~~ or bail, or

(~~iv~~e) from a ~~savings~~ financial institution or public body.

(3) While engaged in an activity referred to in subrule (1), a lawyer or law firm must not receive or accept cash in an aggregate amount ~~in cash of~~ greater than $7,500 ~~or more~~ in respect of any one client matter ~~or transaction~~.

(4) Despite subrule (3), a lawyer or law firm may receive or accept cash in an aggregate amount ~~in cash of~~ greater than $7,500 ~~or more~~ in respect of a client matter ~~or transaction~~ for professional fees, disbursements~~,~~ or expenses ~~or bail~~in connection with the provision of legal services by the lawyer or law firm.

(5) A lawyer or law firm ~~who~~ that receives or accepts cash in an aggregate amount ~~in cash of~~ greater than $7,500 ~~or more~~ under subrule (4) must make any refund ~~greater than $1,000~~ out of such money in cash.

(6) A lawyer or law firm that ~~who~~ receives cash, unless permitted under this rule to accept it, must

(a) make no use of the cash,

(b) return the cash, or if that is not possible, the same amount in cash, to the payer immediately,

(c) make a written report of the details of the transaction to the Executive Director within 7 days of receipt of the cash, and

(d) comply with all other rules pertaining to the receipt of trust funds.

(7) For the purposes of this rule, a lawyer or law firm that receives or accepts cash in foreign currency is deemed to have received or accepted the cash ~~to be~~ converted into Canadian dollars based on

(a) the official conversion rate of the Bank of Canada for that currency as published in the Bank of Canada's Daily ~~Memorandum of Exchange~~Noon Rates in effect at the relevant time, or

(b) if no official conversion rate is published as set out in paragraph (a), the conversion rate of the Bank of Canada in effect on the most recent business day~~that the client would use for that currency in the normal course of business at the relevant time~~.

Pooled trust account

3-60 (4) Subject to subrule (5) and Rule 3-74 *[Trust shortage]*, a lawyer must not deposit to a pooled trust account any funds other than trust funds or funds that are fiduciary property.

Separate trust account

3-61 (3) Subject to Rule 3-74 *[Trust shortage]*, a lawyer must not deposit to a separate trust account any funds other than trust funds or funds that are fiduciary property.

Electronic transfers from trust

3-64.1 (5) A transaction in which a lawyer personally uses an electronic funds transfer system to authorize a financial institution to carry out a transfer of trust funds is not exempted under Rule 3-101 (c) (ii) *[Exemptions]* from the client identification and verification requirements under Rules 3-102 to 3-106.

LAW SOCIETY RULES

Records of cash transactions

3-70 (1) A lawyer who receives any amount of cash for a client ~~that is not the lawyer's employer~~ must maintain a cash receipt book of duplicate receipts and make a receipt in the cash receipt book for any amount of cash received.

Division 11 – Client Identification and Verification

Definitions

3-98 (1) In this division,

"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;

"disbursements" has the same meaning as in Rule 3-53 *[Definitions]*;

"expenses" has the same meaning as in Rule 3-53;

"financial institution" has the same meaning as in Rule 3-53; ~~means~~

~~(a) an authorized foreign bank within the meaning of section 2 *[Definitions]* of the *Bank Act* (Canada) in respect of its business in Canada or a bank to which the *Bank Act* applies,~~

~~(b) a co-operative credit society, savings and credit union or caisse populaire that is regulated by a provincial Act,~~

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

~~(d) a company to which the *Trust and Loan Companies Act* (Canada) applies,~~

~~(e) a trust company or loan company regulated by a provincial Act,~~

~~(f) a department or agent of Her Majesty in right of Canada or of a province where the department or agent accepts deposit liabilities in the course of providing financial services to the public, or~~

~~(g) an organization controlled by a financial institution;~~

"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;

"interjurisdictional lawyer" means a member of a governing body who is authorized to practise law in another Canadian jurisdiction;

"money" ~~means~~ includes cash, currency, securities, ~~and~~ negotiable instruments or other financial instruments, in any form, that indicate ~~the~~ a person's title or right to or interest in them, and electronic transfer of deposits at financial institutions;

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

"professional fees" has the same meaning as in Rule 3-53;

"public ~~authority~~body" has the same meaning as in Rule 3-53;~~means~~

~~(a) a department or agent of Her Majesty in right of Canada or of a province or territory,~~

~~(b) a municipality or regional district or a municipal body incorporated under the law of another province or a territory, or an agent of any of them,~~

~~(c) a college, institute, university or school district,~~

~~(d) an organization that operates a public hospital and that is designated by the Minister of National Revenue as a hospital authority under the *Excise Tax Act* (Canada) or an agent of the organization,~~

~~(e) an organization established or continued under an Act of Canada or of a province or territory for a public purpose, or~~

~~(f) an organization controlled by a public authority;~~

"reporting issuer" means an organization that is

(a) a reporting issuer within the meaning of the securities law of any province or territory of Canada,

(b) a corporation whose shares are traded on a stock exchange that is prescribed by the *Income Tax Act* (Canada) and operates in a country that is a member of the Financial Action Task Force on Money Laundering, or

(c) controlled by a reporting issuer;

"securities dealer" means an ~~person or~~ entity that is authorized under federal, provincial or territorial legislation to engage in the business of dealing in securities or any other financial instruments or to provide portfolio management or investment advising services, other than an entity that acts exclusively on behalf of an entity so authorized.

(2) In this division, a person controls an organization if the person, directly or indirectly, has the power to elect a majority of the directors or equivalent body of the organization by virtue of

(a) ownership or direction over voting securities of the organization,

(b) being or controlling the general partner of a limited partnership, or

(c) being a trustee of or occupying a similar position in the organization.

Application

3-99 (1) Subject to subrule (2), this division applies to a lawyer who is retained by a client to provide legal services.

(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.

(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 ~~that do not involve a~~ if no financial transaction is involved~~in the following circumstances~~:

(i) as part of a duty counsel program sponsored by a non-profit organization;

(ii) in the form of pro bono summary advice.~~, or~~

(~~c~~2.1) ~~if~~ A lawyer is not required to repeat compliance with Rules 3-100 to 3-106 when another lawyer or an interjurisdictional lawyer who has complied with those rules ~~Rules 3-100 to 3-108~~ or the equivalent provisions of a governing body

(~~i~~a) engages the lawyer to provide legal services to the client as an agent, or

(~~ii~~b) refers a matter to the lawyer for the provision of legal services.

(3) In this division, the responsibilities of a lawyer may be fulfilled by the lawyer's firm, including members or employees of the firm conducting business in another Canadian jurisdiction.

Requirement to identify ~~Client~~ client ~~identification~~

3-100 (1) A lawyer who is retained by a client to provide legal services must ~~make reasonable efforts to~~ obtain and~~, if obtained,~~ record, with the applicable date ~~all of the following information that is applicable:~~

(a) [rescinded]

(b) for individuals, all of the following information:

(i) the client's full name~~, business address and business telephone number~~;

(~~b~~ii) ~~if the client is an individual,~~ the client's home address, home telephone number and occupation;

(iii) the address and telephone number of the client's place of work or employment, where applicable, and

(c) ~~if the client is an~~for organizations, all of the following information:

(i) the client's full name, business address and business telephone number;

(ii) the name, position and contact information for individuals who give instructions with respect to the matter for which the lawyer is retained;

(iii~~d~~) if the client is an organization other than a financial institution, public ~~authority~~ body or reporting issuer~~,~~

(~~i~~A) the general nature of the type of business or activity engaged in by the client, and

(~~ii~~B) the organization's incorporation or business identification number and the place of issue of its incorporation or business identification number.

(2) When a lawyer has obtained and recorded the information concerning the identity of an individual client under subrule (1) (b), the lawyer is not required subsequently to obtain and record that information about the same individual ~~or organization~~unless the lawyer has reason to believe the information, or the accuracy of it, has changed.

Exemptions

3-101 Rules 3-102 to 3-106 do not apply

(a) if the client is

(i) a financial institution,

(ii) a public ~~authority~~body,

(iii) a reporting issuer, or

(iv) an individual who instructs the lawyer on behalf of a client described in subparagraphs (i) to (iii),

(b) when a lawyer

(i) pays money to or receives money from any of the following acting as a principal:

(A) a financial institution;

(B) a public ~~authority~~body;

(C) a reporting issuer,

(ii) receives money paid from the trust account of another lawyer or an interjurisdictional lawyer,

(iii) receives money from a peace officer, law enforcement agency or other public official acting in an official capacity, or

(iv) pays or receives money

(A) ~~pursuant to the order of a court or other tribunal,~~[rescinded]

(B) to pay a fine~~,~~ ~~or~~ penalty or bail, or

(C) [rescinded]~~as a settlement of any legal or administrative proceeding, or~~

(D) for professional fees, disbursements~~,~~ or expenses ~~or bail~~, or

(c) to a transaction in which all funds involved are transferred by electronic transmission, provided

(i) the transfer occurs between financial institutions or financial entities headquartered in and operating in countries that are members of the Financial Action Task Force,

(ii) neither the sending nor the receiving account holders handle or transfer the funds, and

(iii) the transmission record contains

(A) a reference number,

(B) the date,

(C) the transfer amount,

(D) the currency, and

(E) the names of the sending and receiving account holders and the sending and receiving entities.

~~Verification~~ Requirement to verify client identity

3-102 (1) When a lawyer provides legal services in respect of a financial transaction, ~~including a non-face-to-face transaction,~~ the lawyer must ~~take reasonable steps~~

(a) obtain from the client and record, with the applicable date, information about the source of money, and

(b) ~~to~~ verify the identity of the client using ~~what the lawyer reasonably considers to be reliable, independent source~~ documents~~, data~~ or information described in subrule (2).

(2) For the purposes of subrule (1), ~~independent source documents may include~~the client's identity must be verified by means of the following documents and information, provided that documents are valid, original and current and information is valid and current:

(a) if the client is an individual~~,~~

(i) ~~valid original government issued~~an identification document~~, including a driver's licence, birth certificate,~~ issued by the government of Canada, a ~~provincial~~ province or ~~territorial~~ territory or a foreign government, other than a municipal government, that

(A) ~~health insurance card, passport or similar record,~~contains the individual's name and photograph, and

(B) is used in the physical presence of the client to verify that the name and photograph are those of the client,

(ii) information in the individual's credit file that is used to verify that the name, address and date of birth in the credit file are those of the individual, if that file is located in Canada and has been in existence for at least three years, or

(iii) any two of the following with respect to the individual:

(A) information from a reliable source that contains the individual's name and address that is used to verify that the name and address are of those of the individual;

(B) information from a reliable source that contains 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;

(C) 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 that is used to verify that information;

(b) if the client is an organization such as a corporation or society that is created or registered pursuant to legislative authority, a written confirmation from a government registry as to the existence, name and address of the organization, including the names of its directors where applicable, such as

(i) a certificate of corporate status issued by a public ~~authority~~body,

(ii) a copy obtained from a public ~~authority~~ body of a record that the organization is required to file annually under applicable legislation, or

(iii) a copy of a similar record obtained from a public ~~authority~~ body that confirms the organization's existence~~, and~~;

(c) if the client is an organization that is not registered in any government registry, such as a trust or partnership, a copy of the organization's constating documents, such as a trust or partnership agreement, articles of association, or any other similar record that confirms its existence as an organization.

(3) An electronic image of a document is not a document or information for the purposes of this rule.

(4) For the purposes of subrule (2) (a) (iii)

(a) the information referred to must be from different sources, and

(b) the individual, the lawyer or an agent is not a source.

(5) To verify the identity of an individual who is under 12 years of age, the lawyer must verify the identity of a parent or guardian of the individual.

(6) To verify the identity of an individual who is 12 years of age or over but less than 15 years of age, the lawyer may refer to information referred to in subrule (2) (a) (iii) (A) that contains the name and address of a parent or guardian of the individual and verifying that the address is that of the individual.

Requirement to ~~Identifying~~ identify directors, shareholders and owners

3-103 (1) When a lawyer provides legal services in respect of a financial transaction for a client that is an organization referred to in Rule 3-102 (2) (b) or (c) *[Requirement to ~~Verification~~verify client identity]*, the lawyer must ~~make reasonable efforts to obtain, and if obtained, record~~

(a) obtain and record, with the applicable date, the name~~s and occupation~~ of all directors of the organization, other than an organization that is a securities dealer, and

(b) make reasonable efforts to obtain and, if obtained, record with the applicable date

(i) the name~~s~~, and address~~es and occupation~~ of all persons who own, directly or indirectly, 25 per cent or more of the organization or of the shares of the organization,

(ii) the names and addresses of all trustees and all known beneficiaries and settlors of the trust, and

(iii) information identifying the ownership, control and structure of the organization.

(2) A lawyer must take reasonable measures to confirm the accuracy of information obtained under this rule.

(3) A lawyer must keep a record, with the applicable dates, of the following:

(a) all efforts made under subrule (1) (b);

(b) all measures taken to confirm the accuracy of information obtained under this rule.

(4) If a lawyer is not able to obtain the information referred to in subrule (1) or to confirm the accuracy of that information in accordance with subrule (2), the lawyer must

(a) take reasonable measures to ascertain the identity of the most senior managing officer of the organization,

(b) determine whether the following are consistent with the purpose of the retainer and the information obtained about the client as required by this rule:

(i) the client's information in respect of its activities;

(ii) the client's information in respect of the source of the money to be used in the financial transaction;

(iii) the client's instructions in respect of the transaction,

(c) assess whether there is a risk that the lawyer may be assisting in or encouraging fraud or other illegal conduct, and

(d) keep a record, with the applicable date, of the results of the determination and assessment under paragraphs (b) and (c).

Use of an agent for ~~Client~~ client ~~identification and~~ verification ~~in non-face-to-face transactions~~

3-104 (1) A lawyer may retain an agent to obtain the information required under Rule 3-102 *[Requirement to verify client identity]*, provided the lawyer and the agent have an agreement or arrangement in writing for this purpose in compliance with this rule~~This rule applies when a lawyer provides legal services in respect of a financial transaction for a client who is an individual not physically present before the lawyer~~.

(2) [rescinded]~~If the client is present elsewhere in Canada, the lawyer must verify the client's identity by obtaining an attestation from a commissioner of oaths for a jurisdiction in Canada, or a guarantor in Canada, that the commissioner or guarantor has seen one of the documents referred to in Rule 3-102 (2) (a) *[Verification]*.~~

(3) [rescinded]~~For the purpose of subrule (2), an attestation must be produced on a legible photocopy of the document and must include~~

LAW SOCIETY RULES

~~(a) the name, profession and address of the person providing the attestation,~~

~~(b) the signature of the person providing the attestation, and~~

~~(c) the type and number of the identifying document provided by the client.~~

(4) [rescinded]~~For the purpose of subrule (2), a guarantor must be a person engaged in one of the following occupations in Canada:~~

~~(a) dentist;~~

~~(b) medical doctor;~~

~~(c) chiropractor;~~

~~(d) judge;~~

~~(e) magistrate;~~

~~(f) lawyer;~~

~~(g) notary (in Quebec);~~

~~(h) notary public;~~

~~(i) optometrist;~~

~~(j) pharmacist;~~

~~(k) professional accountant (Chartered Professional Accountant, Accredited Public Accountant, Public Accountant or Registered Public Accountant);~~

~~(l) professional engineer;~~

~~(m) veterinarian.~~

~~(n) architect;~~

~~(o) peace officer;~~

~~(p) paralegal licensee in Ontario;~~

~~(q) registered nurse;~~

~~(r) school principal.~~

(5) A lawyer must retain an agent to obtain the information required under Rule 3-102 *[Requirement to verify client identity]* to verify the person's identity and must have an agreement or arrangement in writing with the agent for that purpose if ~~If~~ the client

(a) is not present in Canada, and

(b) is not physically present before the lawyer.

~~must rely on an agent to obtain the information required to verify the identity of the client under Rule 3-102 [Verification], which may be attested to in a form similar to that described in this Rule, provided the lawyer and the agent have an agreement or arrangement in writing for this purpose.~~

(6) A lawyer must not rely on information obtained by an agent under this rule unless the lawyer ~~who enters into an agreement or arrangement referred to in subrule (5) must~~

(a) obtains from the agent all of the information obtained by the agent under that agreement or arrangement~~.~~, and

(b) is satisfied that the information is valid and current and that the agent verified identity in accordance with Rule 3-102 *[Requirement to verify client identity]*.

(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.

Timing of verification for individuals

3-105 (1) At the time that a lawyer provides legal services in respect of a financial transaction, the lawyer must verify the identity of a client who is an individual.

(2) When a lawyer has verified the identity of an individual, the lawyer is not required subsequently to verify that same identity ~~if the lawyer recognizes that person~~unless the lawyer has reason to believe the information, or the accuracy of it, has changed.

Timing of verification for organizations

3-106 (1) A lawyer who provides legal services in respect of a financial transaction must verify the identity of a client that is an organization promptly and, in any event, within ~~60~~ 30 days ~~of engaging in a financial transaction~~.

(2) When a lawyer has verified the identity of a client that is an organization and obtained and recorded information under Rule 3-103 *[Requirement to ~~Identifying~~ identify directors, shareholders and owners]*, the lawyer is not required subsequently to verify that identity or obtain and record that information, unless the lawyer has reason to believe that the information, or the accuracy of it, has changed.

Record keeping and retention

3-107 (1) A lawyer must 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 (1) *[Requirement to verify client identity~~Verification~~]*.

(2) The documents referred to in subrule (1) may be kept in a machine-readable or electronic form, if a paper copy can be readily produced from it.

(3) A lawyer must retain a record of the information, with applicable dates, and any documents obtained or produced for the purposes of

(a) Rules 3-100 *[~~Client identification~~Requirement to identify client]*, ~~and~~

(b) Rule 3-103 *[~~Identifying~~ Requirement to identify directors, shareholders and owners]*, ~~and copies of all documents received for the purposes of~~

(c) Rule 3-102 (2) *[~~Verification~~Requirement to verify client identity]*, or

(d) Rule 3-104 *[Use of an agent for client verification]*.

(4) The lawyer must retain information and documents referred to in subrule (3) for the longer of

(a) the duration of the lawyer and client relationship and for as long as is necessary for the purpose of providing services to the client, and

(b) a period of at least 6 years following completion of the work for which the lawyer was retained.

Existing matters

3-108 Rules 3-99 to 3-107 do not apply to matters for which a lawyer was retained before December 31, 2008, but they do apply to all matters for which he or she is retained after that time, regardless of whether the client is a new or existing client.

Criminal activity, duty to withdraw

3-109 (1) If, in the course of obtaining the information and taking the steps required in Rule 3-100 *[~~Client identification~~Requirement to identify client]*, 3-102 (2) *[~~Verification~~Requirement to verify client identity]*, ~~or~~ 3-103 *[~~Identifying~~ Requirement to identify directors, shareholders and owners]* or 3-110 *[Monitoring]*, or at any other time while retained by a client, a lawyer knows or ought to know that he or she is or would be assisting a client in fraud or other illegal conduct, the lawyer must withdraw from representation of the client.

(2) This rule applies to all matters for which a lawyer is retained before or after this division comes into force.

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Monitoring

3-110 (1) While retained by a client in respect of a financial transaction, a lawyer must monitor on a periodic basis the professional business relationship with the client for the purposes of

(a) determining whether the following are consistent with the purpose of the retainer and the information obtained about the client under this division:

(i) the client's information in respect of their activities;

(ii) the client's information in respect of the source of the money used in the financial transaction;

(iii) the client's instructions in respect of transactions, and

(b) assessing whether there is a risk that the lawyer may be assisting in or encouraging dishonesty, fraud, crime or other illegal conduct.

(2) A lawyer must keep a record, with the applicable date, of the measures taken and the information obtained under subrule (1) (a).

LAW SOCIETY RULES

RULE 1 – DEFINITIONS

Definitions

1 In these rules, unless the context indicates otherwise:

"funds" includes current coin, government or bank notes, bills of exchange, cheques, drafts, money orders, charge card sales slips, credit slips and electronic transfers;

"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;

PART 3 – PROTECTION OF THE PUBLIC

Division 7 – Trust Accounts and Other Client Property

Definitions

3-53 In this division,

"cash" means

(a) coins referred to in section 7 of the *Currency Act* (Canada),

(b) notes intended for circulation in Canada issued by the Bank of Canada under the *Bank of Canada Act*, and

(c) coins or bank notes of countries other than Canada;

"cash receipt book" means the book of duplicate receipts referred to in Rule 3-70 (1) *[Records of cash transactions]*;

"client" includes any beneficial owner of funds or valuables received by a lawyer in connection with the lawyer's practice;

"compliance audit" means an examination of a lawyer's books, records and accounts and the answering of questions by lawyers ordered under Rule 3-85 *[Compliance audit of books, records and accounts]*;

LAW SOCIETY RULES

"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;

"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;

"financial institution" means

(a) an authorized foreign bank within the meaning of section 2 *[Definitions]* of the *Bank Act* (Canada) in respect of its business in Canada or a bank to which the *Bank Act* applies,

(b) a co-operative credit society, savings and credit union or caisse populaire that is regulated by a provincial or territorial Act,

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

(d) a financial services co-operative that is regulated by *An Act respecting financial services cooperatives*, CQLR, c. C-67.3, or *An Act respecting the Mouvement Desjardins*, SQ 2000, c. 77, other than a caisse populaire,

(e) a company to which the *Trust and Loan Companies Act* (Canada) applies,

(f) a trust company or loan company regulated by a provincial or territorial Act,

(g) a ministry, department or agent of Her Majesty in right of Canada or of a province or territory where the ministry, department or agent accepts deposit liabilities in the course of providing financial services to the public, or

(h) a subsidiary of a financial institution whose financial statements are consolidated with those of the financial institution;

"lawyer" includes a law firm;

"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;

"public body" means

(a) a ministry, department or agent of Her Majesty in right of Canada or of a province or territory,

(b) a local public body as defined in paragraphs (a) to (c) of the definition in Schedule 1 to the *Freedom of Information and Protection of Privacy Act*, or a similar body incorporated under the law of another province or territory, or

(c) a subsidiary of a public body whose financial statements are consolidated with those of the public body.

LAW SOCIETY RULES

Deposit of trust funds

3-58 (1) Subject to subrule (2) and Rule 3-62 *[Cheque endorsed over]*, a lawyer who receives trust funds must deposit the funds in a pooled trust account as soon as practicable.

(2) Despite subrule (1), a lawyer who receives trust funds with instructions to place the funds otherwise than in a pooled trust account may place the funds in a separate trust account in accordance with section 62 (5) *[Interest on trust accounts]* and Rule 3-61 *[Separate trust account]*.

(3) Unless the client instructs otherwise in writing, a lawyer must deposit all trust funds in an account in a designated savings institution.

(4) As soon as it is practicable, a lawyer who deposits into a trust account funds that belong partly to a client and partly to the lawyer or the lawyer's firm must withdraw the lawyer's or firm's funds from the trust account.

Trust account only for legal services

3-58.1 (1) Except as permitted by the Act or these rules or otherwise required by law, a lawyer or law firm must not permit funds to be paid into or withdrawn from a trust account unless the funds are directly related to legal services provided by the lawyer or law firm.

(2) A lawyer or law firm must take reasonable steps to obtain appropriate instructions and pay out funds held in a trust account as soon as practicable on completion of the legal services to which the funds relate.

Cash transactions

3-59 (1) This rule applies when a lawyer or law firm engages in any of the following activities on behalf of a client, including giving instructions on behalf of a client in respect of those activities:

(a) receiving or paying funds;

(b) purchasing or selling securities, real property or business assets or entities;

(c) transferring funds or securities by any means.

LAW SOCIETY RULES

OPTION 1

(2) Despite subrule (1), this rule does not apply when a lawyer or law firm receives or accepts cash in connection with the provision of legal services by the lawyer or law firm

(a) [rescinded]

(b) from a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity,

(c) to pay a fine, penalty or bail, or

(d) from a financial institution or public body.

OPTION 2

(2) Despite subrule (1), this rule does not apply when a lawyer or law firm receives or accepts cash in connection with the provision of legal services by the lawyer or law firm

(a) [rescinded]

(b) from a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity,

(c) 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,

(d) to pay a fine, penalty or bail, or

(e) from a financial institution or public body.

(3) While engaged in an activity referred to in subrule (1), a lawyer or law firm must not receive or accept cash in an aggregate amount greater than $7,500 in respect of any one client matter.

(4) Despite subrule (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.

(5) A lawyer or law firm that receives or accepts cash in an aggregate amount greater than $7,500 under subrule (4) must make any refund out of such money in cash.

(6) A lawyer or law firm that receives cash, unless permitted under this rule to accept it, must

(a) make no use of the cash,

(b) return the cash, or if that is not possible, the same amount in cash, to the payer immediately,

(c) make a written report of the details of the transaction to the Executive Director within 7 days of receipt of the cash, and

(d) comply with all other rules pertaining to the receipt of trust funds.

(7) For the purposes of this rule, a lawyer or law firm that receives or accepts cash in foreign currency is deemed to have received or accepted the cash converted into Canadian dollars based on

(a) the official conversion rate of the Bank of Canada for that currency as published in the Bank of Canada's Daily Noon Rates in effect at the relevant time, or

(b) if no official conversion rate is published as set out in paragraph (a), the conversion rate of the Bank of Canada in effect on the most recent business day.

Pooled trust account

3-60 (4) Subject to subrule (5) and Rule 3-74 *[Trust shortage]*, a lawyer must not deposit to a pooled trust account any funds other than trust funds or funds that are fiduciary property.

Separate trust account

3-61 (3) Subject to Rule 3-74 *[Trust shortage]*, a lawyer must not deposit to a separate trust account any funds other than trust funds or funds that are fiduciary property.

Electronic transfers from trust

3-64.1 (5) A transaction in which a lawyer personally uses an electronic funds transfer system to authorize a financial institution to carry out a transfer of trust funds is not exempted under Rule 3-101 (c) (ii) *[Exemptions]* from the client identification and verification requirements under Rules 3-102 to 3-106.

Records of cash transactions

3-70 (1) 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 the cash receipt book for any amount of cash received.

LAW SOCIETY RULES

Division 11 – Client Identification and Verification

Definitions

3-98 (1) In this division,

"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;

"disbursements" has the same meaning as in Rule 3-53 *[Definitions]*;

"expenses" has the same meaning as in Rule 3-53;

"financial institution" has the same meaning as in Rule 3-53;

"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;

"interjurisdictional lawyer" means a member of a governing body who is authorized to practise law in another Canadian jurisdiction;

"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;

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

"professional fees" has the same meaning as in Rule 3-53;

"public body" has the same meaning as in Rule 3-53;

"reporting issuer" means an organization that is

(a) a reporting issuer within the meaning of the securities law of any province or territory of Canada,

(b) a corporation whose shares are traded on a stock exchange that is prescribed by the *Income Tax Act* (Canada) and operates in a country that is a member of the Financial Action Task Force on Money Laundering, or

(c) controlled by a reporting issuer;

LAW SOCIETY RULES

"securities dealer" means an entity that is authorized under federal, provincial or territorial legislation to engage in the business of dealing in securities or any other financial instruments or to provide portfolio management or investment advising services, other than an entity that acts exclusively on behalf of an entity so authorized.

(2) In this division, a person controls an organization if the person, directly or indirectly, has the power to elect a majority of the directors or equivalent body of the organization by virtue of

(a) ownership or direction over voting securities of the organization,

(b) being or controlling the general partner of a limited partnership, or

(c) being a trustee of or occupying a similar position in the organization.

Application

3-99 (1) Subject to subrule (2), this division applies to a lawyer who is retained by a client to provide legal services.

(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.

(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.

(2.1) A lawyer is not required to repeat compliance with Rules 3-100 to 3-106 when another lawyer or an interjurisdictional lawyer who has complied with those rules or the equivalent provisions of a governing body

(a) engages the lawyer to provide legal services to the client as an agent, or

(b) refers a matter to the lawyer for the provision of legal services.

(3) In this division, the responsibilities of a lawyer may be fulfilled by the lawyer's firm, including members or employees of the firm conducting business in another Canadian jurisdiction.

LAW SOCIETY RULES

Requirement to identify client

3-100 (1) A lawyer who is retained by a client to provide legal services must obtain and record, with the applicable date

(a) [rescinded]

(b) for individuals, all of the following information:

(i) the client's full name;

(ii) the client's home address, home telephone number and occupation;

(iii) the address and telephone number of the client's place of work or employment, where applicable, and

(c) for organizations, all of the following information:

(i) the client's full name, business address and business telephone number;

(ii) the name, position and contact information for individuals who give instructions with respect to the matter for which the lawyer is retained;

(iii) if the client is an organization other than a financial institution, public body or reporting issuer

(A) the general nature of the type of business or activity engaged in by the client, and

(B) the organization's incorporation or business identification number and the place of issue of its incorporation or business identification number.

(2) When a lawyer has obtained and recorded the information concerning the identity of an individual client under subrule (1) (b), the lawyer is not required subsequently to obtain and record that information about the same individual unless the lawyer has reason to believe the information, or the accuracy of it, has changed.

Exemptions

3-101 Rules 3-102 to 3-106 do not apply

(a) if the client is

(i) a financial institution,

(ii) a public body,

(iii) a reporting issuer, or

(iv) an individual who instructs the lawyer on behalf of a client described in subparagraphs (i) to (iii),

(b) when a lawyer

(i) pays money to or receives money from any of the following acting as a principal:

(A) a financial institution;

(B) a public body;

(C) a reporting issuer,

(ii) receives money paid from the trust account of another lawyer or an interjurisdictional lawyer,

(iii) receives money from a peace officer, law enforcement agency or other public official acting in an official capacity, or

(iv) pays or receives money

(A) [rescinded]

(B) to pay a fine, penalty or bail, or

(C) [rescinded]

(D) for professional fees, disbursements or expenses, or

(c) to a transaction in which all funds involved are transferred by electronic transmission, provided

(i) the transfer occurs between financial institutions or financial entities headquartered in and operating in countries that are members of the Financial Action Task Force,

(ii) neither the sending nor the receiving account holders handle or transfer the funds, and

(iii) the transmission record contains

(A) a reference number,

(B) the date,

(C) the transfer amount,

(D) the currency, and

(E) the names of the sending and receiving account holders and the sending and receiving entities.

Requirement to verify client identity

3-102 (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).

(2) For the purposes of subrule (1), the client's identity must be verified by means of the following documents and information, provided that documents are valid, original and current and information is valid and current:

(a) if the client is an individual

(i) an identification document issued by the government of Canada, a province or territory or a foreign government, other than a municipal government, that

(A) contains the individual's name and photograph, and

(B) is used in the physical presence of the client to verify that the name and photograph are those of the client,

(ii) information in the individual's credit file that is used to verify that the name, address and date of birth in the credit file are those of the individual, if that file is located in Canada and has been in existence for at least three years, or

(iii) any two of the following with respect to the individual:

(A) information from a reliable source that contains the individual's name and address that is used to verify that the name and address are of those of the individual;

(B) information from a reliable source that contains 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;

(C) 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 that is used to verify that information;

(b) if the client is an organization such as a corporation or society that is created or registered pursuant to legislative authority, a written confirmation from a government registry as to the existence, name and address of the organization, including the names of its directors where applicable, such as

(i) a certificate of corporate status issued by a public body,

(ii) a copy obtained from a public body of a record that the organization is required to file annually under applicable legislation, or

(iii) a copy of a similar record obtained from a public body that confirms the organization's existence;

(c) if the client is an organization that is not registered in any government registry, such as a trust or partnership, a copy of the organization's constating documents, such as a trust or partnership agreement, articles of association, or any other similar record that confirms its existence as an organization.

(3) An electronic image of a document is not a document or information for the purposes of this rule.

(4) For the purposes of subrule (2) (a) (iii)

(a) the information referred to must be from different sources, and

(b) the individual, the lawyer or an agent is not a source.

(5) To verify the identity of an individual who is under 12 years of age, the lawyer must verify the identity of a parent or guardian of the individual.

(6) To verify the identity of an individual who is 12 years of age or over but less than 15 years of age, the lawyer may refer to information referred to in subrule (2) (a) (iii) (A) that contains the name and address of a parent or guardian of the individual and verifying that the address is that of the individual.

Requirement to identify directors, shareholders and owners

3-103 (1) When a lawyer provides legal services in respect of a financial transaction for a client that is an organization referred to in Rule 3-102 (2) (b) or (c) *[Requirement to verify client identity]*, the lawyer must

(a) obtain and record, with the applicable date, the names of all directors of the organization, other than an organization that is a securities dealer, and

(b) make reasonable efforts to obtain and, if obtained, record with the applicable date

(i) the names and addresses of all persons who own, directly or indirectly, 25 per cent or more of the organization or of the shares of the organization,

(ii) the names and addresses of all trustees and all known beneficiaries and settlors of the trust, and

(iii) information identifying the ownership, control and structure of the organization.

(2) A lawyer must take reasonable measures to confirm the accuracy of information obtained under this rule.

(3) A lawyer must keep a record, with the applicable dates, of the following:

(a) all efforts made under subrule (1) (b);

(b) all measures taken to confirm the accuracy of information obtained under this rule.

(4) If a lawyer is not able to obtain the information referred to in subrule (1) or to confirm the accuracy of that information in accordance with subrule (2), the lawyer must

(a) take reasonable measures to ascertain the identity of the most senior managing officer of the organization,

(b) determine whether the following are consistent with the purpose of the retainer and the information obtained about the client as required by this rule:

(i) the client's information in respect of its activities;

(ii) the client's information in respect of the source of the money to be used in the financial transaction;

(iii) the client's instructions in respect of the transaction,

(c) assess whether there is a risk that the lawyer may be assisting in or encouraging fraud or other illegal conduct, and

(d) keep a record, with the applicable date, of the results of the determination and assessment under paragraphs (b) and (c).

Use of an agent for client verification

3-104 (1) A lawyer may retain an agent to obtain the information required under Rule 3-102 *[Requirement to verify client identity]*, provided the lawyer and the agent have an agreement or arrangement in writing for this purpose in compliance with this rule.

(2) [rescinded]

(3) [rescinded]

(4) [rescinded]

(5) A lawyer must retain an agent to obtain the information required under Rule 3-102 *[Requirement to verify client identity]* to verify the person's identity and must have an agreement or arrangement in writing with the agent for that purpose if the client

(a) is not present in Canada, and

(b) is not physically present before the lawyer.

(6) A lawyer must not rely on information obtained by an agent under this rule unless the lawyer

(a) obtains from the agent all of the information obtained by the agent under that agreement or arrangement, and

(b) is satisfied that the information is valid and current and that the agent verified identity in accordance with Rule 3-102 *[Requirement to verify client identity]*.

(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.

Timing of verification for individuals

3-105 (1) At the time that a lawyer provides legal services in respect of a financial transaction, the lawyer must verify the identity of a client who is an individual.

(2) When a lawyer has verified the identity of an individual, the lawyer is not required subsequently to verify that same identity unless the lawyer has reason to believe the information, or the accuracy of it, has changed.

Timing of verification for organizations

3-106 (1) A lawyer who provides legal services in respect of a financial transaction must verify the identity of a client that is an organization promptly and, in any event, within 30 days.

(2) When a lawyer has verified the identity of a client that is an organization and obtained and recorded information under Rule 3-103 *[Requirement to identify directors, shareholders and owners]*, the lawyer is not required subsequently to verify that identity or obtain and record that information, unless the lawyer has reason to believe that the information, or the accuracy of it, has changed.

Record keeping and retention

3-107 (1) A lawyer must 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 (1) *[Requirement to verify client identity]*.

(2) The documents referred to in subrule (1) may be kept in a machine-readable or electronic form, if a paper copy can be readily produced from it.

(3) A lawyer must retain a record of the information, with applicable dates, and any documents obtained or produced for the purposes of

(a) Rule 3-100 *[Requirement to identify client]*,

(b) Rule 3-103 *[Requirement to identify directors, shareholders and owners]*,

(c) Rule 3-102 (2) *[Requirement to verify client identity]*, or

(d) Rule 3-104 *[Use of an agent for client verification]*.

(4) The lawyer must retain information and documents referred to in subrule (3) for the longer of

(a) the duration of the lawyer and client relationship and for as long as is necessary for the purpose of providing services to the client, and

(b) a period of at least 6 years following completion of the work for which the lawyer was retained.

Existing matters

3-108 Rules 3-99 to 3-107 do not apply to matters for which a lawyer was retained before December 31, 2008, but they do apply to all matters for which he or she is retained after that time, regardless of whether the client is a new or existing client.

Criminal activity, duty to withdraw

3-109 (1) If, in the course of obtaining the information and taking the steps required in Rule 3-100 *[Requirement to identify client]*, 3-102 (2) *[Requirement to verify client identity]*, 3-103 *[Requirement to identify directors, shareholders and owners]* or 3-110 *[Monitoring]*, or at any other time while retained by a client, a lawyer knows or ought to know that he or she is or would be assisting a client in fraud or other illegal conduct, the lawyer must withdraw from representation of the client.

(2) This rule applies to all matters for which a lawyer is retained before or after this division comes into force.

Monitoring

3-110 (1) While retained by a client in respect of a financial transaction, a lawyer must monitor on a periodic basis the professional business relationship with the client for the purposes of

(a) determining whether the following are consistent with the purpose of the retainer and the information obtained about the client under this division:

(i) the client's information in respect of their activities;

(ii) the client's information in respect of the source of the money used in the financial transaction;

(iii) the client's instructions in respect of transactions, and

(b) assessing whether there is a risk that the lawyer may be assisting in or encouraging dishonesty, fraud, crime or other illegal conduct.

(2) A lawyer must keep a record, with the applicable date, of the measures taken and the information obtained under subrule (1) (a).

CASH TRANSACTIONS

SUGGESTED RESOLUTION:

BE IT RESOLVED to amend the Law Society Rules as follows:

1. In Rule 3-53:

(a) by rescinding the definition of "public body" and substituting the following:

"public body" means

(a) a ministry or department of the government of Canada or of a province or territory,

(b) a local public body as defined in paragraphs (a) to (c) of the definition in Schedule 1 to the *Freedom of Information and Protection of Privacy Act*, or a similar body incorporated under the law of another province or territory,

(c) a body incorporated by or under an Act of a province or territory for a public purpose, or

(d) a subsidiary of a public body whose financial statements are consolidated with those of the public body.***, and***

(b) by adding the following definitions:

"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;

"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;

"financial institution" means

(a) an authorized foreign bank within the meaning of section 2 *[Definitions]* of the *Bank Act* (Canada) in respect of its business in Canada or a bank to which the *Bank Act* applies,

(b) a co-operative credit society, savings and credit union or caisse populaire that is regulated by a provincial or territorial Act,

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

(c.1) a financial services co-operative that is regulated by *An Act respecting financial services cooperatives*, CQLR, c. C-67.3, or *An Act respecting the Mouvement Desjardins*, SQ 2000, c. 77, other than a caisse populaire,

(d) a company to which the *Trust and Loan Companies Act* (Canada) applies,

(e) a trust company or loan company regulated by a provincial or territorial Act,

(f) a department or agent of Her Majesty in right of Canada or of a province or territory where the department or agent accepts deposit liabilities in the course of providing financial services to the public, or

(g) a subsidiary of a financial institution whose financial statements are consolidated with those of the financial institution;

"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;**.**

2. By rescinding Rule 3-59 and substituting the following:

Cash transactions

3-59 (1) This rule applies when a lawyer or law firm engages in any of the following activities on behalf of a client, including giving instructions on behalf of a client in respect of those activities:

(a) receiving or paying funds;

(b) purchasing or selling securities, real property or business assets or entities;

(c) transferring funds or securities by any means.

OPTION 1

(2) Despite subrule (1), this rule does not apply when a lawyer or law firm receives or accepts cash in connection with the provision of legal services by the lawyer or law firm

(b) from a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity,

(c) to pay a fine, penalty or bail, or

(d) from a financial institution or public body.

OPTION 2

(2) Despite subrule (1), this rule does not apply when a lawyer or law firm receives or accepts cash in connection with the provision of legal services by the lawyer or law firm

(b) from a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity,

(c) 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 in an official capacity,

(d) to pay a fine, penalty or bail, or

(e) from a financial institution or public body.

(3) While engaged in an activity referred to in subrule (1), a lawyer or law firm must not receive or accept cash in an aggregate amount greater than $7,500 in respect of any one client matter.

(4) Despite subrule (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.

(5) A lawyer or law firm that receives or accepts cash in an aggregate amount greater than $7,500 under subrule (4) must make any refund greater than $1,000 out of such money in cash.

(6) A lawyer or law firm that receives cash, unless permitted under this rule to accept it, must

(a) make no use of the cash,

(b) return the cash, or if that is not possible, the same amount in cash, to the payer immediately,

(c) make a written report of the details of the transaction to the Executive Director within 7 days of receipt of the cash, and

(d) comply with all other rules pertaining to the receipt of trust funds.

(7) For the purposes of this rule, a lawyer who receives or accepts cash in foreign currency is deemed to have received or accepted the cash converted into Canadian dollars based on

(a) the official conversion rate of the Bank of Canada for that currency as published in the Bank of Canada's Daily Noon Rates in effect at the relevant time, or

(b) if no official conversion rate is published as set out in paragraph (a), the conversion rate of the Bank of Canada in effect on the most recent business day**..**

3. In Rule 3-70, by striking the phrase "that is not the lawyer's employer***".***

4. In Rule 3-98,

(a) by rescinding the definition of "financial institution" and substituting the following:

"financial institution" has the same meaning as in Rule 3-53***;, and***

(b) by inserting the following definitions:

"disbursements" has the same meaning as in Rule 3-53;

"expenses" has the same meaning as in Rule 3-53;**.**

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

TRUST ACCOUNTING

SUGGESTED RESOLUTION:

BE IT RESOLVED to amend the Law Society Rules as follows:

1. In Rule 1, by rescinding the definition of "trust funds" and substituting the following:

"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;**.**

2. By adding the following rule:

Trust account only for legal services

3-58.1 (1) Except as permitted by the Act or these rules or otherwise required by law, a lawyer or law firm must not permit funds to be paid into or withdrawn from a trust account unless the funds are directly related to legal services provided by the lawyer or law firm.

(2) A lawyer or law firm must take reasonable steps to obtain appropriate instructions and pay out funds held in a trust account as soon as practicable on completion of the legal services to which the funds relate**..**

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

CLIENT IDENTIFICATION AND VERIFICATION

SUGGESTED RESOLUTION:

BE IT RESOLVED to amend the Law Society Rules effective January 1, 2020, as follows:

1. In Rule 3-98,

(a) by rescinding the definitions of "money***", "***public body***" and "***securities dealer***" and substituting the following:***

"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;

"public body" has the same meaning as in Rule 3-53;

"securities dealer" means an entity that is authorized under federal, provincial or territorial legislation to engage in the business of dealing in securities or any other financial instruments or to provide portfolio management or investment advising services, other than an entity that acts exclusively on behalf of an entity so authorized.***;***

(b) by adding the following definition:

"professional fees" has the same meaning as in Rule 3-53;**.**

2. In Rule 3-99, by rescinding subrule (2) and substituting the following:

(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.

(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.

(2.1) A lawyer is not required to repeat compliance with Rules 3-100 to 3-106 when another lawyer or an interjurisdictional lawyer who has complied with those rules or the equivalent provisions of a governing body

(a) engages the lawyer to provide legal services to the client as an agent, or

(b) refers a matter to the lawyer for the provision of legal services**.**

3. By rescinding Rule 3-100 and substituting the following:

Requirement to identify client

3-100 (1) A lawyer who is retained by a client to provide legal services must obtain and record, with the applicable date

(b) for individuals, all of the following information:

(i) the client's full name;

(ii) the client's home address, home telephone number and occupation;

(iii) the address and telephone number of the client's place of work or employment, where applicable, and

(c) for organizations, all of the following information:

(i) the client's full name, business address and business telephone number;

(ii) the name, position and contact information for individuals who give instructions with respect to the matter for which the lawyer is retained;

(iii)if the client is an organization other than a financial institution, public body or reporting issuer

(A) the general nature of the type of business or activity engaged in by the client, and

(B) the organization's incorporation or business identification number and the place of issue of its incorporation or business identification number.

(2) When a lawyer has obtained and recorded the information concerning the identity of an individual client under subrule (1) (b), the lawyer is not required subsequently to obtain and record that information about the same individual unless the lawyer has reason to believe the information, or the accuracy of it, has changed**.**

4. ***In Rule 3-101, by rescinding paragraphs (a) and (b) and substituting the following:***

(a) if the client is

(i) a financial institution,

(ii) a public body,

(iii) a reporting issuer, or

(iv) an individual who instructs the lawyer on behalf of a client described in subparagraphs (i) to (iii),

(b) when a lawyer

(i) pays money to or receives money from any of the following acting as a principal:

(A) a financial institution;

(B) a public body;

(C) a reporting issuer,

(ii) receives money paid from the trust account of another lawyer or an interjurisdictional lawyer,

(iii) receives money from a peace officer, law enforcement agency or other public official acting in an official capacity, or

(iv) pays or receives money

(A) [rescinded]

(B) to pay a fine, penalty or bail, or

(C) [rescinded]

(D) for professional fees, disbursements or expenses, or**.**

5. ***By rescinding Rules 3-102 to 3-107 and 3-109, and substituting the following:***

Requirement to verify client identity

3-102 (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).

(2) For the purposes of subrule (1), the client's identity must be verified by means of the following documents and information, provided that documents are valid, original and current and information is valid and current:

(a) if the client is an individual

(i) an identification document issued by the government of Canada, a province or territory or a foreign government, other than a municipal government, that

(A) contains the individual's name and photograph, and

(B) is used in the physical presence of the client to verify that the name and photograph are those of the client,

(ii) information in the individual's credit file that is used to verify that the name, address and date of birth in the credit file are those of the individual, if that file is located in Canada and has been in existence for at least three years, or

(iii) any two of the following with respect to the individual:

(A) information from a reliable source that contains the individual's name and address that is used to verify that the name and address are of those of the individual;

(B) information from a reliable source that contains 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;

(C) 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 that is used to verify that information;

(b) if the client is an organization such as a corporation or society that is created or registered pursuant to legislative authority, a written confirmation from a government registry as to the existence, name and address of the organization, including the names of its directors where applicable, such as

(i) a certificate of corporate status issued by a public body,

(ii) a copy obtained from a public body of a record that the organization is required to file annually under applicable legislation, or

(iii) a copy of a similar record obtained from a public body that confirms the organization's existence;

(c) if the client is an organization that is not registered in any government registry, such as a trust or partnership, a copy of the organization's constating documents, such as a trust or partnership agreement, articles of association, or any other similar record that confirms its existence as an organization.

(3) An electronic image of a document is not a document or information for the purposes of this rule.

(4) For the purposes of subrule (2) (a) (iii)

(a) the information referred to must be from different sources, and

(b) the individual, the lawyer or an agent is not a source.

(5) To verify the identity of an individual who is under 12 years of age, the lawyer must verify the identity of a parent or guardian of the individual.

(6) To verify the identity of an individual who is 12 years of age or over but less than 15 years of age, the lawyer may refer to information referred to in subrule (2) (a) (iii) (A) that contains the name and address of a parent or guardian of the individual and verifying that the address is that of the individual.

Requirement to identify directors, shareholders and owners

3-103 (1) When a lawyer provides legal services in respect of a financial transaction for a client that is an organization referred to in Rule 3-102 (2) (b) or (c) *[Requirement to verify client identity]*, the lawyer must

(a) obtain and record, with the applicable date, the names of all directors of the organization, other than an organization that is a securities dealer, and

(b) make reasonable efforts to obtain and, if obtained, record with the applicable date

(i) the names and addresses of all persons who own, directly or indirectly, 25 per cent or more of the organization or of the shares of the organization,

(ii) the names and addresses of all trustees and all known beneficiaries and settlors of the trust, and

(iii) information identifying the ownership, control and structure of the organization.

(2) A lawyer must take reasonable measures to confirm the accuracy of information obtained under this rule.

(3) A lawyer must keep a record, with the applicable dates, of the following:

(a) all efforts made under subrule (1) (b);

(b) all measures taken to confirm the accuracy of information obtained under this rule.

(4) If a lawyer is not able to obtain the information referred to in subrule (1) or to confirm the accuracy of that information in accordance with subrule (2), the lawyer must

(a) take reasonable measures to ascertain the identity of the most senior managing officer of the organization,

(b) determine whether the following are consistent with the purpose of the retainer and the information obtained about the client as required by this rule:

(i) the client's information in respect of its activities;

(ii) the client's information in respect of the source of the money to be used in the financial transaction;

(iii) the client's instructions in respect of the transaction,

(c) assess whether there is a risk that the lawyer may be assisting in or encouraging fraud or other illegal conduct, and

(d) keep a record, with the applicable date, of the results of the determination and assessment under paragraphs (b) and (c).

Use of an agent for client verification

3-104 (1) A lawyer may retain an agent to obtain the information required under Rule 3-102 *[Requirement to verify client identity]*, provided the lawyer and the agent have an agreement or arrangement in writing for this purpose in compliance with this rule.

(5) A lawyer must retain an agent to obtain the information required under Rule 3-102 *[Requirement to verify client identity]* to verify the person's identity and must have an agreement or arrangement in writing with the agent for that purpose if the client

(a) is not present in Canada, and

(b) is not physically present before the lawyer.

(6) A lawyer must not rely on information obtained by an agent under this rule unless the lawyer

(a) obtains from the agent all of the information obtained by the agent under that agreement or arrangement, and

(b) is satisfied that the information is valid and current and that the agent verified identity in accordance with Rule 3-102 *[Requirement to verify client identity]*.

(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.

Timing of verification for individuals

3-105 (1) At the time that a lawyer provides legal services in respect of a financial transaction, the lawyer must verify the identity of a client who is an individual.

(2) When a lawyer has verified the identity of an individual, the lawyer is not required subsequently to verify that same identity unless the lawyer has reason to believe the information, or the accuracy of it, has changed.

Timing of verification for organizations

3-106 (1) A lawyer who provides legal services in respect of a financial transaction must verify the identity of a client that is an organization promptly and, in any event, within 30 days.

(2) When a lawyer has verified the identity of a client that is an organization and obtained and recorded information under Rule 3-103 *[Requirement to identify directors, shareholders and owners]*, the lawyer is not required subsequently to verify that identity or obtain and record that information, unless the lawyer has reason to believe that the information, or the accuracy of it, has changed.

Record keeping and retention

3-107 (1) A lawyer must 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 (1) *[Requirement to verify client identity]*.

(2) The documents referred to in subrule (1) may be kept in a machine-readable or electronic form, if a paper copy can be readily produced from it.

(3) A lawyer must retain a record of the information, with applicable dates, and any documents obtained or produced for the purposes of

(a) Rule 3-100 *[Requirement to identify client]*,

(b) Rule 3-103 *[Requirement to identify directors, shareholders and owners]*,

(c) Rule 3-102 (2) *[Requirement to verify client identity]*, or

(d) Rule 3-104 *[Use of an agent for client verification]*.

(4) The lawyer must retain information and documents referred to in subrule (3) for the longer of

(a) the duration of the lawyer and client relationship and for as long as is necessary for the purpose of providing services to the client, and

(b) a period of at least 6 years following completion of the work for which the lawyer was retained.

Criminal activity, duty to withdraw

3-109 (1) If, in the course of obtaining the information and taking the steps required in Rule 3-100 *[Requirement to identify client]*, 3-102 (2) *[Requirement to verify client identity]*, 3-103 *[Requirement to identify directors, shareholders and owners]* or 3-110 *[Monitoring]*, or at any other time while retained by a client, a lawyer knows or ought to know that he or she is or would be assisting a client in fraud or other illegal conduct, the lawyer must withdraw from representation of the client.

(2) This rule applies to all matters for which a lawyer is retained before or after this division comes into force.

Monitoring

3-110 (1) While retained by a client in respect of a financial transaction, a lawyer must monitor on a periodic basis the professional business relationship with the client for the purposes of

(a) determining whether the following are consistent with the purpose of the retainer and the information obtained about the client under this division:

(i) the client's information in respect of their activities;

(ii) the client's information in respect of the source of the money used in the financial transaction;

(iii) the client's instructions in respect of transactions, and

(b) assessing whether there is a risk that the lawyer may be assisting in or encouraging dishonesty, fraud, crime or other illegal conduct.

(2) A lawyer must keep a record, with the applicable date, of the measures taken and the information obtained under subrule (1) (a)..

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

The Law Society of British Columbia

Amendments to Rule 4-55 (Investigation of Books and Accounts): Policy Considerations

June 27, 2019

Prepared for: Benchers

Prepared by: Executive Committee

Purpose: Decision

Introduction

1. This memorandum presents and analyses concerns, raised by the Investigations, Monitoring and Enforcement ("IME") department with respect to Rule 4-55, that have been considered by the Executive Committee. The concerns relate to: (1) Executive Director designations and (2) the time period allotted to a lawyer who wishes to request certain records be excluded from an investigation.

Executive Director Designations

I. Issue and Recommendation

2. Rule 4-55(1) states that:

    a. If the chair of the Discipline Committee reasonably believes that a lawyer or former lawyer may have committed a discipline violation, the chair may order that an investigation be made of the books, records and accounts of the lawyer or former lawyer, including, if considered desirable in the opinion of the chair, all electronic records of the lawyer or former lawyer.

3. Rule 4-55(6)(a) also provides that when an order is made under subrule (1) *the Executive Director must designate one or more persons to conduct an investigation*. This provision creates a specific regulatory requirement that the Executive Director designate a person to investigate after the order is made, rather than is the case in other provisions in the rules where the Executive Director is specified as the person who must investigate (for example, a complaint), which then triggers the provisions on Executive Director delegations, allowing the Executive Director to choose and, if necessary, alter the delegation without having to get a new order.

4. The IME department raised the following concerns with regard to these provisions – and in particular with the requirement that the Executive Director must specifically designate a person to conduct an investigation:

    - The requirement adds a procedural layer that serves no apparent purpose;
    - There is no corresponding requirement under section 36 of the *Legal Profession Act* (the enabling provision for Rule 4-55);
    - Compliance can be hindered by staffing changes (departure of a designated individual), which in turn could prejudice an investigation;

    and suggested that the provisions could be simplified by repealing Rule 4-55(6)(a) and amending Rule 4-55(1) to state, for example, "the chair may order that the Executive Director investigate the books, records and accounts …"

5. If this were done, Rule 4-55(3) would require a consequential amendment. Currently a lawyer must send a record exclusion request "*to a person designated* under subrule (6) [Emphasis added]. With the proposed change to subrule (6), however, such a request would instead be made *to the Executive Director*.

II. Discussion

6. The Executive Committee considered the concerns raised by the IME department as highlighted in the section above. In addition, the IME department cited an inconsistency with the process for complaint investigations. To that end, Rule 3-5(1) states that "the Executive Director may, and on the instruction of the Discipline Committee must, investigate a complaint to determine its validity." So unlike Rule 4-55 investigations, the Executive Director is not required to designate specific individuals to conduct complaint investigations.

7. Moreover, Rule 1-44.1 authorizes the Executive Director's "delegate" (defined as including staff when acting in the scope of their employment) to exercise the power and authority of the Executive Director. Hence, unlike investigations under Rule 4-55, complaint investigations can be conducted by staff without the procedural step of a designation.

8. The IME department commented, and the Executive Committee agreed, that there could be a perceived value in requiring Rule 4-55 investigators to be designated, in that the Executive Director can select whomever he/she believes would be most suitable. However, that process is not consistent with the investigation procedures under Rule 3-5. The Committee therefore agreed that it seems inefficient and unfair that, to obtain authority to conduct an investigation in the scope of their employment, certain employees are subject to an extra procedural requirement. Currently, there is a two-step process: the order must be made and the Executive Director must designate. The Committee agreed that a two-step process adds a layer of unnecessary process, and not only does it take more time at the outset, delay can also occur if a designated person leaves their position or is otherwise unavailable when required, because then a new designation needs to be recorded. That process would be obviated by appointing the Executive Director to investigate at the outset, which allows any employee contemplated under Rule 1-44.1(2) to undertake the investigation.

9. Accordingly, to enhance efficiency and ensure that investigative procedures are equitably applicable to staff, the IME department noted, and the executive Committee agreed, that it would be beneficial to amend the appropriate provisions in Rule 4-55.

Record Exclusion Request

I. Issue and Recommendation

10. Another concern raised by the IME department that was considered by the Committee relates to when a lawyer makes a request pursuant to Rule 4-55(2) to exclude personal records that are not relevant to the investigation.

11. Under Rule 4-55(3), a lawyer must make such a request within 7 days of receiving an investigation order. However, the Committee was told that IME department has observed that, on a number of occasions, lawyers have needed more time, with some taking as long as several weeks to review their records. Recognizing that in many cases a 7 day period is perhaps too short a period of time for a lawyer to be able to review all of the identified records and to make a request under Rule 4-55(3), the IME department has suggested increasing the time for making exclusion requests to within 21 days of receiving a copy of an investigation order.

12. As noted in the section above, if Rule 4-55(6) is amended, Rule 4-55(3) would need a consequential amendment that requires record exclusion requests to be made *to the Executive Director*, rather than to a designate.

II. Discussion

13. The Committee was advised that time extensions under this Rule are asked for by lawyers, and the usual practice is that such extensions are granted. In light of this, the IME department reported that a 7 day period of response might be unreasonable as lawyers are currently having some difficulty complying with that timeframe.

14. In particular, the Committee was told that it appears many lawyers faced with the requirements in Rule 4-55 cannot undertake comprehensive record reviews within one week. This is likely because the amount of records a given lawyer reviews depends on various factors, including, for example, firm size, area of practice and the nature of a complaint. Investigations are more complicated with the proliferation of electronic devices. The quantity of documents and other information that can be stored on such devices increases the complexity of orders under s. 4-55. Moreover, the practice, which is now more and more prevalent, of obtaining copies of lawyers' smartphones, which are often dual-use devices that contain a great deal of personal (and therefore not relevant to the investigation) information increases the work necessary in order to comply properly with the order. This increases the length of time if a thorough job is to be done. Added to this is that if counsel is retained (which is to be encouraged), it takes time for the lawyer investigated to bring their lawyer up to speed.

15. Of course, increasing the time limit could create incentives for a lawyer to unnecessarily prolong the process, despite being otherwise able to comply within 7 days. Even so, the

IME department noted, and the Committee agreed, that the regularity of extensions that are being granted suggests that it is unfair to maintain a rule that benefits a minority, especially since some lawyers would, despite having more time, still make requests before a longer period of time had expired.

16. Another identified concern relates to the perception that may be generated by the current practice of providing extensions. In this regard, the worry is that by frequently granting extra time so early in the investigative process, respondent lawyers could view the Law Society enforcement of the rules as being "lax." If that happens, some lawyers may develop an expectation that there should be latitude with other obligations during the investigative process. Notwithstanding that there are instances where flexibility with compliance is justified, if leeway were to be viewed as customary, the Law Society's regulatory enforcement processes could come to be viewed as more permissive than they actually are. This could cause future delays in investigations, and lead to unnecessary further conduct violations due to non-compliance with the rules. In turn, public confidence in the Law Society as a regulator would be weakened.

17. To ensure that lawyers have adequate time to review their records, and to avert any negative perceptions about the Law Society's regulatory capabilities, the Committee agreed that there is a reasonable rationale for increasing the amount of time that is allotted for making record exclusion requests. The Committee agreed that a 21 day, instead of a 7 day, period made some sense, but wanted to ensure that the new rule made it clear that extensions of the new time period would only be granted in exceptional circumstances in order to avoid the new period becoming a base from which all lawyers would seek an extension.

Summary of recommendations

18. Three recommended amendments to Rule 4-55 are suggested:

    i. Amend Rule 4-55(1) to state, for example, that "the chair may order that the Executive Director investigate the books, records and accounts."

    ii. Repeal Rule 4-55(6)(a).

    iii. Amend Rule 4-55(3), replacing "7 days" with a longer period of time, such as "21 days," as well as to require that the request be made in writing to the Executive Director, and to clarify that extensions would only be granted in exceptional circumsatnces.

Impacts

(a) Public Interest

19. The proposed amendments do not change the substantive intent of Rule 4-55. The public interest purpose of ensuring a method through which to access necessary records for regulatory purposes while also permitting privacy interests of the lawyer being investigated in personal information not bearing on the investigation remains intact. Consequently, the public interest ought not to be adversely affected by the amendments. Arguably, the proposed amendments make the rule more defensible and therefore less likely to be challenged as imposing unreasonable time limits, which can be rationalized as being in the overall public interest as well.

(b) Fairness to regulation

20. The proposed amendments will give lawyers a better opportunity to obtain advice and to make a more thorough review of their records to identify personal, non-relevant material. To that extent, the amendments are also in the interests of lawyers while not being contrary to the overall public interest.

(c) Program Impacts, costs and benefits

21. Benefits to the proposed amendments include investigators receiving fewer requests to extend the period of time permitted to make a request to exclude personal records that are not relevant to the investigation. While these are not currently made very often, as noted in the Discussion section above, each time a request is granted, an appearance could be given that the Law Society enforcement of the rules is being lax or permissive. However, faced with what might be argued as an impractical time frame, extensions are usually granted. Therefore the amendments benefit the program by creating a more practical time frame and allowing investigators to better apply the rule.

22. It is not anticipated that the proposed amendments will materially increase the costs of the investigations. They could actually decrease the costs by allowing the focus to be on production of records rather than on considerations of time periods and extensions.

Conclusion

23. The Executive Committee recommend, in principle, to amend the aforesaid rules. If the Benchers approve the recommendation, the matter will be referred to the Act and Rules Committee to prepare rules to implement the policy direction.

The Law Society of British Columbia

Quarterly Financial Report

May 31, 2019

Prepared for: Finance & Audit Committee Meeting – July 11, 2019
Bencher Meeting – July 12, 2019

Prepared by: The Finance Department

Quarterly Financial Report – to the end of May 2019

Attached are the financial results and highlights to the end of May 2019.

The second quarter results to the end of June 2019 are not available due to the timing of the FAC and Bencher meetings.

General Fund

General Fund (excluding capital and TAF)

The General Fund operations resulted in a positive variance to budget mainly due to additional practice fee revenue, the timing of expenses, along with some permanent expense savings, primarily with external counsel fees.

Revenue

Revenue to date was $11,804,000, $479,000 (4%) over budget, due primarily to a higher than expected practice fee revenues and D&O insurance recoveries.

Operating Expenses

Operating expenses to date were $9,936,000 (9%) below budget due the timing of some expenditures, but this also includes permanent savings in external counsel fees and compensation costs which is expected to continue to year end.

2019 Forecast - General Fund (excluding capital and TAF)

At this time, we are forecasting to be ahead of budget in key revenue areas, including practice fee revenue, PLTC student revenues, D&O insurance recoveries, along with expense savings, mainly in external counsel fees. With revenue ahead by $830,000 and expense reductions of $900,000, the forecast is a positive variance of $1,730,000. As there was a deficit budgeted in 2019, the 2019 forecast is a surplus of $515,000.

Operating Revenue

We are currently projecting revenue to be ahead of budget by $830,000.

Practice fee revenue is projected to be ahead of budget by $255,000, with the current projection of FTE lawyers at 12,533, compared to a budget of 12,383. There is a significant increase in the number of PLTC students, resulting in increased PLTC revenue of $315,000. Additionally, we have received $225,000 in D&O insurance recoveries, and we are projecting an additional $60,000 in interest income due to higher cash balances held.

Operating Expenses

Operating expenses are projected to be favorable by $900,000 for the year. Savings primarily relate to external counsel fees, which are quite variable from year to year. With the increased number of citations in 2018, there was $1.115 million in reserve spending approved for Discipline external counsel fees. This is now projected at $820,000 by year end, resulting in a positive variance of $300,000 to budget. In addition, we project there will be additional external counsel fee savings of $200,000 in the legal defence area. The 2019 budget also included a contingency for external counsel fees of $200,000, which is not expected to be used at this time. There will be savings of $175,000 in external forensic accounting fees as all files have been kept in-house, and $80,000 in savings for HR related recruitment and consulting costs. These savings are partially offset by an increase in PLTC costs of $155,000 related to the increase in students.

TAF-related Revenue and Expenses

At May 31, 2019, TAF revenue from the first quarter is $840,000, $170,000 below the budget with a significant decrease in real estate unit sales. The Canadian Real Estate Association is forecasting a decrease in unit sales of 13% for 2019, so we are forecasting TAF revenue to be below budget for the year by a similar percentage. Trust assurance program costs are expected to be close to budget.

Special Compensation Fund

In 2017, pursuant to Section 50 of the Legal Profession Amendment Act, the unused reserves of the Special Compensation Fund was transferred to the Lawyers Insurance Fund, with a small amount held back to pay for anticipated costs related to document production for past files.

Lawyers Insurance Fund

LIF assessment revenues were $6.9 million in the first two months of the year, slightly ahead of budget.

LIF operating expenses were $2.6 million compared to a budget of $3.4 million, with savings primarily related to staff vacancies, a reduced requirement for external counsel fees and reduced costs for the member assistance program.

The market value of the LIF long term investment portfolio is $181.8 million. The LIF long term investment portfolio return for the first 5 months of the year was 7.0%, similar to the benchmark return. This is significantly higher than the budgeted amount of 5% for the entire year, resulting in additional investment income in the first five months.

The Law Society of British Columbia

Summary of Financial Highlights - May 2019
($000's)

2019 General Fund Results - YTD May2019 (Excluding Capital Allocation & Depreciation)

	Actual*	Budget	$ Var	% Var
Revenue (excluding Capital)				
Practice fees	9,280	8,954	326	4%
PLTC and enrolment fees	488	468	20	4%
Electronic filing revenue	295	350	(55)	-16%
Interest income	236	206	30	15%
Credentials & membership services	251	244	7	3%
Fines, penalties & recoveries	319	213	106	50%
Other revenue	348	347	1	0%
Building revenue & tenant cost recoveries	587	543	44	8%
	11,804	11,325	479	4%
Expenses (excl. dep'n)	9,936	10,908	972	9%
	1,868	417	1,451	

2019 General Fund Year End Forecast (Excluding Capital Allocation & Depreciation)

Practice Fee Revenue	**Avg # of Members**
2015 Actual	11,378
2016 Actual	11,619
2017 Actual	11,849
2018 Actual	12,223
2019 Budget	**12,383**
2019 Forecast	**12,533**

	Variance
Revenue	
Practice fee revenue projected to be ahead of budget (expecting 12,533 lawyers, 12,383 budgeted)	255
PLTC revenue projected to be ahead of budget, projecting 660 students vs 540 budget	315
D& O Insurance Recoveries- unbudgeted	225
Interest Income	60
Other	(25)
	830
Expenses	
Compensation savings	130
Savings in external fees related to :	
Discipline external counsel fee- reserve spending	300
External counsel fee contingency	200
Regulation external counsel fees (primarily Legal Defence)	200
Forensic Accounting fees	175
HR savings in recruitment and consultants	80
Additional PLTC expenses related to student numbers higher than budget	(155)
Other	(30)
	900
2019 General Fund Variance to Budget	1,730

Trust Assurance Program Actual

	2019 Actual	2019 Budget	Variance	% Var
TAF Revenue	840	1,010	(170)	-16.8%
Trust Assurance Department	1,342	1,381	39	2.8%
Net Trust Assurance Program	(502)	(371)	(131)	

2019 Lawyers Insurance Fund Long Term Investments - YTD May 2019 *Before investment management fees*

Performance	6.96%
Benchmark Performance	7.02%

The Law Society of British Columbia

General Fund

Results for the 5 Months ended May 31, 2019

($000's)

	2019 Actual	2019 Budget	$ Variance	% Variance
Revenue				
Practice fees **(1)**	11,459	11,155	304	3%
PLTC and enrolment fees	488	468	20	4%
Electronic filing revenue	295	350	(55)	-16%
Fines, penalties and recoveries	236	206	30	15%
Application fees	251	244	7	3%
Interest income	319	213	106	50%
Other revenue	348	347	1	0%
Building Revenue & Recoveries	587	543	44	8%
Total Revenues	13,983	13,526	457	3.4%
Expenses				
Regulation	4,072	4,472	400	9%
Education and Practice	1,679	1,871	192	10%
Corporate Services	1,188	1,237	49	4%
Bencher Governance and Board Relations and Events	537	619	82	13%
Communications and Information Services	887	933	46	5%
Policy and Legal Services	823	970	147	15%
Occupancy Costs	750	807	57	7%
Depreciation	398	470	72	15%
Total Expenses	10,334	11,378	1,044	9.2%
General Fund Results before Trust Assurance Program	**3,649**	**2,148**	**1,501**	
Trust Assurance Program (TAP)				
TAF revenues	840	1,010	(170)	100%
TAP expenses	1,342	1,381	39	2.8%
TAP Results	**(502)**	**(371)**	**(131)**	-35.3%
General Fund Results including Trust Assurance Program	**3,147**	**1,779**	**1,368**	

(1) Practice fees include a capital allocation of $2.18m (Capital allocation budget = $2.2m)

The Law Society of British Columbia

General Fund - Balance Sheet

As at May 31, 2019

($000's)

	May 31 2019	May 31 2018
Assets		
Current assets		
Cash and cash equivalents	15,231	7,471
Unclaimed trust funds	2,163	2,066
Accounts receivable and prepaid expenses	8,577	7,626
Due from Lawyers Insurance Fund	5,772	10,726
	31,743	27,889
Property, plant and equipment		
Cambie Street property	12,597	12,336
Other - net	1,600	1,552
	14,197	13,888
Long Term Loan	365	276
	46,306	**42,053**
Liabilities		
Current liabilities		
Accounts payable and accrued liabilities	2,436	2,016
Liability for unclaimed trust funds	2,163	2,066
Current portion of building loan payable	500	500
Deferred revenue	13,737	12,302
Deferred capital contributions		1
Deposits	60	55
	18,896	16,939
Building loan payable	600	1,100
	19,496	18,039
Net assets		
Capital Allocation	3,639	2,167
Unrestricted Net Assets	23,172	21,847
	26,811	24,014
	46,306	**42,053**

The Law Society of British Columbia
General Fund - Statement of Changes in Net Assets
Results for the 5 Months ended May 31, 2019

	Invested in Capital	*Working Capital*	Unrestricted Net Assets	Trust Assurance	Capital Allocation	2019 Total	Year ended 2018 Total
	$	$	$	$	$	$	$
Net assets - At Beginning of Year	12,919	5,623	18,542	2,955	2,167	23,664	20,997
Net (deficiency) excess of revenue over expense for the period	(578)	2,048	1,470	(502)	2,179	3,147	2,667
Contribution to LIF				-		-	
Repayment of building loan	500	-	500	-	(500)	-	-
Purchase of capital assets:						-	
LSBC Operations	110	-	110	-	(110)	-	-
845 Cambie	97	-	97	-	(97)	-	-
Net assets - At End of Period	**13,048**	**7,671**	**20,719**	**2,453**	**3,639**	**26,811**	**23,664**

The Law Society of British Columbia
Special Compensation Fund
Results for the 5 Months ended May 31, 2019
($000's)

	2019 Actual	2019 Budget	$ Variance
Revenue			
Annual assessment	-	-	
Recoveries	-	-	
Interest income	2	-	
Loan interest expense			
Other income	-	-	
Total Revenues	**2**	**-**	**2**
Expenses			
Claims and costs, net of recoveries	34	-	
Administrative and general costs	0	-	
Total Expenses	**34**	**-**	**34**
Special Compensation Fund Results before Contribution Lawyers Insurance Fund	**(32)**	**-**	**(33)**

The Law Society of British Columbia
Special Compensation Fund - Balance Sheet
As at May 31, 2019
($000's)

	2019 May YTD	2018 May YTD
Assets		
Current assets		
Due from Lawyers Insurance Fund	127	269
	127	**269**
Net assets		
Unrestricted net assets	127	269
	127	**269**

The Law Society of British Columbia
Special Compensation Fund - Statement of Changes in Net Assets
Results for the 5 Months ended May 31, 2019
($000's)

	2019 $	Year ended 2018 $
Unrestricted Net assets - At Beginning of Year	159	276
Net excess of revenue over expense for the period	(32)	- (117)
Unrestricted Net assets - At End of Period	**127**	**159**

The Law Society of British Columbia
Lawyers Insurance Fund
Results for the 5 Months ended May 31, 2019
($000's)

	2019 Actual	2019 Budget	$ Variance	% Variance
Revenue				
Annual assessment	6,861	6,696	165	2%
Investment income	14,901	2,132	12,769	599%
Other income	15	60	(45)	-75%
Total Revenues	21,777	8,888	12,889	145.0%
Expenses				
Insurance Expense				
Provision for settlement of claims	7,166	7,166	-	0%
Salaries and benefits	1,204	1,449	245	17%
Contribution to program and administrative costs of General Fund	560	576	16	3%
Insurance	73	194	121	62%
Office	254	546	292	53%
Actuaries, consultants and investment brokers' fees	191	264	73	28%
Premium taxes	-	4	4	100%
Income taxes	-	2	2	100%
	9,446	10,201	755	7%
Loss Prevention Expense				
Contribution to co-sponsored program costs of General Fund	283	377	94	25%
Total Expenses	9,729	10,578	849	8.0%
Lawyers Insurance Fund Results	**12,047**	**(1,691)**	**13,738**	

The Law Society of British Columbia
Lawyers Insurance Fund - Balance Sheet
As at May 31, 2019
($000's)

	2019 May YTD	2018 May YTD
Assets		
Cash and cash equivalents	10,453	18,115
Accounts receivable and prepaid expenses	378	803
Current portion General Fund building loan	500	500
LT Portion of Building Loan	600	1,100
Investments	181,775	167,602
	193,706	**188,121**
Liabilities		
Accounts payable and accrued liabilities	2,850	1,777
Deferred revenue	8,970	5,268
Due to General Fund	5,772	19,325
Due to Special Compensation Fund	127	269
Provision for claims	76,239	68,901
Provision for ULAE	10,779	9,601
	104,738	105,141
Net assets		
Internally restricted net assets	17,500	17,500
Unrestricted net assets	71,468	65,480
	88,968	82,980
	193,706	**188,121**

The Law Society of British Columbia
Lawyers Insurance Fund - Statement of Changes in Net Assets
Results for the 5 Months ended May 31, 2019

	Unrestricted $	Internally Restricted $	2019 Total $	2018 Total $
Net assets - At Beginning of Year	59,421	17,500	76,921	84,248
Net excess of revenue over expense for the period	12,047	-	12,047	(7,327)
Net assets - At End of Period	**71,468**	**17,500**	**88,968**	**76,921**

The Law Society of British Columbia

Equity, Diversity and Inclusion Advisory Committee - Mid-Year Report

Jasmin Ahmad (Chair)
Jennifer Chow, QC (Vice Chair)
Beatriz Contreras
Jeevyn Dhaliwal
Tina Dion, QC [until May, 2019]
Brook Greenberg
Jamie Maclaren, QC
Elizabeth Rowbotham

June 18, 2019

Prepared for: Benchers

Prepared by: Equity Diversity and Inclusion Advisory Committee

Purpose: Information

Introduction

1. The Equity Diversity and Inclusion Advisory Committee is one of the advisory committees appointed by the Benchers to monitor issues of importance to the Law Society and to advise the Benchers in connection with those issues. From time to time, the Committee is also asked to analyze policy implications of Law Society initiatives, and may be asked to develop recommendations or policy alternatives regarding such initiatives.

2. The purpose of this report is to update the Benchers about the work the Committee has undertaken for the first half of 2019.

3. The Committee has met on January 24, February 28, April 4, May 2, and June 5, 2019. The Committee has discussed the following matters between January and June, 2019.

Justicia

4. The Justicia Project (facilitated by the Law Society of British Columbia and undertaken by law firms) has been actively underway in British Columbia since 2012. Representatives from the Justicia firms have developed model policies, best practice guides, and video vignettes which are available on the Law Society's website.

5. Representatives from the law firms participating in the Justicia Project met on January 29, 2019 to identify priorities for 2019, including supporting women's re-entry to practice and collecting demographic data from each Justicia firm to compare against the data collected during the launch of Justicia in BC to measure progress.

Equity Diversity and Inclusion in Governance

6. This Committee has forwarded recommendations to foster equity and diversity in Law Society leadership roles for consideration by the Governance Committee.

Equity Diversity and Inclusion Audit

7. The Equity Diversity and Inclusion Advisory Committee is requesting the Benchers' approval for the retention of an independent firm to conduct an equity, diversity and inclusion (EDI) audit. The goals of an EDI audit would be to: 1) establish benchmarks for diversity within the organization, and 2) identify the Law Society's strengths and areas for improvement in relation to advancing its EDI goals. The data gathered in an EDI audit would help to inform policy options to enhance EDI throughout the organization. The request will be considered at a future Bencher meeting.

Name Change

8. The Committee recommended changing the name of the "Equity and Diversity Advisory Committee" to the "Equity Diversity and Inclusion Advisory Committee" to signal its efforts to improve inclusivity within the Law Society and the legal profession. The Benchers approved the name change at the June 8, 2019 Bencher meeting.

Terms of Reference

9. The Committee has compared its terms of reference against the terms of reference of other advisory committees. The Committee has observed that its advisory powers are subject to direction from the Benchers or Executive Committee, whereas the advisory powers of some other committees are not. The Committee intends to analyze the issue further to determine whether amendments to the Committee's terms of reference are warranted.

Diversity Portrayals

10. The Committee has considered ideas for increasing the visibility of diverse lawyers, and has proposed that photographs from Call Ceremonies should be featured on the Law Society's website. The Committee will work with Law Society staff to implement this idea.

Equity, Diversity and Inclusion Resources for Law Firms

11. The Committee has discussed the need to increase the availability of resources to support law firms in their efforts to promote equity, diversity and inclusion. Representatives from the Committee are working with Law Society staff to improve the accessibility of such resources on the Law Society's website. The idea of a lecture series was raised, but the Committee is awaiting a recommendation from the Law Firm Regulation Task Force before developing the idea further.

Return to Practice Provisions

12. The Committee has compared the Law Society of BC's timelines regarding change in practice status with those of other law societies in Canada. Most law societies (i.e. Alberta, Ontario, Nova Scotia, New Brunswick, Prince Edward Island, Yukon, Northwest Territories, Nunavut, and Quebec) are similar to BC in allowing lawyers to be away from practice for up to three years before a closer analysis of their competence and the possibility of requalification is triggered. The Committee will continue its assessment of the return to

practice provisions in the Law Society Rules to evaluate whether they pose systemic barriers for certain segments of the profession (e.g. lawyers who take parental or medical leaves).

13. A Parental Leave Subcommittee comprised of members from this Committee will continue to investigate options for practical assistance that may facilitate the return to practice by lawyers who have taken parental leaves.

Systemic Issue with Qualification as Principal

14. The Justicia Diversity Officers brought a systemic issue to the Committee's attention: to be eligible to serve as a principal under Rule 2-57, a lawyer must have been in active practice of law in Canada for at least 5 of the 6 years immediately preceding the articling start date. This Rule precludes many lawyers who have taken parental leave during this timeframe from serving as principals. The Rule likely has a disproportionate impact on women because more women than men take parental leaves, and women tend to take longer parental leaves than men.[1] The Committee will further analyze Rule 2-57 with a view to developing a recommendation to present to the Benchers for consideration later this year.

Gowning Policy Accommodation

15. The Justicia Diversity Officers shared details of an Ontario Court of Appeal Directive that provides robing accommodation for counsel who are pregnant when appearing before the Court of Appeal. The Committee determined that it is not within the parameters of the Law Society's role to request such accommodation from the Court, and identified a more appropriate organization to raise that matter with the Court.

Legal Equity and Diversity Roundtable (LEADR)

16. LEADR is a forum for associations and individuals from diverse groups of legal practitioners to collaborate, support each other, share best practices and issues of common concern, and identify opportunities to make the legal profession more inclusive and welcoming. A representative from the Equity Diversity and Inclusion Advisory Committee has been attending LEADR meetings to monitor the issues and initiatives that are being discussed at these meetings.

[1] For example, a 2012 Statistics Canada study reported that 83% of women take paid parental leave, but only 13% of men do. Men take an average of 2.4 weeks; women take more than 40.

Demographic Data

17. On the recommendation of this Committee, the Executive Committee amended the Annual Practice Declaration in 2013 to include a question on the demographic composition of the legal profession in British Columbia. The responses for 2017 and 2018 are as follows:

Lawyer Demographics	**2017**		**2018**	
	Responses	**Percent**	**Responses**	**Percent**
Aboriginal/Indigenous – First Nations, Metis, Inuit	328	2.67%	321	2.59%
I choose not to answer	2673	21.8%	2863	23.12%
I do not identify with any of these characteristics	6847	55.84%	6693	54.05%
Lesbian/Gay/Bisexual/Transgender	390	3.18%	391	3.16%
Person with a Disability	228	1.86%	233	1.88%
Visible Minority/Racialized/Person of Colour	1789	14.59%	1880	15.18%
Total Responses	**12262**		**12382**	

18. There have been a number of requests from lawyers and the public for the Law Society's demographic data. The Committee recommends that the demographic data should be included in the Law Society's Annual Report.

The Law Society of British Columbia

Lawyer Education Advisory Committee - Mid-Year Report

Tony Wilson, QC, Chair
Sarah Westwood, Vice-Chair
Barbara Cromarty
Celeste Haldane, QC
Rolf Warburton
Michael Welsh, QC
Heidi Zetzsche

July 12, 2019

Prepared for: Benchers

Prepared by: Lawyer Education Advisory Committee

Purpose: Information

Introduction

1. The Lawyer Education Advisory Committee's Mid-Year Report to the Benchers summarizes the Committee's work in the first half of 2019.

2. The foundation for the Committee's work is included in section 3 of the *Legal Profession Act*:

> *It is the object and duty of the society to uphold and protect the public interest in the administration of justice by …*
>
> *(c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission …*
>
> *(e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.*

3. In the first half of this year, the Committee has focused on the review of the Admission Program, as well as consultations with both the Mental Health Task Force and the Truth and Reconciliation Advisory Committee ("TRC Advisory Committee"). Accordingly, as detailed below, the Committee's work has also been guided by the Law Society's 2018-2020 Strategic Plan, the Truth and Reconciliation Commission's Calls to Action, the Law Society's Truth and Reconciliation Action Plan (the "TRC Action Plan"), as well as the recommendations flowing from the Mental Health Task Force's First Interim Report.

Admission Program review

4. The Law Society's 2018-2020 Strategic Plan mandates the review of the Admission Program, with a focus on the examination of the articling program:

> We will ensure, bearing in mind the mobility of lawyers within Canada, that the Admission Program remains appropriate and relevant by
>
> • Examining the availability of Articling positions and develop a Policy and proposals on access to Articling positions and remuneration.
>
> • Examining the effectiveness of Articling and develop proposals for the enhancement of Articling as a student training and evaluation program.

• Examining alternatives to Articling

5. Guided by a detailed research plan developed in 2018, the Committee's recent work has focused on the dissemination of the Admission Program review survey (the "survey"), which was approved by the Executive Committee at the end of last year.

6. In January, the survey was distributed by email to all one to three year calls in BC. The survey addressed each of the areas of inquiry identified in the research plan, including the effectiveness of the Admission Program, the quality of the articling experience, the availability of articles, the different approaches to remuneration and the development of range of competencies by students. The survey also sought information on respondents' experiences with mental health, discrimination and harassment issues during the articling period.

7. The survey elicited 191 responses from a sample size of 800, meeting the threshold of statistical significance. Respondents were forthcoming and candid with their feedback, and have provided a large body of data that will play an important role in improving the Law Society's understanding of how the Admission Program is currently operating, including its strengths, and areas where improvements or adjustments may be required.

8. Staff are currently completing a high-level analysis of these results, and identifying themes that will be explored in more detail in a series of regional focus groups planned for the next phase of the review process.

9. In addition to a review of BC's articling program, the Committee also discussed the Law Society of Ontario Benchers' decisions in relation to the Law Society's O*ptions for Lawyer Licensing* report,[1] released in late 2018. Following that report, Ontario's Benchers voted in favour of retaining the two current transitional pathways to the profession in Ontario — articling and the Law Practice Program ("LPP") — with a series of enhancements, including setting a required baseline salary for articling and LPP work placements, introducing audits or other forms of monitoring for greater oversight of articling and LPP work placements, and implementing mandatory education and training for articling principals and LPP work placement supervisors.

[1] See Law Society of Ontario, Professional Development and Competence Committee, "Options for Lawyer Licensing" (December 2018), online at: https://lawsocietyontario.azureedge.net/media/lso/media/about/convocation/2018/convocation-dec-2018-professional-regulation-committee-report_1.pdf

Pro bono for CPD credit

10. Earlier this year, the Committee presented its recommendation to the Benchers on the eligibility of pro bono work for CPD credit.

11. The recommendation represented the culmination of three years of work by the Committee, involving a substantial and comprehensive consideration of various policy arguments for and against providing CPD credit for pro bono activities. These efforts included consultation with the Access to Legal Services Advisory Committee, research into the approaches taken by other jurisdictions, and a review of academic articles and numerous memoranda prepared by the Law Society's policy and legal services staff.

12. The Committee ultimately recommended that CPD credit should not be provided for pro bono work on the basis that it does not adequately meet the objectives of the CPD program. The recommendation was accompanied by a detailed memorandum providing rationales both in support of, and opposed to the accreditation of pro bono work. After a robust discussion at the Bencher table, the Committee's recommendation was approved.

Consultation with the Mental Health Task Force

13. In December 2018, the Benchers approved the recommendations made by the Mental Health Task Force in its First Interim Report. This included recommendation 10:

> Collaborate with the Lawyer Education Advisory Committee to explore the merits of the Law Society introducing a mandatory CPD requirement for mental health and substance use disorder programming

14. Consultation on this issue began in late February 2019, with the Committee benefitting from a comprehensive presentation by Brook Greenberg, Chair of the Mental Health Task Force, outlining the rationales for mandatory CPD in this area.

15. In addition to the presentation, the Mental Health Task Force provided the Committee with a consultation package that included a number of relevant materials, including American Bar Association Resolution 106, which advocates for lawyers receiving an hour of mental health or substance use disorder programming every three years, as well as the recommendations made by the US National Task Force on Lawyer Well-Being on mandatory continuing legal education on these issues. The rules of other jurisdictions that have adopted mandatory mental health and substance use disorder continuing legal education were also included in the consultation package.

16. The Committee will revisit these materials in the latter portion of the year, and provide the Mental Health Task Force with its recommendation on mandatory CPD in this area.

Collaboration with the Truth and Reconciliation Advisory Committee

17. In recent months, the primary focus of the Committee's work has been collaborating with the TRC Advisory Committee on the issue of cultural competence education for BC lawyers.

18. This work follows changes to the CPD program that were introduced in 2018,[2] which resulted in a number of topics that fall within the ambit of Call to Action 27 becoming eligible for credit. This includes the creation of the new practice management topic "multicultural, diversity and equity issues that arise within the legal context," and the creation of a new subject matter area "educational activities that address knowledge primarily within the practice scope of other professions and disciplines, but are sufficiently connected to the practice of law." Programming covering substantive legal topics that include Indigenous content also continues to be accredited.

19. However, both the TRC Advisory Committee and the Lawyer Education Advisory Committee recognized then, as they do now, that these changes to the CPD program are not enough to satisfy the Law Society's obligation in relation to Call to Action 27, specifically as it relates to lawyer learning in the area of cultural competency.

20. Call to Action 27 states:

> We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

21. The 2018-2020 Strategic Plan also prioritizes the identification and implementation of appropriate responses to the Calls to Action, including "encouraging all lawyers in British Columbia to take education and training in areas relating to Aboriginal law."[3]

22. Additionally, in June 2018, the Benchers adopted the TRC Action Plan, which commits the Law Society to addressing the Calls to Action, and recognizes the Law Society's moral and

[2] Final CPD Review Report (December 2017), online at: https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/LawyerEd-CPD_2017.pdf
[3] Law Society of BC 2018-2020 Strategic Plan, online at: https://www.lawsociety.bc.ca/Website/media/Shared/docs/about/StrategicPlan_2018-2020.pdf

ethical obligation to advance truth and reconciliation.[4] Item 4 of the TRC Action Plan emphasizes the Law Society's duty to improve the cultural competence of lawyers in BC, and enumerates ways that this goal can be achieved:

> The Law Society of British Columbia will improve the intercultural competence of Law Society Benchers, staff, and committee members, and all lawyers and Admission Program candidates in British Columbia by:
>
> i. Mandating Indigenous intercultural competence education for all Law Society Benchers, staff, and committee members, and all lawyers and Admission Program candidates in British Columbia;
>
> ii. Clarifying criteria, standards, and best practices for intercultural competence education;
>
> iii. Cataloguing Indigenous legal course offerings that are available to BC lawyers;
>
> iv. Collaborating with appropriate legal and Indigenous organizations and law firms to:
>
> a. Develop and distribute appropriate intercultural competence educational resources (e.g. online tools and best practice guides) in light of the TRC calls to action; and
>
> b. Support the training of intercultural competence educators (e.g. "train the trainers" session for Indigenous lawyers who are interested in learning how to facilitate a "Blanket Exercise").
>
> v. Facilitating the dissemination of existing educational resources (e.g. the Truth and Reconciliation Symposium proceedings and "But I was Wearing a Suit" videos); and
>
> vi. Reviewing the "continuing professional development" requirements in light of the TRC calls to action.

23. Accordingly, in May 2019, the Lawyer Education Advisory Committee and the TRC Advisory Committee held a joint meeting to discuss the development of a recommendation to the Benchers regarding the role that the CPD program and/or an alternate educational approach

[4] Truth and Reconciliation Action Plan, online at: www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/TruthandReconciationActionPlan2018.pdf

outside the CPD program could fulfil in achieving the Law Society's goals and duties in relation to Call to Action 27.

24. At that meeting, the TRC Advisory Committee provided the Lawyer Education Advisory Committee with valuable input regarding their discussions about, and potential options for, improving the cultural competence of BC lawyers.

25. Following a review of this material, the Lawyer Education Advisory Committee's June and July agendas focus exclusively on the issue of cultural competence education.

26. In undertaking this work, the Committee is working with the TRC Advisory Committee to explore a range of issues, including: clarifying the objectives of cultural competence education; defining the content and scope of cultural competence education; establishing who should receive cultural competence education; determining whether cultural competence education should be mandatory or voluntary; determining whether cultural competence education should fall within the CPD program and/or exist outside of the CPD program; discussing possible delivery mechanisms for cultural competence education; and considering the appropriate amount and frequency of cultural competence education.

27. Over the coming months, the two Committees will continue with these collaborative efforts, with the goal of developing a joint recommendation to present to the Benchers in the fall.

Conclusion and next steps

28. To date, 2019 has been a year marked by consultation for the Lawyer Education Advisory Committee: with the membership as part of the Admission Program review survey, with the Mental Health Task Force in relation to mental health and substance use disorder CPD programming, and with the TRC Advisory Committee on the issue of cultural competence training for BC lawyers.

29. The Committee plans to build on these consultations, with a particular focus on finalizing a recommendation to the Benchers on cultural competence training, and producing a preliminary report on the first phase of the review of the Admissions Program.

The Law Society of British Columbia

Rule of Law and Lawyer Independence Advisory Committee – Mid-Year Report

Jeff Campbell, QC (Chair)
Christopher McPherson, QC (Vice-Chair)
Jennifer Chow, QC
W. Martin Finch, QC
Mark Rushton
Jon Festinger, QC
The Honourable Marshall Rothstein, QC
Patrick Kelly

June 30, 2019

Prepared for: Benchers

Prepared by: Rule of Law and Lawyer Independence Advisory Committee

Purpose: Information

Introduction

1. The Rule of Law and Lawyer Independence Advisory Committee is one of six advisory committees appointed by the Benchers to monitor issues of importance to the Law Society and to advise the Benchers on matters relating to those issues. From time to time, the Committee is also asked to analyze policy implications of Law Society initiatives, and may be asked to develop the recommendations or policy alternatives regarding such initiatives.

2. The lawyer's duty of commitment to his or her client's cause, and the inability of the state to impose duties that undermine that prevailing duty, have been recognized as a principle of fundamental justice.[1] The importance of lawyer independence as a principle of fundamental justice in a democratic society, and its connection to the support of the rule of law, has been explained in past reports by this Committee and need not be repeated at this time. It will suffice to say that the issues are intricately tied to the protection of the public interest in the administration of justice, and that it is important to ensure that citizens are cognizant of this fact.

3. The Committee's mandate is:

    - to advise the Benchers on matters relating to the Rule of Law and lawyer independence so that the Law Society can ensure

        - its processes and activities preserve and promote the preservation of the Rule of Law and effective self-governance of lawyers;

        - the legal profession and the public are properly informed about the meaning and importance of the Rule of Law and how a self-governing profession of independent lawyers supports is a necessary component of the Rule of Law; and

    - to monitor issues (including current or proposed legislation) that might affect the independence of lawyers and the Rule of Law, and to develop means by which the Law Society can effectively respond to those issues.

4. The Committee met on January 23, March 14, April 3, May 1 and July 10, 2019.

5. This is the mid-year report of the Committee, prepared to advise the Benchers on its work to date in 2019 and to identify issues for consideration by the Benchers in relation to the Committee's mandate.

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[1] *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401

Topics of Discussion in 2019

I. Increasing Public Awareness of the importance of the Rule of Law

6. The Committee has continued efforts to advance both the profession's and the public's understanding of the importance of the rule of law. Its primary activities to this end have been undertaken through the continuation of a yearly lecture series and high school essay contest.

a. Rule of Law Lecture

7. The Committee hosted the Law Society's third annual Rule of Law Lecture on June 25 at the UBC Downtown campus. The Lecture, which was entitled "Privacy, Technology and the Rule of Law," included presentations by The Right Honourable Beverley McLachlin, who served as the 17th Chief Justice of the Supreme Court of Canada, and Richard Peck, QC, a Life Bencher of the Law Society and the founding partner of Peck and Company.

8. The Lecture was attended by approximately 225 people and has received very favourable comments. Like last year, the event was webcast live, and a further 58 viewers participated through that medium. A video of the entire Lecture will be posted on the Law Society website.

9. The Committee plans to undertake a fourth lecture next year, and will give some attention to possible topics and speakers later in 2019.

b. High School Essay Contest

10. The Committee completed its fourth essay contest for high school students. This year's topic was:

> *How would you explain the concept of the rule of law to a new classmate who recently arrived in Canada? Please provide examples of its application to our daily lives, which may include a discussion of any current challenges or threats to the rule of law.*

11. The contest was open to currently enrolled high school students in British Columbia who were taking, or had taken, Civic Studies 11 or Law 12.

12. A smaller number of essays were received this year in past years. Judging of the essays was done by a panel comprised of Jeff Campbell QC, Jennifer Chow, QC and Professor Michelle Lawrence, from the Faculty of Law at the University of Victoria.

13. In previous years, the panel has selected a winner and runner-up. This year, however, the panel chose two co-winners. Presentations are to be made to both winners at the July 12, 2019 Bencher meeting, and their essays will be published on the Law Society website.

14. The Committee will soon start the planning process for next year's contest.

II. Public Commentary on the Rule of Law

15. In mid-2015, the Benchers approved the Committee's proposal that it publicly comment on issues relating to the Rule of Law. The recommendation resulted from the Committee's conclusion that, in the course of undertaking its monitoring function, it often identifies news stories or events that bring attention to the rule of law, or lack thereof, and exemplify the dangers to society where it is either absent, diminished or, perhaps, threatened, from which the Committee could usefully select appropriate instances for comment.

16. The Committee re-examined its public commentary role in the context of whether it should be commenting more frequently, particularly on domestic matters. To date, the tendency has been to comment on the rule of law in foreign jurisdictions. However, given the recent increase in Canadian rule of law concerns, the Committee determined that it would be sensible to focus greater attention on the prospect of commenting on domestic problems.

17. The Committee has been monitoring two high-profile rule of law issues that have garnered widespread attention in Canada this year, one which centres on prosecutorial independence and the other on extradition. The former arose in the context of the SNC-Lavalin affair. While the Committee established that it would be inappropriate to comment on whether any wrongdoing occurred, they did write an article about the dual role of the Attorney General/Minister of Justice and how that structure may, in certain circumstances, lead to conflicts. The article, titled "Prosecutorial Independence and the Rule of Law," was recently publish on Slaw.

18. The Committee (with the exception of the Chair, who recused himself from this discussion) also discussed rule of law issues that were engaged in the extradition matter involving Meng Wanzhou, Huawei's Chief Financial Officer.

III. Meetings with Other Groups

19. Last year the Committee met with Gail Davidson, a Director at Lawyers Rights Watch Canada. This year, Ms. Davidson asked the Committee if it would be interested in meeting a lawyer named Edre U. Olalia from the Philippines who was planning to visit Canada and who was interested in meeting with Law Society representatives to discuss his experiences with rule of law challenges in his home country.

20. On May 8, 2019, Committee members Jeff Campbell and Jon Festinger met with Mr. Olalia, who is a human rights lawyer from the Philippines and President of the National Union of Peoples' Lawyers. They discussed reports from that region regarding the political persecution of lawyers, including the reported killings of over 30 lawyers in recent years. Further information can be found at https://iadllaw.org/.

21. On May 10, 2019, Mr. Campbell and Craig Ferris, QC (a past Chair of the Committee), met with a delegation of judges and journalists from the Ukraine. There was a general discussion of

issues related to the rule of law and independence of the judiciary and legal profession in the Ukraine, which faces some challenges on these subjects. The delegation was particularly interested in the role of the bar in defending the judiciary in the faces of unfair criticisms.

IV. Amendments to the Civil Resolution Tribunal Amendment (Bill 22)

22. Last year the Committee prepared a letter, for the President's signature, to the Premier and Attorney General concerning Bill 22, which received royal assent. The Bill, which amends the *Civil Resolution Tribunal Act*, passed very quickly, with minimal opportunity for public consultation. The letter pointed out how the Bill's proposal to increase the tribunal's jurisdiction to handle motor vehicle accident (MVA) claims produces a perception of conflict of interest. Specifically, the Attorney General, who oversees ICBC, and who has expressed a desire to reduce that entity's MVA damage payouts, is responsible for appointing the tribunal members. This creates a risk in that tribunal members could be seen as trying to advance the government's agenda. Such a perception could erode public confidence in the administration of justice.

23. The Committee received a response letter from the Attorney General. In his reply, the Attorney General defended the legislation, asserting that the scheme includes adequate safeguards that mitigate any concerns respecting conflict of interest and tribunal independence.

24. This year the Trial Lawyers Association of British Columbia ("TLABC") filed a lawsuit against the province, which claims that the $5,500 cap on minor injuries under *Insurance (Vehicle) Act* and inadequate tribunal independence and expertise under the *Civil Resolution Tribunal Act* are unconstitutional. After discussing the matter, the Committee made a recommendation to the Executive Committee to refrain from seeking leave to intervene at the trial stage. Instead, the Committee suggested monitoring the case and, should it reach the Court of Appeal, the Law Society could consider intervening at that stage.

V. Bill C-75 (An Act to Amend the Criminal Code, Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts)

25. In 2018, the Committee met with a representative of the CBA National Criminal Law Section. The Committee was informed about some concerns with Bill C-75. The Bill aims to address issues relating to court delay and jury selection, and is drafted largely in response to recent Supreme Court of Canada cases that touch on those issues. While many of the concerns that were raised by the CBA may be legitimate, the Committee concluded that most of them were not rule of law or lawyer independence issues.

26. A possible exception, however, is the omnibus nature of Bill C-75, which obscures many of its details, thereby making proper legislative review and debate implausible. As noted by Professor Adam Dodek, omnibus bills are problematic as they expose a conflict between

parliamentary sovereignty and separation of powers.[2] This point is illustrated by the fact that, notwithstanding the intrinsic obscurity of omnibus bills, the courts have been unwilling to interfere with parliamentary processes.

27. Another exception is a proposed amendment that would increase the maximum imprisonment for summary conviction offences from 6 months to 2 years. The Committee was concerned that this could have unintended consequences with respect to the ability for defendants to appear at summary conviction charges through agents, and in particular through temporary articled students working through legal clinics. Currently, an agent can only appear for offences that carry a maximum jail sentence of 6 months or less, unless the agent is authorized under a provincial program to appear for offences that entail jail terms above 6 months. The Committee was considering making a recommendation that the Law Society comment with respect to this section, although it also thought that with respect to federal legislation, representations might more effectively come from the Federation of Law Societies. Coincidentally, however, the Federation's Public Affairs and Government Relations Committee prepared a draft submission to the Minister of Justice with respect to the very same issue.

28. The Committee reviewed the Federation's proposed submission and recommended to the Executive Committee that the Law Society support the Federation's submission regarding agents. The Committee also asked the Executive Committee to advise the Federation to comment that, for the reasons stated above, legislative reform through omnibus legislation is a process that should discouraged. The Executive Committee endorsed both recommendations, which staff then conveyed to the Federation.

29. In April 2019, with Bill C-75 having already passed in the House of Commons, the Federation provided their submission to the Senate Standing Committee on Legal and Constitutional Affairs. In their submission, the Federation focused on issues pertaining to agents. They chose not to include any comments about the omnibus nature of the bill.

30. In May 2019, the Senate approved amendments to Bill C-75 to address the concerns about agents. The amended provision provided that agents are not allowed to appear for offences that have jail sentences over 6 months, unless the agent is permitted to do so under a law of the province or under a program, for which the latter could be authorized by a law society. Unfortunately, the House of Commons did not accept the Senate amendment on this point

31. The Committee is prepared to monitor the effect of the amended legislation and identify approaches to remediate its impacts.

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[2] Dodek, Adam, *Omnibus Bills: Constitutional Constraints and Legislative Liberations*, December 12, 2016

VI. Amendments to the Access to Information Act and Privacy Act (Bill C-58)

32. In 2018 the Committee prepared a letter for signature by the President to the Treasury Board President and the Chair of the Standing Committee on Access to Information, Privacy and Ethics. The letter outlined concerns regarding proposed amendments that would require disclosure of information relating to judicial expenses of individual judges. While recognizing the need for transparency, the Committee was concerned that such provisions were an infringement on judicial independence. Furthermore, such disclosure could trigger unwarranted criticism of judges, who have limited ability to defend themselves.

33. The Chair of the Standing Committee on Access to Information, Privacy and Ethics sent a response letter, which the Committee viewed as largely unresponsive. The Chair of the Standing Committee advised our Committee to forward its concerns to the Senate as Bill C-58 was about to shift over to that chamber. Accordingly, the Committee prepared a new letter for signature by the President that was sent to the Standing Senate Committee on Legal and Constitutional Affairs.

34. The Committee did not receive a response from the Senate Committee. However, this year the Senate voted in favour of an amendment to Bill C-58 that only allows disclosure of aggregate judicial expenses for each court, rather than for individual judges. In June 2019, the House of Commons accepted the Senate's proposed amendment.

35. While the Committee cannot conclude that its letter was determinative in the Senate's decision to forward amendments to the House of Commons, the Committee is pleased that the concerns it raised, along with other parties, were dealt with by both Houses of Parliament and that the final bill was amended in line with what the Committee advocated.

VII. Submission to the Judicial Compensation Commission

36. Under the *Judicial Compensation Act*, an independent commission must be appointed every three years to report and make recommendation on all matters relating to judicial compensation. As part of the process, the Commission accepts submissions from the public. The Law Society has provided a number of submissions over the years, with the last one being in 2016. This year, the Commission wrote to the Law Society and asked if it would be interested in providing another submission. The Committee discussed the request and agreed that the Law Society should make a submission. The Committee recently provided a draft submission to the Executive Committee and it has now been forwarded to the Commission.

VIII. Review of College of Dentists

37. The Committee reviewed "An Inquiry into the Performance of the College of Dental Surgeons of British Columbia and the Health Professions Act," an independent report that was commissioned by the Ministry of Health. The main finding in the report is that the College

frequently conflates protecting the public interest with protecting the interests of dentists. Consequently, the author recommended a number of changes to the *Health Profession Act* that aim to ensure the College, and all other health regulators, act in the public interest, rather than the interests of their members.

38. In discussing the report, the Committee observed that it is yet another cautionary tale for self-regulating professions British Columbia, particularly in conjunction with the *Professional Governance Act*, which recently received royal assent. Once proclaimed, the self-regulating capacity of several professions in the natural resources sector (e.g. engineers/geoscientists, forest professionals, etc.) will be diminished.

IX. Developing Issues

39. The Committee continues to review items that appear in media reports that express concerns about the rule of law domestically and internationally. There are many issues that arise, such as social media as a court of public opinion, online privacy and state surveillance activities. Unbridled surveillance poses a particular risk to the rule of law and the Committee continues to monitor that issue closely and with concern. Concerns also continue to arise internationally where attacks on the credibility and/or rights and freedoms of lawyers, judges and independent law enforcement agencies continue to accelerate.

The Law Society of British Columbia

Truth and Reconciliation Advisory Committee - Mid-Year Report

Dean Lawton, QC (Co-Chair)
Michael McDonald, QC (Co-Chair)
Martin Finch, QC
Katrina Harry
Claire Marshall
Karen Snowshoe
Ardith Walkem, QC
Rosalie Yazzie

June 12, 2019

Prepared for: Benchers

Prepared by: Truth and Reconciliation Advisory Committee

Purpose: Information

Introduction

1. The Truth and Reconciliation Advisory Committee ("Committee") is one of the advisory committees appointed by the Benchers to monitor issues of importance to the Law Society and to advise the Benchers in connection with those issues. From time to time, the Committee is also asked to analyze policy implications of Law Society initiatives, and may be asked to develop the recommendations or policy alternatives regarding such initiatives.

2. The purpose of this report is to update the Benchers about the work the Committee has undertaken between January and June, 2019. The Committee met on January 24, February 28, April 4, May 2, and June 5, 2019. The Committee also had a joint meeting with the Lawyer Education Advisory Committee on May 2, 2019. The Committee has made progress on the following matters between January and June, 2019.

Reconciliation Action Plan

3. The Committee discussed its priorities for the year in light of the Reconciliation Action Plan. Two key priorities were identified: 1) developing a recommendation with respect to intercultural competence training for lawyers, 2) improving the Law Society's engagement with Indigenous people (including Indigenous lawyers, organizations, and individuals).

Intercultural Competency Education for Lawyers

4. The Committee has spent the majority of its time developing a recommendation with respect to Indigenous intercultural competence training for lawyers. The Committee has thoroughly considered what is meant by Indigenous intercultural competence training, what topics should be included, and who should be required to take it.

5. The Committee met with the Lawyer Education Advisory Committee on May 2, 2019 to discuss the development of a joint recommendation that will be presented to the Benchers in the fall of 2019. Although the proposed model is still under development, the intention is for the model to strike a balance that provides an appropriate baseline of Indigenous intercultural competence that is required of all lawyers in British Columbia without diluting the spirit and intent of the Truth and Reconciliation Commission's Call to Action 27.

Intercultural Competency Education for Staff

6. Approximately 35 Law Society staff participated in a webinar session about Indigenous cultures that was provided by the Canadian Centre for Diversity and Inclusion on June 4,

2019. The webinar examined strategies to create inclusive workplaces for Indigenous colleagues.

7. 30 Law Society staff attended an Indigenous intercultural competence lunch and learn in recognition of National Indigenous Peoples' Day on June 21, 2019. Participants viewed *Colonization Road* – a short documentary that features well-respected lawyers, historians, researchers and policy makers who provide history, context, and potential solutions for colonization and its impacts. The screening was followed by a facilitated discussion about the relevance of the Law Society's reconciliation efforts in light of the issues that were highlighted in the film.

Intercultural Competency Education in PLTC

8. PLTC staff continues to collaborate with Indigenous lawyers to integrate Indigenous content throughout PLTC materials. The PLTC curriculum already contains modules on Indigenous sentencing principles, Indigenous child welfare, and Indigenous intercultural competency. PLTC staff is now working with the University of Victoria Faculty of Law's Indigenous Laws Research Unit to develop a module on an Indigenous legal orders.

Intercultural Competency Education for Tribunal Members

9. The Law Society's "Tribunal Refresher Course" on July 10, 2019 will focus on Indigenous intercultural competence in the tribunal context. The session will be led by Professor Patricia Barkaskas (the Academic Director at the Indigenous Community Legal Clinic and a co-developer of the Indigenous Cultural Competency Certificate at the Allard School of Law at the University of British Columbia).

Indigenous Inclusion in Law Society Hearing Pools

10. A targeted call for Indigenous applicants for the Law Society of BC's hearing panel pools was sent to Indigenous organizations in British Columbia on May 30, 2019. The call for applicants specifically indicates that "The Law Society is particularly interested in including representation of Indigenous communities among its hearing panel pool membership." The deadline for applications is June 28, 2019.

Indigenous Engagement

11. The Truth and Reconciliation Advisory Committee acknowledges that, at a basic level, reconciliation starts with improving relationships between Indigenous and non-Indigenous people. The goal of the Law Society's outreach efforts is relationship building, which is

foundation for reconciliation. To that end, representatives from the Law Society and the Truth and Reconciliation Advisory Committee have participated in the following events:

a. The First Nations Provincial Justice Council Forum, organized by the BC First Nations Justice Council, took place on the traditional lands of the Musqueam on April 24 and 25, 2019. The Forum was attended by the Co-Chairs of the Law Society's Truth and Reconciliation Advisory Committee, Dean Lawton, QC and Michael McDonald, QC, by Benchers Karen Snowshoe and Claire Marshall, and by senior staff representatives.

b. The Law Society's President Nancy Merrill, QC and Chief Executive Officer Don Avison attended the 12th Annual Justice Summit on April 26, 2019. The goal of this session was to look back at the Summit process and accomplishments with a view towards identifying the preferred "vision and approach" for future Justice Summits, and to get input on how to improve the sessions, including roles, responsibilities and accountabilities for follow-up and on recommendations.

c. The Law Society of BC sponsored the Reception for the Canadian Bar Association of BC Aboriginal Lawyers Forum Retreat that was held on the unceded lands of the Musqueam on June 20, 2019. Co-Chair Michael McDonald, QC, and Benchers Karen Snowshoe and Claire Marshall attended the Retreat and Reception.

d. Co-Chair of the Committee Dean Lawton, QC gave a presentation on June 28, 2019 at the University of Victoria Faculty of Law to 38 visiting judges from Thailand. The subject matter included discussion about the Truth and Reconciliation Commission's mandate, report, and Calls to Action, and focused on the continuing work of the Law Society and the academy respecting Calls to Action #27 and #28.

Federation of Law Societies TRC Calls to Action Committee

12. Dean Lawton, QC, serves as the Western Representative of the Federation of Law Societies TRC Calls to Action Committee. The Federation's Committee held a teleconference on January 16, 2019, and an in-person meeting in Ottawa on February 26, 2019. The focus of both meetings was a draft proposal for engaging law societies on Call to Action 27.

Symbolism

13. The Committee has had preliminary discussions about developing an approach to find a unifying and inclusive symbol for the Law Society of British Columbia.

The Law Society of British Columbia

Mental Health Task Force - Mid-Year Report

Brook Greenberg (Chair)
Michelle Stanford, QC, (Vice Chair)
The Honourable Madam Justice Iyer
[appointed June 10, 2019]
Christopher McPherson, QC
Derek LaCroix, QC
Kendra Milne
Phil Dwyer

July 12, 2019

Prepared for: Benchers

Prepared by: Mental Health Task Force

Purpose: Information

Introduction

1. The 2018-2020 Strategic Plan sets the course for the Law Society's proactive approach to improving mental health within the profession, which focuses on two key goals: reducing stigma around mental health issues and developing an integrated mental health review concerning the current regulatory approach to discipline and admissions.[1] The Mental Health Task Force is responsible for coordinating and assisting the Benchers in implementing this strategic vision.

2. In addition to the Strategic Plan, the Task Force's work in 2019 has been guided by three key documents: the Task Force's Terms of Reference,[2] its First Interim Report[3] and associated recommendations, and the Task Force's 2019 work plan.

3. Pursuant to section 3(b) of its Terms of Reference, the Task Force is required to produce a mid-year report to the Benchers on its activities. This report is therefore intended to serve as an informational update on the Task Force's work since January 2019.

4. Over the past seven months, the Task Force has pursued three streams of work, described in parts one, two and three of this mid-year report, respectively:

    a. implementing the recommendations contained in the First Interim Report;
    b. engaging in informal consultations and educational outreach activities; and
    c. developing an additional set of recommendations that further advance the Law Society's strategic priorities in relation to mental health.

Part 1: Implementation of the recommendations of the First Interim Report

5. In December 2018, the Benchers approved the 13 recommendations contained in the Task Force's First Interim Report. The recommendations fall into two broad categories: educational strategies that increase awareness and understanding of

[1] Law Society of BC 2018-2020 Strategic Plan, online at: www.lawsociety.bc.ca/Website/media/Shared/docs/about/StrategicPlan_2018-2020.pdf
[2] Law Society of BC Mental Health Task Force Terms of Reference, online at: https://www.lawsociety.bc.ca/Website/media/Shared/images/initiatives/MentalHealthTaskForce_termsofreference.pdf
[3] Law Society of BC Mental Health Task Force First Interim Report (December 2018), online at: https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/MentalHealthTaskForceInterimReport2018.pdf

mental health and substance use within the legal profession and reduce stigma, and regulatory strategies that focus on how these issues are most appropriately addressed in the regulatory context.

6. As detailed in the following sections, the Task Force has made considerable progress in implementing both the educational and regulatory recommendations.

Providing Law Society staff, Benchers and other Tribunal members with specialized education and training related to mental health and substance use issues

7. Over the past six months, the Task Force has worked closely with both Law Society staff and the Canadian Mental Health Association ("CMHA") to implement the series of recommendations addressing the education and training of staff, as well as Bencher and other committee and hearing panel members, with the goal of enhancing their knowledge, skills and access to resources related to mental health and substance use issues.

> **Recommendation 2:** Provide Practice Advisors with specialized education and training to enhance their knowledge, skills and access to resources related to mental health and substance use issues.
>
> **Recommendation 3:** Provide Practice Standards lawyers and support staff with specialized education and training to enhance their knowledge, skills and access to resources related to mental health and substance use issues.
>
> **Recommendation 4**: Provide lawyers and paralegals in the Professional Regulation Department with specialized education and training to enhance their knowledge, skills and access to resources related to mental health and substance use issues.
>
> **Recommendation 5:** Provide Credentials Officers, auditors in the Trust Assurance Program and staff lawyers in the Lawyers Insurance Fund with basic education and training to improve their awareness of mental health and substance use issues.
>
> **Recommendation 7:** Provide members of the Credentials Committee, the Practice Standards Committee and the Discipline Committee and their associated hearing panels, as well as individuals who are responsible for practice reviews, conduct meetings and conduct reviews, with basic

education and training to improve awareness and knowledge of mental health and substance use issues.

8. Early in 2019, the Task Force finalized its consultations with the staff groups identified in the above recommendations as requiring specialized training. The CMHA was subsequently provided with detailed information about the function of these groups within the Law Society, the manner in which they typically interact with lawyers or applicants experiencing wellness issues, the number of individuals requiring training and their educational needs. This information was intended to assist the CMHA with developing a framework for the training program and to tailor content to the specific needs of the various groups.

9. In March 2019, the CMHA presented the Task Force with an initial draft proposal for a series of workshops, resulting in the Law Society committing to the following training:

    - a customized 3-hour workshop that includes information about the mental health continuum, mental illnesses, stigma, risk and protective factors, as well as a set of applicable case studies and resources;
    - compassion fatigue training for individuals that frequently interact with lawyers in distress;
    - a half-day SafeTalk suicide awareness and prevention course to help recognize those who might be at risk of suicide and connect them to supports and resources;
    - an online "Understanding Addictions" modular program to learn effective, practical skills that will assist staff working directly or indirectly with lawyers with substance use issues.

10. The Task Force has been working closely with the CMHA through this development phase and is currently overseeing the refinement of the content to ensure that the programming is appropriately tailored to the regulatory context. The goal is to finalize this content in the coming months, in anticipation of commencing training in the fall.

11. More than half a dozen training sessions have been scheduled for staff in the latter half of 2019, following which, the training program will be modified for, and made available to, Benchers and other members of the Discipline committee, Practice Standards committee and Credentials committee and their respective hearing panels.

Consultation with Lifeworks

12. The Task Force has made considerable progress in implementing its recommendation in relation to improving access to, and information about, the support services provided by LifeWorks:

> **Recommendation 9:** Seek assistance from LifeWorks to help the Law Society better explain to the profession what services are available and who may benefit from them, and to explore alternate means for lawyers to connect with LifeWorks support services that do not require access through the Law Society's member portal.

13. Earlier this year, LifeWorks representatives met with the Chair of the Task Force to outline the full scope of their services and what individuals should expect when they contact LifeWorks, including the processes associated with any referrals to a mental health professional. A modified version of this presentation was also provided to the Benchers.

14. The Task Force has explored a range of options to improve the accessibility LifeWorks' services to Law Society members and is now developing a proposal to modify the current process to ensure that members are not required to utilize the member portal to access LifeWorks' services.

15. The Task Force also continues to work with LifeWorks to develop and distribute additional materials designed to improve lawyers' understanding of the types of issues LifeWorks can assist with and the support services offered.

Communications with the profession

16. The Communications department continues to work with the Task Force to implement its communication strategy in relation to mental health within the profession:

> **Recommendation 8:** Develop a comprehensive, profession-wide communication strategy for increasing awareness about mental health and substance use issues within the legal profession.

17. In January, the Law Society participated in the Bell Let's Talk Day Twitter campaign to draw attention to the work being done by the Task Force, share facts about mental health in the legal profession and highlight available resources. Each of

the tweets included an interactive component, whether asking for a retweet to further spread the messaging about mental health or linking to a relevant article or webpage.

18. In May, the Law Society participated in the CMHA's Mental Health Week by releasing a series of tweets that provided members with information about the Task Force's work and support resources such as LifeWorks and the Lawyers Assistance Program (the "LAP"). The tweets also highlighting a number of compelling articles on mental health and substance use in the legal profession that all BC lawyers were encouraged to read. The Communications department also oversaw internal communications for staff on a range of mental health and wellness topics and initiatives.

19. The use of social media to draw attention to the Task Force's work and the issue of mental health in the legal profession more generally, is ongoing. Additionally, the summer edition of the *Benchers' Bulletin* contained an update on the Task Force's work.

20. The Communications department also continues to work with the Task Force to improve the information available to members about LifeWorks services and to expand the content of the Task Force's webpage to include more information on available resources and additional reading materials.

Establishing a roster of qualified mental health professionals to support Law Society staff

21. Work is also progressing on establishing a roster of mental health professionals to support Law Society staff, pursuant to Recommendation 6:

> **Recommendation 6:** Establish a roster of qualified mental health professionals that Practice Advisors, Practice Standards lawyers, Credentials Officers and staff in the Professional Regulation Department may consult to assist them in addressing mental health and substance use issues that arise in the course of Law Society processes involving lawyers or applicants.

22. Staff are currently exploring the extent to which the Law Society could utilize Lifeworks' clinical counsellors to provide staff with the necessary consultation and coaching services. As outlined in the First Interim Report, the role of these professional counsellors would exclusively focus on supporting Law Society staff, sourcing and disseminating information on how to recognize mental health problems

and providing guidance on communicating with an affected lawyer, and would be confidential in nature.

Consultation with the Credentials Committee on the medical fitness questions in the LSAP Application form

23. A key priority for the Task Force this year has been the development of consultation materials for the Credentials Committee, in accordance with the recommendation regarding the medical fitness questions contained in Schedule A of the Law Society's admission application form ("LSAP Application form"):

> **Recommendation 12**: Collaborate with the Credentials Committee in re-evaluating the Law Society's current approach to inquiries into mental health and substance use in the Law Society Admission Program Enrolment Application.

24. A brief summary of the Task Force's concerns with the medical fitness questions were outlined in the First Interim Report. Since the publication of that report, however, the Task Force has undertaken extensive additional research into the effectiveness of, and concerns relating to, the current medical fitness questions.

25. Following from this research and analysis, the Task Force has developed a series of detailed rationales for the elimination of the medical fitness questions in the LSAP Application form.

26. In summary, the Task Force is strongly of the view that inquiries into fitness should solely focus on applicants' conduct or behaviour, not their medical status.

27. This position, which is supported by numerous academics, law school administrators and a number of key US legal bodies, was presented to the Credentials Committee as part of a comprehensive consultation package comprised of more than 700 pages of material.

28. Part One of the consultation package includes recent reports, studies, legal opinions from the US Department of Justice, resolutions from the American Bar Association and comprehensive submissions from the University of Victoria Faculty of Law and the Allard School of Law, all of which address a variety of concerns with the use of mental health questions and advocate for their elimination. Part Two contains a body of academic literature supporting the removal of these types of questions, as well as

examples of applications and rules from jurisdictions that do not ask medical fitness questions in their admissions forms.

29. Recognizing that Part One and Part Two of the consultation package represent a large body of material, the Task Force distilled its research into a detailed memo that was provided to the Credentials Committee in advance of a joint meeting in April 2019, a copy of which is attached as **Appendix A**.

30. The memo outlined the Task Force's position that questions regarding substance use disorders and mental health conditions should be removed from the LSAP Application form for two overarching reasons. First, from an evidence-based perspective, the questions are not helpful in assessing an applicant's overall fitness to be a lawyer. Second, in addition to failing to achieve their intended purpose of protecting the public from unfit lawyers, the questions have significant adverse effects for both individual applicants and the profession more generally.

31. With respect to the effectiveness of the questions, the Task Force identified new research that refutes the assumed predictive value of the medical fitness questions in assisting the regulator in determining whether an applicant that provides a positive answer to these questions is likely to have disciplinary problems as a lawyer.[4]

32. Additionally, the Task Force has been advised that the numbers of students answering the medical fitness questions in the affirmative are very low. These low rates of disclosure are notable given that the most recent studies on mental health and substance use among law students reveal that a high percentage of students feel they need help for a mental health issue or exhibit problematic drinking behaviours.[5] This suggests that many individuals either do not consider that the medical fitness questions apply, or they choose not to reveal a medical fitness issue on their application, again raising doubts about the effectiveness and utility of the medical fitness inquiry.

33. Even if there were a connection between those individuals that identify as having a mental health or substance use issue and later misconduct — which the evidence

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[4] Leslie C. Levin, Christine Zozula and Peter Seigleman, "A Study of the Relationship between Bar Admissions Data and Subsequent Lawyer Discipline" (2013) Law School Admission Council Grants Report Series.

[5] J. M. Organ, D. Jaffe, & K. Bender, "Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns" (2016) 66 J. Legal Educ. 116. This study found that 43% of students felt that hiding a mental health condition would improve their chances of being admitted to the bar and that 49% of students felt that hiding a substance use issue would improve their admission chances. These percentages were even higher among students with the highest rates of binge drinking, drug use, depression or severe anxiety.

shows there is not — identifying a few individuals with these issues must be weighed against the significant costs associated with asking the questions at all.

34. In this regard, the Task Force's research reveals that the medical fitness questions are associated with a variety of harms. Most notably, both academic research[6] and the observations of administrators at BC law schools[7] suggest that the questions deter individuals from seeking counselling and treatment for mental health and substance use issues based on concerns about the consequences of disclosure.

35. This chilling effect is counterproductive to the purpose of the questions — protecting the public — as applicants that may have benefited from support or treatment prior to entering the profession often fail to seek it, resulting in the admission of individuals that may be less prepared to deal with the pressures and stresses of practice.

36. A number of other deleterious effects are also associated with the medical fitness questions. Rather than revealing actual risks, the questions rely on stereotypes about applicants with mental health issues that compound the counterproductive effect of the inquiry. In addition to reinforcing the stigma experienced by individuals at the time of their admission to the Law Society, the stereotypes and assumptions created by the medical fitness questions appear to be significant contributors to perpetuating stigma around mental health and substance use issues within the profession as a whole. As identified in the 2018-2020 Strategic Plan and the Task Force's Terms of Reference, reducing this stigma is a key priority for the Law Society.

37. Additionally, given that an affirmative answer to the questions often result in applicants being required to consent to the release of medical records or a medical examination, the questions have a significant impact on applicants' privacy interests. In particular, students that must undergo an independent medical examination frequently have their call date delayed, which must be explained to their principal. This puts students in the position of having to disclose personal health information to their employer that they would likely have otherwise keep confidential.

38. Students have also expressed concerns about the nature of the questions they are compelled to answer as part of the medical examination process, which may include questions about physical, mental or sexual abuse and their reproductive medical

[6] *Ibid.*
[7] This concern was highlighted by both the Allard School of Law and the University of Victoria Faculty of Law in their submissions to the Task Force earlier this year.

history. Some students have also raised concerns that they are unclear about who has access to their medical information and for how long.

39. Investigations that may follow from providing affirmative answers to medical fitness questions can be a source of great stress for, and prejudice to, applicants. Law school administrators have underscored that affirmative answers can diminish students' ability to participate in law school clinical programs and result in delays to the admission process.

40. Throughout its consultations with the Credentials Committee, the Task Force has been unequivocal that it is not suggesting that the Law Society abandon its consideration of fitness to practice as an element of the application process. Indeed, s. 19 of the *Legal Profession Act* (the "*LPA*") requires that such an inquiry is made. Rather, the issue is whether there are more effective, less stigmatizing ways to assess "fitness" than the current *medical* fitness questions.

41. Importantly, medical fitness is not mandated by the *LPA.* To date, however, it has been incorrectly presumed that medical fitness questions are required on the basis that they provide helpful information to the Law Society with respect to fitness to practice. Evidence shows that this is not the case. In this regard, the Task Force is strongly of the view that the existing questions in the LSAP Application form that inquire into applicants' past conduct are sufficient for the Law Society to assess each of the good character, repute and fitness requirements of all candidates.

42. The Task Force has developed additional materials and recommendations for the Credentials Committee to consider in respect of fulfilling the Law Society's statutory mandate with helpful and non-stigmatizing inquiries. The Committee has advised it intends to review the recommendations, along with the Task Force's earlier consultation materials, in the coming months.

Consultation with the Ethics Committee on *BC Code* rule 7.1-3 and Commentary

43. The Task Force has also prioritized consultations with the Ethics Committee regarding the stigmatizing language in the *Code of Professional Conduct for British Columbia* (the "*BC Code*"):

> **Recommendation 13**: To eliminate stigmatizing language and approaches to the reporting requirements in *BC Code* provision 7.1-3(d) [Duty to report] and the associated Commentary

44. As part of these consultations, the Task Force has proposed a series of amendments to the rule and associated Commentary. With respect to the rule itself, the Task Force advocates for the removal of subsection 7.1-3(d), which currently imposes a duty on lawyers to report "the mental instability of a lawyer of such a nature that the lawyer's clients are likely to be materially prejudiced," and replacing this language with a duty to report "conduct that raises a substantial question about the lawyer's capacity to provide professional services."

45. In addition to eliminating stigmatizing language that reinforces the stereotype that those living with mental health conditions are more likely than others to harm the public, these changes will also bring the *BC Code* into closer alignment with the corresponding rule in the Federation's Model Code.[8]

46. With respect to the Commentary associated with rule 7.1-3, the Task Force advocates for two significant modifications. The first is the removal of the latter half of Commentary [3], which currently reminds lawyers acting as counsellors for professional support groups that they have an ethical duty to report a lawyer they are assisting if they are aware they are "engaging in, or may in the future engage in serious misconduct or in criminal activity related to the lawyer's practice."[9]

47. The second suggested change is the creation of a specific exemption from the duty to report under rule 7.1-3 for lawyer-counsellors providing peer support through programs such as the LAP. Notably, a number of Canadian and US jurisdictions have long standing exemptions for lawyer-counsellors participating in an approved lawyer assistance program, excusing them from the mandatory reporting requirements.

48. The rationales for these changes are two-fold, namely: concern that Commentary [3], as currently worded, creates barriers to lawyers seeking support from peer assistance programs, while at the same time, failing to ensure the Law Society will obtain meaningful information that would serve to protect the public.

49. With respect to deterring support-seeking behaviour, the most current and comprehensive study on the prevalence of mental health and substance use disorders among lawyers found that the greatest barriers to lawyers seeking support for these issues are "not wanting others to find out they needed help" and related

[8] See the Federation's Model Code rule 7.1-3, online at: https://flsc.ca/wp-content/uploads/2018/03/Model-Code-as-amended-March-2017-Final.pdf, which was recently amended based on concerns about stigmatizing language.
[9] See *BC Code* rule 7.1-3, online at: https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/chapter-7-%E2%80%93-relationship-to-the-society-and-other/].

apprehensions regarding privacy and confidentiality.[10] The Task Force is of the view that Commentary [3] does not sufficiently allay confidentiality concerns for lawyers that are considering seeking assistance from a professional peer support group, and has the potential to undermine the peer support relationship. Specifically, lawyers needing support may not seek it based on concerns about what information, if shared with a lawyer-counsellor, could be disclosed to the Law Society.

50. With respect to the value of the information Commentary [3] seeks to elicit, the Task Force observes that it is unrealistic, and indeed impossible, for anyone to predict whether another lawyer "may engage" in serious misconduct in the near future, all the more so as lawyer-counsellors are not trained mental health professionals. The challenge of predicting future behaviour, even by medical professionals, is well documented in the academic literature.

51. Further, the Task Force notes that it is anomalous that lawyer-counsellors are currently caught by the mandatory reporting provisions of rule 7.1-3, while a lawyer providing legal advice to another lawyer with respect to the otherwise mandatory reporting matters would not be required to provide this information to the Law Society given that the rule includes an exemption for communications covered by solicitor-client privilege. Nor would a non-lawyer counsellor providing counseling advice be required to report this information. However, Commentary [3] makes a particular point of emphasizing that a lawyer-counsellor — the primary resource the Law Society offers to lawyers seeking support — would be required to report a lawyer they were assisting under rule 7.1-3.

52. Such circumstances are particularly problematic where, as is the case in British Columbia, no reports under rule 7.1-3 have been provided to the Law Society in the last ten years, and possibly ever, from lawyer-counsellors operating under the LAP.

53. The Task Force recognizes that the removal of this language from Commentary [3] and the creation of an exemption from rule 7.1-3 for lawyer-counsellors may generate concerns that the Law Society might not receive information about a lawyer's conduct that is necessary to protect the public.

54. The Task Force is cognizant of the importance of the Law Society obtaining information that may protect the public, given its statutory mandate. However, the costs associated with creating a potential disincentive for lawyers to utilize the LAP for fear of being reported by their own lawyer-counsellors is not offset by any

[10] P. R. Krill, R. Johnson, & L. Albert, "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys" (2016), 10 J. Addiction Med . 46.

benefits of the information lawyer-counsellors are expected to report, given that the Law Society loses nothing in terms of the quality or quantity of valuable reported information. Consequently, the public interest is better served by encouraging lawyers to seek support through the LAP and removing any barriers that may prevent them from doing so.

55. The Task Force has articulated, as part of its consultations with the Ethics Committee, that there are other provisions in the *BC Code* that address this concern by permitting or requiring all lawyers, including lawyer-counsellors, to disclose confidential information in circumstances where serious harm and public safety may be an issue.

56. Specifically, *BC Code* rules 3.3-1[Confidential information] and 3.3-3 [Future harm / public safety exception] ensure that lawyers must divulge information if required to do so by a law or a court, and are permitted to make a disclosure if a lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and that disclosure is necessary to prevent the death or harm to the lawyer, client or others.[11] From the Task Force's perspective, these rules are sufficient to address the type of conduct that truly warrants the disclosure of otherwise confidential information by lawyer-counsellors. In addition, these rules provide lawyer-counsellors with detailed guidance regarding when confidential information should be disclosed, in contrast to the stigmatization and vague guidance provided in the current Commentary [3] associated with rule 7.1-3.

57. The Task Force's views on the rule 7.1-3 and Commentary [3] have been presented to the Ethics Committee and are the subject of ongoing discussion and analysis by that Committee.

Consultation with the Lawyer Education Advisory Committee on potential mandatory mental health and substance use disorder programming

58. Earlier this year, the Task Force held consultations with the Lawyer Education Advisory Committee regarding the possibility of introducing a mental health CPD requirement, pursuant to recommendation 10 of the First Interim Report:

[11] The commentary associated with *BC Code* rule 3.3-3 notes that serious bodily harm may include psychological harm that substantially interferes with the health or well-being of an individual. See rule 3.3-3, online at: https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/chapter-3-%E2%80%93-relationship-to-clients/].

Recommendation 10: Collaborate with the Lawyer Education Advisory Committee to explore the merits of the Law Society introducing a mandatory CPD requirement for mental health and substance use disorder programming

59. In its presentation to the Lawyer Education Advisory Committee, the Task Force provided background information on recent research on the prevalence of mental health and substance use issues within the legal profession and the manner in which, if left untreated, these issues can impact on lawyer competence and professionalism, both areas of focus for the CPD program.

60. The benefits of mandatory CPD include raising awareness of these issues among all lawyers and providing valuable information as to how practitioners can seek, or assist others in obtaining, support. The Task Force also discussed how a mandatory requirement could reduce stigma that might otherwise prevent some lawyers from attending this type of CPD training.

61. The Task Force has provided the Lawyer Education Advisory Committee with a consultation package containing a number of relevant materials, including the ABA Model rule that encourages regulators to ensure lawyers receive an hour of mental health or substance use disorder programming every three years[12] and a similar recommendation made by the US National Task Force on Lawyer Well-Being.[13] The rules of other jurisdictions that have adopted mandatory mental health and substance use disorder continuing legal education were also included. Materials from the consultation package provided by the Task Force to the Committee are attached at **Appendix B.**

62. The Lawyer Education Advisory Committee indicated that it will revisit these materials in more detail later this year.

Part 2: Informal consultations and outreach

Speaking engagements and informal consultations

63. As part of the Task Force's work to reduce stigma surrounding mental health and substance use issues, and in an effort to share the work of the Task Force with the

[12] For information about the amendments to the ABA Model Rule as the result of ABA Resolution 106 (February 2017), see: https://abacolap.wordpress.com/2017/02/09/aba-approves-changes-to-cle-model-rule-adding-substance-use-mental-health-requirement/

[13] See recommendation 20.3 of the National Task Force on Lawyer Well-Being, online at: https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf

broader legal community, several members of the Task Force have participated in educational outreach activities in various regions of the province. This work includes presentations to the CBA family and criminal law sections in Kamloops and the Fraser Valley bar, and participation in a LawTalk CPD event in Prince George.

64. Additionally, several Task Force members have served as guest instructors for the PLTC program and have integrated mental health and wellness content into the ethics materials.

65. As part of its outreach work, the Task Force has also undertaken informal consultations with a number of groups. This includes discussions with articled students during both PLTC classes and Bencher interviews, during which some students expressed a desire for more information about the support resources available to them earlier in the articling process. This feedback was shared with the Law Society's Manager of Member Services and Credentials.

66. Additionally, members of the Task Force have received feedback from a number of lawyers on the services provided by Lifeworks, including both positive remarks about the support resources available and some comments regarding the challenges of utilizing these services. This feedback has been shared with Lifeworks.

Federation of Law Societies conference on lawyer wellness

67. As further evidence of the growing attention on the mental health of lawyers, the Federation of Law Societies 2019 Fall Conference will focus on mental health and wellness in the legal profession.

68. Importantly, the Task Force's First Interim Report has been instrumental in framing the issues and shaping the agenda that will be explored over the two-day meeting in St. John's, Newfoundland in October. Policy and legal services lawyers supporting the Task Force have been appointed to the conference planning Committee and continue to share the work of the Task Force with the planning group.

Engaging the judiciary

69. In the wake of Supreme Court Justice Gascon's courageous step to publicly speak about his experiences with depression and anxiety, President Merrill, assisted by the Task Force, wrote to Chief Justice Hinkson and Chief Judge Gillespie to explore the judiciary's interest in participating in the work of the Task Force.

70. Recognizing that judges are well-positioned to play a leadership role in combatting stigma by signalling an awareness and understanding of these issues, the correspondence suggested a variety of ways that the judiciary could contribute to the work of the Task Force. In response, Chief Justice Hinkson suggested Madam Justice Iyer be appointed to the Task Force, and her Ladyship expressed her willingness to join.

71. The Task Force is grateful for Justice Iyer's involvement in its work, and regards judicial representation as a powerful way to convey to lawyers, law students and judges that addressing mental health and substance use issues is of critical importance for the profession.

Part 3: Developing recommendations for the Second Interim Report

72. In parallel with implementing the recommendations contained in the First Interim Report, the Task Force is developing a second set of recommendations for the Benchers that include additional regulatory and educational strategies.

73. On the regulatory front, the Task Force continues to explore the potential for a "diversion" or other alternative discipline process for lawyers affected by mental health or substance use disorders. In building its understanding of how diversionary schemes can be beneficial not only to lawyers, but to the protection of the public, the Task Force is currently conducting a literature review and identifying key issues requiring further research.

74. The Task Force has also spoken to several US regulators with a depth of knowledge of American diversionary schemes, as well as meeting with the Law Society's Chief Legal Officer and managers within the Professional Regulation department on this issue.

75. The Task Force is also considering a recommendation supporting the development of a statement of best regulatory practices that will improve the manner in which the Law Society responds to mental health and substance use issues affecting its members. The aim of a best practices framework would be to establish a series of evidence-based guidelines that ensure the Law Society is effectively addressing mental health and substance use issues across its various processes.

76. On the educational front, the Task Force has completed foundational work on a future recommendation to the Benchers regarding the advisability, viability and scope of a potential voluntary, confidential member survey addressing mental health

and wellness among BC lawyers, pursuant to item 3(c) (viii) of its Terms of Reference.

77. In the United States, several recent ground breaking studies have used survey methodology to evaluate the mental health of American lawyers.[14] In addition to highlighting the prevalence of mental health and substance use issues within the profession, these surveys have been critical in developing and prioritizing appropriate responses.

78. Very little comparable research has been undertaken Canada, resulting in a dearth of knowledge about the wellness of Canadian lawyers.[15] The Task Force is of the view that developing an anonymous survey to explore members' experiences with a range of issues along the mental health continuum is vital to understanding these issues in the BC-specific context and establishing a set of aggregate data that can be used to monitor and improve mental health outcomes for BC lawyers.

79. Having recently completed a review of more than half a dozen wellness surveys conducted by other professional bodies and legal organizations, the Task Force has identified a number of approaches and issues that require further analysis.

Conclusion

80. In the first half of 2019, the Task Force has maintained its strong forward momentum in advancing the Law Society's strategic goals in relation to improving mental health within the profession.

81. This work, which has been both comprehensive and consultative, includes the implementation of previously approved recommendations, the development of new proposals, as well as a number of outreach activities. Collectively, this work has raised the profile of the Mental Task Force's work within the profession and established the Law Society of BC as a leader in improving awareness about, and responding to, mental health and substance use issues affecting lawyers.

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[14] Krill et al. *supra* note 10, Jaffe et al. *supra* note 5.

[15] The Quebec Bar Association recently conducted a study of more than 2,500 lawyers to measure psychological health at work among its members. The 150-question survey focused on three health indicators: psychological distress, exhaustion and well-being. Psychological distress. See the summary report (French only): https://www.barreau.qc.ca/media/1887/sommaire-sante-psychologique-travail-avocats.pdf.

82. Looking forward, the Task Force will continue to focus on implementation, outreach and refining a second suite of recommendations for the Benchers, with the goal of producing a second interim report by the end of 2019 or early 2020.

Appendix A: Consultation memo from the Mental Health Task Force to the Credentials Committee, "Rationales for the elimination of the medical fitness questions in the LSAP Application form" (April 15, 2019)

Appendix B: Overview of Mental Health Task Force consultation materials for the Lawyer Education Advisory Committee (January 20, 2019)

The Law Society of British Columbia

Memo

To: Credentials Committee

From: Mental Health Task Force

Date: April 15 2019

Subject: **Rationales for the elimination of the medical fitness questions in the LSAP Application form**

Please Note: Some of this memorandum has been redacted for the purposes of maintaining privilege and confidentiality.

Purpose

1. In its First Interim Report, the Mental Health Task Force (the "Task Force") summarized a series of concerns with the medical fitness questions contained in the Law Society Admission Program Application form ("LSAP Application form"). The resulting recommendation was that the Task Force and the Credentials Committee collaborate in re-evaluating the current approach to inquiries into mental health and substance use in Schedule A. This memo, and the supporting material included in this consultation package, goes a step further and advocates for a new approach to assessing fitness.

2. In the nine years since the Law Society last reviewed the medical fitness questions in the LSAP Application form, there have been significant advances in understandings about the impact and effectiveness of these inquiries. This new body of information includes studies, reports, academic papers, resolutions and opinions from key US regulatory bodies, recommendations from the National Task Force on Lawyer-Wellbeing and submissions from BC law schools. All of this information is contained in this consultation package, and much of it is referenced in this memo.

3. **Part one** of the memo outlines the Task Force's position that questions regarding substance use disorders and mental health conditions should be *eliminated* from the LSAP Application form on the basis that, from an evidenced-based perspective, the questions are not effective in protecting the public interest. Moreover, the questions are counterproductive as they are associated with a variety of significant harms, including: deterring some individuals from seeking treatment and support, invading applicants' privacy and causing stress, inconvenience and delays to bar admission that can have profound personal and professional implications.

4. **Part two** proposes shifting the focus of the fitness inquiry to *conduct or behavior* that impairs an applicant's ability to practice law in a competent, ethical and professional manner.

Background

5. Most Canadian and US legal regulators evaluate "fitness" to practice law as part of the admission process. In many jurisdictions, the inquiry includes questions in the admission application about conditions, impairments, diagnoses and/or treatments relating to mental health and/or substance use.[1]

6. The Law Society of BC's inquiry into applicants' medical fitness is informed by s. 19 of the *Legal Profession Act* ("*LPA*"), which establishes that "no person may be enrolled as an articled student, called and admitted or reinstated as a member unless the Benchers are satisfied that they are of good character and repute and is fit to become a lawyer." This requirement flows from s. 3 of the *LPA*, which mandates the Law Society to uphold and protect the public interest by ensuring the competence of lawyers.

7. One of the mechanisms used by the Law Society to assess fitness to practice is the medical fitness questions contained in Schedule A of the LSAP Application form. These questions pursue two lines of inquiry. First, whether an applicant has a substance use disorder and whether they have received counseling or treatment, and second, whether an applicant has an existing condition that is reasonably likely to impair their ability to practice:

> 2a) Based on your personal history, your current circumstances or any professional opinion or advice you have received, do you have a substance use disorder?
>
> b) Have you been counseled or received treatment for a substance use disorder?
>
> 3. If you answered yes to questions 2 (a) or (b), please provide a general description on a separate sheet.
>
> 4. Based on your personal history, your current circumstances or any professional opinion or advice you have received, do you have any existing condition that is reasonably likely to impair your ability to function as an articled student?

[1] The nature and scope of these questions varies widely. Some regulators ask very specific questions, other inquiries are more general; some are temporally limited, others are not; some questions refer to mental and physical impairments and substance use disorders, others target only mental health conditions.

> 5. If the answer to question 4 is "yes", please provide a general description of the impairment on a separate sheet.

Purpose of the medical fitness questions

8. Proponents of medical fitness questions typically defend these inquiries on two grounds. First, the questions are necessary to identify applicants that may put clients' interests at risk, and as such, protect the public by helping to ensure that lawyers that are not fit to practice competently are screened at the admission stage.[2]

9. The secondary purpose of the medical fitness questions is to protect the profession's reputation by signaling to the public that lawyers have been adequately vetted before they are licensed and are therefore worthy of trust.[3] Both purposes are underpinned by the assumption that applicants with past or present mental health and substance use issues are more likely to engage in misconduct once admitted to the bar than currently "healthy" individuals.

10. These dual purposes - protection of the public and upholding the profession's reputation - are reflected in the preamble of Schedule A:

> In asking the questions in this Schedule, the Benchers are seeking information that will help them assess medical fitness to practice competently [...]The practice of law is often rigorous, demanding a high level of functioning. Any medical condition that would render you incapable of practicing law competently puts clients' interests at risks and harms the profession's reputation [emphasis added].

[2] See Jennifer McPherson Hughes, "Suffering in Silence: Questions Regarding an Applicant's Mental Health Bar Applications and their Effect on Students Needing Treatment" (2004) 28 J. Legal Prof. 187 ("McPherson Hughes"); Levin et al. infra note 8 at 2; Dragnich infra note 7 at 682; Josselyn infra note 3 at 90; Lusk infra note 28 at 364; Bauer infra note 3 at 144, 149; National Conference of Bar Examiners Comprehensive Guide to Bar Admissions Requirements 2015 (4-5).

[3] Sara Josselyn, "Bar Mental Fitness Questions: Perpetuating Stigma" (2007) 16 Dalhousie J. of Legal Stud. 85 at 91 ("Josselyn") (while most proponents would likely argue that inquires into medical fitness actually serve to protect the public ...the more common (unintentional) justification is that the questions *appear* to fulfill these ends); Jon Bauer, "The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the American With Disabilities Act" (2001) 49 UCLA L. Rev 93 at 203 ("Bauer") (although the officially sanctioned rationale for the medical fitness screening is public protection, it is really upholding the image of the profession that seems to be the foremost concern); Deborah L. Rhode, "Moral Character as a Professional Credential" (1985) 94 Yale L. J. 491 at 511 ("Rhode") (regardless of whether admission certification procedures actually decrease future lawyer misconduct by excluding mentally unfit candidates, it is the public's perception that disreputable individuals are excluded that is essential in order to ensure a credible bar); Leslie C. Levin, "The Folly of Expecting Evil: Reconsidering the Bar's Character and Fitness Requirement" (2014) BYU L. Rev. 775 at 779 ("Levin #2) (the inquiry is also thought to serve a symbolic function: it communicates to the public that lawyers are to be trusted).

11. As described in this memo, the Task Force is of the view that the medical fitness questions fail to fulfill their primary purpose of protecting the public and instead cause harm by, amongst other things, dissuading students and lawyers from seeking appropriate support for mental health and substance use issues.

Revisions to the LSAP Application form in 2010

12. In 2010, the decision of the Human Rights Tribunal in G*ichuru v. Law Society of BC, (*No. 4) 2009 BCHRT 360 found that the question about past treatment for a list of specific mental health disorders in the LSAP Application form discriminated against applicants with mental disabilities.[4]

13. To address the problems the Tribunal identified with the question, the Law Society sought both a medical and legal opinion.[5] The medical opinion advised against eliminating the mental health question, and instead suggested replacing it with a general, inclusive question covering both physical and mental conditions that might affect a candidate's ability to practice. The medical opinion also supported maintaining a separate substance use question.

14. [redacted]

15. Based on the medical and legal opinions, the Law Society modified the mental health question in the LSAP Application form and made minor changes to the substance use question (although no analysis was done as to whether that question was discriminatory). The results of these amendments are reflected in the current medical fitness questions contained in Schedule A.

[4] The question at issue in *Gichuru* was: "Have you ever been treated for schizophrenia, paranoia, or a mood disorder described as a major affective illness, biploar mood disorder or manic depressive illness?" A separate question asking whether an applicant has ever had a drug or alcohol dependency and whether they had received treatment or counselling for this dependency was not at issue.

[redacted]

Why should the Credentials Committee re-visit the medical fitness questions?

16. The Task Force strongly urges the Credentials Committee to revisit the medical fitness questions for three interrelated reasons. First, the last review did not include a fulsome policy analysis of the effectiveness of the questions in achieving their purpose, including weighing their deleterious effects. [redacted]

17. Second, understandings of mental health and substance use have evolved considerably over the past decade, as have understandings about the consequences and effectiveness of asking medical fitness questions. New research reveals that, from an evidence-based perspective, the questions are unhelpful. What is at issue is not whether the Law Society should consider fitness to practice, but rather, whether the current questions are an effective means of doing so.

18. Third, in recent years, major bodies including the American Bar Association ("ABA") and the US Department of Justice have called for the elimination of medical fitness questions following their comprehensive review of the utility and impact of this type of inquiry. As an increasing number of US regulators respond by removing medical fitness questions from their bar applications, a review of the Law Society's use of these questions is timely.

Discussion

Part 1: Problems with the medical fitness questions

19. The medical fitness questions in the LSAP Application form should be removed for two overarching reasons.[6] First, the questions do not achieve their intended purpose of protecting the public from unfit lawyers. Second, questions about applicants' medical status have a series of adverse effects that further erode the effectiveness and, indeed, their appropriateness of, this line of inquiry. These two areas of concern are discussed in further detail below.

[6] Given that the Task Force advocates for the elimination of the medical fitness questions, the discussion does not include an analysis of how the current questions could be further modified, or whether, due to developments in the case law, they are problematic from a *Charter*, human rights or privacy perspective.

Medical fitness questions have no predictive value

20. Empirical evidence now confirms what mental health professionals and academic commentators[7] have suggested for some time: the predictive value of the medical fitness questions is so limited that regulators simply cannot determine, with any level of confidence, whether an applicant that provides a positive answer to a medical fitness question on an admissions application will go on to have disciplinary problems as a lawyer.

21. The first statistically significant study exploring the relationship between bar applicants who disclose mental health and substance use issues in the character and fitness process and the subsequent imposition of discipline was published in 2013.[8] Researchers compared rates of discipline for lawyers admitted to the Connecticut bar to determine whether the information provided in the admission application was predictive of whether individuals would subsequently be subject to disciplinary action as lawyers. Although an imperfect proxy, discipline was deemed the best available measure for lawyers who engage in misconduct.[9]

22. The study found that drug or alcohol problems reported at the time of bar admission were *not* associated with any higher discipline risk.[10]

23. With respect to mental health, the study found that there were no cases in which an applicant who reported a mental health issue on their bar application was later "severely disciplined" for the serious misconduct.[11] There was, however, a higher probability that

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[7] See Phyllis Coleman and Ronald A. Shellow, "Ask About Conduct, Not Mental Illness: A proposal for Bar Examiners and Medical Boards to Comply with the ADA and Constitution" (1994) 20 J. Legis. 147 at 148-149 ("Coleman and Shellow") (presence of, or treatment for mental illness or substance abuse are not directly related to character and fitness. Instead the test is conduct: whether the applicant's behaviour is likely to injure...clients, the profession or the public); Nancy Paine Sabol, "Stigmatized by the Bar: An Analysis of Recent Changes to the Mental Health Questions on the Character and Fitness Questionnaire" (2015) 4 Mental Health L. & Pol'y J. 1 at 3 ("Sabol") (new research reveals that the mental health questions do not adequately predict whether an individual will later have character and fitness issues); Josselyn *supra* note 3 at 99 (medical fitness inquiries are wholly incapable of eliciting meaningful information regarding applicant's' competence and fitness); Alyssa Dragnich, "Have You Ever…? How State Bar Association Inquiries into Mental Health Violate the American with Disabilities Act" (2015) 80 Brooklyn L. Rev. 677 at 742 ("Dragnich").

[8] Leslie C. Levin, Christine Zozula and Peter Seigleman, "A Study of the Relationship between Bar Admissions Data and Subsequent Lawyer Discipline" (2013) Law School Admission Council Grants Report Series ("Levin et al."). The study referenced an earlier study published in 1991 that undertook a similar analysis of the discipline records and bar admission files of lawyers in Minnesota. However, owing to the small sample size and the lack of statistical analysis, the data is unreliable, with the investigators themselves concluding that "the study was not conducted scientifically". See also, Dragnich *supra* note 7 at 721.

[9] Leslie C. Levin, "Rethinking the Character and Fitness Inquiry" (2014) 22 Prof. Law. 12 at 22 ("Levin").

[10] *Ibid*. at 22; Levin et al. *supra* note 8 at 29.

[11] Levin et al. *supra* note 8 at 24. The study broadly characterized discipline as "severe" (e.g. suspended for 2 or more years or disbarred) and "less severe", which included shorter suspensions, reprimands and conditions.

lawyers whose applications indicated the presence of a mental health issue would be subject to "less severe" discipline, raising the probability of discipline by 3.5% (from a baseline discipline rate of 2.5% up to 6%).[12]

24. Despite this slightly increased risk, an applicant who answered affirmatively to the mental health questions still had a 94% probability of *not* being disciplined over the time of the study.[13]

25. By way of comparison, the study found that being male raises the probability of discipline by 2.5%.[14] As more than one author notes, there is no suggestion that based on this "elevate risk" (which is similar to the increased risk associated with the presence of a mental health issue), all men should be subject to a more rigorous and intrusive bar application process in an effort to protect the public interest.[15]

26. The study concluded that "it remains true that someone who reports a mental health diagnosis or treatment is still overwhelmingly unlikely to be disciplined."[16] Further, the researchers observed that "even knowing that an applicant has a substantial elevated risk of future discipline is probably not sufficient to justify some kind of corrective or preventive action, given the low baseline risk"[17] and cautioned that "policy makers would almost certainly not be advised to take significant action based on a predictive probability of future discipline as low as 6%."[18]

27. This data, which did not exist at the time the Law Society's medical fitness questions were last evaluated, raises serious doubts about the effectiveness of these types of questions in identifying unfit lawyers.

28. [redacted]

[12] *Ibid*. Notably, Levin's study found that 23.68% of the disciplined lawyers may have had psychological issues which contributed directly or indirectly to their misconduct. However, she emphasizes that it is not know if those lawyers had these issues at the time of their admission or whether they developed later in their careers.
[13] Sabol *supra* note 7 at 15.
[14] Levin et al. *supra* note 8 at 25.
[15] Dragnich *supra* note 7 at 723; Sabol *supra* note 7 at 16.
[16] Levin et al. *supra* note 8 at 29. The study also emphasized that the failure of the variables to strongly predict subsequent discipline was not due to the fact that those who were likely to be problematic lawyers were denied admission to the bar as only one to two lawyers in Connecticut were denied admission each year based on concerns about medical fitness.
[17] Levin et al. *supra* note 8 at 1.
[18] Levin et al. *supra* note 8 at 38.

[redacted] Similarly, very few US regulators indicate that they can support the use of mental health inquiries with statistical data.[20]

29. The Task Force recognizes that not infrequently, disciplinary proceedings involve individuals with mental health or substance use issues, however, these conditions can (and do) develop at *any* point in a lawyer's career. Research indicates, however, that asking about these issues at the application stage is not an effective means of identifying which students will have competency issues once they become lawyers.

Jurisdictions that ask medical fitness questions do not have lower rates of lawyer discipline

30. If medical fitness questions are effective in identifying applicants that lack the requisite fitness to practice competently, one would expect to see lower levels of lawyer discipline in those jurisdictions that ask questions about mental health and substance use as compared to jurisdictions that do not ask these types questions. This, however, does not appear to be the case.[21]

31. For example, Pennsylvania and Massachusetts, neither of which ask questions about mental health in their bar applications, have lower rates of discipline as compared to several states that do ask mental health questions.[22] Aggregate data also fail to show a correlation between those states that ask medical fitness questions and lower rates of discipline.[23] This is not the result one would expect if the questions were effective in "weeding out" unfit lawyers.

32. Amongst Canada law societies, Ontario, Saskatchewan and the Northwest Territories do not ask medical fitness questions on their admissions application forms.[24] Although no analysis has been done as to whether these provinces have higher rates of lawyer discipline as compared to provinces that do ask these questions, presumably these regulators (along with the growing number of US states that do not ask medical fitness questions) are satisfied that they can achieve the goal of protecting the public without relying on questions about applicants' medical status.

[redacted]

[20] An informal study of 33 states found that while most asked about mental health on their applications, only 15% of examiners said they could support their use of mental health inquiries with statistical or anecdotal data (the acknowledge use of anecdotal data is in itself someone concerning). See Dragnich *supra* note 7 at 720.
[21] Sabol *supra* note 7 at 32.
[22] Dragnich *supra* note 7 at 725 (using discipline as a proxy for unfit lawyers).
[23] *Ibid*. at 726.
[24] These jurisdictions are statutorily mandated to consider good character but not "fitness".

Low rates of affirmative responses to medical fitness questions

33. Although the Task Force does not have statistics on the percentage of applicants that answer the Law Society's medical fitness questions affirmatively, anecdotally the Task Force has been advised that the numbers are very low. This corresponds with observations in other jurisdictions where the number of affirmative responses are also minimal, often in the range of one to two percent of applicants.[25] The number of denied or conditional admissions resulting from responses to medical fitness questions are, of course, much lower.

34. These low rates of disclosure are notable given that the most comprehensive study to date on mental health and substance use affecting US law students (the "Student Well-Being study") found that 42% of respondents felt they needed help for a mental health issue and 25% of respondents exhibited drinking behaviours for which further screening for alcoholism was suggested.[26]

35. There are several possible explanations for the gap between the number of applicants self-reporting and the number of students likely experiencing these issues. Some applicants may feel their condition does not cause an impairment, and therefore, does not need to be reported. In other cases, an applicant may be unaware that they have a mental health or substance use disorder (demonstrating that the questions are ineffective in eliciting information about undiagnosed and untreated conditions).[27]

36. Another likely explanation is that those with mental health or substance use issues, particularly those without a history of treatment, keep their condition hidden based on concerns about the consequences of disclosure. Data from the Student Well-Being study supports this explanation. Researchers found that 43% of students felt that hiding a mental health condition would improve their chances of being admitted to the bar and 49% of students felt hiding a substance use issue would improve their admission chances. Notably, these rates were considerably greater, in the range of 72% (substance use) and 62% (mental health) amongst students with the highest rates of binge drinking, drug use, depression or severe anxiety.

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[25] Dragnich *supra* note 7 at 728. For example, the rate of affirmative answers regarding mental health on the Virginia bar application were less than 1% (*Ibid*. at 685). Approximately 2% of the lawyers in the Connecticut study answered the mental health questions positively.

[26] J.M. Organ, D.B. Jaffe and K.M. Bender, "Suffering in Silence: the Survey of Law Student Well-Being and Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns" (2016) 66 J. Legal Educ. 116 ("Student Well-Being study").

[27] As at least one commentator observers, the problem with diagnosis or treatment based questions about substance use (the approach currently employed by the Law Society) is that "they are practically useless in identifying applicants with active, untreated substance use problems. Ask such a person whether they have a disorder, or are being treated, and their denial virtually guarantees a no answer." (Bauer *supra* note 3 at 178).

37. These statistics suggests that many individuals, and *particularly* those with the most serious issues (arguably the group regulators are attempting to identify) will choose not to reveal a medical fitness issue on their admissions application. Conversely, the questions are more likely to capture those individuals that have sought treatment or support and are therefore less likely to deny or hide their condition. Again, this raises questions as to the effectiveness and utility of these inquiries.

38. Proponents of medical fitness questions assert that identifying even a few applicants with mental health or substance use conditions that may lead to competency issues is better than not "capturing" any of these individuals at all. This line of argument is problematic for at least two reasons. First, as previously discussed, the data suggest a very weak connection, if any, between those individuals that identify as having a mental health or substance use issue on their admission application and later lawyer misconduct. Second, the medical fitness questions only make sense if they produce a net gain in public protection. That is, even if the questions identify *some* problematic individuals, these "gains" must be weighed against the significant costs associated with asking questions, as described below.

Medial fitness questions deter students from seeking treatment

39. There is an abundance of academic literature[28] and empirical research [29] demonstrating that asking medical fitness questions in a bar application deters some applicants from seeking necessary counselling and treatment for mental health and substance use issues. Although it is not possible to measure the full impact of the questions on help-seeking behaviour, two studies suggest the deterrent effect is likely significant.

40. In 1994, a nation-wide study of US law students explored whether individuals would seek assistance if they believed they had a substance use issue. The results showed that the prospect of disclosure in the bar application significantly reduced students' willingness to seek counselling for substance use issues or to refer friends for help. Specifically, when students were asked whether they would seek assistance for a substance use problem, only 10% said yes. However, 41% indicated they would seek assistance if they were

[28] See for example, Josselyn *supra* note 3 at 97; Lindsay Lusk,"The Poison of Propensity: How Character and Fitness Sacrifices "Others" in the Name of Protection" (2018) 1 University of Illinois L. Rev 345 at 365, 372; Dragnich *supra* note 7 at 683; Bauer *supra* note 3 at 150; Rhode *supra* note 3 at 581; Jennifer Jolly-Ryan, "The Last Taboo: Breaking Law Students with Mental Illness and Disabilities out of the Stigma Straightjacket" (2010) 79 UMKC L. Rev. 124, 131; Sabol *supra* note 7 at 3,17.

[29] Report of the Association of American Law Schools (AALS) Special Committee on Problems of Substance Abuse in Law Schools, (1994) 44 J. Legal. Educ. 35 ("AALS Study") which involved over 3,300 students from 19 law schools; Student Well-Being study *supra* note 26, which involved 3,300 students from 15 law schools.

assured that *bar officials would not have access to the information.* A similar effect of confidentiality assurances was seen in relation to student's willingness to report an impaired colleague.[30]

41. This deterrent effect was also observed in the 2013 Student Well-Being study. Researchers found that although 42% of respondents thought they needed help for mental health issues, only half of these students had actually sought help. Only 4% of respondents reported they had used a health professional for drug or alcohol issues, a very low percentage relative to the 25% of respondents that exhibited drinking behaviours that met the threshold for further screening for alcoholism.[31]

42. In exploring barriers to help-seeking behaviours, researchers found that 63% of respondents identified the potential threat to bar admissions as discouraging them from seeking assistance for substance use issues. Additionally, 45% of respondents identified potential threat to bar admissions as discouraging them from seeking assistance for a mental health issue.[32] The researchers confirmed that "one of the most significant obstacles to seeing a health professional for alcohol, drug or mental health issues is fear of not being admitted to the bar, owing the character and fitness component of bar applications."[33]

43. Administrators at BC law schools also observe that the medical fitness questions contained in the LSAP Application form have a negative impact on law students' desire to seek treatment.[34] Although Schedule A contains a preamble stating that disclosing treatment is not a bar to admission, the message from the law schools and reflected in the low rates of self-reporting is that many students simply do not trust that this is the case.[35]

44. Additionally, medical fitness questions may also prevent applicants who are actively seeking help for these issues from being forthcoming with their healthcare providers due to fear that this information will find its way back to the regulator. This lack of candour may result in misdiagnosis or a less effective course of treatment.[36]

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[30] *Ibid.*
[31] Student Well-Being study *supra* note 26 at 140.
[32] *Ibid*. at 141.
[33] *Ibid*. at 154.
[34] See the submissions of the Allard School of Law and the UVic Faculty of Law contained in the supporting materials included in this consultation package.
[35] For a critique of the preambles to medical fitness questions, see Hilary Duke, "The Narrowing of State Bar Examiner Inquiries into the Mental Health of Bar Applicants: Bar Examiner Objectives are Met Better Through Attorney Education, Rehabilitation and Discipline" (1997) 11 Geo. J. Legal Ethics 101 at 122-123; Dragnich *supra* note 7 at 711.
[36] American Bar Association, "Resolution 102 and supporting report" (August 2015) at 7; Josselyn *supra* note 3 at 98; Dragnich *supra* note 7 at 686.

45. This chilling effect is counterproductive to the purpose of the questions - protecting the public - as applicants that may have benefited from counselling or treatment prior to beginning their legal career fail to seek it. As a result, these individuals may be less prepared to deal with the pressures and stresses of legal practice. As one author notes, "medical fitness inquiries serve to deter treatment that would otherwise enable applicants to be stronger, healthier, more successful and generally "fit" lawyers."[37]

46. Even if there were some discernable benefit to retaining the medical fitness questions — which the evidence suggests there is not — their counterproductive effect still justifies their removal.

Medical fitness questions reinforce stigma

47. The inclusion medical fitness questions in the LSAP Application form sends the message that those experiencing mental health and substance use issues pose an elevated risk to the public and must therefore be considered for more intensive screening. As discussed previously, current research suggests this is not the case.

48. Rather than revealing actual risks, the questions rely on speculation, stereotypes and generalizations about applicants with mental health or substance use issues.[38] Consequently, one of the most significant impacts of asking the questions is reinforcing the stigma surrounding mental health and substance use, extending the counterproductive effect of the inquiry further still.

49. Similarly, justifying these questions on the basis that they achieve their secondary objective of protecting the reputation of the profession by assuring the public that a rigorous vetting process is in place to prevent unfit individuals from being admitted to the bar is not acceptable as this "reassurance" reinforces the notion that there is a correlation between applicants' medical status and competence.

50. Given that addressing stigma is a strategic priority for the Law Society,[39] it is imperative to find ways to elicit information about applicants' fitness to practice in a non-stigmatizing manner and for the Law Society to undertake a leadership and educating role in challenging these stereotypes and actively seeking ways to reduce stigma.

[37] Josselyn *supra* note 3 at 98.
[38] Josselyn *supra* note 3 at 104; Rhode *supra* note 3; Bauer *supra* note 3at 193; Sabol *supra* note 7 at 17.
[39]Law Society of BC Strategic Plan 2018-2020, online at: www.lawsociety.bc.ca/Website/media/Shared/docs/about/StrategicPlan_2018-2020.pdf

Medical fitness questions impact on privacy interests

51. The impact of medical fitness questions on privacy interests are well documented.[40] Within BC, in addition to being required to disclose the existence of, and details about certain medical conditions, an affirmative answer to the medical fitness questions can result in an applicant being asked to consent to the release of their medical records and/or an independent medical examination.[41]

52. Medical records can include information about life circumstances, past traumas, personal relationships, past struggles with mental health or addiction and associated treatment histories, much of which will have nothing to do with the applicant's current ability to practice law.

53. Generally, students are also obliged disclose their health status to their employer to explain the Law Society's involvement in their application process, particularly when the process surrounding the release of medical records and independent medical examinations result in delays in the commencement of articles.

54. In balancing applicants' rights to privacy with the public interest in having relevant information disclosed at the time of admission, the efficacy of the medical fitness questions must be considered. Given the body of evidence that demonstrates that self-identifying as having a mental health or substance use issue in a bar admission application has little, if any, bearing on future professional competence, the questions and related follow-up inquiries are an unreasonable invasion of privacy.

Medical fitness questions cause stress, inconvenience and delay

55. In addition to potentially generating feelings of shame and embarrassment, being required to answer medical fitness questions, and the investigations that flow from providing affirmative answers to these questions, can be a great source of stress and inconvenience for many applicants.[42]

56. As noted above, consenting to the release of highly confidential medical information to individuals that have enormous control over applicants' future can be an extremely

[40]Shellow and Coleman *supra* note 7 at 159; Dragnich *supra* note 7 at 68.
[41] See the Law Society of BC's Procedure regarding affirmative answer to the medical fitness questions, contained in this consultation package.
[42] Lusk *supra* note 3 at 372; Dragnich *supra* note 7 at 684; Bauer *supra* note 3 at 193, 210; Levin, #2 *supra* note 2 at 779.

difficult experience for many individuals. Similarly, independent medical examinations, can be inconvenient, onerous and stressful.

57. Academics and law school administrators have also observed that affirmative answers to the medial fitness questions can lead to delays in the admission process that can affect students' ability to participate in law school clinical programs, as well as impacting professional opportunities.[43] Delays that limit a student's employability can be tremendously inconvenient and stressful for applicants. The submissions from the Allard School of Law and the University of Victoria Faculty of Law, included in this consultation package, provide a more detailed account of these challenges.

Part 2: What is the scope of the appropriate fitness inquiry?

58. Given the significant costs associated with medical fitness inquiries and the body of evidence indicating that the questions are not an effective means of protecting the public from unfit lawyers and further, are not an appropriate means of safeguarding the reputation of the profession, are there alternate means to achieving these goals?

59. In posing this question, it is important to underscore that the issue is not whether the Law Society should consider fitness to practice as an element of the application process. Indeed, under section 19 of the *LPA*, it is required to. Rather, the issue is whether there are more effective means of doing so than the medical fitness questions.

60. Numerous academics,[44] the American Bar Association[45] and the US Department of Justice[46] are all of the view that the answer is yes, there are better ways to undertake a fitness inquiry that protects the public from unfit lawyers and safeguards the reputation of

[43] Dragnich *supra* note 7 at 684; Levin #2 *supra* note 3 at 779; Allard Law and UVic Faculty of Law submission.
[44] Coleman and Shellow *supra* note 7 at 149,173 (the most accurate way to predict whether a person's conduct is likely to cause injury is to determine if he has a history of harmful behaviour. Consequently, professional licensing boards should inquire about conduct, not treatment for or history of mental illness or substance abuse)(as with mental illness, when evaluating an applicant for a professional license, the important question is conduct, not substance abuse); Josselyn *supra* note 3 at 112 (instead of continuing the debate regarding how to appropriately narrow and improve upon current medical fitness questions, a more suitable examination might be to consider whether Bar Societies' screening processes can be effective without any mental health questions at all); Dragnich *supra* note 7 at 737 (the appropriate inquiry should be the applicant's history of behaviour...the mere existence of a particular mental health diagnosis has no probative value); McPherson Hughes *supra* note 2 at 195 (because bar exam questions regarding mental health can deter students from seeking necessary help, they may be unlawful or ineffective or both. Therefore, they should be excluded from bar applications. Instead, state bars should focus on applicants' behaviour and not his mental health status); Sabol *supra* note 7 at 5 (it is now time for all of the states to focus their questions on applicant conduct, rather than mental health status or history).
[45] ABA Resolution 102 and supporting report *supra* note 36.
[46] Letter from Jocelyn Samuels, Acting Assistant Attorney General, US Department of Justice, Civil Rights Division to the Louisiana Supreme Court, the Louisiana Supreme Court Committee on Bar Admission and the Louisiana Attorney Disciplinary Board Office of Disciplinary Counsel (February 5, 2014) ("DoJ Findings Letter to Louisiana State Bar").

the public, namely: applicants' fitness to practice can, and indeed *should* be evaluated on the basis of their actions, not the presence or absence of a medical condition.

61. The Task Force strongly supports this position.

62. Recognizing the limitations and drawbacks of mental health inquiries, in 2015 the American Bar Association replaced its resolution urging regulators to *narrowly tailor* questions concerning mental health and treatment to elicit information about fitness to practice with a new resolution calling on licensing entities to no longer ask *any* questions concerning mental health history, diagnosis or treatment and instead focus on conduct or behaviour that impairs an applicant's ability to practice in a competent, ethical and professional manner.[47]

63. Again, the Task Force supports this view. Illness does not affect a professional's fitness to practice unless it results in *conduct* that is harmful to clients. Because the issue is behaviour, fitness inquiries should focus on conduct that demonstrates (or fails to demonstrate) that an applicant can competently fulfill the professional and ethical duties required of a lawyer.[48]

64. As such, questions about mental health or substance use should not be included on admissions applications, and should *only* occur in the context of follow-up inquiries if the applicant has demonstrated problematic conduct and mental health or substance use is shown to be an explanation for the conduct.

65. This approach is perhaps best articulated by the ABA in its letter of support for the recent elimination of the medical fitness questions in Washington state:

> Requiring bar applicants to provide their mental health histories, diagnoses, or past treatment details unfairly discriminates against individuals with disabilities and is likely to deter individuals from seeking mental health counseling and treatment. Additionally, these questions have proven to be ineffective for the presumed purpose of identifying unfit applicants. The ABA does, however, make clear that:
>
> > licensing entities are not precluded from making reasonable and narrowly tailored follow-up inquiries concerning an applicant's mental health history if the applicant has engaged in conduct or behavior that may otherwise warrant a denial of admission, and a mental health condition either has been raised by the applicant as, or is shown by other information

[47] *Ibid*.
[48] Coleman and Shellow *supra* note 7 at 154,155.

> to be, an explanation for such conduct or behavior. We believe this approach strikes the right balance and allows licensing entities to carry on in their vital role of protecting the profession and the public.[49]

66. The US Department of Justice similarly advocates for an approach in which applicants are not asked to disclose diagnosis of, or treatment for a disability *unless that information is being used to explain the applicant's conduct.*[50]

67. More than half a dozen states have adopted the approach advocated by the ABA and the US Department of Justice. Samples of some of these application forms are included in the consultation package for reference, as are the admissions application forms in Ontario, Saskatchewan and the Northwest Territories, which do not ask questions specific questions about applicants' mental health or substance use.

68. These jurisdictions are clearly confident that they can protect the public without inquiring into an applicant's medical status. A focus on behavioural inquiries will result in fitness concerns being revealed through other information gathered in the application process (e.g. leaves of absence from school or work, credit problems, employment history revealing multiple terminations)[51] in a manner that does not of deter treatment, perpetuate stigma, or subject applicants to unnecessary invasions of privacy, stress, inconvenience and delay.

69. Under this behavioural approach, denial of admission may be justified if the applicant's fitness to practice competently is in doubt based on a pattern of problematic conduct, including that which can be explained by a mental health issue or substance use disorder.

70. Given the ineffectiveness of the medical fitness questions in achieving their stated purpose and the significant costs associated with these inquiries, the Task Force supports the approach proposed by the ABA and the US Department of Justice and adopted by many states, and advocates for the removal of the questions found in Schedule A of the LSAP Application form.

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[49] American Bar Association, "Letter to Washington State Supreme Court Re: Revisions to Admissions Practice Rules 20-25 and the Bar Application" (April 21, 2016) ("ABA Letter to Washington State Court")

[50] DoJ Findings Letter to Louisiana State Bar *supra* note 46 at 31 ("To remedy the deficiencies discussed above and protect the civil rights of individuals with mental health diagnoses or treatment who seek to practice law in the State of Louisiana, the Court should promptly implement the minimum remedial measures set forth below. a) Refrain from utilizing […] any other question that requires applicants to disclose diagnosis of, or treatment for, a disability when that information is not being disclosed to explain the applicant's conduct").

[51] By way of example, behavioural inquiries have proved effective in California, where without asking a status based substance use question, the regulator has found indications of problematic substance use in hundreds of applications a year (Bauer *supra* note 3 at 178).

71. The Law Society's fitness inquiry should instead focus on eliciting information about *conduct or behavior* that impairs an applicant's ability to practice law in a competent, ethical and professional manner.[52] Reasonable and narrowly tailored follow-up inquiries concerning an applicant's mental health or substance use are only permissible if the applicant has engaged in conduct or behavior that may otherwise warrant a denial of admission and these conditions have either has been raised by the applicant as, or shown by other information to be, an explanation for such conduct.

Conclusion

72. The Law Society has a duty to protect the public from incompetent lawyers and in doing so, ensuring that applicants are effectively screened for fitness to practice law. However, from an evidence-based perspective, asking medical fitness questions in the LSAP Application form is not an effective or appropriate means to achieve this goal. Rather, these questions are counterproductive and reinforce stigma.

73. In the time since the Law Society last reviewed the medical fitness questions in the LSAP Application form, there have been important advances in understandings about the impact and effectiveness of these inquiries. A consideration of this new body of information, which includes studies, reports, academic papers, policy positions and opinions from the American Bar Association, the US Department of Justice and the National Task Force on Lawyer-Wellbeing, submissions from BC law schools and examples of admission applications from other legal regulators that have eliminated medical fitness questions, is necessary.

74. All of this material is contained in this consultation package, and much of it has been referenced throughout this memo.

75. New research shows the predictive value of the medical fitness questions is so limited that regulators simply cannot determine, with any level of confidence, whether an applicant that provides a positive answer to a medical fitness question on an admissions application will go on to have disciplinary problems as a lawyer.

76. There is also no evidence that jurisdictions that ask medical fitness questions have lower rates of lawyer misconduct that those that do not. Further, data suggests that many individuals, and *particularly* those with the most serious conditions, will choose not to reveal a medical fitness issue on their admissions application. Collectively, these issues raise serious questions as to the effectiveness and utility of the medical fitness inquiry.

[52] ABA Letter to Washington State Court *supra* note 49.

77. There are significant costs associated with asking medical fitness questions. There is an abundance of research that medical fitness questions deter some individuals from seeking necessary counselling and treatment for mental health and substance use issues. Medical fitness questions also invade applicants' privacy, cause stress and inconvenience and result in delays bar admission that can have both personal and professional ramifications.

78. Based on the evidence and arguments discussed in this memo and the supporting materials included in this consultation package, the Task Force strongly advocates for the removal of the all medial fitness questions from Schedule A of the LSAP Application form.

79. The fitness inquiry should, instead, focus on *conduct or behavior* that impairs an applicant's ability to practice law in a competent, ethical and professional manner. Follow-up inquiries concerning an applicant's medical condition may, however, be appropriate, if the applicant has engaged in concerning conduct or behavior and a mental health or substance use issue has either has been raised by the applicant as, or is shown by other information to be, an explanation for such conduct or behavior.

The Law Society of British Columbia

Memo

To: Lawyer Education Advisory Committee

From: Mental Health Task Force

Date: January 20, 2019

Subject: Overview of Mental Health Task Force consultation materials for the Lawyer Education Advisory Committee

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1. In December 2018, the Benchers approved all 13 of the Recommendations contained in the Mental Health Task Force's First Interim Report.

2. Recommendation 10 proposed that the Mental Health Task Force work together with the Lawyer Education Advisory Committee to explore the merits of the Law Society introducing a mandatory continuing professional development requirement for mental health and substance use disorder programming.

3. As the Mental Health Task Force shifts its focus to implementing its Recommendations, it seeks to collaborate with the Lawyer Education Advisory Committee in undertaking a policy analysis of this issue.

4. The following materials are included in this consultation package to assist the Mental Health Task Force and the Lawyer Education Advisory Committee in their consideration of this issue:

    - **CPD purpose statement and Professional Wellness excerpt from the LEAC 2017 Final CPD Report (December 2017)**
        - This excerpt from the 2017 Final CPD Report outlines the recent changes to the CPD program that resulted in "professional wellness" becoming a newly accredited subject matter, and the rationales for those changes.
        - This material includes guidance for the profession on what topics qualify for "professional wellness" credit in BC.

- **Part 1 and Recommendation 10 of the Mental Health Task Force's First Interim Report (December 2018)**

    - Part 1 of the First Interim Report outlines the prevalence of mental health and substance use issues in the legal profession, the role of stigma, and the rationales for the Law Society to work proactively to address these issues across its various functions and processes.
    - Recommendation 10 highlights the recent changes to the American Bar Associations Model Rule, which now includes a stand-alone CLE requirement for mental health and substance use disorder programming. This rule has been adopted by a number of US states.

- **National Task Force on Lawyer Well-Being, "The Path to Lawyer Well-Being: Practical Recommendations for Positive Change" (2017) – highlighted sections pertaining to CPD/CLE**

    - The National Task Force's *Path to Lawyer Well-Being* is widely regarded as the most authoritative report on lawyer well-being to date. The report strongly advocates for action to address mental health and substance use in the legal profession, and encourages specific actions for improving the well-being of lawyers, as outlined in more than three dozen recommendations for various stakeholders.
    - In addition to drawing a link between lawyer well-being and professionalism and competence (both objectives of the Law Society of BC's CPD program), the report contains a specific recommendation to regulators to adopt the ABA's Model Rule in relation to mandatory mental health programming.
    - Specifically, Recommendation 20.3 proposes that all states adopt the Model Rule provision requiring lawyers to earn one credit hour every three years of CLE programming that addresses the prevention, detection, and/or treatment of "mental health and substance use disorders."
    - The report also highlights a broader set of well-being topics that the National Task Force recommends regulators accredit for the purposes of CLE/CPD.

- **American Bar Association Resolution 106 and Report (February 2017)**
    - Resolution 106 amending the ABA Model Rule for Minimum Continuing Legal Education includes a requirement for lawyers to receive at least one hour of mental health or substance use disorder programming every three years.

- The comments detail that while these types of programs generally count toward general CLE or ethics requirements, the amended Model Rule recommends a stand-alone requirement.
- The Resolution's accompanying Report explains the rationales for this approach, including reducing the concern of lawyers who would otherwise be reluctant to attend due to stigma.

- **Rules of other jurisdictions that have adopted stand-alone *mandatory* mental health and substance use disorder CLE requirements**
  - The CPD rules on stand-alone mandatory mental health and substance use disorder programming from the following states are enclosed: California, Illinois, Nevada, South Carolina and North Carolina. Indiana is also poised to implement mandatory mental health CLE.

5. The Mental Health Task Force encourages collaboration and dialogue with the Lawyer Education Advisory Committee in exploring the merits of instituting a mandatory mental health and substance use disorder CPD requirement in BC. This could include a series of meetings and/or an exchange of memos on the issue, with the ultimate goal of working toward a recommendation for the Benchers.

6. The Task Force's view is that the mandatory approach has the potential to address the very real concern – as highlighted in the Report accompanying ABA Resolution 106 - that stigma will prevent many lawyers from attending voluntary CPD programming on mental health and substance use disorders, and that these topics are of critical importance to lawyer learning given the prevalence of these issues among the profession.

The Law Society of British Columbia

Memo

To: Benchers
From: Ad Hoc Bencher Election Working Group
Date: June 19, 2019
Subject: Suggested Bencher Election Guidelines

The Working Group met twice in May, 2019.

We discussed at length what guidelines might be put in place governing bencher elections, as follows:

1. **No Negative Campaigning**

After much discussion it was felt that trying to impose restrictions in this regard may raise freedom of speech issues and thus was rejected.

2. Prohibition Against Running a Slate of Candidates

This concern arose out of the Ontario bencher election and the Cayton Report on the self-regulation of dentists. That report suggested that running slates of candidates turned the Dental regulators into an Advocacy Group.

Again after much discussion the Working Group rejected this idea as it could raise a freedom of association issue.

3. Spending Limits

Again the Working Group felt this was not something that could be imposed on bencher candidates. A reporting mechanism would have to be created and enforced. Monetary limits would have to be established as well as penalties for non-compliance. This then becomes a resource issue and another area for the law society to investigate.

We did agree that there was possible merit in alerting candidates that spending large sums on election campaigning may have the opposite effect than intended, but that it was not an issue that the law society would regulate.

4. Suggestions

a. Tightening up the wording of the bencher oath of office to underscore that our obligation is to the public. Current Oath of Office reads:

> **Oath of office**
>
> **1-3** (1) At the next regular meeting of the Benchers attended by a Bencher after being elected or appointed as a Bencher or taking office as President or a Vice-President, the Bencher must take an oath of office in the following form:
>
> I, [name] do swear or solemnly affirm that:
>
> I will abide by the *Legal Profession Act*, the Law Society Rules and the *Code of Professional Conduct*, and I will faithfully discharge the duties of [a Bencher/ President/First or Second Vice-President], according to the best of my ability; and
>
> I will uphold the objects of the Law Society and ensure that I am guided by the public interest in the performance of my duties.

b. Make it clear in the announcements regarding bencher elections what a regulator is, and emphasizing that the law society is NOT an advocacy group promoting lawyers' interests.

c. Provide more information to prospective benchers in a timely manner what it means to be a bencher, what the role entails and the time commitment needed. This could include providing prospective benchers with a package which would include the new Bencher Code of Conduct, the Oath of Office and any other relevant material (for example Governance may wish to propose additional material).

d. As part of the Nomination Document, have the nominee sign off that they have read the material referred to in the preceding paragraph of this memo and will abide by the obligations contained therein if elected.

e. Create short videos showcasing several benchers (fairness dictates that they not be running for re-election this year otherwise it could be perceived that we are giving them an unfair advantage) discussing the role of the bencher, what prospective benchers can expect if elected, encouraging diverse candidates, why it is such important, fulfilling work and the like.

REDACTED MATERIALS

REDACTED MATERIALS

The Law Society of British Columbia

Memo

To:	Benchers
From:	Executive Committee
Date:	July 3, 2019
Subject:	Pro Bono Award Criteria

At the May 3, 2019 Bencher meeting, Benchers unanimously agreed to approve the creation of a pro bono award and delegate to the Executive Committee any edits to the criteria for the award.

At the May 15, 2019 meeting, the Executive Committee discussed revised pro bono criteria put forward by the Access to Legal Services Advisory Committee (ALSAC). The Executive Committee sought further clarification on some matters from ALSAC and requested for the matter to be brought back for consideration at a subsequent meeting.

The matter was next considered by the Committee at its June 27 meeting. The Executive Committee agreed on recommended edits to the criteria in consultation with input from the ALSAC.

For your information, the criteria approved by the Executive Committee is provided below.

Title: T.B.D.

Purpose of the Award: The purpose of the Award is to recognize lawyers who have demonstrated exceptional commitment to the provision of pro bono in British Columbia, exhibiting professionalism and a high degree of competence, in one or more of the following ways:

1. by consistently taking on pro bono files over a number of years; and

2. by taking an active and ongoing role in promoting pro bono in British Columbia.

(Collectively, "The Purposes of the Award")

Eligibility: Lawyers practising in British Columbia who are in good standing with the Law Society are eligible for the Award. Employees of a pro bono organization are not eligible for the Award.

Criteria for nomination: Lawyers who act in a manner that meets and advances the Purposes of the Award.

Additional consideration may be given to lawyers who have done any of the following:

- publicly demonstrated a commitment and dedication to pro bono activities, whether through public advocacy, writing articles or performing research designed to support greater pro bono engagement;
- participated in the governance of pro bono organizations;
- pro bono work that has been designed and undertaken in an innovative manner;
- pro bono work that has resulted in significant benefit to an individual(s), a non-profit or community group(s) or to the provision of pro bono services generally.

Nomination Process: A member of the BC Law Society in good standing may nominate a practising lawyer for the Award. The nomination is by way of letter in which the nominator explains why the nominee is deserving of the Award, based on the Purposes of the Award.

Selection Process: The President of the Law Society will appoint a panel of Benchers to review nominations and recommend to the Benchers the name of an individual who should receive the Award.

Award: [description of award TBD]

Presentation: The Award will be presented on a biennial basis at the Life Bencher Dinner.

Brook Greenberg was recognized at the Lexpert awards in June for his work with mental health and substance use in the profession. He was pleased to be recognized as it brought attention and legitimacy to the work of our Mental Health Task Force and wanted to share the recognition with the other members of the Task Force: Michelle D. Stanford, QC (Vice-Chair), Phil Dwyer, The Honourable Madam Justice Nitya Iyer, Derek C. LaCroix, QC, Christopher A. McPherson, QC and Kendra F. Milne.