



The Law Society of  
Upper Canada

Barreau

du Haut-Canada

# Real Estate Practice Guide

**FOR LAWYERS**

June 2010

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# REAL ESTATE PRACTICE GUIDE

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# **REAL ESTATE PRACTICE GUIDE<sup>1</sup>**

## **INTRODUCTION**

This handbook is a guide to help lawyers and their staff better understand some of the regulatory requirements and guidelines relating to the practice of real estate. This handbook is not intended to cover every possible ethical situation encountered in the practice of real estate law. In order to ensure compliance, lawyers should refer to the Law Society *Rules of Professional Conduct (Rules) and By-Laws*. Lawyers who have specific questions about the Law Society Rules, By-Laws or Guidelines may call the Law Society Resource Centre at 416 947-3315 or toll free in Ontario 1–800-668-7380 ext. 3315 or consult the Law Society’s website at [www.lsuc.on.ca](http://www.lsuc.on.ca).

## **PART 1 - THE REAL ESTATE TRANSACTION**

Over the course of the past decade there have been a number of changes both to the law affecting real estate practice and to conveyancing practice. This part of the article summarizes some of the regulatory requirements and issues regarding title insurance, electronic registration, mortgage transactions and disbursement of closing funds.

### ***TITLE INSURANCE***

Both the *Rules* and the Residential Real Estate Transactions Practice Guidelines contain provisions dealing with title insurance.

### **RULES – TITLE INSURANCE**

The *Rules* impose certain obligations on the lawyer with respect to title insurance in real estate conveyancing.

When advising a client about a real estate conveyance, a lawyer has an obligation to:

- assess all reasonable options to assure title; and
- advise the client that title insurance is not mandatory and is not the only option to protect the client’s interests in a real estate transaction [Subrule 2.02(10)]

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<sup>1</sup> The information contained in this guide is not a substitute for the lawyer’s own research, analysis and judgment. The Law Society of Upper Canada does not provide substantive legal advice or opinions.

The lawyer should be cognizant of when title insurance may be an appropriate option. Although title insurance is intended to protect the client against title risk, it is not a substitute for a lawyer's services in a real estate transaction.

The lawyer should be knowledgeable about title insurance and discuss with the client the advantages, conditions, and limitations of the various options and coverages generally available to the client through title insurance [Subrule 2.02(10) and Commentary].

The *Rules* also provide that a lawyer may not receive compensation, whether directly or indirectly, from a title insurer, agent or intermediary for recommending a specific title insurance product to his or her client [Subrule 2.02(11)].

Furthermore, the lawyer must disclose to the client that no commission or fee is being furnished by any insurer, agent, or intermediary to the lawyer with respect to title insurance coverage and if discussing TitlePlus insurance with the client, the lawyer must fully disclose the relationship between the legal profession, the Law Society and the Lawyers Professional Indemnity Company [Subrules 2.02(12)-(13)].

## **RESIDENTIAL REAL ESTATE TRANSACTIONS PRACTICE GUIDELINES – TITLE INSURANCE**

The Residential Real Estate Transactions Practice Guidelines with the exception of those provisions contained in *Rules* or *By-Laws*, set out recommended practices and procedures for lawyers acting on residential real estate transactions. These Guidelines contain a number of references to title insurance and best practices.

### **ADVISING THE CLIENT AT THE OUTSET OF THE TRANSACTION**

The Guidelines provide that the lawyer should consider forwarding an initial letter to the client at the outset of the retainer that may include information about the various methods of assuring title and confirmation of the method selected by the client.

Where title insurance is being used, the lawyer should at the commencement of the retainer:

- advise the client about the searches that the lawyer will not be performing and the type of information that these searches would reveal about the property such as zoning, encroachments or survey issues;
- communicate with the client to determine whether the client has any adverse knowledge about the property that could give rise to the insurer relying on the “knowledge” exclusion if the matter is not disclosed and “insured over” pre-closing [Guideline 1].

Where title insurance is not being used, the lawyer should advise the client about the post closing protections provided by title insurance which the client is not receiving (e.g. regarding post-closing encroachments onto the property and fraud) [Guideline 1].

### **ADVISING THE CLIENT DURING THE COURSE OF THE TRANSACTION AND REPORTING TO THE CLIENT**

The lawyer should discuss with the client and obtain instructions from the client regarding the off title searches that may be appropriate or advisable in view of the nature of the property, the circumstances of the transaction, the terms of the agreement of purchase and sale and the consequences of not conducting those searches.

Where title insurance is being used, the lawyer should be aware of what off title searches are not covered by title insurance and either make the appropriate searches or obtain waivers from the client.

The lawyer should also be aware of the inter-related nature of the following issues: deciding not to make certain off title searches; allowing the requisition date to pass without the results of those searches being available; the timing of receiving a title insurance binder or commitment (usually after the requisition date has passed); and the policy of the selected title insurer regarding “insure over” requests for adverse circumstances which emerge before closing notwithstanding the lack of a search [Guideline 2].

Prior to closing where title insurance is being used, the lawyer should review with the client and receive written confirmation from the client regarding:

- the manner in which title is being assured;
- the state of title and the coverage that will be available under the client’s title

- insurance policy, if applicable;
- whether the client has any adverse knowledge about the property that could give rise to an insurer relying on the “knowledge” exclusion if the matter is not disclosed and “insured over” prior to closing [Guideline 1].

Where title insurance has been used to assure title, the reporting letter to the client should not opine on title, but should include the title insurance policy issued to the client [Guideline 1].

### **DELAY IN CLOSING**

Where title insurance is being relied upon to close a transaction where registration is delayed, there should be an express obligation on the part of the insurer as part of the binder/commitment pre-closing addressed to the insured client to provide coverage to the client for any adverse registrations which occur between releasing the closing proceeds and registration of the title documents [Guideline 2].

### **ISSUANCE OF THE TITLE INSURANCE POLICY**

The lawyer should review the draft title insurance policy or binder/commitment to determine:

- that the insured is named correctly;
- that the legal description is correct and includes any off-site lands that should be included in the description such as easements located on other properties;
- whether there are other title issues, not apparent from the insurance commitment, of which the client should be warned; and
- what coverage is excluded under the policy [Guideline 2].

The lawyer should issue the title insurance policy as soon as possible after closing to insure that an issued policy exists should the insured client need to make a claim and to minimize the risk of the client being obliged to disclose adverse information obtained between closing and the issuance of the policy [Guideline 2].

See **Appendix 1** for Rule 2 and **Appendix 2** for the Residential Real Estate Transactions Practice Guidelines.

## ***ELECTRONIC REGISTRATION***

Both the *Rules* and the Practice Guidelines for Electronic Registration of Title Documents (Electronic Registration Practice Guidelines) contain requirements or suggested procedures to be followed by lawyers in the electronic registration of title documents.

## **PERSONAL SECURITY PACKAGE (PSP)**

A PSP is the personalized specially encrypted diskette or key and the corresponding pass phrase used to access the e-reg™ system. The *Rules* impose obligations on lawyers to safeguard their PSPs and to ensure that non-lawyers employed by them also safeguard their PSPs.

A lawyer who has a personalized specially encrypted diskette to access the e-reg™ system, must not permit others, including a non-lawyer employee, to use the lawyer's diskette and must not disclose his or her personalized e-reg™ pass phrase to others [Subrule 5.01(3)].

In addition the lawyer must ensure that any non-lawyer employed by the lawyer who has a personalized specially encrypted diskette to access the e-reg™ system does not permit others to use the diskette and does not disclose his or her e-reg™ pass phrase to others [Subrule 5.01(4)].

## **AUTHORIZATION TO REGISTER**

Guideline 3 of the Electronic Registration Practice Guidelines deals with the Acknowledgment and Direction.

In the e-reg™ system documents are signed and registered electronically by lawyers and their assistants. Prior to registering electronic documents, lawyers should obtain and retain in their files the client's written authorization to register.

The Acknowledgment and Direction is a form generated by the e-reg™ system that contains:

- the client's acknowledgement that the information in the document to be registered is accurate and that the client understands the contents of the



- document;
- the client's authorization to the lawyer to electronically register the document and if required to enter into a Document Registration Agreement (DRA); and
- the client's confirmation of his or her identity.

A lawyer may use either the form of Acknowledgment and Direction generated by the e-reg™ system or the lawyer may prepare his or her own form of acknowledgement and direction containing the pertinent information.

Amendments should be made to the standard form to meet the circumstances of the individual transaction. If a lawyer drafts his or her own form of Acknowledgment and Direction, it is recommended that the document registration report generated by the e-reg™ system be attached to the form.

Lawyers should meet with their clients and review with them the Acknowledgment and Direction and any other written client instructions before the electronic document is released for registration. If it is not possible for the lawyer to meet with the client, the lawyer should arrange for this document to be signed with the safeguards appropriate for the execution of any original document. Signed copies of the Acknowledgment and Direction should be retained in the lawyer's file as the written verification of client instructions and authority for the electronic registration of the document.

In certain circumstances it may be appropriate for a lawyer to rely on documents other than the Acknowledgment and Direction to confirm client instructions. For example, during the transition period in which electronic registration is being introduced, documents prepared in Polaris format and signed by clients can serve as instructions to register if lawyers fully explain this to their clients.

Please note that the Electronic Land Registration Agreement that account holders are required to enter into with the Ontario government for authorization to submit documents for registration in the electronic land registration system provides that prior to submitting certain documents (transfers, charges, discharges and powers of attorney) for electronic registration, the account holder must ensure that users under the account have obtained evidence of proper authorization from the owner of the land or holder of an interest in

the land that has directed the registration. In addition they must be in a position to provide evidence of that person's explicit consent to release their authorization for registration to the Director of Land Registration upon request by the Director in the event of an investigation regarding suspected fraudulent or unlawful activity or registration.

Find the Electronic Registration Practice Guidelines at **Appendix 3**, the Standard Form Acknowledgment and Direction form generated from the e-reg™ system at **Appendix 4** and Subrule 5.01 of the *Rules of Professional Conduct* at **Appendix 5**.

### **THE DOCUMENT REGISTRATION AGREEMENT (DRA)**

In electronic closings, lawyers usually exchange documents, funds and keys prior to closing and hold these items in escrow pending the electronic registration of documents. The DRA is a standardized form of agreement entered into by the lawyers prior to closing containing the terms of the escrow.

Lawyers who enter into DRAs incur professional obligations. The DRA contains undertakings and the lawyer is obliged under the *Rules* to fulfill all undertakings given and not to give undertakings that cannot be fulfilled [Subrule 6.03(10)].

Guideline 4 of the Electronic Registration Practice Guidelines gives lawyers guidance regarding electronic closings and the DRA.

Lawyers may either sign the DRA as a separate document or subscribe to it as a protocol. If the latter procedure is followed, the additional relevant information or changes as required by the standard form DRA need to be provided. The standard form DRA, as amended from time to time, is available on the Law Society's Resource Centre website at [www.lsuc.on.ca](http://www.lsuc.on.ca).

See **Appendix 6** for Subrule 6.03(10) of the *Rules*. See **Appendix 7** for the Standard Form Document Registration Agreement, posted on the Law Society website on April 8, 2004.

## **COMPLIANCE WITH LAW STATEMENTS**

The e-reg™ system permits lawyers to make compliance with law statements. These statements are used in the place of filing paper copies of the evidence upon which the statement is based.

Only a lawyer may sign for completeness any document containing a compliance with law statement.

When making compliance with law statements lawyers should obtain and retain in their files the evidence upon which compliance with law statements are based, or alternatively ensure that publicly available information to fully support the statement is and remains available. This may be particularly important where a claim is made against the lawyer in consequence of any such statement [Guideline 6 of the Electronic Registration Practice Guidelines].

## **PAYMENT OF LAND TRANSFER AND REGISTRATION FEES**

A person who wishes to use the e-reg™ system will become a subscriber with Teranet Inc. When documents are submitted for electronic registration, land transfer tax if payable and registration fees are debited from an account designated by the account holder. This account is known as the “electronic registration bank account” or “ERBA”. A lawyer may designate either a general account or a special trust account as the lawyer’s ERBA. Sections 15 -17 of By-Law 9 set out the procedure to be followed for the payment of land transfer tax and registration fees from a special trust account. Payment of land transfer tax and registration fees from a general account is treated the same as any other client disbursement from a general account.

The article entitled *Payment of Registration Fees and Land Transfer Tax*, found at **Appendix 8**, discusses the regulatory requirements regarding payment of land transfer tax and registration fees in electronic registration. See **Appendix 9** for By-Law 9. A sample completed Form 9B is at **Appendix 9B**.

## **CONFLICT OF INTEREST SITUATIONS**

Sometimes lawyers act for more than one party in a real estate transaction. There are some practice situations where the *Rules of Professional Conduct* specifically prohibit a

lawyer from representing both sides in a real estate transaction. There are some circumstances where although the lawyer is permitted to act for more than one party in the transaction, it would not be prudent for the lawyer to do so.

### **ACTING FOR A PURCHASER AND A VENDOR IN A REAL ESTATE TRANSACTION**

Effective March 31, 2008, the Rules of Professional Conduct were amended to provide that an individual lawyer cannot act for or otherwise represent both the transferor and the transferee with respect to a transfer of title to real property except in certain limited defined circumstances.

Provided that there is no violation of Rule 2.04, one lawyer may represent both the transferor and the transferee in a transfer of title to real property in the following circumstances:

- a transfer where the transferor and the transferee are one and the same and the transfer is being made to effect a change in legal tenure ( *Ontario Regulation 19/99, Land Registration Reform Act*);
- a transfer where the transferor and the transferee are one and the same and the transfer is being made to effect a severance of land ( *Ontario Regulation 19/99, Land Registration Reform Act* );
- a transfer from an estate trustee, executor or administrator to a person who is beneficially entitled to a share in the estate ( *Ontario Regulation 19/99, Land Registration Reform Act*);
- a transfer where the transferor and the transferee are “related persons” as defined in section 251 of the *Income Tax Act (Canada)*;
- a transfer where the lawyer practices law in a remote location where there are no other lawyers that either the transferor or the transferee could without undue inconvenience retain for the transfer [Rule 2.04.1].

In addition, transfers involving a government body including a municipality or transfers of easements do not require compliance with law statements.

In situations where the Rules permit an individual lawyer to act for both the transferor and the transferee in the transfer of title to real property, the lawyer must ensure that

he or she complies with Rule 2.04 on conflicts of interest including obligations with respect to joint retainers.

There is no requirement in the *Rules* that the lawyer for the transferee and the lawyer for the transferor be from separate law firms provided that there is no violation of Rule 2.04 on conflicts of interest. Where the lawyers for the transferor and the transferee practise in the same law firm, the retainer is a joint retainer. In this regard the disclosure required under Rule 2.04(6) must be made to both the transferor and the transferee and the clients' consent to the joint retainer must be obtained.

In addition new subrule 5.01(6) provides that a lawyer who electronically signs a document using the e-reg™ system assumes complete professional responsibility for the document.

Rule 2.04.1 can be found at **Appendix 1**. Section 251 of the *Income Tax Act* may be found at **Appendix 22**. The Law Society of Upper Canada Backgrounder on current and recent initiatives is found at **Appendix 21**.

See **Appendix 24** for information and practice supports on the Two Lawyer Requirement for Transfers of Title.

### **ACTING FOR SPOUSES WITH RESPECT TO THE SALE OF A MATRIMONIAL HOME WHERE THE SPOUSES ARE INVOLVED IN A MATRIMONIAL DISPUTE**

A lawyer who represents one of the spouses in a matrimonial dispute should not act for both spouses with respect to the sale of the matrimonial home because of the potential for a serious conflict of interest developing.

A lawyer who acts for both spouses with respect to the sale of the matrimonial home is acting on a joint retainer and must comply with subrules 2.04(6) -(10). When a lawyer is retained on a joint retainer, no information received in connection with the matter from one client can be treated as confidential as far as any of the other clients in the joint retainer are concerned. In such a situation the lawyer has a fiduciary duty to protect both clients and to disclose all relevant information to both clients.

Furthermore, if the lawyer is acting for both parties and a dispute arises between the parties as to the manner in which the closing proceeds are to be distributed, the lawyer may not distribute the proceeds in a manner inconsistent with the instructions of both of the parties. The lawyer cannot prefer the interests of one client over the other. In such a situation, the lawyer should not pay out any portion of the proceeds without the written consent of both spouses or without a court order. See Rule 2.04 on Avoidance of Conflicts of Interest.

## ***MORTGAGES***

There are a number of Rules, By-Laws and Guidelines dealing specifically with mortgage or loan transactions. These provisions assist lawyers to fulfill their fiduciary obligations to their clients and to manage risk.

### **ACTING FOR A BORROWER AND A LENDER IN A MORTGAGE OR LOAN TRANSACTION**

A lawyer or two or more lawyers practicing in partnership or association are permitted to act for both a borrower and a lender in a mortgage or loan transaction only in the following circumstances:

- the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the transaction;
- the mortgage is a vendor take back mortgage;
- the lender is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business;
- the consideration for the mortgage or loan does not exceed \$50,000.00; and
- the lender and borrower are not at arms length as defined in the *Income Tax Act (Canada)*.

Subrules 2.04 (11) and (12) address acting for a borrower and a lender in a mortgage or loan transaction. See page 57 for these subrules.

### **DISCHARGES OF MORTGAGES**

The recommended procedure for discharging mortgages is contained in a guideline developed by the Law Society in 1992. Although the guideline is dated 1992, it continues to remain relevant. While compliance with the guideline is not mandatory, the

guideline does aim at risk management and promotes competence.

### **INSTITUTIONAL MORTGAGES**

An institutional mortgage is defined in the guideline as a mortgage held by a bank, trust company, insurance company, credit union or finance company.

Subject to the contractual obligations of the parties, the recommended procedure for discharging these mortgages is as follows:

The lawyer obtains from the mortgagee a mortgage statement for discharge purposes as at the date of closing;

The lawyer's letter to the mortgagee regarding the statement should make it clear that:

- the lawyer will be relying upon the accuracy of the statement and will be issuing a cheque payable to the mortgagee for the purposes of completely discharging the mortgage; and
- the lawyer will not be bound by any qualification of the statement whether by use of the abbreviation "E. & O.E" or otherwise.

On closing the purchaser's lawyer should deliver to the vendor's lawyer a certified cheque payable to the mortgagee in accordance with the vendor's written direction and the vendor's lawyer should deliver to the purchaser's lawyer his or her personal undertaking to:

- deliver the cheque to the mortgagee forthwith;
- be responsible for any additional monies payable for the discharge of the mortgage as a result of any delay in delivery of the discharge funds;
- make every reasonable effort to obtain and register a proper form of discharge of the mortgage as soon as possible after closing.

In addition the purchaser's lawyer should require the vendor's personal undertaking to be responsible for any additional amounts payable to the mortgagee by reason of any error, omission or other change in the mortgage statement.

### **PRIVATE MORTGAGES**

The guideline defines a private mortgage as a mortgage held by individuals or

corporations that are not institutional mortgages. Subject to the contractual obligations of the parties, the guideline provides that the purchaser's lawyer should insist that the discharge of a private mortgage be produced and registered on or before closing. As a general rule, an undertaking to obtain and register the discharge of a private mortgage at a later date should not be given or accepted.

## **ELECTRONIC REGISTRATION AND DISCHARGES OF MORTGAGES**

Guideline 5 of the Electronic Registration Practice Guidelines contains some additional provisions dealing with the electronic discharge of mortgages.

The Guideline provides that some financial institutions create and register an electronic discharge of a mortgage without the assistance of the vendor's lawyer after discharge funds have been delivered. When requesting a discharge statement from a financial institution, the lawyer should seek clarification on whether the lawyer or the financial institution itself will prepare and register the electronic discharge of mortgage. If the financial institution insists on dealing with the matter "in house", the lawyer should obtain written confirmation to that effect. In these circumstances, and subject to any contrary provisions in the Agreement of Purchase and Sale, the lawyer may be more comfortable wording the undertaking to the purchaser's lawyer to provide that the vendor's lawyer "will cause a discharge of the mortgage to be registered". It is still the vendor's lawyer's responsibility, however, to ensure that:

- the necessary funds (including any additional interest accrual and the discharge registration fee) are forwarded to the financial institution;
- the electronic discharge is prepared and registered by the financial institution in a timely manner;
- registration particulars of the discharge are obtained and forwarded to the purchaser's solicitor to confirm compliance with the undertaking.

With respect to private mortgages, unless the mortgage is paid out and discharged prior to closing, it may be necessary for the vendor's lawyer to seek written authority from the lender in the recommended form of Acknowledgment and Direction to create the required electronic form of discharge and arrange for it to be registered on closing.

Also in the case of private mortgages, it is acceptable for a lawyer to transfer amounts



required to pay out the mortgage directly to the vendor's lawyer's trust account if the mortgage discharge itself comprises one of the documents to be registered under the Document Registration Agreement (DRA). Acting on proper written authority, the vendor's lawyer could include the Discharge of Mortgage in the DRA as one of the documents to be registered on closing, subject to compliance with the escrow terms of the DRA. The vendor's lawyer would confirm to the lender that a DRA was being utilized as part of the closing procedure and that a discharge of mortgage would be shown as a document for registration under that agreement subject to the terms of the escrow.

See **Appendix 3** for Practice Guideline 5 - Electronic Closings and Mortgage Transactions.

### **REPORTING TO THE LENDER**

If a lawyer acts for a lender and the loan is secured by a mortgage on real property, the lawyer must provide the lender with a final report on the transaction, together with the duplicate registered mortgage within sixty days of the registration of the mortgage or within such other time period as instructed by the lender [Subrules 2.02 (14) and (15) can be found on page 45].

### **MORTGAGES AND RECORD KEEPING REQUIREMENTS - BY-LAW 9**

By-Law 9 contains specific record keeping requirements regarding private mortgage transactions.

### **FORMS 9D AND 9E**

A lawyer who acts for or receives money from a lender must in addition to keeping the financial records required under By-Law 9, also maintain a file for each charge, containing:

- a completed investment authority (Form 9D) signed by each lender before the first advance of money to or on behalf of the borrower;
- a copy of a completed report on the investment (Form 9E);
- an original declaration of trust if the charge is not held in the name of all of the lenders;
- a copy of the registered charge; and
- any supporting documents supplied by the lender [subsection 24(1) of By-Law 9].

The term “lender” is defined in section 1 of By-Law 9 as a person who is making a loan that is secured or to be secured by a charge, including a charge to be held in trust directly or indirectly through a related person or corporation [Section 1 of By-Law 9].

The completion of Forms 9D and 9E contain a record of the disclosure made and assist the lawyer to make the required disclosure to the lender client.

An original completed Form 9E and a copy of the Declaration of Trust if applicable, must be delivered to each lender forthwith after the first advance of money to or on behalf of the borrower [Subsection 24(3) of By-Law 9].

Please note that Forms 9D and 9E must be signed anew in accordance with By-Law 9 and added to the file each time that the lawyer or any lawyer of the same firm of lawyers:

- makes a change in the priority of the charge that results in the reduction of the amount of security available to it;
- makes a change to another charge of higher priority that results in a reduction of the amount of security available to the lender’s charge;
- releases collateral or other security held for the loan; or
- releases a person who is liable under a covenant with respect to an obligation in connection with the loan [Subsection 24(5) of By-Law 9].

#### **EXCEPTIONS FROM REQUIREMENT TO COMPLETE FORMS 9D AND 9E**

A lawyer is not required to obtain and retain completed Forms 9D and 9E in each of the following circumstances.

1. The lender,
  - is a bank listed in Schedule I or II to the *Bank Act* (Canada), a licensed insurer, a registered loan or trust corporation, a subsidiary of any of them, a pension fund, or any other entity that lends money in the ordinary course of its business;
  - has entered into a loan agreement with the borrower and has signed a written commitment setting out the terms of the prospective charge, and
  - has given the lawyer a copy of the written commitment before the advance of money to or on behalf of the borrower;

2. The lender and borrower are not at arms length as defined in the *Income Tax Act*,
3. The borrower is an employee of the lender or of a corporate entity related to the lender;
4. The lender has executed the Investor/Lender Disclosure Statement for Brokered Transactions, approved by the Superintendent under subsection 54(1) of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, and has given the lawyer written instructions, relating to the particular transaction, to accept the executed disclosure statement as proof of the loan agreement;
5. the total amount advanced by the lender does not exceed \$6,000.00; or
6. the lender is selling real property to the borrower and the charge represents part of the purchase price [Subsection 24(2) of By-Law 9].

#### **RECORD KEEPING REQUIREMENTS IF MORTGAGES OR CHARGES ARE HELD IN TRUST FOR CLIENTS**

Section 20 of By-Law 9 also contains specific record keeping requirements if the lawyer holds either directly or indirectly through a related person or corporation mortgages and other charges in trust for clients.

See **Appendix 9** for By-Law 9, **Appendix 9D** for a sample completed Form 9D and at **Appendix 9E** for a sample completed Form 9E.

#### ***USE OF THIRD PARTY SERVICE PROVIDERS BY LENDERS TO PROCESS RESIDENTIAL MORTGAGES AND POTENTIAL CONFLICTS OF INTEREST FOR LAWYERS***

In 2003 the Law Society issued a Notice to the Profession advising lawyers that some mortgage lenders had launched programs in which third party service providers process residential mortgages on behalf of the lender. The tasks performed by the third party in these transactions may include instructing the lawyer on behalf of the lender, preparing the mortgage document, providing the mortgage advance to the lawyer and administering the report after closing. Some of the requirements imposed on lawyers retained to act in these types of transactions are inconsistent with the lawyer's professional obligations and in particular place the lawyer into a conflict of interest position. The Law Society cautioned that lawyers who are retained to act in such transactions must ensure that they comply with their professional obligations under the

*Rules.* The Notice to the Profession discusses some of the issues that require vigilance on the part of the lawyer who is retained to act in these types of transactions.

See **Appendix 10** for the Notice to the Profession on the Use of Third Party Service Providers by Lenders to Process Mortgages.

## **TRANSFER OF FUNDS**

Lawyers may electronically withdraw funds from a trust account provided that they comply with the requirements of By-Law 9. By-Law 9 sets out two procedures: one for the transfer of trust funds generally and one for the transfer of closing funds. Section 12 of By-Law 9 sets out the general procedure for electronically disbursing trust funds. Section 13 contains a specific procedure for electronically disbursing “closing funds” which are defined as money necessary to complete or close a transaction in real estate.

See **Appendix 27** for “*Show Me the Money – Funds Handling and the Benefit of Wire Transfers*” published in Volume 7, Issue 2 Summer 2008 Edition, LAWPRO Magazine.

## **ELECTRONIC TRANSFER OF FUNDS – SECTION 12, BY-LAW 9**

If funds are being transferred in accordance with Section 12 of By-Law 9, a Form 9A must be completed. This form must be signed by a person who has signing authority on the trust account. Except in exceptional circumstances, this person must be a lawyer who is entitled to hold trust funds.

One person using a password enters the transfer data as set out in Form 9A and another person with a separate password authorizes the transfer. A sole practitioner without employees may enter the data and also authorize the transaction.

An electronic confirmation of the transaction containing the following information must be printed:

- the trust account number from which the money is withdrawn;
- the name, branch and address of the account to which the funds have been transferred;
- the name of the account to which funds have been transferred;
- the number of the account to which funds have been transferred;
- the time and date that the transaction details and authorization were received

- by the sending lawyer's financial institution; and
- the time and date the confirmation of the transaction is sent to the sending lawyer by the financial institution. (Please note that while this confirmation may be obtained by the end of the next banking day, realistically it may not be available unless it is printed immediately).

No later than the close of the second banking day after the transaction, the lawyer must compare the Form 9A with the printed confirmation and verify that the money was withdrawn as specified in the Form 9A.

The client name, client matter and any file number must be written on the confirmation and the lawyer must date and sign the confirmation.

Both the Form 9A and the printed confirmation should be kept in numerical order with the lawyer's financial records. The lawyer may wish to keep a copy in the client's file as well.

### **SECTION 13 PROCEDURE – CLOSING FUNDS**

Section 13 of By-Law 9 has a specific procedure for electronically disbursing "closing funds". The procedure requires that the lawyer:

- complete and sign a Form 9C for each client transaction prior to the transfer. This Form must be signed by a person who has signing authority on the trust account.
- use an electronic transfer system that requires a password
- use an electronic transfer system that immediately produces a confirmation of the transfer
- print the confirmation which must have the following information:
  - i. the name of the lawyer's account
  - ii. the number of the lawyer's account
  - iii. the name of the account to which the closing funds are transferred
  - iv. the number of the account to which the closing funds are transferred
  - v. the date of the transfer

By 5:00 p.m. on the day after the transfer, the lawyer must compare the printed

confirmation with the Form 9C and satisfy himself or herself that the transfer was completed in accordance with his or her directions in the Form 9C. The lawyer must then write the name of the client, the subject matter, and number of the file on the confirmation; then sign and date the confirmation. The Form 9C and confirmations should be kept in numerical order by requisition number with the firm's accounting records. The lawyer may also want to keep copies in the client file.

With respect to the transfer of closing funds, the *Residential Real Estate Transactions* Practice Guidelines provide that absent the agreement between the law firms and accompanying instructions from the clients, funds should be exchanged in the form provided for in the agreement of purchase and sale [Guideline 5].

- By-Law 9 is at **Appendix 9**, a sample completed Form 9A is at **Appendix 9A** and a sample completed Form 9C is at **Appendix 9C**.
- The Residential Real Estate Transactions Practice Guidelines can be found at **Appendix 2**.

## **PART 2 - ETHICAL ISSUES IN REAL ESTATE TRANSACTIONS**

This part of the guide covers some of the ethical issues encountered by lawyers acting on real estate transactions.

### ***JOINT RETAINERS***

A joint retainer is a retainer in which the lawyer accepts employment from more than one client in a matter or transaction whether or not a conflict or potential conflict of interest exists. The *Rules of Professional Conduct (Rules)* impose certain obligations on the lawyer both prior to accepting a joint retainer and during the course of the joint retainer.

### **OBLIGATIONS BEFORE ACCEPTING THE JOINT RETAINER**

Before accepting a retainer to act for more than one party in a matter or transaction, the lawyer must make certain disclosure to the clients and must obtain the clients' informed consent.

The lawyer must advise the clients that:

- the lawyer has been asked to act for both or all of them;
- no information received in connection with the matter from one can be treated as

- confidential so far as any of the others are concerned; and
- if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely [Subrules 2.04(6) – (10)].

The client's consent must be in writing and signed by each of the clients or may be oral provided that the lawyer sends a letter to each person giving the oral consent confirming his or her consent [Rule 1.02 – Definition of Consent].

There is one exception to these requirements. In situations where a lawyer is retained jointly by an institutional lender (a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business) and another client in respect of a mortgage or loan from that lending client to the other client, the lawyer is not required to provide the above advice to the lending client nor obtain its written consent unless the lending client requires that its consent be reduced to writing. In such circumstances, the lending client's consent to the joint retainer is deemed to exist when the lawyer receives written instructions from the lending client to act in the transaction [Subrules 2.04(8.1) – (8.2)].

See **Appendix 1** for subrules 2.04(8.1) – (8.2) and page 174 for Subrule 1.02 – Definition of "Consent".

### **INDEPENDENT LEGAL ADVICE AND JOINT RETAINERS**

In order to ensure that the client's consent is informed, genuine, and uncoerced, in some cases the lawyer should recommend that the client obtain independent legal advice before accepting a joint retainer. Examples of these situations would include a situation where one of the parties is less sophisticated or more vulnerable than the other. (Commentary to Subrule 2.04(6)).

If the lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts the joint retainer for that client and another client in a matter or transaction, the lawyer must advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer [Subrule 2.04(7)]. However, in situations where the lawyer is retained

jointly by an institutional lender (a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business) and another client in respect of a mortgage or loan from that lending client to the other client, the lawyer is not required to provide this advice nor recommend independent legal advice to the lending client. [Subrules 2.04(8.1) – (8.2)].

### **RULES ON DISCLOSURE TO CLIENTS IN A JOINT RETAINER**

When a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must disclose in writing to both the borrower and the lender, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction [Subrule 2.04(6.1)].

Please see **Appendix 1** for the provisions dealing with joint retainers [subrules 2.04(6) – (10)], **Appendix 12** for the Sample Form Joint Retainer Acknowledgment and Consent Form for Use in a Real Estate Transactions and **Appendix 13** for steps to assist in compliance with the Joint Retainer Rule.

### ***UNREPRESENTED PARTIES***

Subrule 2.04(14) sets out a procedure that a lawyer must follow when dealing with an unrepresented party on the client's behalf. The procedure assists the lawyer to manage the potential conflict of interest.

The lawyer must:

- urge the unrepresented person to obtain independent legal representation;
- take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and
- make clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client and accordingly his or her comments may be partisan .

If the unrepresented party insists on proceeding without independent legal representation, it might be prudent for the lawyer to send a letter to that party confirming that the lawyer is not representing that party and urging him or her to seek independent legal representation. It might also be prudent to confirm that the lawyer has not received any confidential information regarding that party's interest in the



matter if such is the case.

In the event that the unrepresented party requests that the lawyer advise or act in the matter on his or her behalf, the lawyer should be governed by the considerations outlined in the joint retainer rule [subrules 2.04(6) – (10)] and Rule 2.04 on Avoidance of Conflicts of Interest. See page 58 for Subrule 2.04(14).

### **DELEGATION OF TASKS TO NON-LAWYERS**

A lawyer who delegates tasks to a non-lawyer must comply with the requirements of By-Law 7.1 regarding supervision and delegation of tasks and Rule 5.01 regarding supervision.

When a lawyer delegates to a non-lawyer tasks and functions in connection with the lawyer's practice of law in relation to a client's business, the lawyer must assume complete professional responsibility for his or her practice of law in relation to the client's business and must directly supervise the non-lawyer to whom the lawyer has delegated such tasks and functions.

A lawyer who delegates such tasks and functions to a non-lawyer must:

- maintain a direct relationship with each client throughout the lawyer's retainer;
- assign to the non-lawyer only tasks and functions that the non-lawyer is competent to perform;
- ensure that the non-lawyer does not act without the lawyer's instructions;
- review the non-lawyer's performance of tasks and functions assigned to him or her at sufficiently frequent intervals;
- ensure that the delegated tasks are performed properly and in a timely manner; and
- assume responsibility for all tasks and functions performed by the non-lawyer including all documents prepared by that person.

There are certain tasks that a lawyer may not delegate to a non-lawyer. For example, a lawyer shall not permit a non-lawyer to:

- accept a client on the lawyer's behalf;
- act without the lawyer's instructions;
- act finally in respect of the business of the lawyer's client;
- provide legal advice to the lawyer's client;

- sign correspondence, other than correspondence of a routine administrative nature;
- forward to the lawyer's client any document, other than a routine document, that has not been previously reviewed by the lawyer; or
- use the lawyer's personalized specially encrypted diskette or key for the electronic registration of title documents.

With respect to real estate matters, while a lawyer may permit a non-lawyer to attend to matters of routine administration, assist in more complex transactions relating to the sale, purchase, option, lease or mortgaging of land, draft statements of account and routine documents and correspondence and attend to registrations, the lawyer cannot delegate to a non-lawyer the ultimate responsibility for the:

- review of a title search report or of documents before signing;
- review and signing of a letter of requisition, title opinion or a reporting letter to the client.

In transactions using the system for the electronic registration of title documents, only a lawyer may sign for completeness any document requiring compliance with law statements.

Subrule 5.01 is at **Appendix 5** and By-Law 7.1 is at **Appendix 14**.

### ***FEES AND DISBURSEMENTS***

Fees and disbursements charged or accepted by lawyers must be fair and reasonable and must be disclosed in a timely manner to the client [Rule 2.08].

The fiduciary relationship between a lawyer and a client requires full disclosure in all financial dealings between them and prohibits the acceptance of any hidden fees by the lawyer. No fee, reward, costs, commission, interest, rebate, agency or forwarding allowance or other compensation related to professional employment may be taken by the lawyer from anyone other than the client without full disclosure to and consent of the client [Commentary to subrule 2.08(1)].

## **DIVISION OF FEES BETWEEN LAWYERS**

Fees for a matter may be divided between lawyers who are not in the same firm provided that:

- the client consents;
- the fees are divided in proportion to the work done and the responsibilities assumed [Subrule 2.08(6)].

## **REFERRAL FEES**

If a lawyer refers a matter to another lawyer because of the expertise and ability of the other lawyer to handle the matter and the referral was not made because of a conflict of interest, a fee may be paid to the referring lawyer by the other lawyer provided that:

- the fee is reasonable and does not increase the total amount of the fee charged to the client;
- the client is informed and consents [Subrule 2.08(7)].

## **DIVISION OF FEES AND REFERRAL FEES WITH NON-LAWYERS**

A lawyer may not directly or indirectly share, split, or divide his or her fees with a non-lawyer or give any financial or other reward to any non-lawyer for the referral of clients or client matters.

Guideline 1 of the Residential Real Estate Transactions Practice Guidelines provides that the lawyer should consider forwarding an initial letter to the client at the commencement of the retainer that may include an estimate of fees and disbursements and if applicable the amount of land transfer tax payable upon registration.

In addition at the commencement of the lawyer-client relationship, when requested the lawyer should provide the client or potential client with a timely estimate of the fees and disbursements involved so that the client or potential client is able to make an informed decision on retaining the lawyer.

In discussing fees and disbursements with clients, the lawyer:

- should provide a reasonable estimate of the total cost and not an unreasonable estimate designed to garner the client's business; and
- should not manipulate fees and disbursements in a manner as to provide a lower fee estimate [Guideline 1].

See **Appendix 2** for the Residential Real Estate Transactions Practice Guidelines and **Appendix 1** for Subrule 2.08.

### ***UNDERTAKINGS***

Personal undertakings given on closings of real estate transactions is a topic that generates many questions from real estate practitioners. Subrule 6.03 (10) of the *Rules* and the commentary to this subrule deal with undertakings (see page 118). A lawyer shall not give an undertaking that cannot be fulfilled and shall fulfill every undertaking given.

Many times lawyers will deliver personal undertakings on closings to deal with issues that cannot be resolved prior to closing. An example of this is the undertaking given by the lawyer to hold back a certain sum of money from the proceeds of sale and to pay out the sum upon the occurrence of certain events.

Sometimes these undertakings are drafted quickly on the date of closing. Often times after closing, the parties find that the wording used in the undertaking is unclear and that the parties disagree on what the lawyer's obligations are under the undertaking. Sometimes contingencies arise that are not addressed in the undertaking and the parties, after closing, disagree on how the contingency should be handled.

The following are some practice tips when giving or accepting a personal undertaking on closing:

- do not give an undertaking that cannot be fulfilled;
- fulfill every undertaking given in a timely manner;
- ensure that the wording of the undertaking is clear;
- ensure that the undertaking is in writing;
- if you do not intend to accept personal responsibility, this should be stated clearly in the undertaking;
- consider imposing a time period in which the undertaking must be fulfilled;
- provide for contingencies - eg. If the obligations in the undertaking are contingent on certain events occurring, indicate what will happen if these events do not occur.

Furthermore a lawyer should maintain a system to follow up on undertakings regarding mortgage discharges and/or undertakings given or received during the course of a transaction. See the Residential Real Estate Transactions Practice Guidelines at **Appendix 2**.

### ***WITHDRAWAL OF SERVICES***

There will be situations when a lawyer will find himself or herself in a position of having to withdraw from representing the client. *Rule 2.09* deals with withdrawal of services.

### **MANDATORY WITHDRAWAL**

There are some circumstances where a lawyer has an obligation to withdraw from representing a client. Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer must withdraw from representation if:

- the lawyer is discharged by the client;
- the lawyer is instructed by the client to do something inconsistent with the lawyer's duty to the tribunal and, following explanation, the client persists in such instructions;
- the client is guilty of dishonourable conduct in the proceedings or is taking the position solely to harass or maliciously injure another;
- it becomes clear that the lawyer's continued employment will lead to a breach of the *Rules*;
- the lawyer's client is an organization and the lawyer has knowledge that the client intends to act, has acted or is acting dishonestly, fraudulently, criminally or illegally and the lawyer is required to withdraw pursuant to subrules 2.02(5.1) or (5.2);
- the lawyer is not competent to handle the matter [Subrule 2.09(7)].

The following are some examples of situations when a lawyer acting in a real estate transaction would be required to withdraw from representing a client:

- the lawyer would be assisting in or encouraging dishonesty, fraud, crime or illegal conduct by continuing to act for the client;
- the lawyer discovers an error or omission in connection with a matter for which the lawyer is responsible that is or may be damaging to the client and that cannot be readily rectified and that would place the lawyer in a conflict of interest

- if the representation of that client were to continue;
- the client insists that the lawyer provide a personal undertaking that the lawyer knows that he or she cannot fulfill;
- the client insists that the lawyer not respond to letters or communications from another lawyer; or
  - the client insists that the lawyer take a step that would lead to a breach of the *Rules*.

### **OPTIONAL WITHDRAWAL**

There may be circumstances in the course of a retainer where a lawyer although not required to withdraw from representing the client, desires to withdraw. While a client has a right to terminate the lawyer client relationship at will, the lawyer does not enjoy the same freedom of action. A lawyer cannot withdraw from representation of a client except for good cause and upon notice to the client appropriate in the circumstances [Subrule 2.09(1)].

### **SERIOUS LOSS OF CONFIDENCE**

The *Rules* permit a lawyer to withdraw from representation if there has been a serious loss of confidence between the lawyer and the client [Subrule 2.09(2)]. A serious loss of confidence between a lawyer and a client might occur where:

- the client deceives the lawyer;
- the client refuses to accept the lawyer's advice on a significant point; or
- the lawyer and the client are not getting along – perhaps the personalities of the lawyer and the client conflict.

### **NON-PAYMENT OF FEES**

A lawyer may withdraw from representation in accordance with subrules 2.09(3) if the client fails to pay fees or disbursements provided that the client is given reasonable notice and no serious prejudice would result to the client [Subrule 2.09(3)].

### **NOTICE TO THE CLIENT**

If a lawyer withdraws from representation where the circumstances giving rise to the withdrawal are optional, the lawyer must provide the client with appropriate notice. The length of notice that is required is dependent on the fact situation. If the matter is covered by statutory provisions or rules of court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best

of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril [Subrule 2.09(1)].

### **DUTIES OF THE LAWYER UPON WITHDRAWAL**

When a lawyer withdraws from representation of a client, the lawyer must:

- try to minimize expense and avoid prejudice to the client;
- do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor lawyer;
- subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled;
- give the client all information that may be required in connection with the case or matter;
- account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation;
- promptly render an account for outstanding fees and disbursements; and
- cooperate with the successor lawyer so as to minimize expense and avoid prejudice to the client [Subrules 2.09(8) and (9)].

If the question of a right of lien for unpaid fees and disbursements arises, the lawyer should have due regard to the effect of its enforcement upon the client's position. Generally speaking, the lawyer should not enforce the lien if to do so would prejudice materially the client's position in any uncompleted matter [Subrule 2.09(9)]. See page 79 for Subrule 2.09.

### ***REAL ESTATE FRAUD***

Fraud in real estate transactions is an area of concern. Title fraud occurs when a property is transferred from its true registered owner and/or a fraudulent mortgage is registered on the property. In these types of transactions, the true registered owner's identity is often misappropriated by a fraudster. In such cases false contact information and photo identification is provided to the lawyer by the client. Value fraud occurs when the value of a property is inflated to deceive a mortgage lender to obtain a higher mortgage amount than would otherwise be available. The Law Society has developed a number of resources for lawyers regarding real estate fraud. These resources are found

in the Real Estate Practice Resources section of the Law Society's Resource Centre website.

Both the *Rules* and the Residential Real Estate Transactions Practice Guidelines contain provisions aimed at preventing fraud and assisting the lawyer to manage the risk of becoming the tool or dupe of an unscrupulous client.

The *Rules* provide that when advising a client, a lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment. A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client or persons associated with such a client [Subrule 2.02(5)].

Before accepting a retainer or during a retainer if a lawyer has suspicions or doubts about whether he or she might be assisting the client in dishonesty, fraud, crime or illegal conduct, the lawyer should make reasonable inquiries to obtain information about the client, and about the subject matter and objectives of the retainer, including verifying who are the legal or beneficial owners of a property and business entities, verifying who has control of business entities and clarifying the nature and purpose of a complex or unusual transaction where the purpose is not clear. The lawyer should make a record of the results of these inquiries. In certain circumstances the lawyer may have to decline the retainer or withdraw from representation [Subrule 2.02 (5)].

## **IDENTIFICATION**

Guideline 2 of the *Residential Real Estate Transactions Practice Guidelines* provides that although a lawyer may not be able to guarantee the identity of the client or a party to a document in many circumstances (absent personal, long term knowledge), the lawyer shall undertake steps to verify that the person retaining the lawyer and/or signing documents under the lawyer's supervision has reasonable identification to substantiate that he or she is the named client/party and the lawyer should retain details or information about the identification obtained.

In addition, effective December 31, 2008, the Law Society introduced new "know your client requirements". These requirements are contained in By-Law 7.1 and they aim at



fighting money laundering and other illegal activity. Lawyers are required in accordance with the by-law to identify and verify the identity of the client and any third party directing, instructing or who has the authority to direct or instruct the client. Lawyers must also retain a record of the information obtained as required by the by-law.

Identifying the client means obtaining some basic information about the client and third party such as a name and address whenever the lawyer is retained to act for a client. Verifying the identity of a client means actually looking at an original identifying document from an independent source to ensure that the client and any third party are who they say they are whenever the lawyer is involved in a funds transfer activity, that is, the lawyer engages in or instructs with respect to the payment, receipt or transfer of funds. The lawyer is not required to identify and/or verify the identity of the client and third parties in all situations. There are a number of exceptions outlined in the by-law.

See **Appendix 25** for information on the Client Identification and Verification Requirements.

### **TITLE SEARCHING**

In addition Guideline 2 of the Residential Real Estate Transactions Practice Guidelines provides that due to the increasing risk of fraud in real estate transactions, the lawyer should review:

- the pattern of inactive or deleted instruments on the parcel register and inquire about any suspicious patterns of transfers or discharges;
- the values revealed by arm's-length transfers in the recent past, to determine if there have been any suspicious changes in value.

### **COMMUNICATION WITH THE CLIENT**

The lawyer should report the results of the title search and due diligence process and in particular any suspicious patterns of transfers or discharges and/or any suspicious changes in values revealed by the due diligence process to:

- the purchaser/borrower if the lawyer is acting for the purchaser/borrower;
- the lender if the lawyer is acting for the lender; and
- the title insurer (if applicable).

Where title insurance is not being used, the lawyer should advise the client about the

post-closing protections provided by title insurance, which the client is not receiving such as fraud.

### **POWERS OF ATTORNEY IN REAL ESTATE TRANSACTIONS**

In recent years, powers of attorney have been used in real estate transactions to perpetrate fraud. The Law Society has developed guidelines and support materials to assist lawyers to avoid becoming the tool or dupe of unscrupulous persons when dealing with real estate transactions involving powers of attorney. These guidelines and support materials may be found at **Appendix 26**.

### **CHANGES TO REAL ESTATE PRACTICE - 2008**

The Ontario government as part of its Real Estate Fraud Action Plan has restricted most registration of transfers to lawyers. Lawyers are now required to sign most transfers of title for completeness. Lawyers and law firms wishing to electronically register documents must apply for and obtain the authorization of the Director of Land Registration to register documents. In addition, lawyers who intend to practice real estate law in Ontario must obtain from LAWPRO the real estate practice coverage before being able to practice real estate law. Information on this coverage is available on the LAWPRO website at [www.lawpro.ca](http://www.lawpro.ca).

### **DUE DILIGENCE IN MORTGAGE TRANSACTIONS**

The completion of a real estate transaction usually involves the participation of a number of parties in the transaction including lawyers, lenders, real estate brokers and agents and mortgage brokers. It is essential that all parties involved in the transaction exercise care to detect and deter fraud at all stages of the transaction. The Law Society has prepared a document outlining the steps that lawyers and lenders should or must take in order to detect and deter fraud.

Due Diligence in Mortgage or Loan Transactions can be found at **Appendix 16**. See **Appendix 15** for the Law Society's Notice to the Profession regarding Real Estate Fraud, **Appendix 17** for FAQs regarding Fraud in Real Estate Transactions: Some Ethical Issues, **Appendix 18** for Mortgage Fraud Scenarios That May Help Lawyers Identify Red Flag Indicators and **Appendix 20** for Real Estate Fraud: Being Creative and Fighting Back.

## **PROHIBITED CASH TRANSACTIONS**

By-Law 9 prohibits certain cash transactions by lawyers. Section 4.1 provides that when a lawyer engages in or gives instructions with respect to the following activities

- receives or pays funds
- purchases or sells securities, real properties or business assets or entities
- transfers funds by any means,

the lawyer may not receive or accept from a person cash in an aggregate amount of \$7,500.00 or more in Canadian dollars in respect of any one client file.

This prohibition does not apply where the lawyer receives cash

- from a public body and certain entities described in By-law 9, subsection 6(a);
- from a peace officer, law enforcement agency or other agent of the Crown, acting in an official capacity;
- pursuant to an order of the tribunal;
- to pay a fine or a penalty; or
- for fees, disbursements, expenses or bail, provided that any refunds out of such receipts are also made in cash [By-law 9, Section 6]. See **Appendix 9** for By-Law 9.

## ***REAL ESTATE TRANSACTION LEVY SURCHARGE***

Pursuant to By-law 6, a lawyer or law firm that acts for one or more parties on a real estate transaction (as defined in paragraph A of Endorsement 2 of Policy No. 2010-001), must pay the Law Society a real estate transaction levy surcharge of \$65.00 per transaction inclusive of all taxes. If the file was opened before January 1, 2010, the transaction levy surcharge is \$50.00 inclusive of all taxes.

The levy surcharge may be disbursed to the client. As with other disbursements, this expense attracts GST/HST. If you disburse the transaction levy surcharge to a client after July 1, 2010, subject to the Ministry of Revenue's transitional rules, this amount no longer attracts the five per cent GST, but after July 1, 2010 is subject to the 13 per cent HST (which is remitted directly to the government).

The real estate transaction levy surcharge does not apply to title-insured real estate transactions provided certain conditions are met. These conditions are outlined on the

LAWPRO website.

The real estate levy surcharges are accumulated and paid quarterly. Filings and payments must be made within thirty days of the quarterly period ending on the last day of March, June, September and December. The filings and payments must be forwarded to LAWPRO.

See **Appendix 23** for information on the 2010 Real Estate Levy Surcharge and Exemption Forms.

**Rule 2****Rule 2 Relationship to Clients****2.01 COMPETENCE****Definitions**

2.01 (1) In this rule

“competent lawyer” means a lawyer who has and applies relevant skills, attributes, and values in a manner appropriate to each matter undertaken on behalf of a client including

(a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises,

*[Amended – June 2007]*

(b) investigating facts, identifying issues, ascertaining client objectives, considering possible options, and developing and advising the client on appropriate courses of action,

(c) implementing, as each matter requires, the chosen course of action through the application of appropriate skills, including,

(i) legal research,

(ii) analysis,

(iii) application of the law to the relevant facts,

(iv) writing and drafting,

(v) negotiation,

(vi) alternative dispute resolution,

(vii) advocacy, and

(viii) problem-solving ability,

(d) communicating at all stages of a matter in a timely and effective manner that is appropriate to the age and abilities of the client,

(e) performing all functions conscientiously, diligently, and in a timely and cost-effective manner,

(f) applying intellectual capacity, judgment, and deliberation to all functions,

(g) complying in letter and in spirit with the Rules of Professional Conduct,

- (h) recognizing limitations in one's ability to handle a matter or some aspect of it, and taking steps accordingly to ensure the client is appropriately served,
- (i) managing one's practice effectively,
- (j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills, and
- (k) adapting to changing professional requirements, standards, techniques, and practices.

**Commentary**

As a member of the legal profession, a lawyer is held out as knowledgeable, skilled, and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with legal matters to be undertaken on the client's behalf.

A lawyer who is incompetent does the client a disservice, brings discredit to the profession, and may bring the administration of justice into disrepute. In addition to damaging the lawyer's own reputation and practice, incompetence may also injure the lawyer's partners and associates.

A lawyer should not undertake a matter without honestly feeling competent to handle it or being able to become competent without undue delay, risk, or expense to the client. This is an ethical consideration and is to be distinguished from the standard of care that a tribunal would invoke for purposes of determining negligence.

A lawyer must be alert to recognize any lack of competence for a particular task and the disservice that would be done to the client by undertaking that task. If consulted in such circumstances, the lawyer should either decline to act or obtain the client's instructions to retain, consult, or collaborate with a lawyer who is competent for that task. The lawyer may also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting, or other non-legal fields, and, in such a situation, the lawyer should not hesitate to seek the client's instructions to consult experts.

A lawyer should clearly specify the facts, circumstances, and assumptions upon which an opinion is based. Unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications. If the circumstances do not justify an exhaustive investigation with consequent expense to the client, the lawyer should so state in the opinion.

A lawyer should be wary of bold and confident assurances to the client, especially when the lawyer's employment may depend upon advising in a particular way.

In addition to opinions on legal questions, the lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, policy, or social implications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, where and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.

**Rule 2**

In a multi-discipline practice, a lawyer must be particularly alert to ensure that the client understands that he or she is receiving legal advice from a lawyer supplemented by the services of a non-licensure. If other advice or service is sought from non-licensure members of the firm, it must be sought and provided independently of and outside the scope of the retainer for the provision of legal services and will be subject to the constraints outlined in the relevant by-laws and regulations governing multi-discipline practices. In particular, the lawyer should ensure that such advice or service of non-licensurees is provided from a location separate from the premises of the multi-discipline practice.

Whenever it becomes apparent that the client has misunderstood or misconceived the position or what is really involved, the lawyer should explain, as well as advise, so that the client is apprised of the true position and fairly advised about the real issues or questions involved.

The requirement of conscientious, diligent, and efficient service means that a lawyer should make every effort to provide service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed.

[Amended - June 2009]

**Competence**

(2) A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer.

**Commentary**

This rule does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described by the rule.

Incompetent professional practice may give rise to disciplinary action under this rule.

In addition to this rule, the *Law Society Act* provides that the Society may conduct a review of a lawyer's practice to determine if the lawyer is meeting standards of professional competence. A review will be conducted in circumstances defined in the by-laws under the *Law Society Act*.

A lawyer may also be subject to a hearing at which it will be determined whether the lawyer is failing or has failed to meet standards of professional competence.

The Act provides that a lawyer fails to meet standards of professional competence if there are deficiencies in (a) the lawyer's knowledge, skill, or judgment, (b) the lawyer's attention to the interests of clients, (c) the records, systems, or procedures of the lawyer's professional business, or (d) other aspects of the lawyer's professional business, and the deficiencies give rise to a reasonable apprehension that the quality of service to clients may be adversely affected.

**2.02 QUALITY OF SERVICE**

**Honesty and Candour**

2.02 (1) When advising clients, a lawyer shall be honest and candid.

Commentary

The lawyer's duty to the client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law, and the lawyer's own experience and expertise.

The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.

**When Client an Organization**

(1.1) Notwithstanding that the instructions may be received from an officer, employee, agent, or representative, when a lawyer is employed or retained by an organization, including a corporation, in exercising his or her duties and in providing professional services, the lawyer shall act for the organization.

Commentary

A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors, and employees. While the organization or corporation will act and give instructions through its officers, directors, employees, members, agents, or representatives, the lawyer should ensure that it is the interests of the organization that are to be served and protected. Further, given that an organization depends upon persons to give instructions, the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority.

In addition to acting for the organization, the lawyer may also accept a joint retainer and act for a person associated with the organization. An example might be a lawyer advising about liability insurance for an officer of an organization. In such cases the lawyer acting for an organization should be alert to the prospects of conflicts of interest and should comply with the rules about the avoidance of conflicts of interest (rule 2.04).

*[New – March 2004]*

**Encouraging Compromise or Settlement**

(2) A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing useless legal proceedings.



**Rule 2**

(3) The lawyer shall consider the use of alternative dispute resolution (ADR) for every dispute, and, if appropriate, the lawyer shall inform the client of ADR options and, if so instructed, take steps to pursue those options.

**Threatening Criminal Proceedings**

(4) A lawyer shall not advise, threaten, or bring a criminal or quasi-criminal prosecution in order to secure a civil advantage for the client.

**Dishonesty, Fraud etc. by Client**

(5) When advising a client, a lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct, or instruct the client on how to violate the law and avoid punishment.

*[Amended – March 2004]*

**Commentary**

A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client or persons associated with such a client. A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activity such as mortgage fraud or money laundering. Vigilance is required because the means for these and other criminal activities may be transactions for which lawyers 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.

Before accepting a retainer or during a retainer, if a lawyer has suspicions or doubts about whether he or she might be assisting a client in dishonesty, fraud, crime or illegal conduct, the lawyer should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer, including 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 lawyer should make a record of the results of these inquiries.

A *bona fide* test case is not necessarily precluded by subrule 2.02(5) and, so long as no injury to the person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case.

*[Amended - January 2005]*

**Dishonesty, Fraud, etc. when Client an Organization**

(5.1) When a lawyer is employed or retained by an organization to act in a matter and the lawyer knows that the organization intends to act dishonestly, fraudulently, criminally, or illegally with respect to that matter, then in addition to his or her obligations under subrule (5), the lawyer for the organization shall

- (a) advise the person from whom the lawyer takes instructions that the proposed conduct would be dishonest, fraudulent, criminal, or illegal,
- (b) if necessary because the person from whom the lawyer takes instructions refuses to cause the proposed wrongful conduct to be abandoned, advise the organization's chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct would be dishonest, fraudulent, criminal or illegal,
- (c) if necessary because the chief legal officer or the chief executive officer of the organization refuses to cause the proposed conduct to be abandoned, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct would be dishonest, fraudulent, criminal, or illegal, and
- (d) if the organization, despite the lawyer's advice, intends to pursue the proposed course of conduct, withdraw from acting in the matter in accordance with rule 2.09.

(5.2) When a lawyer is employed or retained by an organization to act in a matter and the lawyer knows that the organization has acted or is acting dishonestly, fraudulently, criminally, or illegally with respect to that matter, then in addition to his or her obligations under subrule (5), the lawyer for the organization shall

- (a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the conduct was or is dishonest, fraudulent, criminal, or illegal and should be stopped,
- (b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer, or the chief executive officer refuses to cause the wrongful conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the conduct was or is dishonest, fraudulent, criminal, or illegal and should be stopped, and
- (c) if the organization, despite the lawyer's advice, continues with the wrongful conduct, withdraw from acting in the matter in accordance with rule 2.09.

**Commentary**

The past, present, or proposed misconduct of an organization may have harmful and serious consequences not only for the organization and its constituency but also for the public, who rely on organizations to provide a variety of goods and services. In particular, the misconduct of publicly traded commercial and financial corporations may have serious consequences to the public at large. Rules 2.02 (5.1) and (5.2) address some of the professional responsibilities of a lawyer acting for an organization, which includes a corporation, when he or she learns that the organization has acted, is acting, or proposes to act in a way that is dishonest, fraudulent, criminal or illegal. In addition to these rules, the lawyer may need to consider, for example, the rules and commentary about confidentiality (rule 2.03).

## Rule 2

Rules 2.02 (5.1) and (5.2) speak of conduct that is dishonest, fraudulent, criminal or illegal, and this conduct would include acts of omission as well as acts of commission. Indeed, often it is the omissions of an organization, for example, to make required disclosure or to correct inaccurate disclosures that would constitute the wrongful conduct to which these rules relate. Conduct likely to result in substantial harm to the organization, as opposed to genuinely trivial misconduct by an organization, would invoke these rules.

Once a lawyer acting for an organization learns that the organization has acted, is acting, or intends to act in a wrongful manner, then the lawyer may advise the chief executive officer and shall advise the chief legal officer of the misconduct. If the wrongful conduct is not abandoned or stopped, then the lawyer reports the matter “up the ladder” of responsibility within the organization until the matter is dealt with appropriately. If the organization, despite the lawyer’s advice, continues with the wrongful conduct, then the lawyer shall withdraw from acting in the particular matter in accordance with rule 2.09. In some but not all cases, withdrawal would mean resigning from his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter.

These rules recognize that lawyers as the legal advisers to organizations are in a central position to encourage organizations to comply with the law and to advise that it is in the organizations’ and the public’s interest that organizations do not violate the law. Lawyers acting for organizations are often in a position to advise the executive officers of the organization not only about the technicalities of the law but about the public relations and public policy concerns that motivated the government or regulator to enact the law. Moreover, lawyers for organizations, particularly in-house counsel, may guide organizations to act in ways that are legal, ethical, reputable, and consistent with the organization’s responsibilities to its constituents and to the public.

*[New – March 2004]*

### Client Under a Disability

(6) When a client’s ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

#### Commentary

A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client’s ability to make decisions, however, depends on such factors as his or her age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client’s ability to make decisions may change, for better or worse, over time. When a client is or comes to be under a disability that impairs his or her ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships. Recognizing these factors, the purpose of this rule is to direct a lawyer with a client under a disability to maintain, as far as reasonably possible, a normal lawyer and client relationship.

A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage his or her legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children’s Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client’s interests are not abandoned.

**Medical-Legal Reports**

(7) A lawyer who receives a medical-legal report from a physician or health professional that is accompanied by a proviso that it not be shown to the client shall return the report immediately to the physician or health professional unless the lawyer has received specific instructions to accept the report on this basis.

**Commentary**

The lawyer can avoid some of the problems anticipated by the rule by having a full and frank discussion with the physician or health professional, preferably in advance of the preparation of a medical-legal report, which discussion will serve to inform the physician or health professional of the lawyer’s obligation respecting disclosure of medical-legal reports to the client.

(8) A lawyer who receives a medical-legal report from a physician or health professional containing opinions or findings that if disclosed might cause harm or injury to the client shall attempt to dissuade the client from seeing the report, but if the client insists, the lawyer shall produce the report.

(9) Where a client insists on seeing a medical-legal report about which the lawyer has reservations for the reasons noted in subrule (8), the lawyer shall suggest that the client attend at the office of the physician or health professional to see the report in order that the client will have the benefit of the expertise of the physician or health professional in understanding the significance of the conclusion contained in the medical-legal report.

**Title Insurance in Real Estate Conveyancing**

(10) A lawyer shall assess all reasonable options to assure title when advising a client about a real estate conveyance and shall advise the client that title insurance is not mandatory and is not the only option available to protect the client’s interests in a real estate transaction.

**Commentary**

A lawyer should advise the client of the options available to protect the client’s interests and minimize the client’s risks in a real estate transaction. The lawyer should be cognizant of when title insurance may be an appropriate option. Although title insurance is intended to protect the client against title risks, it is not a substitute for a lawyer’s services in a real estate transaction.

The lawyer should be knowledgeable about title insurance and discuss with the client the advantages, conditions, and limitations of the various options and coverages generally available to the client through title insurance. Before recommending a specific title insurance product, the lawyer should be knowledgeable about the product and take such training as may be necessary in order to acquire the knowledge.

(11) A lawyer shall not receive any compensation, whether directly or indirectly, from a title insurer, agent or intermediary for recommending a specific title insurance product to his or her client.

(12) A lawyer shall disclose to the client that no commission or fee is being furnished by any insurer, agent, or intermediary to the lawyer with respect to any title insurance coverage.

**Commentary**

The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance of any hidden fees by the lawyer, including the lawyer's law firm, any employee or associate of the firm, or any related entity.

(13) If discussing TitlePLUS insurance with the client, a lawyer shall fully disclose the relationship between the legal profession, the Society, and the Lawyers' Professional Indemnity Company (LawPRO).

**Reporting on Mortgage Transactions**

(14) Where a lawyer acts for a lender and the loan is secured by a mortgage on real property, the lawyer shall provide a final report on the transaction, together with the duplicate registered mortgage, to the lender within 60 days of the registration of the mortgage, or within such other time period as instructed by the lender.

(15) The final report required by subrule (14) must be delivered within the times set out in that subrule even if the lawyer has paid funds to satisfy one or more prior encumbrances to ensure the priority of the mortgage as instructed and the lawyer has obtained an undertaking to register a discharge of the encumbrance or encumbrances but the discharge remains unregistered.

*[New - February 2007]*

**2.03 CONFIDENTIALITY**

**Confidential Information**

2.03 (1) A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.

**Commentary**

A lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

This rule must be distinguished from the evidentiary rule of lawyer and client privilege concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.

Generally, the lawyer should not disclose having been consulted or retained by a particular person about a particular matter unless the nature of the matter requires such disclosure.

A lawyer should take care to avoid disclosure to one client of confidential information concerning or received from another client and should decline employment that might require such disclosure.

A lawyer should avoid indiscreet conversations, even with the lawyer's spouse or family, about a client's affairs and should shun any gossip about such things even though the client is not named or otherwise identified. Similarly, a lawyer should not repeat any gossip or information about the client's business or affairs that is overheard or recounted to the lawyer. Apart altogether from ethical considerations or questions of good taste, indiscreet shop-talk between lawyers, if overheard by third parties able to identify the matter being discussed, could result in prejudice to the client. Moreover, the respect of the listener for lawyers and the legal profession will probably be lessened.

Although the rule may not apply to facts that are public knowledge, nevertheless, the lawyer should guard against participating in or commenting on speculation concerning the client's affairs or business.

In some situations, the authority of the client to disclose may be implied. For example, some disclosure may be necessary in court proceedings, in a pleading or other court document. Also, it is implied that a lawyer may, unless the client directs otherwise, disclose the client's affairs to partners and associates in the law firm and, to the extent necessary, to non-legal staff, such as secretaries and filing clerks. But this implied authority to disclose places the lawyer under a duty to impress upon associates, employees, and students the importance of non-disclosure (both during their employment and afterwards) and requires the lawyer to take reasonable care to prevent their disclosing or using any information that the lawyer is bound to keep in confidence.

A lawyer may have an obligation to disclose information under subrule 4.06(3)(Security of Court Facilities). If client information is involved in those situations, the lawyer should be guided by the provisions of rule 2.03.

The rule prohibits disclosure of confidential information because confidentiality and loyalty are fundamental to the relationship between a lawyer and client and legal advice cannot be given and justice cannot be done unless clients have a large measure of freedom to discuss their affairs with their lawyers. However, there are some very exceptional situations identified in the following subrules where disclosure without the client's permission might be warranted because the lawyer is satisfied that truly serious harm of the types identified is imminent and cannot otherwise be prevented. These situations will be extremely rare, and, even in these situations, the lawyer should not disclose more information than is required.

### Justified or Permitted Disclosure

- (2) When required by law or by order of a tribunal of competent jurisdiction, a lawyer shall disclose confidential information, but the lawyer shall not disclose more information than is required.
- (3) Where a lawyer believes upon reasonable grounds that there is an imminent risk to an identifiable person or group of death or serious bodily harm, including serious psychological harm that substantially interferes with health or well-being, the lawyer may disclose, pursuant to judicial order where practicable, confidential information where it is necessary to do so in order to prevent the death or harm, but shall not disclose more information than is required.

#### Commentary

A lawyer employed or retained to act for an organization, including a corporation, confronts a difficult problem about confidentiality when he or she becomes aware that the organization may commit a dishonest, fraudulent, criminal, or illegal act. This problem is sometimes described as the problem of whether the lawyer should “blow the whistle” on his or her employer or client. Although the *Rules of Professional Conduct* make it clear that the lawyer shall not knowingly assist or encourage any dishonesty, fraud, crime, or illegal conduct (rule 2.02 (5)) and provide a rule for how a lawyer should respond to conduct by an organization that was, is or may be dishonest, fraudulent, criminal, or illegal (rules 2.02 (5.1) and (5.2)), it does not follow that the lawyer should disclose to the appropriate authorities an employer's or client's proposed misconduct. Rather, the general rule, as set out above, is that the lawyer shall hold the client's information in strict confidence, and this general rule is subject to only a few exceptions. Assuming the exceptions do not apply, there are, however, several steps that a lawyer should take when confronted with the difficult problem of proposed misconduct by an organization. The lawyer should recognise that his or her duties are owed to the organization and not to the officers, employees, or agents of the organization (rule 2.02 (1.1)) and the lawyer should comply with subrules 2.02 (5.1) and (5.2), which set out the steps the lawyer should take in response to proposed, past or continuing misconduct by the organization.

[Amended – March 2004]

- (4) Where it is alleged that a lawyer or the lawyer's associates or employees are
- (a) guilty of a criminal offence involving a client's affairs,

- (b) civilly liable with respect to a matter involving a client’s affairs, or
- (c) guilty of malpractice or misconduct,

a lawyer may disclose confidential information in order to defend against the allegations, but the lawyer shall not disclose more information than is required.

- (5) A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but the lawyer shall not disclose more information than is required.

**Literary Works**

- (6) If a lawyer engages in literary works, such as a memoir or an autobiography, the lawyer shall not disclose confidential information without the client’s or former client’s consent.

Commentary

The fiduciary relationship between lawyer and client forbids the lawyer from using any confidential information covered by the ethical rule for the benefit of the lawyer or a third person or to the disadvantage of the client.

**2.04 AVOIDANCE OF CONFLICTS OF INTEREST**

**Definition**

2.04 (1) In this rule

A “conflict of interest” or a “conflicting interest” means an interest

- (a) that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or
- (b) that a lawyer might be prompted to prefer to the interests of a client or prospective client.



Commentary

Conflicting interests include, but are not limited to, the financial interest of a lawyer or an associate of a lawyer, including that which may exist where lawyers have a financial interest in a firm of non-lawyers in an affiliation, and the duties and loyalties of a lawyer to any other client, including the obligation to communicate information. For example, there could be a conflict of interest if a lawyer, or a family member, or a law partner had a personal financial interest in the client's affairs or in the matter in which the lawyer is requested to act for the client, such as a partnership interest in some joint business venture with the client. The definition of conflict of interest, however, does not capture financial interests that do not compromise a lawyer's duties to the client. For example, a lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest, because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client.

Where a lawyer is acting for a friend or family member, the lawyer may have a conflict of interest because the personal relationship may interfere with the lawyer's duty to provide objective, disinterested professional advice to the client.

*[Amended - May 2001, March 2004, October 2004]*

**Avoidance of Conflicts of Interest**

- (2) A lawyer shall not advise or represent more than one side of a dispute.
- (3) A lawyer shall not act or continue to act in a matter when there is or is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents.

Commentary

A client or the client's affairs may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflict of interest.

A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest.

As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf should not be subject to other interests, duties, or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs. In some instances, each client's case may gather strength from joint representation. In the result, the client's interests may sometimes be better served by not engaging another lawyer, for example, when the client and another party to a commercial transaction are continuing clients of the same law firm but are regularly represented by different lawyers in that firm.

A conflict of interest may arise when a lawyer acts not only as a legal advisor but in another role for the client. For example, there is a dual role when a lawyer or his or her law firm acts for a public or private corporation and the lawyer serves as a director of the corporation. Lawyers may also serve these dual roles for partnerships, trusts, and other organizations. A dual role may raise a conflict of interest because it may affect the lawyer's independent judgment and fiduciary obligations in either or both roles, it may obscure legal advice from business and practical advice, it may invalidate the protection of lawyer and client privilege, and it has the potential of disqualifying the lawyer or the law firm from acting for the organization. Before accepting a dual role, a lawyer should consider these factors and discuss them with the client. The lawyer should also consider rule 6.04 (Outside Interests and Practice of Law).

If a lawyer has a sexual or intimate personal relationship with a client, this may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. Before accepting a retainer from or continuing a retainer with a person with whom the lawyer has such a relationship, a lawyer should consider the following factors:

- a. The vulnerability of the client, both emotional and economic;
- b. The fact that the lawyer and client relationship may create a power imbalance in favour of the lawyer or, in some circumstances, in favour of the client;
- c. Whether the sexual or intimate personal relationship will jeopardize the client's right to have all information concerning the client's business and affairs held in strict confidence. For example, the existence of the relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship;
- d. Whether such a relationship may require the lawyer to act as a witness in the proceedings;
- e. Whether such a relationship will interfere in any way with the lawyer's fiduciary obligations to the client, his or her ability to exercise independent professional judgment, or his or her ability to fulfill obligations owed as an officer of the court and to the administration of justice.

There is no conflict of interest if another lawyer of the firm who does not have a sexual or intimate personal relationship with the client is the lawyer handling the client's work.

While subrule 2.04(3) does not require that a lawyer advise the client to obtain independent legal advice about the conflicting interest, in some cases, especially those in which the client is not sophisticated or is vulnerable, the lawyer should recommend such advice to ensure that the client's consent is informed, genuine, and uncoerced.

*[Amended – March 2004, October 2004]*

**Acting Against Client**

(4) A lawyer who has acted for a client in a matter shall not thereafter act against the client or against persons who were involved in or associated with the client in that matter

- (a) in the same matter,

- (b) in any related matter, or
- (c) save as provided by subrule (5), in any new matter, if the lawyer has obtained from the other retainer relevant confidential information unless the client and those involved in or associated with the client consent.

Commentary

It is not improper for the lawyer to act against a client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person and where previously obtained confidential information is irrelevant to that matter.

- (5) Where a lawyer has acted for a former client and obtained confidential information relevant to a new matter, the lawyer's partner or associate may act in the new matter against the former client if
- (a) the former client consents to the lawyer's partner or associate acting, or
  - (b) the law firm establishes that it is in the interests of justice that it act in the new matter, having regard to all relevant circumstances, including
    - (i) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur,
    - (ii) the extent of prejudice to any party,
    - (iii) the good faith of the parties,
    - (iv) the availability of suitable alternative counsel, and
    - (v) issues affecting the public interest.

Commentary

The term “client” is defined in rule 1.02 to include a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work. Therefore, if a member of a law firm has obtained from a former client confidential information that is relevant to a new matter, no member of the law firm may act against the former client in the new matter unless the requirements of subrule (5) have been satisfied. In its effect, subrule (5) extends with necessary modifications the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rule 2.05) to the situation of a law firm acting against a former client.

**Joint Retainer**

- (6) Except as provided in subrule (8.2), where a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that
- (a) the lawyer has been asked to act for both or all of them,
  - (b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and
  - (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

[Amended – February 2007]

**Commentary**

Although this subrule does not require that, before accepting a joint retainer, a lawyer advise the client to obtain independent legal advice about the joint retainer, in some cases, especially those in which one of the clients is less sophisticated or more vulnerable than the other, the lawyer should recommend such advice to ensure that the client's consent to the joint retainer is informed, genuine, and uncoerced.

A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act, 1992 S.O. 1992 c. 30* to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that if subsequently only one of them were to communicate new instructions, for example, instructions to change or revoke a will:

- (a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;
- (b) in accordance with rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; but
- (c) the lawyer would have a duty to decline the new retainer, unless;
  - (i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship, or permanently ended their close personal relationship, as the case may be;
  - (ii) the other spouse or partner had died; or
  - (iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8).

[Amended – February, 2005]

**Rule 2**

**2.04 Avoidance of Conflicts of Interest**

(6.1) Where a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer shall disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

Commentary

What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or “flip” where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information.

*[New – February 2007]*

(7) Except as provided in subrule (8.2), where a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

*[Amended – February 2007]*

Commentary

Although all the parties concerned may consent, a lawyer should avoid acting for more than one client when it is likely that an issue contentious between them will arise or their interests, rights, or obligations will diverge as the matter progresses.

(8) Except as provided in subrule (8.2), where a lawyer has advised the clients as provided under subrules (6) and (7) and the parties are content that the lawyer act, the lawyer shall obtain their consent.

*[Amended – February 2007]*

(8.1) In subrule (8.2), "lending client" means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

(8.2) If a lawyer is jointly retained by a client and by a lending client in respect of a mortgage or loan from the lending client to that client, including any guarantee of that mortgage or loan, the lending client’s consent is deemed to exist upon the lawyer’s receipt of written instructions from the lending client to act and the lawyer is not required to

- (a) provide the advice described in subrule (6) to the lending client before accepting the employment,

- (b) provide the advice described in subrule (7) if the lending client is the other client as described in that subrule, or
- (c) obtain the consent of the lending client as described in subrule (8), including confirming the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.

Commentary

Subrules (8.1) and (8.2) are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g. mortgage loan instructions) and the consent is generally deemed by such clients to exist when the lawyer is requested to act.

Subrule (8.2) applies to all loans where a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.

*[New – February 2007]*

- (9) Save as provided by subrule (10), where clients have consented to a joint retainer and an issue contentious between them or some of them arises, the lawyer shall
  - (a) not advise them on the contentious issue, and
  - (b) refer the clients to other lawyers, unless
    - (i) no legal advice is required, and
    - (ii) the clients are sophisticated,in which case, the clients may settle the contentious issue by direct negotiation in which the lawyer does not participate.

Commentary

The rule does not prevent a lawyer from arbitrating or settling or attempting to arbitrate or settle, a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer. Where, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

(10) Where clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them and a contentious issue does arise, the lawyer may advise the one client about the contentious matter and shall refer the other or others to another lawyer.

### Affiliations Between Lawyers and Affiliated Entities

(10.1) Where there is an affiliation, before accepting a retainer to provide legal services to a client jointly with non-legal services of an affiliated entity, a lawyer shall disclose to the client

(a) any possible loss of solicitor and client privilege because of the involvement of the affiliated entity, including circumstances where a non-lawyer or non-lawyer staff of the affiliated entity provide services, including support services, in the lawyer's office,

(b) the lawyer's role in providing legal services and in providing non-legal services or in providing both legal and non-legal services, as the case may be,

(c) any financial, economic or other arrangements between the lawyer and the affiliated entity that may affect the independence of the lawyer's representation of the client, including whether the lawyer shares in the revenues, profits or cash flows of the affiliated entity; and

(d) agreements between the lawyer and the affiliated entity, such as agreements with respect to referral of clients between the lawyer and the affiliated entity, that may affect the independence of the lawyer's representation of the client.

(10.2) Where there is an affiliation, after making the disclosure as required by subrule (10.1), a lawyer shall obtain the client's consent before accepting a retainer under subrule (10.1).

(10.3) Where there is an affiliation, a lawyer shall establish a system to search for conflicts of interest of the affiliation.

#### Commentary

Lawyers practising in an affiliation are required to control the practice through which they deliver legal services to the public. They are also required to address conflicts of interest in respect of a proposed retainer by a client as if the lawyer's practice and the practice of the affiliated entity were one where the lawyers accept a retainer to provide legal services to that client jointly with non-legal services of the affiliated entity. The affiliation is subject to the same conflict of interest rules as apply to lawyers and law firms. This obligation may extend to inquiries of offices of affiliated entities outside of Ontario where those offices are treated economically as part of a single affiliated entity.

In reference to clause (a) of subrule (10.1), see also subsection 3(2) of By-Law 7.1 (Operational Obligations and Responsibilities).

*[Amended – January 2008]*

**Prohibition Against Acting for Borrower and Lender**

(11) Subject to subrule (12), a lawyer or two or more lawyers practising in partnership or association shall not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

(12) Provided that there is no violation of this rule, a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction if

- (a) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction,
- (b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price,
- (c) the lender is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business,
- (d) the consideration for the mortgage or loan does not exceed \$50,000, or
- (e) the lender and borrower are not at “arm’s length” as defined in the *Income Tax Act (Canada)*.

*[Amended - May 2001]*

**Multi-discipline Practice**

(13) A lawyer in a multi-discipline practice shall ensure that non-licensee partners and associates observe this rule for the legal practice and for any other business or professional undertaking carried on by them outside the legal practice.

*[Amended - June 2009]*

**Unrepresented Persons**

(14) When a lawyer is dealing on a client’s behalf with an unrepresented person, the lawyer shall

- (a) urge the unrepresented person to obtain independent legal representation,
- (b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer, and
- (c) make clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client and accordingly his or her comments may be partisan.

**Short-term limited legal services**

(15) In this subrule and subrules (16) to (19)



“*pro bono* client” means a client to whom a lawyer provides short-term limited legal services;

“short-term limited legal services” means *pro bono* summary legal services provided by a lawyer to a client under the auspices of Pro Bono Law Ontario’s Law Help Ontario program for matters in the Superior Court of Justice or in Small Claims Court, with the expectation by the lawyer and the client that the lawyer will not provide continuing legal representation in the matter.

(16) A lawyer engaged in the provision of short-term limited legal services may provide legal services to a *pro bono* client unless

- (a) the lawyer knows or becomes aware that the interests of the *pro bono* client are directly adverse to the immediate interests of another current client of the lawyer, the lawyer’s firm or Pro Bono Law Ontario; or
- (b) the lawyer has or, while providing the short-term limited legal services, obtains confidential information relevant to a matter involving a current or former client of the lawyer, the lawyer’s firm or Pro Bono Law Ontario whose interests are adverse to those of the *pro bono* client.

(17) A lawyer who is a partner, an associate, an employee or an employer of a lawyer providing short-term limited legal services to a *pro bono* client may act for other clients of the law firm whose interests are adverse to the *pro bono* client so long as adequate and timely measures are in place to ensure that no disclosure of the *pro bono* client’s confidential information is made to the lawyer acting for the other clients.

(18) A lawyer who is unable to provide short-term limited legal services to a *pro bono* client because of the operation of subrule (16) (a) or (b) shall cease to provide short term limited legal services to the *pro bono* client as soon as the lawyer actually becomes aware of the adverse interest or as soon as he or she has or obtains the confidential information referred to in subrule (16) and the lawyer shall not seek the *pro bono* client’s waiver of the conflict.

(19) In providing short-term limited legal services, a lawyer shall

- (a) ensure, before providing the legal services, that the appropriate disclosure of the nature of the legal services has been made to the client; and
- (b) determine whether the client may require additional legal services beyond the short-term limited legal services and if additional services are required or advisable, encourage the client to seek further legal assistance.

## Commentary

Short term limited legal service programs are usually offered in circumstances in which it may be difficult to systematically screen for conflicts of interest in a timely way, despite the best efforts and existing practices and procedures of Pro Bono Law Ontario (PBLO) and the lawyers and law firms who provide these services. Performing a full conflicts screening in circumstances in which the *pro bono* services described in subrule (15) are being offered can be very challenging given the timelines, volume and logistics of the setting in which the services are provided. The time required to screen for conflicts may mean that qualifying individuals for whom these brief legal services are available are denied access to legal assistance.

Subrules (15) to (19) apply in circumstances in which the limited nature of the legal services being provided by a lawyer significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm. Accordingly, the lawyer is disqualified from acting for a client receiving short-term limited legal services only if the lawyer has actual knowledge of a conflict of interest between the *pro bono* client and an existing or former client of the lawyer, the lawyer's firm or PBLO. For example, a conflict of interest of which the lawyer has no actual knowledge but which is imputed to the lawyer because of the lawyer's membership in or association or employment with a firm would not preclude the lawyer from representing the client seeking short-term limited legal services.

The lawyer's knowledge would be based on the lawyer's reasonable recollection and information provided by the client in the ordinary course of the consultation and in the client's application to PBLO for legal assistance.

The personal disqualification of a lawyer participating in PBLO's program does not create a conflict for the other lawyers participating in the program, as the conflict is not imputed to them.

Confidential information obtained by a lawyer representing a *pro bono* client, as defined in subrule (15), will not be imputed to the lawyer's licensee partners, associates and employees or non-licensee partners or associates in a multi-discipline partnership. As such, these individuals may continue to act for another client adverse in interest to the *pro bono* client who is obtaining or has obtained short-term limited legal services, and may act in future for another client adverse in interest to the *pro bono* client who is obtaining or has obtained short-term limited legal services.

Appropriate screening measures must be in place to prevent disclosure of confidential information relating to the client to the lawyer's partners, associates, employees or employer (in the practice of law). Subrule (17) extends, with necessary modifications, the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rule 2.05) to the situation of a law firm acting against a current client of the firm in providing short term limited legal services. Measures that the lawyer providing the short-term limited legal services should take to ensure the confidentiality of information of the client's information include:

- having no involvement in the representation of or any discussions with others in the firm about another client whose interests conflict with those of the *pro bono* client;

**Rule 2**

**2.05 Conflicts from Transfer between Law Firms**

- identifying relevant files, if any, of the *pro bono* client and physically segregating access to them to those working on the file or who require access for specifically identified or approved reasons; and
- ensuring that the firm has distributed a written policy to all licensees, non-licensee partners and associates and support staff, explaining the screening measures that are in place.

Subrule (18) precludes a lawyer from obtaining a waiver in respect of conflicts of interest that arise in providing short-term legal services.

*[New – April 22, 2010]*

**2.04.1 LAWYERS ACTING FOR TRANSFEROR AND TRANSFEREE IN TRANSFERS OF TITLE**

2.04.1 (1) Subject to subrule (3), an individual lawyer shall not act for or otherwise represent both the transferor and the transferee in a transfer of title to real property.

(2) Subrule (1) does not prevent a law firm of two or more lawyers from acting for or otherwise representing a transferor and a transferee in a transfer of title to real property so long as the transferor and transferee are represented by different lawyers in the firm and there is no violation of rule 2.04.

(3) So long as there is no violation of rule 2.04, an individual lawyer may act for or otherwise represent both the transferor and the transferee in a transfer of title to real property if

(a) the Land Registration Reform Act permits the lawyer to sign the transfer on behalf of the transferor and the transferee,

(b) the transferor and transferee are “related persons” as defined in section 251 of the Income Tax Act (Canada), or

(c) the lawyer practices law in a remote location where there are no other lawyers that either the transferor or the transferee could without undue inconvenience retain for the transfer

*[Effective March 31, 2008]*

**2.05 CONFLICTS FROM TRANSFER BETWEEN LAW FIRMS**

**Definitions**

2.05 (1) In this rule

“client” includes anyone to whom a lawyer owes a duty of confidentiality, whether or not a solicitor-client relationship exists between them,

*[Amended - June 2007]*

“confidential information” means information obtained from a client that is not generally known to the public, and

Commentary

The duties imposed by this rule concerning confidential information should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

“matter” means a case or client file but does not include general “know-how” and, in the case of a government lawyer, does not include policy advice unless the advice relates to a particular case.

**Application of Rule**

(2) This rule applies where a lawyer transfers from one law firm (“former law firm”) to another (“new law firm”), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that

- (a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client (“former client”),
- (b) the interests of those clients in that matter conflict, and
- (c) the transferring lawyer actually possesses relevant information respecting that matter.

(3) Subrules (4) to (7) do not apply to a lawyer employed by the federal, a provincial, or a territorial Attorney General or Department of Justice who, after transferring from one department, ministry, or agency to another, continues to be employed by that Attorney General or Department of Justice.

Commentary

The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification.

Lawyers and support staff - This rule is intended to regulate lawyers and articled students who transfer between law firms. It also imposes a general duty on lawyers to exercise due diligence in the supervision of non-lawyer staff, to ensure that they comply with the rule and with the duty not to disclose confidences of clients of the lawyer’s firm and confidences of clients of other law firms in which the person has worked.

Government employees and in-house counsel - The definition of “law firm” includes one or more lawyers practising in a government, a Crown corporation, any other public body, and a corporation. Thus, the rule applies to lawyers transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same.

Law firms with multiple offices - The rule treats as one “law firm” such entities as the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm, and a legal aid program with many community law offices. The more autonomous each unit or office is, the easier it should be, in the event of a conflict, for the new firm to obtain the former client's consent or to establish that it is in the public interest that it continue to represent its client in the matter.

*[Amended – June 2007]*

### **Law Firm Disqualification**

(4) Where the transferring lawyer actually possesses relevant information respecting the former client that is confidential and that, if disclosed to a member of the new law firm, may prejudice the former client, the new law firm shall cease its representation of its client in that matter unless

*[Amended – June 2007]*

- (a) the former client consents to the new law firm's continued representation of its client, or
- (b) the new law firm establishes that it is in the interests of justice that it act in the matter, having regard to all relevant circumstances, including,
  - (i) the adequacy and timing of the measures taken to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur,
  - (ii) the extent of prejudice to any party,
  - (iii) the good faith of the parties,
  - (iv) the availability of suitable alternative counsel, and
  - (v) issues affecting the public interest.

**Commentary**

The circumstances enumerated in subrule (4)(b) are drafted in broad terms to ensure that all relevant facts will be taken into account. While clauses (ii) to (iv) are self-explanatory, clause (v) addresses governmental concerns respecting issues of national security, cabinet confidences, and obligations incumbent on Attorneys General and their agents in the administration of justice.

(5) For greater certainty, subrule (4) is not intended to interfere with the discharge by an Attorney General or his or her counsel or agent (including those occupying the offices of Crown Attorney, Assistant Crown Attorney, or part-time Assistant Crown Attorney) of their constitutional and statutory duties and responsibilities.

(6) Where the transferring lawyer actually possesses relevant information respecting the former client but that information is not confidential information which, if disclosed to a member of the new law firm, may prejudice the former client,

- (a) the lawyer shall execute an affidavit or solemn declaration to that effect, and
- (b) the new law firm shall
  - (i) notify its client and the former client, or if the former client is represented in that matter by a lawyer, notify that lawyer of the relevant circumstances and its intended action under this rule, and
  - (ii) deliver to the persons referred to in (i) a copy of any affidavit or solemn declaration executed under (a).

*[Amended - June 2007]*

**Transferring Lawyer Disqualification**

(7) A transferring lawyer described in the opening clause of subrule (4) or (6) shall not, unless the former client consents,

- (a) participate in any manner in the new law firm's representation of its client in that matter, or
- (b) disclose any confidential information respecting the former client.

*[Amended - June 2007]*

(8) No member of the new law firm shall, unless the former client consents, discuss with a transferring lawyer described in the opening clause of subrule (4) or (6) the new law firm's representation of its client or the former law firm's representation of the former client in that matter.

*[Amended - June 2007]*

**Rule 2****2.05 Conflicts from Transfer between Law Firms****Determination of Compliance**

(9) Anyone who has an interest in, or who represents a party in, a matter referred to in this rule may apply to a tribunal of competent jurisdiction for a determination of any aspect of this rule.

**Due Diligence**

(10) A lawyer shall exercise due diligence in ensuring that each member and employee of the lawyer's law firm, each non-lawyer partner and associate, and each other person whose services the lawyer has retained

*[Amended - June 2007]*

- (a) complies with this rule, and
- (b) does not disclose
  - (i) confidential information of clients of the firm, and
  - (ii) confidential information of clients of another law firm in which the person has worked.

Commentary

**MATTERS TO CONSIDER**

When a law firm considers hiring a lawyer or articulated student ("transferring lawyer") from another law firm, the transferring lawyer and the new law firm need to determine, before the transfer, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the law firm that the transferring lawyer is leaving and with respect to clients of a firm in which the transferring lawyer worked at some earlier time. The transferring lawyer and the new law firm need to identify, first, all cases in which

- (a) the new law firm represents a client in a matter that is the same as or related to a matter in respect of which the former law firm represents its client,
- (b) the interests of these clients in that matter conflict, and
- (c) the transferring lawyer actually possesses relevant information respecting that matter.

*[Amended – June 2007]*

The law firm must then determine whether, in each such case, the transferring lawyer actually possesses relevant information respecting the former client that is confidential and that, if disclosed to a member of the new law firm, may prejudice the former client. If this element exists, the new law firm is disqualified unless the former client consents or the new law firm establishes that its continued representation is in the interests of justice, based on relevant circumstances.

*[Amended - June 2007]*

In determining whether the transferring lawyer possesses confidential information, both the transferring lawyer and the new law firm need to be very careful to ensure that they do not, during the interview process itself, disclose client confidences.

#### MATTERS TO CONSIDER BEFORE HIRING A POTENTIAL TRANSFEREE

After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether a conflict exists.

##### A. Where a conflict does exist

If the new law firm concludes that the transferring lawyer does actually possess relevant information respecting a former client that is confidential and that, if disclosed to a member of the new law firm, may prejudice the former client if the transferring lawyer is hired, the new law firm will be prohibited from continuing to represent its client in the matter unless

(a) the new law firm obtains the former client's consent to its continued representation of its client in that matter, or

(b) the new law firm complies with subrule (4)(b), and, in determining whether continued representation is in the interests of justice, both clients' interests are the paramount consideration.

If the new law firm seeks the former client's consent to the new law firm continuing to act, it will in all likelihood be required to satisfy the former client that it has taken reasonable measures to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur. The former client's consent must be obtained before the transferring lawyer is hired.

Alternatively, if the new law firm applies under subrule (9) for a determination that it may continue to act, it bears the onus of establishing the matters referred to in subrule (4)(b). Ideally, this process should be completed before the transferring person is hired.

*[Amended – June 2007]*

##### B. Where no conflict exists

Although subrule 2.05(6) does not require that the notice required by that subrule be in writing, it would be prudent for the new law firm to confirm these matters in writing. Written notification eliminates any later dispute about whether notice has been given and about its timeliness and content.

The new law firm might, for example, seek the former client's consent to the transferring lawyer acting for the new law firm's client in the matter because, in the absence of such consent, the transferring lawyer may not act.

If the former client does not consent to the transferring lawyer acting, it would be prudent for the new law firm to take reasonable measures to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information. If such measures are taken, it will strengthen the new law firm's position if it is later determined that the transferring lawyer did in fact possess confidential information which, if disclosed, may prejudice the former client.



A transferring lawyer who possesses no such confidential information puts the former client on notice by executing an affidavit or solemn declaration and delivering it to the former client. A former client who disputes the allegation of no such confidential information may apply under subrule (9) for a determination of that issue.

C. Where the new law firm is not sure whether a conflict exists

There may be some cases where the new law firm is not sure whether the transferring lawyer actually possesses confidential information respecting a former client that, if disclosed to a member of the new law firm, may prejudice the former client. In such circumstances, it would be prudent for the new law firm to seek guidance from the Society before hiring the transferring lawyer.

#### REASONABLE MEASURES TO ENSURE NON-DISCLOSURE OF CONFIDENTIAL INFORMATION

As noted above, there are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information:

(a) where the transferring lawyer actually possesses confidential information respecting a former client that, if disclosed to a member of the new law firm, may prejudice the former client, and

*[Amended – June 2007]*

(b) where the new law firm is not sure whether the transferring lawyer actually possesses such confidential information, but it wants to strengthen its position if it is later determined that the transferring lawyer did in fact possess such confidential information.

It is not possible to offer a set of “reasonable measures” that will be appropriate or adequate in every case. Instead, the new law firm that seeks to implement reasonable measures must exercise professional judgment in determining what steps must be taken “to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information.”

In the case of law firms with multiple offices, the degree of autonomy possessed by each office will be an important factor in determining what constitutes “reasonable measures.” For example, the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm, or a legal aid program may be able to demonstrate that, because of its institutional structure, reporting relationships, function, nature of work, and geography, relatively fewer “measures” are necessary to ensure the non-disclosure of client confidences. If it can be shown that, because of factors such as the above, lawyers in separate units, offices, or departments do not “work together” with other lawyers in other units, offices or departments, this shall be taken into account in the determination of what screening measures are “reasonable.”

The guidelines at the end of this Commentary, adapted from the Canadian Bar Association's Task Force report entitled *Conflict of Interest Disqualification: Martin v. Gray and Screening Methods* (February 1993), are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

In cases where a transferring lawyer joining a government legal services unit or the legal department of a corporation actually possesses confidential information respecting a former client that, if disclosed to a member of the new “law firm,” may prejudice the former client, the interests of the new client (Her Majesty or the corporation) must continue to be represented. Normally, this will be effected by instituting satisfactory screening measures, which could include referring the conduct of the matter to counsel in a different department, office or legal services unit. As each factual situation will be unique, flexibility will be required in the application of subrule (4)(b), particularly clause (v). Only in those situations where the entire firm must be disqualified pursuant to subrule (4) will it be necessary to refer conduct of the matter to outside counsel.

## GUIDELINES

1. The screened lawyer should have no involvement in the new law firm's representation of its client.

*[Amended – June 2007]*

2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.
3. No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.
4. The current matter should be discussed only within the limited group that is working on the matter.
5. The files of the current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.
6. No member of the new law firm should show the screened lawyer any documents relating to the current representation.
7. The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.
8. Undertakings should be provided by the appropriate law firm members setting out that they have adhered to and will continue to adhere to all elements of the screen.
9. The former client, or if the former client is represented in that matter by a lawyer, that lawyer, should be advised
  - (a) that the screened lawyer is now with the new law firm, which represents the current client, and
  - (b) of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.

## Rule 2

10. The screened lawyer's office or work station and that of the lawyer's support staff should be located away from the offices or work stations of lawyers and support staff working on the matter.

11. The screened lawyer should use associates and support staff different from those working on the current matter.

12. In the case of law firms with multiple offices, consideration should be given to referring conduct of the matter to counsel in another office.

*[Amended – June 2007]*

## 2.06 DOING BUSINESS WITH A CLIENT

### Definitions

2.06 (1) In this rule

“related persons” means related persons as defined in the *Income Tax Act (Canada)* and “related person” has a corresponding meaning, and

“syndicated mortgage” means a mortgage having more than one investor.

### Investment by Client where Lawyer has an Interest

(2) Subject to subrule (2.1), where a client intends to enter into a transaction with his or her lawyer or with a corporation or other entity in which the lawyer has an interest other than a corporation or other entity whose securities are publicly traded, the lawyer, before accepting any retainer

(a) shall disclose and explain the nature of the conflicting interest to the client or, in the case of a potential conflict, how and why it might develop later,

(b) shall recommend independent legal representation and shall require that the client receive independent legal advice, and

(c) where the client requests the lawyer to act, the lawyer shall obtain the client's written consent.

*[Amended - May 2001]*

(2.1) When a client intends to pay for legal services by transferring to his, her or its lawyer a share, participation or other interest in property or in an enterprise, other than a non-material interest in a publicly traded enterprise, the lawyer shall recommend but need not require that the client receive independent legal advice before accepting a retainer.

*[New – May 2001; Amended – March 2004]*

**Commentary**

If the lawyer does not choose to make disclosure of the conflicting interest or cannot do so without breaching a confidence, the lawyer must decline the retainer.

The lawyer should not uncritically accept the client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined.

Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, and that the client's consent was obtained.

If the investment is by borrowing from the client, the transaction may fall within the requirements of subrules 2.06(4) or (6).

**Certificate of Independent Legal Advice**

(3) A lawyer retained to give independent legal advice shall, before any advance of funds has been made by the client,

- (a) provide the client with a written certificate that the client has received independent legal advice, and
- (b) obtain the client's signature on a copy of the certificate of independent legal advice and send the signed copy to the lawyer with whom the client proposes to transact business.

**Borrowing from Clients**

(4) A lawyer shall not borrow money from a client unless

- (a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, or
- (b) the client is a related person as defined by the Income Tax Act (Canada) and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the case and by independent legal advice or independent legal representation.

**Commentary**

The relationship between lawyer and client is a fiduciary one, and no conflict between the lawyer's own interest and the lawyer's duty to the client can be permitted.

Whether a person lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is to be considered a client within this rule is to be determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice in respect of the loan or investment, the lawyer will be considered bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

(5) In any transaction, other than a transaction within the provisions of subrule (4), in which money is borrowed from a client by a lawyer's spouse or by a corporation, syndicate, or partnership in which either the lawyer or the lawyer's spouse has, or both of them together have, directly or indirectly, a substantial interest, the lawyer shall ensure that the client's interests are fully protected by the nature of the case and by independent legal representation.

### Lawyers in Loan or Mortgage Transactions

(6) A lawyer engaged in the private practice of law in Ontario shall not directly, or indirectly through a corporation, syndicate, partnership, trust, or other entity in which the lawyer or a related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities

- (a) hold a syndicated mortgage or loan in trust for investor clients unless each investor client receives
  - (i) a complete reporting letter on the transaction,
  - (ii) a trust declaration signed by the person in whose name the mortgage or any security instrument is registered, and
  - (iii) a copy of the duplicate registered mortgage or security instrument,
- (b) arrange or recommend the participation of a client or other person as an investor in a syndicated mortgage or loan where the lawyer is an investor unless the lawyer can demonstrate that the client or other person had independent legal advice in making the investment, or
- (c) sell mortgages or loans to, or arrange mortgages or loans for, clients or other persons except in accordance with the skill, competence, and integrity usually expected of a lawyer in dealing with clients.

#### Commentary

#### ACCEPTABLE MORTGAGE OR LOAN TRANSACTIONS

A lawyer may engage in the following mortgage or loan transactions in connection with the practice of law:

(a) a lawyer may invest in mortgages or loans personally or on behalf of a related person or a combination thereof,

(b) a lawyer may deal in mortgages or loans as an executor, administrator, committee, trustee of a testamentary or inter vivos trust established for purposes other than mortgage or loan investment or under a power of attorney given for purposes other than exclusively for mortgage or loan investment, and

(c) a lawyer may collect, on behalf of clients, mortgage or loan payments that are made payable in the name of the lawyer under a written direction to that effect given by the client to the mortgagor or borrower provided that such payments are deposited into the lawyer's trust account.

A lawyer may introduce a borrower (whether or not a client) to a lender (whether or not a client) and the lawyer may then act for either, and when subrule 2.04 (12) applies, the lawyer may act for both.

**Disclosure**

(7) Where a lawyer sells or arranges mortgages for clients or other persons, the lawyer shall disclose in writing to each client or other person the priority of the mortgage and all other information relevant to the transaction that is known to the lawyer that would be of concern to a proposed investor.

**No Advertising**

(8) A lawyer shall not promote, by advertising or otherwise, individual or joint investment by clients or other persons who have money to lend, in any mortgage in which a financial interest is held by the lawyer, a related person, or a corporation, syndicate, partnership, trust or other entity in which the lawyer or related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities.

**Guarantees by a Lawyer**

(9) Except as provided by subrule (10), a lawyer shall not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender.

(10) A lawyer may give a personal guarantee in the following circumstances:

(a) the lender is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent, or child,

(b) the transaction is for the benefit of a non-profit or charitable institution where the lawyer as a member or supporter of such institution is asked, either individually or together with other members or supporters of the institution, to provide a guarantee, or

- (c) the lawyer has entered into a business venture with a client and the lender requires personal guarantees from all participants in the venture as a matter of course and
- (i) the lawyer has complied with rule 2.04 (Avoidance of Conflicts of Interest) and this rule (Doing Business with a Client), and
  - (ii) the lender and participants in the venture who are or were clients of the lawyer have received independent legal representation.

[Amended - June 2007]

## 2.07 PRESERVATION OF CLIENT'S PROPERTY

### Preservation of Client's Property

2.07 (1) A lawyer shall care for a client's property as a careful and prudent owner would when dealing with like property and shall observe all relevant rules and law about the preservation of a client's property entrusted to a lawyer.

#### Commentary

The duties concerning safekeeping, preserving, and accounting for clients' monies and other property are set out in the by-laws made under the *Law Society Act*.

These duties are closely related to those regarding confidential information. The lawyer should keep the client's papers and other property out of sight as well as out of reach of those not entitled to see them and should, subject to any rights of lien, promptly return them to the client upon request or at the conclusion of the lawyer's retainer.

### Notification of Receipt of Property

(2) A lawyer shall promptly notify the client of the receipt of any money or other property of the client, unless satisfied that the client is aware that they have come into the lawyer's custody.

### Identifying Client's Property

(3) A lawyer shall clearly label and identify the client's property and place it in safekeeping distinguishable from the lawyer's own property.

(4) A lawyer shall maintain such records as necessary to identify a client's property that is in the lawyer's custody.

**Accounting and Delivery**

- (5) A lawyer shall account promptly for a client’s property that is in the lawyer’s custody and upon request shall deliver it to the order of the client.
- (6) Where a lawyer is unsure of the proper person to receive a client’s property, the lawyer shall apply to a tribunal of competent jurisdiction for direction.

Commentary

The lawyer should be alert to claim on behalf of a client any privilege in respect of property seized or attempted to be seized by an external authority. In this regard, the lawyer should be familiar with the nature of the client's privilege and with such relevant statutory provisions as are found in the *Income Tax Act (Canada)*.

**2.08 FEES AND DISBURSEMENTS**

**Reasonable Fees and Disbursements**

- 2.08 (1) A lawyer shall not charge or accept any amount for a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion.
- (2) A lawyer shall not charge a client interest on an overdue account save as permitted by the *Solicitors Act* or as otherwise permitted by law.

Commentary

What is a fair and reasonable fee will depend upon such factors as

- (a) the time and effort required and spent,
- (b) the difficulty and importance of the matter,
- (c) whether special skill or service has been required and provided,
- (d) the amount involved or the value of the subject-matter,
- (e) the results obtained,
- (f) fees authorized by statute or regulation,
- (g) special circumstances, such as the loss of other retainers, postponement of payment, uncertainty of reward, or urgency.



**Rule 2**

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

Breach of this rule and misunderstandings about fees and financial matters bring the legal profession into disrepute and reflect adversely upon the general administration of justice. A lawyer should try to avoid controversy with a client about fees and should be ready to explain the basis for the charges (especially if the client is unsophisticated or uninformed about how a fair and reasonable fee is determined). A lawyer should inform a client about his or her rights to have an account assessed under the *Solicitors Act*.

Where possible to do so, a lawyer should give the client a fair estimate of fees and disbursements, pointing out any uncertainties involved, so that the client may be able to make an informed decision. This is particularly important concerning fee charges or disbursements that the client might not reasonably be expected to anticipate. When something unusual or unforeseen occurs that may substantially affect the amount of a fee or disbursement, the lawyer should forestall misunderstandings or disputes by giving the client an immediate explanation.

It is in keeping with the best traditions of the legal profession to provide services pro bono and to reduce or waive a fee where there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation. A lawyer should provide public interest legal services and should support organizations that provide services to persons of limited means.

**Contingency Fees and Contingency Fee Agreements**

(3) Subject to subrule (1) except in family law or criminal or quasi-criminal matters, a lawyer may enter into a written agreement in accordance with the *Solicitors Act* and the regulations thereunder, that provides that the lawyer's fee is contingent, in whole or in part, on the successful disposition or completion of the matter for which the lawyer's services are to be provided.

[Amended – November 2002, October 2004]

**Commentary**

In determining the appropriate percentage or other basis of the contingency fee, the lawyer and the client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. The lawyer and client may agree that in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as a part of a settlement is to be paid to the lawyer, which agreement under the *Solicitors Act* must receive judicial approval. In such circumstances, a smaller percentage of the award than would otherwise be agreed upon for the contingency fee, after considering all relevant factors, will generally be appropriate. The test is whether the fee in all of the circumstances is fair and reasonable.

*[New - October 2002, Amended October 2004]*

**Statement of Account**

(4) In a statement of an account delivered to a client, a lawyer shall clearly and separately detail the amounts charged as fees and as disbursements.

**Joint Retainer**

(5) Where a lawyer is acting for two or more clients, the lawyer shall divide the fees and disbursements equitably between them, unless there is an agreement by the clients otherwise.

**Division of Fees and Referral Fees**

(6) Where the client consents, fees for a matter may be divided between licensees who are not in the same firm, provided that the fees are divided in proportion to the work done and the responsibilities assumed.

(7) Where a lawyer refers a matter to another licensee because of the expertise and ability of the other licensee to handle the matter and the referral was not made because of a conflict of interest, the referring lawyer may accept and the other licensee may pay a referral fee provided that

(a) the fee is reasonable and does not increase the total amount of the fee charged to the client, and

(b) the client is informed and consents.

(8) A lawyer shall not

(a) directly or indirectly share, split, or divide his or her fees with any person who is not a licensee, or

- (b) give any financial or other reward to any person who is not a licensee for the referral of clients or client matters.

*[Amended - April 2008]*

Commentary

This rule does not prohibit an arrangement respecting the purchase and sale of a law practice when the consideration payable includes a percentage of revenues generated from the practice sold.

*[New - May 2001]*

**Exception for Multi-discipline Practices and Interprovincial and International Law Firms**

- (9) Subrule (8) does not apply to

- (a) multi-discipline practices of lawyer and non-licensee partners where the partnership agreement provides for the sharing of fees, cash flows or profits among members of the firm, and
- (b) sharing of fees, cash flows or profits by lawyers who are
- (i) members of an interprovincial law firm, or
- (ii) members of a law partnership of Ontario and non-Canadian lawyers who otherwise comply with this rule.

*[Amended – June 2009]*

Commentary

An affiliation is different from a multi-discipline practice established in accordance with the by-laws under the *Law Society Act*, an interprovincial law partnership or a partnership between Ontario lawyers and foreign lawyers. An affiliation is subject to subrule 2.08(8). In particular, an affiliated entity is not permitted to share in the lawyer's revenues, cash flows or profits, either directly or indirectly through excessive inter-firm charges, for example, by charging inter-firm expenses above their fair market value.

*[New - May 2001]*

**Appropriation of Funds**

- (10) The lawyer shall not appropriate any funds of the client held in trust or otherwise under the lawyer's control for or on account of fees except as permitted by the by-laws under the *Law Society Act*.

**2.09 WITHDRAWAL FROM REPRESENTATION**

**Withdrawal from Representation**

2.09 (1) A lawyer shall not withdraw from representation of a client except for good cause and upon notice to the client appropriate in the circumstances.

**Commentary**

Although the client has the right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship.

No hard and fast rules can be laid down about what will constitute reasonable notice before withdrawal. Where the matter is covered by statutory provisions or rules of court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril.

**Optional Withdrawal**

(2) Subject to the rules about criminal proceedings and the direction of the tribunal, where there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

**Commentary**

A lawyer who is deceived by the client will have justifiable cause for withdrawal, and the refusal of the client to accept and act upon the lawyer's advice on a significant point might indicate a loss of confidence justifying withdrawal. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

**Non-payment of Fees**

(3) Subject to the rules about criminal proceedings and the direction of the tribunal, where, after reasonable notice, the client fails to provide funds on account of disbursements or fees, a lawyer may withdraw unless serious prejudice to the client would result.

**Withdrawal from Criminal Proceedings**

(4) Where a lawyer has agreed to act in a criminal case and where the interval between a withdrawal and the trial of the case is sufficient to enable the client to obtain another licensee and to allow such other licensee adequate time for preparation, the lawyer who has agreed to act may withdraw because the client has not paid the agreed fee or for other adequate cause provided that the lawyer

*[Amended – June 2007]*

- (a) notifies the client, preferably in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause,
- (b) accounts to the client for any monies received on account of fees and disbursements,
- (c) notifies Crown counsel in writing that the lawyer is no longer acting,
- (d) in a case when the lawyer's name appears on the records of the court as acting for the accused, notifies the clerk or registrar of the appropriate court in writing that the lawyer is no longer acting.

Commentary

A lawyer who has withdrawn because of conflict with the client should not indicate in the notice addressed to the court or Crown counsel the cause of the conflict or make reference to any matter that would violate the privilege that exists between lawyer and client. The notice should merely state that the lawyer is no longer acting and has withdrawn.

(5) Where a lawyer has agreed to act in a criminal case and where the date set for trial is not far enough removed to enable the client to obtain another licensee or to enable another licensee to prepare adequately for trial and an adjournment of the trial date cannot be obtained without adversely affecting the client's interests, the lawyer who agreed to act may not withdraw because of non-payment of fees.

(6) Where the lawyer is justified in withdrawing from a criminal case for reasons other than non-payment of fees and there is not a sufficient interval between a notice to the client of the lawyer's intention to withdraw and the date when the case is to be tried to enable the client to obtain another licensee and to enable such licensee to prepare adequately for trial, the first lawyer, unless instructed otherwise by the client, should attempt to have the trial date adjourned and may withdraw from the case only with the permission of the court before which the case is to be tried.

*[Amended – June 2007]*

Commentary

Where circumstances arise that in the opinion of the lawyer require an application to the court for leave to withdraw, the lawyer should promptly inform Crown counsel and the court of the intention to apply for leave in order to avoid or minimize any inconvenience to the court and witnesses.

**Mandatory Withdrawal**

- (7) Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer shall withdraw if
- (a) discharged by the client,
  - (b) the lawyer is instructed by the client to do something inconsistent with the lawyer's duty to the tribunal and, following explanation, the client persists in such instructions,
  - (c) the client is guilty of dishonourable conduct in the proceedings or is taking a position solely to harass or maliciously injure another,
  - (d) it becomes clear that the lawyer's continued employment will lead to a breach of these rules,
  - (d.1) the lawyer is required to do so pursuant to subrules 2.02 (5.1) or (5.2) (dishonesty, fraud, etc. when client an organization), or
  - (e) the lawyer is not competent to handle the matter.

*[Amended – March 2004]*

**Commentary**

When a law firm is dissolved it will usually result in the termination of the lawyer-client relationship as between a particular client and one or more of the lawyers involved. In such cases, most clients will prefer to retain the services of the lawyer whom they regarded as being in charge of their business before the dissolution. However, the final decision rests with the client, and the lawyers who are no longer retained by that client should act in accordance with the principles here set out, and, in particular, should try to minimize expense and avoid prejudice to the client.

**Manner of Withdrawal**

- (8) When a lawyer withdraws, the lawyer shall try to minimize expense and avoid prejudice to the client and shall do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor legal practitioner.
- (9) Upon discharge or withdrawal, a lawyer shall
- (a) subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled,
  - (b) give the client all information that may be required in connection with the case or matter,

**Rule 2**

**2.09 Withdrawal from Representation**

- (c) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation,
- (d) promptly render an account for outstanding fees and disbursements, and
- (e) co-operate with the successor legal practitioner so as to minimize expense and avoid prejudice to the client.

*[Amended – June 2009]*

Commentary

The obligation to deliver papers and property is subject to a lawyer's right of lien. In the event of conflicting claims to such papers or property, the lawyer should make every effort to have the claimants settle the dispute.

A lawyer acting for several clients in a case or matter who ceases to act for one or more of them should co-operate with the successor legal practitioner or practitioners to the extent required by the rules and should seek to avoid any unseemly rivalry, whether real or apparent.

*[Amended – June 2009]*

Where upon the discharge or withdrawal of the lawyer, the question of a right of lien for unpaid fees and disbursements arises, the lawyer should have due regard to the effect of its enforcement upon the client's position. Generally speaking, the lawyer should not enforce the lien if to do so would prejudice materially the client's position in any uncompleted matter.

**Duty of Successor Licensee**

- (10) Before agreeing to represent a client, a successor licensee shall be satisfied that the former licensee approves, has withdrawn, or has been discharged by the client.

*[Amended – June 2007]*

Commentary

It is quite proper for the successor licensee to urge the client to settle or take reasonable steps towards settling or securing any outstanding account of the former licensee, especially if the latter withdrew for good cause or was capriciously discharged. But if a trial or hearing is in progress or imminent or if the client would otherwise be prejudiced, the existence of an outstanding account should not be allowed to interfere with the successor licensee acting for the client.

*[Amended – June 2007]*



## RESIDENTIAL REAL ESTATE TRANSACTIONS

### PRACTICE GUIDELINES

#### EXECUTIVE SUMMARY

##### ***Purpose***

The *Residential Real Estate Transaction Practice Guidelines* contain recommended guidelines or procedures that lawyers should follow when acting for clients in residential real estate transactions. The guidelines focus on six client-centered professional principles: Client/Lawyer Relationship, Due Diligence, Proper Filing and Record-keeping, Document Preparation and Registration, Financial Issues and Extraordinary Matters.

The *Guidelines* are not intended to replace a lawyer's professional judgment or to establish a rigid approach to the practice of law or the conduct of a real estate transaction. Subject to those provisions of the *Guidelines* that incorporate legal, by-law or *Rules of Professional Conduct* requirements, a lawyer should consider the circumstances of the individual transaction and choose and recommend to the client the practice and procedure that best suits the individual transaction. In appropriate circumstances the lawyer may deviate from the *Guidelines*. Whether a lawyer has provided quality service will depend upon the circumstances of each individual transaction.

##### ***Terminology***

Certain aspects of the Guidelines are mandatory and others are not.

The term "shall" is used in those instances where compliance is mandated by either the *By-laws* made pursuant to the *Law Society Act* or the *Rules of Professional Conduct*.

The term "should" or the phrase "should consider" connotes a recommendation. The terms refer to those practices or policies that are considered to be a reasonable goal for maintaining or enhancing client service.

The term "may" or the phrase "may consider" convey discretion. Lawyers may or may not pursue these suggested policies or practices depending upon the particular circumstances of the transaction.

##### ***Living Document***

By their very nature the *Guidelines* are not static: professional requirements, standards, techniques and practices change. The Guidelines will be reviewed regularly and revised where necessary to reflect the evolving practice of law.



## INTRODUCTION

A lawyer who undertakes to perform legal services on behalf of a client must perform such services to the standard of a competent lawyer. Rule 2.01 provides a definition of the term “competent lawyer”. A competent lawyer includes a lawyer who ascertains client objectives, develops and advises the client on appropriate courses of action, communicates with the client at all stages of a matter in a timely and effective manner and complies in letter and in spirit with the *Rules of Professional Conduct*.

A lawyer who undertakes professional services on behalf of a client in a residential real estate transaction should be guided by the following principles.

### GUIDELINE 1 CLIENT/LAWYER RELATIONSHIP

#### ***Communication***

**At the commencement of the lawyer-client relationship, the lawyer should ascertain all necessary and relevant information regarding the client, the property and the transaction and clarify and confirm the client’s expectations about the lawyer’s role and responsibilities in the transaction.**

- The lawyer should obtain from the client at the outset of the retainer information about the property. This information might include but is not limited to information regarding:
  - the number of residential units in the property;
  - the manner in which the property is serviced – public or private;
  - whether the property is tenanted;
  - whether the property is located on a ravine, waterfront or highway or adjacent to any significant physical features;
  - whether the property is subject to or near hydro installations; and
  - any other matter that may impact on the choice of searches.
- The lawyer should communicate with the client at the outset of the retainer to obtain information about the client’s intentions regarding the future use of the property.
- The lawyer should advise the client of the options available to assure title in order to protect the client’s interests and minimize the client’s risk. In this regard, the lawyer shall comply with his or her obligations regarding title insurance and real estate conveyancing pursuant to subrules 2.02(10) – 2.02(13) of the *Rules*. If the client selects title insurance, the lawyer should advise the client about the searches that the lawyer will not be performing and the type of information that

these searches would reveal about the property such as zoning, encroachments or survey issues. Where title insurance is not being used, the lawyer should advise the client about the post closing protections provided by title insurance which the client is not receiving (e.g. regarding post-closing encroachments onto the property and fraud).

- Where title insurance is being used, the lawyer should communicate with the client to determine whether the client has any adverse knowledge about the property that could give rise to the insurer relying on the “knowledge” exclusion if the matter is not disclosed and “insured over” pre-closing.
- When requested, the lawyer should provide the client or potential client with a timely estimate of the fees and disbursements involved so that the client or potential client is able to make an informed decision on retaining the lawyer. In discussing fees and disbursements with clients, the lawyer:
  - should provide a reasonable estimate of the total cost and not an unreasonable estimate designed to garner the client’s business;
  - should not manipulate fees and disbursements in a manner as to provide a lower fee estimate.
- The lawyer should make an early determination whether to advise the client to obtain a survey of the property (for instance, based upon the client’s statement of intended use for the property) and should advise the client accordingly.
- The lawyer should consider forwarding an initial letter to the client at the commencement of the lawyer-client relationship.

The lawyer may consider including the following topics in the initial letter to the purchaser:

- the name of the lawyer primarily responsible for the matter;
- the name of any person in the firm who will be working on the file and the functions that the person will be performing;
- confirmation that the lawyer will be supervising all non-lawyers who are working on the file and that the lawyer is available to discuss issues with the client;
- information about the various methods of assuring title and the method selected by the client;
- an estimate of fees and disbursements;
- the amount of land transfer tax payable on registration;
- an explanation of the nature of closing adjustments and confirmation that adjustments will be reviewed in detail before closing;

- an explanation of joint retainer issues if the lawyer is acting for more than one client in the transaction (e.g. purchaser and lender), including the inability of the lawyer to keep information confidential as between the two clients;
- a request for instructions regarding title and an explanation of the difference between a joint tenancy and a tenancy in common;
- a request for information regarding the type of property and other relevant information about the property (number of units and approximate age of the property), the type of heating, mortgage and fire insurance policy;
- a request for any available survey and for information on any changes to the property not reflected on the survey, and an explanation of the importance of a survey;
- if the property is a condominium, confirmation of the extent of review of the Status Certificate and attachments;
- instructions regarding arranging utility and other service accounts;
- if the property is a new home, instructions regarding the Tarion inspection, HST and the New Home Rebate and additional types of adjustments that can be expected;
- a request for information regarding the client's proposed mortgage financing;
- instructions regarding the form of funds that will be required shortly before closing (certified cheque or bank draft);
- information regarding the need to produce identification;
- an explanation regarding the requirement for property insurance;
- information regarding how and when keys will be available; and
- any other matter upon which the client has instructed the lawyer or upon which the lawyer must provide information or instruction in order for the lawyer to proceed with the handling of the transaction.

A lawyer may consider including the following topics in the initial letter to the vendor:

- the name of the lawyer primarily responsible for the matter;
- the name of any person in the firm who will be working on the file and the functions that the person will be performing;

- confirmation that the lawyer will be supervising all non-lawyers who are working on the file and that the lawyer is available to discuss any issues with the client;
- an estimate of fees and disbursements;
- a request for the existing transfer, mortgage details (including most recent statement), realty tax bill, most recent utility bills and contact address for after closing;
- a request for any available survey and for information on any changes to the property not reflected on the survey;
- a request for information regarding the manner in which the house is heated;
- if applicable, information regarding the real estate commission payable and prepayment penalties for the discharges of mortgages;
- a request for the name and phone number of the condominium manager if applicable;
- a request for information regarding the client's marital status and residency;
- information regarding the need to produce identification;
- instructions regarding arranging final meter readings;
- an explanation of the statement of adjustments;
- an explanation of HST; and
- any other matter upon which the client has instructed the lawyer or upon which the lawyer must provide information or instruction in order for the lawyer to proceed with the handling of the transaction.

### ***Responsibility***

**The lawyer is responsible for carriage of the transaction or client's legal matter and shall have knowledge of legal issues affecting the matter that require a lawyer's expertise to address.**

- The lawyer shall comply with the requirements of Rule 5.01 of the *Rules of Professional Conduct* regarding supervision.
- While a lawyer may permit a non-lawyer to attend to all matters of routine administration, assist in more complex transactions, draft statements of account and routine documents and correspondence and attend to registrations, the lawyer shall not delegate to a non-lawyer the ultimate responsibility for:

- review of a title search report or of documents before signing;
  - review and signing of a letter of requisition;
  - review and signing of a title opinion; and
  - review and signing of a reporting letter to the client.
- A lawyer shall not permit a non-lawyer to:
- provide advice to the client concerning insurance, including title insurance without supervision;
  - present insurance options or information regarding premiums to the client without supervision;
  - recommend one insurance product over another without supervision;
  - provide a legal opinion including without limitation a legal opinion regarding the title insurance coverage obtained.
- In transactions using the system for the electronic registration of title documents, only a lawyer can sign for completeness any document requiring compliance with law statements.
- If the lawyer has a personalized specially encrypted diskette to access the system for the electronic registration of title documents, the lawyer shall not permit others including a non-lawyer employee or agents to use the lawyer's diskette and shall not disclose his or her personalized e-reg™ pass phrase to others.

### ***Accessibility***

**The lawyer shall answer with reasonable promptness all communications from other lawyers that require an answer, shall be punctual in fulfilling all commitments and should be reasonably available to speak to clients as well as the lawyer on the other side of the transaction at their request.**

### ***Communication Prior to Closing and Reporting***

**The lawyer shall report in a prompt and clear manner to the client, as reasonably required throughout the transaction on an interim basis and in all cases at the end of a transaction.**

- Prior to closing, the lawyer should meet with the client where possible and should in any event review with the client and receive written confirmation from the client regarding:
- the manner in which title is being assured;
  - the state of title, including the coverage that will be available under the client's title insurance policy, if applicable. The review should include but is

not limited to matters such as subdivision/development agreements, easements and restrictive covenants, even if the client is obliged to accept title subject to them;

- where title insurance is being used, whether the client has any adverse knowledge about the property, that could give rise to the insurer relying on the “knowledge” exclusion if the matter is not disclosed and “insured over” before closing;
  - the manner in which the client is taking title and the implications of joint tenancy or tenancy in common;
  - any limitations on the lawyer’s retainer, if applicable, regarding private services, condominium documentation, rental property or multi-unit issues;
  - any necessary disclosure pursuant to the *Rules of Professional Conduct* regarding payments that the lawyer is receiving from other sources and how that relates, if applicable, to the client’s disbursements.
- Depending on the nature and type of transaction, it may be appropriate for the lawyer to include the following topics in a reporting letter to a purchaser or mortgagee client:
- details of any waivers given by the client (e.g. instructions on not obtaining an up to date survey of the property or any other material instructions);
  - full particulars of any mortgages (e.g. payments, payment dates and privileges);
  - information on how title was taken;
  - a short description of the closing documentation;
  - information regarding the statement of adjustments;
  - particulars of property insurance arrangements;
  - reference to Tarion, if applicable;
  - a description of the various taxes involved such as realty taxes, HST and land transfer tax.
  - information on any unusual aspects of the transaction;
  - if the property is a condominium, highlights or a reference to the Declaration, By-Laws and status certificate;
  - any other information that provides the client with a record of the practical aspects of the property;

- the lawyer’s legal opinion on title and the exceptions to which the opinion is subject if title insurance is not being used;
  - if title insurance is not being used, advice on the search inquiries conducted and responses received including the status of zoning and building searches, tax account and utility status and other off-title title search inquiries;
  - if title insurance is being used, information regarding the title insurance coverage obtained and in a transaction where title insurance has been used to assure title, the reporting letter to the client should not opine on title but should include the title insurance policy issued in favour of the client.
- Depending on the nature and type of transaction, it would be appropriate for a lawyer to cover the following topics in a reporting letter to a vendor:
- information regarding the adjustments made on closing;
  - particulars of the receipt and disbursement of funds;
  - information concerning mortgages or other encumbrances that have been discharged;
  - details of real estate commission;
  - if the vendor has taken back a mortgage, the details of such mortgage;
  - details of any waivers obtained from the client;
  - confirmation of payment of realty taxes and other payments;
  - a short description of the closing documentation;
  - particulars of any undertaking given or received on closing;
  - information on any unusual aspect of the transaction; and
  - any other information that provides the client with a record of the practical aspects of the property.

## **GUIDELINE 2 DUE DILIGENCE**

**The lawyer should employ a well-reasoned approach in determining the level and scope of due diligence involved in any particular transaction and in advising the client regarding due diligence and should conduct title and off-title searches having due regard for the terms of the client’s contractual rights and obligations, the time and cost of conducting title and off-title searches and the availability/utility of title insurance.**

## ***Title Searches***

- ❑ Performing a proper search requires that the lawyer review all documents on title affecting the client's interest in the property and retain notes on the search of title with respect to every real estate file.
- ❑ The lawyer should advise a purchaser, borrower or lender client as to the state of title, the location of easements, the impact of restrictive covenants, subdivision and other agreements affecting title.
- ❑ Due to the increasing risk of fraud in real estate transactions, the lawyer should review:
  - the pattern of inactive or deleted instruments on the parcel register and inquire about any suspicious patterns of transfers or discharges;
  - the values revealed by arm's-length transfers in the recent past, to determine if there have been any suspicious changes in value.
  - The lawyer should report the results of the title search and due diligence process and in particular any suspicious patterns of transfers or discharges and/or any suspicious changes in values revealed by the due diligence process to:
    - the purchaser/borrower if the lawyer is acting for the purchaser/borrower;
    - the lender if the lawyer is acting for the lender; and
    - the title insurer (if applicable).

## ***Off-Title Searches***

- ❑ The lawyer should discuss with the client and obtain instructions from the client regarding the off title searches that may be appropriate or advisable in view of the nature of the property, the circumstances of the transaction, the terms of the agreement of purchase and sale and the consequences of not conducting those searches.
- ❑ Where title insurance is being used, the lawyer should be cognizant of:
  - what off-title searches relevant to the client or transaction are not covered by title insurance and make appropriate searches or obtain waivers from the client; and
  - the inter-related nature of the following issues: deciding not to make certain off-title searches; allowing the requisition date to pass without the results of those searches being available; the timing of receiving a title insurance binder or commitment (usually after the requisition date has passed); and the policy of the selected title insurer regarding "insure over" requests for adverse



circumstances which emerge before closing notwithstanding the lack of a search.

### ***Review of Title and Off-Title Searches***

- A lawyer is responsible for reviewing personally all title search reports, off title search reports and the draft title insurance policy exclusions and exemptions.

### ***Client/Party Identification***

- Although the lawyer may not be able to guarantee the identity of the client or a party to a document in many circumstances (absent personal, long-term knowledge), the lawyer shall undertake steps to verify that the person retaining the lawyer and/or signing documents under the lawyer's supervision has reasonable identification to substantiate that he/she is the named client/party and should retain details or information about the identification obtained.

### ***Title Insurance***

- Where title insurance is being relied upon to close a transaction where registration is delayed, there should be an express obligation on the part of the title insurer as part of the binder/commitment pre-closing, addressed to the insured-client(s), to provide coverage to the client for any adverse registrations which occur between releasing the closing proceeds and registration of the title document(s). This obligation may be satisfied by obtaining a draft policy from the title insurer in the name of the insured clients including an endorsement or policy terms providing the coverage described.
- The lawyer should review the draft title insurance policy or binder/commitment, to ensure the following:
  - Is the insured named correctly?
  - Is the legal description correct? Since only the lands described are insured, there may be off-site lands that should be included in the description, so that easements or rights-of-way located on other properties, but benefiting the subject property, and encroachments from the subject property onto other lands, will be covered by the insurance.
  - Are there other title issues, not apparent from the insurance commitment, of which the client should be warned? For example, problems may have been found when the search was conducted but the title insurer has not entered them on the Schedule to the policy because those problems are removed from coverage by the standard, pre-printed exceptions.
  - In the alternative, have problems emerged with respect to the title that it would be preferable for the owner to have resolved under the terms of the agreement of purchase and sale?
  - What coverage is excluded from the commitment/policy?

- The lawyer should issue the title insurance policy as soon as possible after closing, to insure that an issued policy exists should the insured-client(s) need to make a claim, and to minimize the risk of the client's being obliged to disclose adverse information obtained between closing and the issuance of the policy.
- The issued policy should be compared carefully to the draft policy or binder/commitment received before closing to ensure that there are no discrepancies in coverage.

### **GUIDELINE 3 PROPER FILING AND RECORD-KEEPING**

**The lawyer should keep a separate file for each transaction that is consistent with proper management of a transaction including appropriate management of deadlines and the facilitation of information storage and retrieval, while also fulfilling all record-keeping requirements of the *Rules of Professional Conduct* and other regulatory requirements**

- Lawyers should maintain a system to follow up on undertakings regarding mortgage discharges and/or other undertakings given or received in the course of the transaction.
- Lawyers should approach a post-closing claim relating to an undertaking to re-adjust in good faith, advising clients of their rights and obligations and attempting to resolve the situation (subject to reporting the claim to the purchaser's title insurer, if any, and following the instructions of the insurer).

### **GUIDELINE 4 DOCUMENT PREPARATION AND REGISTRATION**

**The lawyer shall utilize appropriate means to ensure the reliable, consistent and legally sound preparation and registration of documents in accordance with evolving professional tools and practices.**

#### ***Electronic Registration***

- Where the electronic registration system is being used, the initial letter to the other lawyer should specify:
  - who is preparing the electronic transfer;
  - whether the Document Registration Agreement ("DRA") is intended to be used and if so, whether it will be signed as a separate document or subscribed to as a protocol (if the latter, additional relevant information and/or changes thereto need to be provided as per the current form of DRA);
  - to whom messages should be sent through the system.

- ❑ Prior to registering electronic documents, lawyers should obtain and retain in their files the client's written authorization.
- ❑ Lawyers should obtain and retain in their files the evidence upon which compliance with law statements are based, or alternatively ensure that publicly available information to fully support the statements is and remains available.

***Review of Documents***

- ❑ A lawyer is responsible for the ultimate review of documents before signing.

## **GUIDELINE 5 FINANCIAL ISSUES**

**The lawyer shall maintain appropriate financial records, controls and systems to ensure proper record-keeping and accountability, while also fulfilling all financial requirements of the *Rules of Professional Conduct* and other regulatory requirements.**

***Transfer of Funds***

- ❑ Due regard should be had to the method of funds transfer. Absent agreement between the law firms and accompanying instructions from the clients, funds should be exchanged in the form provided for in the agreement of purchase and sale.

## **GUIDELINE 6 EXTRAORDINARY MATTERS**

**A lawyer should not undertake a matter without honestly feeling competent to handle it or being able to become competent without undue delay, risk or expense to the client.**

- ❑ A lawyer must be alert to recognize any lack of competence for a particular task and the disservice that would be done to the client by undertaking that task. If consulted in such circumstances, the lawyer should either decline the retainer to act or obtain the client's instructions to retain, consult, or collaborate with a lawyer who is competent for that task.
- ❑ When handling a task on behalf of a client, the lawyer is responsible for keeping up to date with changes in the law and adapting to changing professional requirements, standards, techniques and practices.
- ❑ When acting for a client in the provision of legal services, the lawyer may be asked for or be expected to give advice on non-legal matters such as business or policy implications involved in the question or the course that the client should choose. If the lawyer expresses views on such matters, the lawyer should where and to the extent necessary point out any lack of experience or qualification in the particular field and should clearly distinguish legal advice from other advice.

## **PRACTICE GUIDELINE 1**

### **MAINTAINING INTEGRITY OF ACCESS AND ACCOUNTS**

#### **Responsibilities Regarding Accounts**

##### **Teranet Account**

Every person who wishes to use e-reg<sup>TM</sup> must become a subscriber with Teranet Land Information Services Inc. ("Teranet"). In the context of lawyers, each subscribing lawyer or law firm will need to establish an account with Teranet. It is from this account that user fees (access charges and on line charges) will be debited. Registration fees and Land Transfer Tax can be paid from lawyers' special trust accounts or general accounts.

##### **The Personal Security Package**

Each user under a Teranet account (i.e. each person in a law firm that will be accessing the e-reg<sup>TM</sup> system) needs to obtain a personalized, specially encrypted floppy diskette and a corresponding pass phrase. Both must be used in conjunction to access the system. Integrity and security of the electronic registration system is achieved by Teranet establishing and maintaining an audit trail of all transactions and the party (identified by the pass phrase used) who performed them.

Rule 5.01 of *The Rules of Professional Conduct* provides that a lawyer shall not share his or her Personal Security Package.

##### **Compliance With Law Statements**

While non-lawyers may obtain access to the e-reg<sup>TM</sup> system, by regulation under the *Land Registration Reform Act*, only lawyers entitled to practice may make statements professing compliance with law without registration of supporting evidence. Consequently, Teranet maintains a current list of lawyers entitled to practice which is updated to reflect lawyers whose rights and privileges have been affected by, for example, retirement, suspension, disbarment or resignation.

##### **Responsibilities Regarding Access For Users**

Individual users within a law firm will be allowed access through that firm's account with Teranet. Given the importance to the security and integrity of the e-reg<sup>TM</sup> system and since the knowledge of, and control over, movements of members of law firms (employees, associates or partners) rests with the firm, law firms must be vigilant to ensure appropriate safeguards are implemented in relation to individual encrypted diskettes and pass phrases.

At a minimum, firms should ensure that:

- a. the need to maintain the confidentiality of pass phrases and the need to safeguard encrypted diskettes are emphasized to all users granted access pursuant to their accounts. Firms should take appropriate steps to discourage and prevent sharing of pass phrases;
- b. appropriate guidelines are established in formulating pass phrases to take full advantage of the security afforded by the system;
- c. appropriate steps are taken to destroy/disable and/or replace pass phrases and diskettes when such confidentiality is breached;
- d. appropriate monitoring procedures are implemented to safeguard against unauthorized access to the e-reg<sup>TM</sup> system under their accounts. This should include careful recording and reconciliation of any and all charges incurred with Teranet which may disclose unauthorized access; and,
- e. procedures are implemented which includes the immediate notification of Teranet when the law firm has changes in its membership (whether employees, associates or partners) affecting who the authorized users are under the firm's account. In particular, where an authorized user leaves the firm, the firm should ensure that all copies of the user's encrypted diskette are returned and that Teranet is immediately notified of the termination of access of the specific user.

#### **Account Responsibility - "Law Firms"**

When establishing accounts with Teranet, lawyers must carefully consider which lawyers may operate under the same account. Lawyers who are partners or who are employers/employees will normally access the e-reg<sup>TM</sup> system under the same account.

However, care must be exercised where lawyers are practising in "association". Where there is no intended joint and several liability, it is ill advised to subscribe to the e-reg<sup>TM</sup> system under the same account.

Additionally, it will be permissible to pay registration fees and land transfer tax out of a special trust account. Since it is inappropriate for associated lawyers who are not "practising in the manner of employed solicitors" to share the use of a common trust account, pragmatically, it is improper for such associated lawyers to operate under the same Teranet account.

#### **Effect of Suspensions and Other Changes to Law Society Status**

As only lawyers entitled to practice law are able to approve electronic documents containing compliance with law statements, lawyers need to be extremely sensitive to the effects of changes in their status on their ability to complete real estate transactions. E-reg<sup>TM</sup> will automatically verify statuses of lawyers and will not allow lawyers who are not entitled to practice to approve

documents containing compliance of law statements. The Law Society will be providing timely updates to Teranet as to changes in members' statuses.

Lawyers voluntarily leaving their practices through retirement or resignation need to ensure that all real estate closings are either completed or reassigned (both paper files and access to electronic documents in the e-reg<sup>TM</sup> system) to other counsel, before the effective date of their status changes.

Lawyers who are suspended and/or disbarred will likewise be precluded from approving these types of documents. This will be particularly germane for lawyers who are "administratively" suspended (i.e. suspended for non-payment of Law Society fees/Lawyers' Professional Indemnity Company levies or non-filing of required Law Society/Lawyers' Professional Indemnity Company forms). As the Law Society will be providing electronic updates regarding member statuses to Teranet, this will likely result in a much faster effect to changes than in the past. It is conceivable that the change to Teranet access may take effect before members receive written confirmation of status change by registered mail. Consequently, lawyers will need to exercise additional care to ensure that their fees and levies are paid on time or they may risk being precluded from completing certain real estate transactions.

## **PRACTICE GUIDELINE 2**

### **OBLIGATIONS REGARDING DOCUMENT PREPARATION**

#### **Computerization**

Accessing e-reg<sup>TM</sup> will involve learning how to use the hardware and software for preparation and registration of documents. Currently, lawyers are required to draft certain documents for registration to complete real estate transactions. For example, the lawyer for the transferor is responsible for preparation of the transfer. In the e-reg<sup>TM</sup> system, this is now an electronic document which is prepared at a computer terminal and, at the appropriate time, released for electronic registration and will require input from the lawyer for both the transferor and transferee in a timely manner.

Although access to e-reg<sup>TM</sup> will continue to be available through computer terminals at Land Registry Offices (LROs), current staff and service levels there are not likely to be maintained once e-reg<sup>TM</sup> is introduced to an LRO. Lawyers cannot rely on attending at the LRO to prepare and register documents in electronic format. This is not a viable alternative to properly outfitting the lawyer's office with the required computer equipment to gain remote access to e-reg<sup>TM</sup>.

Accordingly, lawyers practising real estate should equip themselves with the required technological tools to properly service their clients. In particular, the necessary computer equipment should be acquired to function as real estate practitioners in the e-reg<sup>TM</sup> system. Teranet has published hardware specifications with recommended requirements and also a set of

minimum requirements. It should be noted that with upgrades imminent, it will be necessary to have equipment which meets current requirements.

### **Consequences of the Failure to Computerize**

A lawyer who is not prepared to meet the minimum technical investment required is incapable of producing any registerable documentation under e-reg<sup>TM</sup>. Apart from the obvious concerns about the lawyer's failure to fulfill his or her duty to the client and the potential effect on the client's contractual rights and obligations, this will cause inconvenience for the lawyer's colleague(s) acting for other parties to the transaction, who is computer-equipped for e-reg<sup>TM</sup>.

In these situations, the lawyer should be prepared to make suitable arrangements to meet his or her obligations. Arrangements may include retaining an agent, or making arrangements with a lawyer for another party to the transaction. In either case, the lawyer should be prepared to compensate the agent or other party's lawyer (as the case may be) for the costs associated with assisting the lawyer in completing his or her obligations. Compensation to the other party's lawyer for expenses and additional time caused may take the form of financial compensation to the other parties' lawyer for the costs of using e-reg<sup>TM</sup> in preparing the documentation on the lawyer's behalf, and may also include an amount for the time spent by him or her in assisting the lawyer.

If assistance is required, this should be identified and addressed early in the transaction and confirmed in writing with the lawyer acting for other parties, to avoid last minute delays, inconvenience to the other lawyer as well as potential prejudice to the lawyer's clients.

## **PRACTICE GUIDELINE 3**

### **THE ACKNOWLEDGMENT AND DIRECTION**

The e-reg<sup>TM</sup> system has been designed to produce five different standard forms of Acknowledgment and Direction corresponding to each of the electronic registration formats, which can be amended to suit the particular needs of any transaction:

- Transfer (Transferors)
- Transfer (Transferee)
- Charge (Chargor)
- Discharge of Mortgage/Charge (Chargee)
- Document General.

The Law Society recommends that the appropriate form of Acknowledgment and Direction for each electronic document to be registered under e-reg<sup>TM</sup> be printed from the e-reg<sup>TM</sup> system for signature by the lawyer's client(s) before each electronic document is released for registration. Alternatively, one may draft his or her own form of Acknowledgment and Direction containing the pertinent information. However, if one drafts his or her own form of Acknowledgment and

Direction, it is still recommended that the e-reg<sup>TM</sup> document registration report be attached to the form. Where an electronic document to be registered relates to a transaction where it is also appropriate for the lawyer to enter into a Document Registration Agreement (DRA), such as where the lawyer represents the vendor or the purchaser of property under an agreement of purchase and sale, a statement authorizing the lawyer to enter into a DRA should be included in the Acknowledgment and Direction. A true copy of the DRA should be appended as a schedule and also be signed by the client(s).

The description of the electronic document contained in an Acknowledgment and Direction should correspond exactly to the electronic document which is ultimately registered electronically.

### **Amendments to the Acknowledgment and Direction**

In a situation where an amendment, which is not merely clerical in nature, is required to be made to an existing Acknowledgment and Direction, such as a change in the rate of interest provided in an Acknowledgment and Direction for a Charge (Chargor) or where contrary instructions are received from the client, an amended Acknowledgment and Direction that includes any necessary changes should be prepared and signed by the lawyer's client(s) to confirm the changes.

The Acknowledgment and Direction only confirms client instructions for registration of an electronic document and, additionally, a related DRA in some instances. Lawyers are cautioned to obtain written confirmation of client instructions appropriate to the circumstances of the individual transaction. For example, the lawyer may represent the party or parties to an agreement of purchase and sale for property as purchasers and she or he may be instructed by the client(s) to electronically register a Transfer in favour of one or more but not all of those parties or in favour of a third party as transferee(s). In addition to obtaining an Acknowledgment and Direction for a Transfer (Transferees) from the party or parties to be named as transferee(s) in the Transfer document, written instructions should be obtained from all parties who are purchasers under the Agreement of Purchase and Sale. Those instructions should set out the party or parties to be named as transferee(s) and therefore the registered owner(s) of the property described. Lawyers should continue to obtain written confirmation of client instructions for issues not directly related to the registration of an electronic document itself and in particular for those transactions where the lawyer will be providing a qualified opinion on title.

### **The Signing of the Acknowledgment and Direction**

An Acknowledgment and Direction and any other appropriate form of written client instructions should be reviewed, where possible and/or practicable with the client(s) in a personal interview with the lawyer before an electronic document is released for registration. The review should include a detailed explanation of the contents of the Acknowledgment and Direction and other client instructions before signature. Signed copies of the Acknowledgment and Direction should be retained in the lawyer's file as the written verification of client instructions and authority for electronic document registration.



### **Reliance on Documents other than the Acknowledgment and Direction**

During the transition period in which e-reg<sup>TM</sup> is being introduced in a region, lawyers may find it appropriate to rely on documents other than the Acknowledgment and Direction to confirm client instructions. This is particularly the case when such alternate written documents already exist and the Acknowledgment and Direction merely serves as a duplication. For example, documents prepared in Polaris format and signed by clients can serve as instructions to counsel if this is fully explained to the clients.

## **PRACTICE GUIDELINE 4**

### **ELECTRONIC CLOSINGS AND THE DOCUMENT REGISTRATION AGREEMENT (“DRA”)**

Closings in the e-reg<sup>TM</sup> system will require a procedure to be established whereby documents, funds, keys etc. are exchanged between the lawyers prior to closing and held under very strict escrow terms until the computerized title documents have been electronically registered.

The terms of escrow should be clearly set out in an agreement executed prior to closing. A standardized form of agreement (the DRA) can be used for this purpose. Alternatively, the DRA can form the basis for a closing protocol which the parties would expressly agree to adhere to. Items that require completion in the DRA would be set out in a letter confirming adherence to the DRA closing protocol.

#### **Additions or Modifications to the DRA**

Additions or modifications to the DRA may be required to meet the circumstances of individual transactions.

The DRA establishes strict escrow terms relating only to the closing procedure. It does not, for example:

- provide for giving or acceptance of possession of the real property in advance of registration of title documents, or
- address any of the issues relating to interim possession, readjustments, amendment or preservation of contractual rights/obligations or other matters normally associated with an "escrow closing" as that term is commonly used in relation to a transaction which cannot be completed on the scheduled closing date.

Those issues, in addition to the specific escrow provisions of the DRA itself, will have to be reviewed and addressed by lawyers for the parties to a transaction.

### **Authorization to enter into a DRA**

As each lawyer entering into a DRA will be undertaking professional obligations with respect to the handling and disposition of a client's documents and funds, specific written authority should be obtained from the client authorizing the lawyer to make that commitment.

A lawyer who becomes a party to the recommended form of DRA contracts as agent for his or her client with the intention that the client shall have both the benefits and burdens of the covenants in the agreement.

Provision for the written acknowledgment and consent of the client required to enable a lawyer to enter into a DRA in these terms is included in the forms of Acknowledgment and Direction referred to earlier in these Practice Guidelines.

It should also be noted that the DRA neither precludes nor prevents a lawyer from retaining conveyancers to assist in the closing of the transaction.

### **Professional Obligations of Lawyer**

A lawyer who becomes a party to the prescribed form of DRA incurs professional obligations. A lawyer must fulfill all obligations that the lawyer has undertaken pursuant to the DRA. It is important to remember that a lawyer who enters into a DRA is giving undertakings pursuant to that agreement and accordingly the lawyer must comply with subrule 6.03(8) of the Rules of Professional Conduct which provides that a lawyer shall not give an undertaking that cannot be fulfilled and shall fulfill every undertaking given.

## **PRACTICE GUIDELINE 5**

### **ELECTRONIC CLOSINGS AND MORTGAGE TRANSACTIONS**

#### **Parties to the DRA**

Although the recommended form of DRA refers to "Purchaser's solicitor" and "Vendor's solicitor", it is not intended that the agreement would be limited to purchase and sale transactions. Lawyers representing mortgagees, guarantors or others involved in a real estate transaction may be necessary parties to such agreements with respect to funds and documents (whether in electronic or paper form) held for disbursement, registration or release subject to escrow terms. Appropriate additions or amendments to the recommended form may be made to accommodate those additional parties and the further obligations involved.

#### **Delivery of Paper Copy of Mortgage**

Lawyers acting for mortgagees are reminded that Section 4 of the *Mortgages Act* (R.S.O. 1990, Chap. M.40, as amended) requires the mortgagee to deliver a true copy of the mortgage or charge to the mortgagor within thirty days "after receipt by the mortgagee of a mortgage executed by the mortgagor". Section 4 of the *Mortgages Act* has been amended to provide that for the purposes

of this section “a true copy” includes a facsimile as defined in section 1 of the *Land Titles Act* R.S.O. 1990 Chap. L.5 as amended. A “facsimile” is defined in the *Land Titles Act* as an accurate reproduction of a book, document or record and includes a print from microfilm and a printed copy generated by or produced from a computer record. The mortgagee's lawyer should, therefore, print out a paper copy of the electronic charge as registered and deliver it to the mortgagor (or the mortgagor's solicitor) together with a paper copy of the Standard Charge Terms within thirty days of registration. Lawyers for mortgagees should also obtain from the mortgagor a signed paper copy of the acknowledgment of receipt of the Standard Charge Terms before the electronic charge is registered.

### **Guarantees**

Although a guarantor may be identified in the electronic form of charge, it would appear necessary for the guarantor to sign a separate (paper) form of guarantee to bind the guarantor to the covenant. Lawyers should ensure that the terms of the paper document signed by the guarantor are consistent with the provisions (if any) regarding the guarantee in the charge and the Standard Charge Terms.

### **Discharge of Mortgages**

The forms of Agreement of Purchase and Sale of real property now in common use make provision for the payment and subsequent discharge of institutional mortgages (mortgages held by banks, trust companies, insurance companies, credit unions, or finance companies) held by certain financial institutions so that these mortgages may be paid from the proceeds of the sale. Yet undefined procedures as to who is to prepare and electronically register discharges (lawyers or financial institutions) require lawyers to be careful in clarifying who is to assume these tasks, who is to pay for associated costs and the scope of the lawyer's undertaking. The procedure set out in the Agreement of Purchase and Sale requires that the vendor's lawyer give his/her personal undertaking to obtain and register a discharge of the mortgage after closing. The recommended forms of Acknowledgment and Direction previously referred to include a form by which the mortgagee could authorize the vendor's lawyer to create and register the required discharge of mortgage. If financial institutions will give that authority, the vendor's lawyer should be able to give the undertaking in accordance with the terms of the Agreement of Purchase and Sale.

However, it is anticipated that some financial institutions may establish a practice of creating and registering an electronic discharge of a mortgage without the assistance of the vendor's lawyer after discharge funds have been received. When requesting a discharge statement from the financial institution, lawyers retained to act for vendors under an Agreement of Purchase and Sale requiring the lawyer to give a personal undertaking respecting the discharge of an institutional mortgage, should also seek clarification on whether the lawyer or the financial institution itself will prepare and register the electronic discharge of mortgage. If the financial institution insists upon dealing with this matter "in-house", the lawyer should obtain written confirmation to that effect. In these circumstances, and subject to any contrary provision in the Agreement of Purchase and Sale, the lawyer may be more comfortable changing the wording of

the undertaking to provide that the vendor's lawyer "will cause a discharge of the mortgage to be registered".

It will still be the responsibility of the vendor's lawyer to ensure that the necessary funds (including any additional interest accrual and the discharge registration fee) are forwarded to the financial institution, that the electronic discharge is prepared and registered by the financial institution in a timely manner (in default of which an application may have to be brought to the court for an order discharging the mortgage) and that registration particulars of the discharge are obtained and forwarded to the purchaser's solicitor to confirm compliance with the undertaking.

In the case of "private mortgages" (mortgages held by persons other than financial institutions), and in the absence of any express provision to the contrary in the Agreement of Purchase and Sale, lawyers should not give or accept personal undertakings respecting discharge after closing. Unless the private mortgage is paid out and discharged prior to closing, it may be necessary for the vendor's solicitor or the mortgagee's solicitor to seek written authority from the lender in the recommended form of Acknowledgment and Direction to create the required electronic form of discharge and arrange for it to be registered on closing.

In the case of a private mortgage, it would be acceptable for a lawyer to transfer amounts required to pay out the mortgage directly to the vendor's solicitor's trust account where the mortgage discharge itself comprises one of the documents to be registered under the DRA.

Acting on proper written authority, the vendor's solicitor could include a Discharge of Mortgage in the DRA as one of the documents to be registered on closing, subject to compliance with the escrow terms of that agreement. The vendor's solicitor would confirm to the lender that a DRA was being utilized as part of the closing procedure and that the discharge of mortgage would be shown as a document for registration under that agreement, subject to the terms of the escrow.

### **Electronic Payment of Closing Proceeds and Discharge Funds**

Where the electronic real time cleared funds transfer capability is utilized, it would be acceptable for the purchaser's solicitor to transfer the amount required to payout an institutional mortgage directly to the vendor's solicitor's trust account. In this context, the purchaser's solicitor would rely on the vendor's solicitor's personal undertaking to deliver discharge funds to the mortgagee and procure a discharge of the mortgage.

## **PRACTICE GUIDELINE 6**

### **USE OF COMPLIANCE WITH LAW STATEMENTS**

Electronic registration moves away from the practice of placing large volumes of supporting material in the public records. The new practice involves a legally trained professional determining whether a document is suitable for registration and in compliance with applicable

legislation. Each electronically registered document must contain prescribed information. Among the types of information which may be included or used are statements which call for an application of legal expertise based on legal judgments, which must be made by a lawyer. These statements are called the "Compliance with Law Statements", and will be used in the place of filing hard/paper copy of the evidence upon which the statements is based.

### **Supporting Evidence**

Lawyers should obtain and retain in their files the evidence upon which compliance with law statements are based, or alternatively, ensure that publicly available information to fully support the statements is and remains available. This is important in the Teraview Electronic Registration System ("TERS") as copies of the supporting evidence will not be available from the Land Registry Office when a document has been registered in reliance on one or more compliance with law statements. The copies retained in the lawyer's file may be the only source of such supporting evidence. This may be particularly important where a claim is made against the lawyer in consequence of any such statements.

Lawyers should also be aware of the effect that this may have on the period that files must be retained. In considering whether real estate files can be safely destroyed, members should take additional care in ensuring that they are not destroying what may be the only source of evidence in support of an electronic document registration and that alternate, public supporting information is available.

### **Going Behind Compliance with Law Statements**

Lawyers need not look to nor request nor require evidence behind registered compliance with law statements, but rather should rely upon the provisions of the *Land Titles Act* as to the sufficiency of title once certified. The entire TERS and Land Titles system is premised on the sufficiency of the register to establish title to real property.

## ACKNOWLEDGEMENT AND DIRECTION

**TO:** John Smith  
(insert Lawyer's name)

**AND TO:** Smith & Smith  
(insert Lawyer's name)

**RE:** \_\_\_\_\_ ("the transaction")  
(insert brief description of transaction)

**This will confirm that:**

- I/we have reviewed the information set out this Acknowledgement and Direction and in the documents described below (the "Documents"), and that this information is accurate;
- You, your agent or employee are authorized and directed to sign, deliver, and/or register electronically, on my/our behalf the Documents in the form attached.
- You are hereby authorized and directed to enter into an escrow closing arrangement substantially in the form attached hereto being a copy of the version of the Document Registration Agreement, which appears on the website of the Law Society of Upper Canada as of the date of the Agreement of Purchase and sale therein. I/we acknowledge the said Agreement has been reviewed by me/us and that I/we shall be bound by its terms;
- The effect of the documents has been fully explained to me/us, and I/we understand that I/we are parties to and bound by the terms and provisions of the Documents to the same extent as if I/we had signed them; and
- I/we are in fact the parties named in the Documents and I/we have not misrepresented our identities to you.
- I, \_\_\_\_\_, am the spouse of \_\_\_\_\_, the (Transferor/Chargor), and hereby consent to the transaction described in the Acknowledgement and Direction. I authorize you to indicate my consent on all the Documents for which it is required.

**DESCRIPTION OF ELECTRONIC DOCUMENTS**

The Document(s) described in the Acknowledgement and Direction are the document(s) selected below which are attached hereto as "Document in Preparation" and are:

- A Transfer of the land described above.
- A Charge of the land described above.
- Other documents set out in Schedule "B" attached hereto.

**Dated at** \_\_\_\_\_, **this** \_\_\_\_\_ **day of** \_\_\_\_\_, **20**\_\_\_\_\_.

**WITNESS**

(As to all signatures, if required)

\_\_\_\_\_

**Properties**

*PIN* 08567 – 0058 LT *Interest/Estate* Fee Simple  
*Description* LT 21, RCP 434; Newbury  
*Address* Newbury

**Consideration**

*Consideration* \$132,456.00

**Transferor(s)**

The transferor(s) hereby transfers the land to the transferee(s)

*Name* CHARLES, WAYNE  
Acting as an individual

*Address for Service* 123 Roadway Rd  
Newbury

I am at least 18 years of age

This document is not authorized under Power of Attorney by this party

**Transferee(s)****Capacity****Share**

*Name* URSINO, DAVID  
Acting as an individual Registered Owner

*Date of Birth* 1965 08 05

*Address for Service* 987 Roadway Rd  
Newbury

**Calculated Taxes**

*Retail Sales Tax* \$0.00

*Land Transfer Tax* \$115.00

## Rule 5 Relationship to Students, Employees, and Others

### 5.01 SUPERVISION

#### Application

5.01 (1) In this rule, a non-lawyer does not include an articulated student.

#### Direct Supervision required

- (2) A lawyer shall in accordance with the By-Laws
- (a) assume complete professional responsibility for his or her practice of law, and
  - (b) shall directly supervise non-lawyers to whom particular tasks and functions are assigned.

#### Commentary

By-Law 7.1 governs the circumstances in which a lawyer may assign certain tasks and functions to a non-lawyer within a law practice. Where a non-lawyer is competent to do work under the supervision of a lawyer, a lawyer may assign work to the non-lawyer. The non-lawyer must be directly supervised by the lawyer. A lawyer is required to review the non-lawyer's work at frequent intervals to ensure its proper and timely completion.

A lawyer may permit a non-lawyer to perform tasks assigned and supervised by the lawyer as long as the lawyer maintains a direct relationship with the client or, if the lawyer is in a community legal clinic funded by Legal Aid Ontario, as long as the lawyer maintains a direct supervisory relationship with each client's case in accordance with the supervision requirements of Legal Aid Ontario and assumes full professional responsibility for the work.

A lawyer who practices alone or operates a branch or part-time office should ensure that all matters requiring a lawyer's professional skill and judgment are dealt with by a lawyer qualified to do the work and that legal advice is not given by unauthorized persons, whether in the lawyer's name or otherwise.

A lawyer should ensure that the non-lawyer is identified as such when communicating orally or in writing with clients, licensees, public officials, or with the public generally whether within or outside the offices of the law practice.

The following examples, which are not exhaustive, illustrate situations where it may be appropriate to assign work to non-lawyers subject to direct supervision.



Real Estate – A lawyer may permit a non-lawyer to attend to all matters of routine administration, assist in more complex transactions, draft statements of account and routine documents and correspondence and attend to registrations. The lawyer must not assign to a non-lawyer the ultimate responsibility for review of a title search report or of documents before signing or for review and signing of a letter of requisition, review and signing of a title opinion or review and signing of a reporting letter to the client.

In real estate transactions using the system for the electronic registration of title documents (“e-reg” TM), only a lawyer may sign for completeness of any document that requires compliance with law statements.

Corporate and Commercial – A lawyer may permit a non-lawyer to attend to all matters of routine administration and to assist in more complex matters and to draft routine documents and correspondence relating to corporate, commercial, and securities matters such as drafting corporate minutes and documents pursuant to corporation statutes, security instruments, security registration documents and contracts of all kinds, closing documents and statements of account, and to attend on filings.

Wills, Trusts and Estates – A lawyer may permit a non-lawyer to attend to all matters of routine administration, to assist in more complex matters, to collect information, draft routine documents and correspondence, to prepare income tax returns, to calculate such taxes, to draft executors’ accounts and statements of account, and to attend to filings.

*[New- November 2007]*

**Electronic Registration of Title Documents**

- (3) When a lawyer has a personalized specially encrypted diskette to access the system for the electronic registration of title documents (“e-reg” TM), the lawyer
  - (a) shall not permit others, including a non-lawyer employee, to use the lawyer’s diskette, and
  - (b) shall not disclose his or her personalized e-reg TM pass phrase to others.
  
- (4) When a non-lawyer employed by a lawyer has a personalized specially encrypted diskette to access the system for the electronic registration of title documents, the lawyer shall ensure that the non-lawyer
  - (a) does not permit others to use the diskette, and
  - (b) does not disclose his or her personalized e-reg TM pass phrase to others.

**Commentary**

The implementation across Ontario of a system for the electronic registration of title documents imposes special responsibilities on lawyers and others using the system. Each person in a law office who accesses the e-reg<sup>TM</sup> system must have a personalized specially encrypted diskette and personalized e-reg<sup>TM</sup> pass phrase. The integrity and security of the system is achieved, in part, by its maintaining a record of those using the system for any transactions. Moreover, under the system, only lawyers entitled to practise law may make certain prescribed statements. Statements professing compliance with law without registration of supporting documents may be made only by lawyers in good standing. Only lawyers entitled to practise law may approve electronic documents containing these statements. It is, therefore, important that lawyers should maintain and ensure the security and the exclusively personal use of the personalized specially encrypted diskette used to access the system and the personalized electronic registration pass phrase. When in a real estate practice it is permissible for a lawyer to delegate responsibilities to a non-lawyer who has a personalized specially encrypted diskette and a personalized electronic registration pass phrase, the lawyer should ensure that the non-lawyer maintains and understands the importance of maintaining the security of the personalized specially encrypted diskette and the pass phrase.

In real estate transactions using the e-reg<sup>TM</sup> system, a lawyer who approves the electronic registration of title documents by a non-lawyer is responsible for the content of any document that contains the electronic signature of the non-lawyer.

*[Amended – November 2007]*

**Title Insurance**

- (5) A lawyer shall not permit a non-lawyer to
- (a) provide advice to the client concerning any insurance, including title insurance, without supervision,
  - (b) present insurance options or information regarding premiums to the client without supervision,
  - (c) recommend one insurance product over another without supervision, and
  - (d) give legal opinions regarding the insurance coverage obtained.

*[New - March 31, 2008]*

**Signing E-Reg<sup>TM</sup> Documents**

- (6) A lawyer who electronically signs a document using the system for the electronic registration of title documents – e-reg<sup>TM</sup> – assumes complete professional responsibility for the document.

*[New - March 31, 2008]*

**5.02 STUDENTS**

**Recruitment Procedures**

5.02 (1) A lawyer shall observe the procedures of the Society about the recruitment of articling students and the engagement of summer students.

**Duties of Principal**

(2) A lawyer acting as a principal to a student shall provide the student with meaningful training and exposure to and involvement in work that will provide the student with knowledge and experience of the practical aspects of the law, together with an appreciation of the traditions and ethics of the profession.

**Duties of Articling Student**

(3) An articling student shall act in good faith in fulfilling and discharging all the commitments and obligations arising from the articling experience.

**5.03 SEXUAL HARASSMENT**

**Definition**

5.03 (1) In this rule, sexual harassment is one incident or a series of incidents involving unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature

- (a) when such conduct might reasonably be expected to cause insecurity, discomfort, offence, or humiliation to the recipient(s) of the conduct,
- (b) when submission to such conduct is made implicitly or explicitly a condition for the provision of professional services,
- (c) when submission to such conduct is made implicitly or explicitly a condition of employment,
- (d) when submission to or rejection of such conduct is used as a basis for any employment decision (including, but not limited to, allocation of files, matters of promotion, raise in salary, job security, and benefits affecting the employee), or
- (e) when such conduct has the purpose or the effect of interfering with a person's work performance or creating an intimidating, hostile, or offensive work environment.

## Commentary

Types of behaviour that constitute sexual harassment include, but are not limited to,

- (a) sexist jokes causing embarrassment or offence, or that are by their nature clearly embarrassing or offensive,
- [Amended - January 2009]*
- (b) leering,
  - (c) the display of sexually offensive material,
  - (d) sexually degrading words used to describe a person,
  - (e) derogatory or degrading remarks directed towards members of one sex or one's sexual orientation,
  - (f) sexually suggestive or obscene comments or gestures,
  - (g) unwelcome inquiries or comments about a person's sex life,
  - (h) unwelcome sexual flirtations, advances, or propositions,
  - (i) persistent unwanted contact or attention after the end of a consensual relationship,
  - (j) requests for sexual favours,
  - (k) unwanted touching,
  - (l) verbal abuse or threats, and
  - (m) sexual assault.

Sexual harassment can occur in the form of behaviour by men towards women, between men, between women, or by women towards men.

**Prohibition on Sexual Harassment**

- (2) A lawyer shall not sexually harass a colleague, a staff member, a client, or any other person.

**5.04 DISCRIMINATION****Special Responsibility**

5.04 (1) A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences (as defined in the Ontario Human Rights Code), marital status, family status, or disability with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other licensees or any other person.

*[Amended – June 2007]*

**Commentary**

The Society acknowledges the diversity of the community of Ontario in which lawyers serve and expects them to respect the dignity and worth of all persons and to treat all persons equally without discrimination.

This rule sets out the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario.

Rule 5.04 will be interpreted according to the provisions of the Ontario Human Rights Code and related case law.

The Ontario Human Rights Code defines a number of grounds of discrimination listed in rule 5.04. For example,

Age is defined as an age that is eighteen years or more.

*[Amended - January 2009]*

Disability is broadly defined in s. 10 of the Code to include both physical and mental disabilities.

*[Amended - January 2009]*

Family status is defined as the status of being in a parent-and-child relationship.

Marital status is defined as the status of being married, single, widowed, divorced, or separated and includes the status of living with a person in a conjugal relationship outside marriage.

*[Amended - January 2009]*

Record of offences is defined such that a prospective employer may not discriminate on the basis of a pardoned criminal offence (a pardon must have been granted under the Criminal Records Act (Canada) and not revoked) or provincial offences.

The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant.

There is no statutory definition of discrimination. Supreme Court of Canada jurisprudence defines discrimination as including

- (a) Differentiation on prohibited grounds that creates a disadvantage. Lawyers who refuse to hire employees of a particular race, sex, creed, sexual orientation, etc. would be differentiating on the basis of prohibited grounds.

*[Amended - January 2009]*

- (b) Adverse effect discrimination. An action or policy that is not intended to be discriminatory can result in an adverse effect that is discriminatory. If the application of a seemingly "neutral" rule or policy creates an adverse effect on a group protected by rule 5.04, there is a duty to accommodate. For example, while a requirement that all articling students have a driver's licence to permit them to travel wherever their job requires may seem reasonable, that requirement should only be imposed if driving a vehicle is an essential requirement for the position. Such a requirement may have the effect of excluding from employment persons with disabilities that prevent them from obtaining a licence.

*[Amended - January 2009]*

Human rights law in Ontario includes as discrimination, conduct which, though not intended to discriminate, has an adverse impact on individuals or groups on the basis of the prohibited grounds. The Ontario Human Rights Code requires that the affected individuals or groups must be accommodated unless to do so would cause undue hardship.

A lawyer should take reasonable steps to prevent or stop discrimination by any staff or agent who is subject to the lawyer's direction or control.

Ontario human rights law excepts from discrimination special programs designed to relieve disadvantage for individuals or groups identified on the basis of the grounds noted in the Code.

In addition to prohibiting discrimination, rule 5.04 prohibits harassment on the ground of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status, or disability. Harassment by superiors, colleagues, and co-workers is also prohibited.

*[Amended - January 2009]*

Harassment is defined as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome" on the basis of any ground set out in rule 5.04. This could include, for example, repeatedly subjecting a client or colleague to jokes based on race or creed.

### Services

- (2) A lawyer shall ensure that no one is denied services or receives inferior service on the basis of the grounds set out in this rule.

### Employment Practices

- (3) A lawyer shall ensure that his or her employment practices do not offend this rule.

## Commentary

Discrimination in employment or in the provision of services not only fails to meet professional standards, it also violates the Ontario Human Rights Code and related equity legislation.

In advertising a job vacancy, an employer may not indicate qualifications by a prohibited ground of discrimination. However, where discrimination on a particular ground is permitted because of an exception under the Ontario Human Rights Code, such questions may be raised at an interview. For example, if an employer has an anti-nepotism policy, the employer may inquire about the applicant's possible relationship to another employee as that employee's spouse, child or parent. This is in contrast to questions about applicant's marital status by itself. Since marital status has no relevance to employment within a law firm, questions about marital status should not be asked.

*[Amended - January 2009]*

An employer should consider the effect of seemingly "neutral" rules. Some rules, while applied to everyone, can bar entry to the firm or pose additional hardships on employees of one sex or of a particular creed, ethnic origin, marital or family status, or on those who have (or develop) disabilities. For example, a law office may have a written or unwritten dress code. It would be necessary to revise the dress code if it does not already accept that a head covering worn for religious reasons must be considered part of acceptable business attire. The maintenance of a rule with a discriminatory effect breaches rule 5.04 unless changing or eliminating the rule would cause undue hardship.

If an applicant cannot perform all or part of an essential job requirement because of a personal characteristic listed in the Ontario Human Rights Code, the employer has a duty to accommodate. Only if the applicant cannot do the essential task with reasonable accommodation may the employer refuse to hire on this basis. A range of appropriate accommodation measures may be considered. An accommodation is considered reasonable unless it would cause undue hardship.

The Supreme Court of Canada has confirmed that what is required is equality of result, not just of form. Differentiation can result in inequality, but so too can the application of the same rule to everyone, without regard for personal characteristics and circumstances. Equality of result requires the accommodation of differences that arise from the personal characteristics cited in rule 5.04.

The nature of accommodation as well as the extent to which the duty to accommodate might apply in any individual case are developing areas of human rights law. However, the following principles are well established.

If a rule, requirement, or expectation creates difficulty for an individual because of factors related to the personal characteristics noted in rule 5.04, the following obligations arise:

The rule, requirement or expectation must be examined to determine whether it is "reasonable and *bona fide*." If the rule, requirement, or expectation is not imposed in good faith and is not strongly and logically connected to a business necessity, it cannot be maintained. There must be objectively verifiable evidence linking the rule, requirement, or expectation with the operation of the business.

If the rule, requirement, or expectation is imposed in good faith and is strongly logically connected to a business necessity, the next step is to consider whether the individual who is disadvantaged by the rule can be accommodated.

The duty to accommodate operates as both a positive obligation and as a limit to obligation. Accommodation must be offered to the point of undue hardship. Some hardship must be tolerated to promote equality; however, if the hardship occasioned by the particular accommodation at issue is "undue," that accommodation need not be made.



## Rule 6 Relationship to the Society and Other Lawyers

### 6.01 RESPONSIBILITY TO THE PROFESSION GENERALLY

#### Integrity

6.01 (1) A lawyer shall conduct himself or herself in such a way as to maintain the integrity of the profession.

#### Commentary

Integrity is the fundamental quality of any person who seeks to practise as a lawyer. If a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed regardless of how competent the lawyer may be.

Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect credit on the legal profession, inspire the confidence, respect and trust of clients and the community, and avoid even the appearance of impropriety.

*[Amended – June 2007]*

#### Meeting Financial Obligations

(2) A lawyer shall promptly meet financial obligations incurred in the course of practice on behalf of clients unless, before incurring such an obligation, the lawyer clearly indicates in writing to the person to whom it is to be owed that it is not to be a personal obligation.

*[Amended - January 2009]*

#### Commentary

In order to maintain the honour of the Bar, lawyers have a professional duty (quite apart from any legal liability) to meet financial obligations incurred, assumed, or undertaken on behalf of clients unless, the lawyer clearly indicates otherwise in advance.

*[Amended - January 2009]*

When a lawyer retains a consultant, expert, or other professional, the lawyer should clarify the terms of the retainer in writing, including specifying the fees, the nature of the services to be provided, and the person responsible for payment. If the lawyer is not responsible for the payment of the fees, the lawyer should help in making satisfactory arrangements for payment if it is reasonably possible to do so.

**Rule 6**

If there is a change of lawyer, the lawyer who originally retained a consultant, expert, or other professional should advise him or her about the change and provide the name, address, telephone number, fax number, and e-mail address of the new lawyer.

**Duty to Report Misconduct**

- (3) A lawyer shall report to the Society, unless to do so would be unlawful or would involve a breach of solicitor-client privilege,
- (a) the misappropriation or misapplication of trust monies,
  - (b) the abandonment of a law or legal services practice,
  - (c) participation in serious criminal activity related to a licensee's practice,
  - (d) the mental instability of a licensee of such a serious nature that the licensee's clients are likely to be severely prejudiced, and
  - (e) any other situation where a licensee's clients are likely to be severely prejudiced.

*[Amended – June 2007]*

**Commentary**

Unless a licensee who departs from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these rules or the rules governing paralegals. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Society directly or indirectly (e.g., through another lawyer).

Nothing in this paragraph is meant to interfere with the traditional solicitor-client relationship. In all cases the report must be made *bona fide* without malice or ulterior motive.

*[Amended – June 2007]*

Often, instances of improper conduct arise from emotional, mental, or family disturbances or substance abuse. Lawyers who suffer from such problems should be encouraged to seek assistance as early as possible. The Society supports the Ontario Lawyers' Assistance Program (OLAP), and other support groups in their commitment to the provision of confidential counselling. Therefore, lawyers acting in the capacity of counsellors for OLAP and other support groups will not be called by the Society or by any investigation committee to testify at any conduct, capacity, or competence hearing without the consent of the lawyer from whom the information was received. Notwithstanding the above, a lawyer counselling another lawyer has an ethical obligation to report to the Society upon learning that the lawyer being assisted is engaging in or may in the future engage in serious misconduct or criminal activity related to the lawyer's practice. The Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation.

[Amended - October 2006]

### Encouraging Client to Report Dishonest Conduct

(4) A lawyer shall attempt to persuade a client who has a claim against an apparently dishonest licensee to report the facts to the Society before pursuing private remedies.

(5) If the client refuses to report his or her claim against an apparently dishonest licensee to the Society, the lawyer shall inform the client of the policy of the Compensation Fund and shall obtain instructions in writing to proceed with the client's claim without notice to the Society.

(6) A lawyer shall inform a client of the provision of the *Criminal Code of Canada* dealing with the concealment of an indictable offence in return for an agreement to obtain valuable consideration (section 141).

(7) If the client wishes to pursue a private agreement with the apparently dishonest lawyer, the lawyer shall not continue to act if the agreement constitutes a breach of section 141 of the *Criminal Code of Canada*.

[Amended – June 2007]

### Duty to Report Certain Offences

(8) If a lawyer is charged with an offence described in By-law 8 of the Society, he or she shall inform the Society of the charge and of its disposition in accordance with the By-law.

[Amended – June 2007]

Commentary

By-law 8 relates to the reporting of serious criminal charges under the *Criminal Code* and charges under other Acts that bring into question the honesty of a lawyer or that relate to a lawyer's practice of law. Such a charge may be a red flag that clients may need protection. The Society must be in a position to determine what, if any, action is required by it if a lawyer is charged with an offence described in By-law 8 and what, if any, action is required if the lawyer is found guilty.

[Amended - June 2007]

## 6.02 RESPONSIBILITY TO THE SOCIETY

### Communications from the Society

6.02 A lawyer shall reply promptly to any communication from the Society.

## 6.03 RESPONSIBILITY TO LAWYERS AND OTHERS

### Courtesy and Good Faith

6.03 (1) A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.

Commentary

The public interest demands that matters entrusted to a lawyer be dealt with effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. The lawyer who behaves otherwise does a disservice to the client, and neglect of the rule will impair the ability of lawyers to perform their function properly.

Any ill feeling that may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward other legal practitioners or the parties. The presence of personal animosity between legal practitioners involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system.

A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice, or charges of other legal practitioners, but should be prepared, when requested, to advise and represent a client in a complaint involving another legal practitioner.

[Amended – June 2009]

(2) A lawyer shall agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities, and similar matters that do not prejudice the rights of the client.

(3) A lawyer shall avoid sharp practice and shall not take advantage of or act without fair warning upon slips, irregularities, or mistakes on the part of other legal practitioners not going to the merits or involving the sacrifice of a client's rights.

(4) A lawyer shall not use a tape recorder or other device to record a conversation between the lawyer and a client or another legal practitioner, even if lawful, without first informing the other person of the intention to do so.

*[Amended - June 2009]*

**Communications**

(5) A lawyer shall not in the course of professional practice send correspondence or otherwise communicate to a client, another legal practitioner, or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.

(6) A lawyer shall answer with reasonable promptness all professional letters and communications from other legal practitioners that require an answer, and a lawyer shall be punctual in fulfilling all commitments.

**Communications with a represented person**

(7) Subject to subrule (8), if a person is represented by a legal practitioner in respect of a matter, a lawyer shall not, except through or with the consent of the legal practitioner,

- (a) approach or communicate or deal with the person on the matter, or
- (b) attempt to negotiate or compromise the matter directly with the person.

*[Amended – June 2009]*

**Second Opinions**

(8) A lawyer who is not otherwise interested in a matter may give a second opinion to a person who is represented by a legal practitioner with respect to that matter.

*[Amended - June 2009]*

Commentary

Subrule (7) applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by a legal practitioner concerning the matter to which the communication relates. A lawyer may communicate with a represented person concerning matters outside the representation. This subrule does not prevent parties to a matter from communicating directly with each other.

The prohibition on communications with a represented person applies only where the lawyer knows that the person is represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but actual knowledge may be inferred from the circumstances. This inference may arise where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of the other legal practitioner by closing his or her eyes to the obvious.

Subrule (8) deals with circumstances in which a client may wish to obtain a second opinion from another lawyer. While a lawyer should not hesitate to provide a second opinion, the obligation to be competent and to render competent services requires that the opinion be based on sufficient information. In the case of a second opinion, such information may include facts that can be obtained only through consultation with the first legal practitioner involved. The lawyer should advise the client accordingly, and if necessary consult the first legal practitioner unless the client instructs otherwise.

*[Amended - June 2009]*

### **Communications with a represented corporation or organization**

(9) A lawyer retained to act on a matter involving a corporation or organization that is represented by a legal practitioner shall not approach

(a) directors, officers, or persons likely involved in the decision-making process for the corporation or organization, or

(b) employees and agents of the corporation or organization whose acts or omissions in connection with the matter may expose the corporation or organization to civil or criminal liability,

in respect of that matter unless the legal practitioner representing the corporation or organization consents or unless otherwise authorized or required by law.

#### **Commentary**

This subrule applies to corporations and “other organizations.” “Other organizations” include partnerships, limited partnerships, associations, unions, unincorporated groups, government departments and agencies, tribunals, regulatory bodies, and sole proprietorships. In the case of a corporation or other organization (including, for example, an association or government department), this rule prohibits communications by a lawyer for another person or entity concerning the matter in question with persons likely involved in the decision-making process about the matter. If an agent or employee of the organization is represented in the matter by a legal practitioner, the consent of that legal practitioner to the communication will be sufficient for purpose of this rule. A lawyer may communicate with employees or agents concerning matters outside the representation.

A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances, the lawyer must comply with the requirements of rule 2.04 (Avoidance of Conflicts of Interest), and particularly subrules 2.04(6) through (10). A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of rule 2.04 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

*[Amended - June 2009]*

### Undertakings

(10) A lawyer shall not give an undertaking that cannot be fulfilled and shall fulfill every undertaking given.

#### Commentary

Undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms. If a lawyer giving an undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking itself. In the absence of such a statement, the person to whom the undertaking is given is entitled to expect that the lawyer giving it will honour it personally. The use of such words as “on behalf of my client” or “on behalf of the vendor” does not relieve the lawyer giving the undertaking of personal responsibility.

In real estate transactions using the system for the electronic registration of title documents (“e-reg”<sup>TM</sup>), the lawyers acting for the parties (with their consent) will sign and be bound by a Document Registration Agreement that will contain undertakings. When entering into a Document Registration Agreement, a lawyer should have regard to and strictly comply with his or her obligations under subrule (10).

*[Amended - November 2007]*

## 6.04 OUTSIDE INTERESTS AND THE PRACTICE OF LAW

### Maintaining Professional Integrity and Judgment

6.04 (1) A lawyer who engages in another profession, business, or occupation concurrently with the practice of law shall not allow such outside interest to jeopardize the lawyer's professional integrity, independence, or competence.

(2) A lawyer shall not allow involvement in an outside interest to impair the exercise of the lawyer's independent judgment on behalf of a client.

**Commentary**

The term “outside interest” covers the widest possible range of activities and includes activities that may overlap or be connected with the practice of law such as engaging in the mortgage business, acting as a director of a client corporation, or writing on legal subjects, as well as activities not so connected such as, for example, a career in business, politics, broadcasting or the performing arts. In each case the question of whether and to what extent the lawyer may be permitted to engage in the outside interest will be subject to any applicable law or rule of the Society.

Where the outside interest is not related to the legal services being performed for clients, ethical considerations will usually not arise unless the lawyer's conduct might bring the lawyer or the profession into disrepute or impair the lawyer's competence as, for example, where the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation.

**6.05 THE LAWYER IN PUBLIC OFFICE****Standard of Conduct**

6.05 (1) A lawyer who holds public office shall, in the discharge of official duties, adhere to standards of conduct as high as those that these rules require of a lawyer engaged in the practice of law.

**Commentary**

The rule applies to a lawyer who is elected or appointed to a legislative or administrative office at any level of government, regardless of whether the lawyer attained the office because of professional qualifications. Because such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by a failure to observe its ethical standards.

Generally, the Society will not be concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely upon the lawyer's integrity or professional competence may be the subject of disciplinary action.

**Conflict of Interest**

(2) A lawyer who holds public office shall not allow professional or personal interests to conflict with the proper discharge of official duties.



Commentary

The lawyer holding part-time public office must not accept any private legal business where duty to the client will, or may, conflict with official duties. If some unforeseen conflict arises, the lawyer should terminate the professional relationship, explaining to the client that official duties must prevail. The lawyer who holds a full-time public office will not be faced with this sort of conflict but must nevertheless guard against allowing independent judgment in the discharge of official duties to be influenced either by the lawyer's own interest, that of some person closely related to or associated with the lawyer, that of former or prospective clients, or former or prospective partners or associates.

Subject to any special rules applicable to the particular public office, the lawyer holding the office who sees that there is a possibility of a conflict of interest should declare the possible conflict at the earliest opportunity, and not take part in any consideration, discussion or vote concerning the matter in question.

- (3) If there may be a conflict of interest, a lawyer who holds or who held public office shall not represent clients or advise them in contentious cases that the lawyer has been concerned with in an official capacity.

**Appearances before Official Bodies**

- (4) Subject to the rules of the official body, when a lawyer or any of his or her partners or associates is a member of an official body, the lawyer shall not appear professionally before that body.

Commentary

Subject to the rules of the official body, a partner or associate may appear professionally before a committee of the official body if the partner or associate is not a member of that committee, provided that in respect of matters in which the partner or associate appears, the lawyer does not sit on the committee, take part in the discussions of the committee's recommendations, or vote upon them.

**Conduct after Leaving Public Office**

- (5) A lawyer who has left public office shall not act for a client in connection with any matter for which the lawyer had substantial responsibility before leaving public office.

**Rule 6**

Commentary

It would not be improper for the lawyer to act professionally in the matter on behalf of the public body in question.

A lawyer who has acquired confidential information by virtue of holding public office should keep the information confidential and not divulge or use it, notwithstanding that the lawyer has ceased to hold such office.

**6.06 PUBLIC APPEARANCES AND PUBLIC STATEMENTS**

**Communication with the Public**

6.06 (1) Provided that there is no infringement of the lawyer's obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements.

Commentary

Lawyers in their public appearances and public statements should conduct themselves in the same manner as with their clients, their fellow legal practitioners, and tribunals. Dealings with the media are simply an extension of the lawyer's conduct in a professional capacity. The mere fact that a lawyer's appearance is outside of a courtroom, a tribunal, or the lawyer's office does not excuse conduct that would otherwise be considered improper.

A lawyer's duty to the client demands that, before making a public statement concerning the client's affairs, the lawyer must first be satisfied that any communication is in the best interests of the client and within the scope of the retainer.

Public communications about a client's affairs should not be used for the purpose of publicizing the lawyer and should be free from any suggestion that the lawyer's real purpose is self-promotion or self-aggrandizement.

Given the variety of cases that can arise in the legal system, particularly in civil, criminal, and administrative proceedings, it is impossible to set down guidelines that would anticipate every possible circumstance. Circumstances will arise where the lawyer should have no contact with the media and other cases where the lawyer is under a specific duty to contact the media to properly serve the client - the latter situation will arise more often in the context of administrative boards and tribunals where a particular tribunal is an instrument of government policy and hence is susceptible to public opinion.

A lawyer is often involved in a non-legal setting where contact is made with the media about publicizing such things as fund-raising, expansion of hospitals or universities, programs of public institutions or political organizations, or in acting as a spokesperson for organizations that, in turn, represent particular racial, religious, or other special interest groups. This is a well-established and completely proper role for the lawyer to play in view of the obvious contribution it makes to the community.

A lawyer is often called upon to comment publicly on the effectiveness of existing statutory or legal remedies, on the effect of particular legislation or decided cases, or to offer an opinion about cases that have been instituted or are about to be instituted. This, too, is an important role the lawyer can play to assist the public in understanding legal issues.

*[Amended – June 2009]*

A lawyer is often involved as advocate for interest groups whose objective is to bring about changes in legislation, governmental policy, or even a heightened public awareness about certain issues. This is also an important role that the lawyer can be called upon to play.

Lawyers should be aware that when they make a public appearance or give a statement they will ordinarily have no control over any editing that may follow or the context in which the appearance or statement may be used, or under what headline it may appear.

### Interference with Right to Fair Trial or Hearing

(2) A lawyer shall not communicate information to the media or make public statements about a matter before a tribunal if the lawyer knows or ought to know that the information or statement will have a substantial likelihood of materially prejudicing a party's right to a fair trial or hearing.

#### Commentary

Fair trials and hearings are fundamental to a free and democratic society. It is important that the public, including the media, be informed about cases before courts and tribunals. The administration of justice benefits from public scrutiny. It is also important that a person's, particularly an accused person's, right to a fair trial or hearing not be impaired by inappropriate public statements made before the case has concluded.

## 6.07 PREVENTING UNAUTHORIZED PRACTICE

### Preventing Unauthorized Practice

6.07 (1) A lawyer shall assist in preventing the unauthorized practice of law and the unauthorized provision of legal services.

*[Amended – June 2007]*

**Commentary**

Statutory provisions against the practice of law and provision of legal services by unauthorized persons are for the protection of the public. Unauthorized persons may have technical or personal ability, but they are immune from control, regulation, and, in the case of misconduct, from discipline by the Society. Moreover, the client of a lawyer who is authorized to practise has the protection and benefit of the lawyer-client privilege, the lawyer's duty of secrecy, the professional standard of care that the law requires of lawyers, and the authority that the courts exercise over them. Other safeguards include professional liability insurance, rights with respect to the assessment of bills, rules respecting the handling of trust monies, and requirements for the maintenance of compensation funds.

**Working With or Employing Unauthorized Persons**

(2) Without the express approval of a committee of Convocation appointed for the purpose, a lawyer shall not retain, occupy office space with, use the services of, partner or associate with, or employ in any capacity having to do with the practice of law or provision of legal services any person who, in Ontario or elsewhere, has been disbarred and struck off the Rolls, has had his or her license to practise law or to provide legal services revoked, has been suspended, has had his or her license to practise law or to provide legal services suspended, has undertaken not to practise law or to provide legal services, or who has been involved in disciplinary action and been permitted to resign or to surrender his or her license to practise law or to provide legal services, and has not had his or her license restored.

*[Amended - January 2008]*

**Practice by Suspended Lawyers Prohibited**

(3) A lawyer whose license to practise law is suspended shall comply with the requirements of the By-laws and shall not

- (a) practice law
- (b) represent or hold himself or herself out as a person entitled to practise law, or
- (c) represent or hold himself or herself out as a person entitled to provide legal services.

*[New - January 2008]*

**Commentary**

Part II of By-Law 7.1 (Operational Obligations and Responsibilities) and Part II.1 of By-Law 9 (Financial Transactions and Records) set out the obligations of a lawyer whose license to practise law is suspended.

*[Amended - May 2008]*

**Undertakings Not to Practise Law**

- (4) A lawyer who gives an undertaking to the Law Society not to practise law shall not,
- (a) practise law,
  - (b) represent or hold himself or herself out as a person entitled to practise law, or
  - (c) represent or hold himself or herself out as a person entitled to provide legal services.

*[New - January 2008]*

**Undertakings to Practise Law Subject to Restrictions**

- (5) A lawyer who gives an undertaking to the Law Society to restrict his or her practise shall comply with the undertaking.

*[New - January 2008]*

**6.08 RETIRED JUDGES RETURNING TO PRACTICE**

**Definitions**

- 6.08 (1) In this rule, “retired appellate judge” means a lawyer
- (a) who was formerly a judge of the Supreme Court of Canada, the Court of Appeal for Ontario, or the Federal Court of Appeal,

*[Amended - January 2009]*

- (b) who has retired, resigned, or been removed from the Bench, and
  - (c) who has returned to practice.
- (2) In this rule, “retired judge” means a lawyer
- (a) who was formerly a judge of the Federal Court, the Tax Court of Canada, the Supreme Court of Ontario, Trial Division, a County or District Court, the Ontario Court of Justice, or the Superior Court of Justice,

*[Amended - January 2009]*

- (b) who has retired, resigned, or been removed from the Bench, and
- (c) who has returned to practice.

**Appearance as Counsel**

(3) A retired appellate judge shall not appear as counsel or advocate in any court, or in chambers, or before any administrative board or tribunal without the express approval of a committee of Convocation appointed for the purpose. This approval may only be granted in exceptional circumstances and may be restricted as the committee of Convocation sees fit.

(4) A retired judge shall not appear as counsel or advocate

(a) before the court on which the judge served or any lower court, and

(b) before any administrative board or tribunal over which the court on which the judge served exercised an appellate or judicial review jurisdiction

for a period of two years from the date of his or her retirement, resignation, or removal, without the express approval of a committee of Convocation, appointed for the purpose, which approval may only be granted in exceptional circumstances and may be restricted as the committee of Convocation sees fit.

**6.09 ERRORS AND OMISSIONS****Informing Client of Error or Omission**

6.09 (1) When, in connection with a matter for which a lawyer is responsible, the lawyer discovers an error or omission that is or may be damaging to the client and that cannot be rectified readily, the lawyer shall

(a) promptly inform the client of the error or omission being careful not to prejudice any rights of indemnity that either of them may have under an insurance, client's protection or indemnity plan, or otherwise,

(b) recommend that the client obtain legal advice elsewhere concerning any rights the client may have arising from the error or omission, and

(c) advise the client that in the circumstances, the lawyer may no longer be able to act for the client.

**Notice of Claim**

(2) A lawyer shall give prompt notice of any circumstance that the lawyer may reasonably expect to give rise to a claim to an insurer or other indemnitor so that the client's protection from that source will not be prejudiced.

**Commentary**

Compulsory insurance imposes obligations on a lawyer, but these obligations must not impair the relationship and duties of the lawyer to the client. The insurer's rights must be preserved. There may well be occasions when a lawyer believes that certain actions or the failure to take action have made the lawyer liable for damages to the client when, in reality, no liability exists. Further, in every case a careful assessment will have to be made of the client's damages arising from the lawyer's negligence. Many factors will have to be taken into account in assessing the client's claim and damages. As soon as a lawyer becomes aware that an error or omission may have occurred, that may reasonably be expected to involve liability to the client for professional negligence, the lawyer should take the following steps.

*[Amended - January 2009]*

1. Immediately arrange an interview with the client and advise the client that an error or omission may have occurred, that may form the basis of a claim by the client against the lawyer.
2. Advise the client to obtain an opinion from an independent lawyer and that, in the circumstances, the first lawyer might no longer be able to act for the client.
3. Subject to rule 2.03 (Confidentiality), inform the insurer of the facts of the situation.
4. Co-operate fully and as expeditiously as possible with the insurer in the investigation and eventual settlement of the claim.
5. Make arrangements to pay that portion of the client's claim that is not covered by the insurance immediately upon completion of the settlement of the client's claim. This would include payment of the deductible under a policy of insurance in accordance with By-Law 6 (Professional Liability Insurance).

*[Amended - January 2009]*

**Co-operation**

(3) When a claim of professional negligence is made against a lawyer, he or she shall assist and co-operate with the insurer or other indemnitor to the extent necessary to enable the claim to be dealt with promptly.

**Responding to Client's Claim**

(4) If a lawyer is not indemnified for a client's errors and omissions claim or to the extent that the indemnity may not fully cover the claim, the lawyer shall expeditiously deal with the claim and shall not take unfair advantage that would defeat or impair the client's claim.

(5) In cases where liability is clear and the insurer or other indemnitor is prepared to pay its portion of the claim, a lawyer has a duty to pay the balance.

**Rule 6**

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**6.10 RESPONSIBILITY IN MULTI-DISCIPLINE PRACTICES**

**Compliance with these Rules**

6.10 A lawyer in a multi-discipline practice shall ensure that non-licensee partners and associates comply with these rules and all ethical principles that govern a lawyer in the discharge of his or her professional obligations.

*[Amended - June 2009]*

**6.11 DISCIPLINE**

**Disciplinary Authority**

6.11 (1) A lawyer is subject to the disciplinary authority of the Society regardless of where the lawyer's conduct occurs.

**Professional Misconduct**

(2) The Society may discipline a lawyer for professional misconduct.

**Conduct Unbecoming a Lawyer**

(3) The Society may discipline a lawyer for conduct unbecoming a lawyer.



**DOCUMENT REGISTRATION AGREEMENT**

**BETWEEN:**

\_\_\_\_\_ (hereinafter referred to as the “**Purchaser’s Solicitor**”)

**AND:**

\_\_\_\_\_ (hereinafter referred to as the “**Vendor’s Solicitor**”)

**RE:** \_\_\_\_\_ (the “**Purchaser**”) purchase from \_\_\_\_\_ (the “**Vendor**”) of \_\_\_\_\_ (the “**Property**”) pursuant to an agreement of purchase and sale dated \_\_\_\_\_, as amended from time to time (the “**Purchase Agreement**”), scheduled to be completed on \_\_\_\_\_ (the “**Closing Date**”)

**FOR GOOD AND VALUABLE CONSIDERATION** (the receipt and sufficiency of which is hereby expressly acknowledged), the parties hereto hereby undertake and agree as follows:

Holding Deliveries  
In Escrow

1. The Vendor’s Solicitor and the Purchaser’s Solicitor shall hold all funds, keys and closing documentation exchanged between them (the “**Requisite Deliveries**”) in escrow, and *shall* not release or otherwise deal with same except in accordance with the terms of this Agreement. Both the Vendor’s Solicitor and the Purchaser’s Solicitor have been authorized by their respective clients to enter into this Agreement. Once the Requisite Deliveries can be released in accordance with the terms of this Agreement, any monies representing payout funds for mortgages to be discharged shall be forwarded promptly to the appropriate mortgage lender.<sup>1</sup>

Advising of  
Concerns with  
Deliveries

2. Each of the parties hereto shall notify the other as soon as reasonably possible following their respective receipt of the Requisite Deliveries (as applicable) of any defect(s) with respect to same.

Selecting Solicitor  
Responsible for  
Registration

3. The Purchaser’s Solicitor shall be responsible for the registration of the Electronic Documents (as hereinafter defined) unless the box set out below indicating that the Vendor’s Solicitor will be responsible for such registration has been checked. For the purposes of this Agreement, the solicitor responsible for such registration shall be referred to as the “**Registering Solicitor**” and the other solicitor shall be referred to as the “**Non-Registering Solicitor**”:

Vendor’s Solicitor will be registering the Electronic Documents

Responsibility of  
Non-Registering  
Solicitor

4. The Non-Registering Solicitor shall, upon his/her receipt and approval of the Requisite Deliveries (as applicable), electronically release for registration the Electronic Documents and shall thereafter be entitled to release the Requisite Deliveries from escrow forthwith following the earlier of:

and

Release of  
Requisite Deliveries by  
Non-Registering Solicitor

- a) the registration of the Electronic Documents;
- b) the closing time specified in the Purchase Agreement unless a specific time has been inserted as follows [\_\_\_\_\_ a.m./p.m. on the Closing Date] (the “**Release Deadline**”), and provided that notice under paragraph 7 below has not been received; or
- c) receipt of notification from the Registering Solicitor of the registration of the Electronic Documents.

If the Purchase Agreement does not specify a closing time and a Release Deadline has not been specifically inserted the Release Deadline shall be 6.00 p.m. on the Closing Date.

<sup>1</sup>Solicitors should continue to refer to the Law Society of Upper Canada practice guidelines relating to recommended procedures to follow for the discharge of mortgages.

Responsibility of Registering Solicitor

5. The Registering Solicitor shall, subject to paragraph 7 below, on the Closing Date, following his/her receipt and approval of the Requisite Deliveries (as applicable), register the documents listed in Schedule "A" annexed hereto (referred to in this agreement as the "Electronic Documents") in the stated order of priority therein set out, as soon as reasonably possible once same have been released for registration by the Non- Registering Solicitor, and immediately thereafter notify the Non-Registering Solicitor of the registration particulars thereof by telephone or telefax (or other method as agreed between the parties).

Release of Requisite Deliveries by Registering Solicitor

6. Upon registration of the Electronic Documents and notification of the Non-Registering solicitor in accordance with paragraph 5 above, the Registering Solicitor shall be entitled to forthwith release the Requisite Deliveries from escrow.

Returning Deliveries where Non-registration

7. Any of the parties hereto may notify the other party that he/she does not wish to proceed with the registration<sup>2</sup> of the Electronic Documents, and provided that such notice is received by the other party before the release of the Requisite Deliveries pursuant to this Agreement and before the registration of the Electronic Documents, then each of the parties hereto shall forthwith return to the other party their respective Requisite Deliveries.

Counterparts & Gender

8. This Agreement may be signed in counterparts, and shall be read with all changes of gender and/or number as may be required by the context.

Purchase Agreement Prevails if Conflict or Inconsistency

9. Nothing contained in this Agreement shall be read or construed as altering the respective rights and obligations of the Purchaser and the Vendor as more particularly set out in the Purchase Agreement, and in the event of any conflict or inconsistency between the provisions of this Agreement and the Purchase Agreement, then the latter shall prevail.

Telefaxing Deliveries & Providing Originals if Requested

10. This Agreement (or any counterpart hereof), and any of the closing documents hereinbefore contemplated, may be exchanged by telefax or similar system reproducing the original, provided that all such documents have been properly executed by the appropriate parties. The party transmitting any such document(s) shall also provide the original executed version(s) of same to the recipient within 2 business days after the Closing Date, unless the recipient has indicated that he/she does not require such original copies.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

Name/Firm Name of Vendor's Solicitor

Name/Firm Name of Purchaser's Solicitor

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Name of Person Signing

Name of Person Signing

(Signature)

(Signature)

**Note: This version of the Document Registration Agreement was adopted by the Joint LSUC-CBAO Committee on Electronic Registration of Title Documents on March 29, 2004 and posted to the web site on April 8, 2004.**

<sup>2</sup> For the purpose of this Agreement, the term "registration" shall mean the issuance of registration number(s) in respect of the Electronic Documents by the appropriate Land Registry Office.

## **PAYMENT OF REGISTRATION FEES AND LAND TRANSFER TAX**

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### **Background**

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The Teraview Electronic Registration Systems Agreement (“the Teraview agreement”) requires an account holder to designate an account from which Teranet is authorized to withdraw registration fees and land transfer tax which are incurred when the account holder uses Teraview to submit documents for registration. The Teraview agreement refers to this account as “the electronic registration bank account” or “ERBA”.

The Teraview agreement provides that the submission of instructions for registration of documents on-line in electronic format is deemed to be an authorization to Teranet to debit predetermined sums representing registration fees and land transfer tax from the electronic registration bank account.

With the roll-out of the Teraview Electronic Registration System (“Teraview”), the Law Society had to consider payment methods which adhered to our regulatory and statutory scheme for the payment of land transfer tax and registration fees.

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### **Designation of a trust account as the Electronic Registration Bank Account**

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The Law Society By-laws have always permitted the payment of registration fees and land transfer tax from a licensee’s *general* account. With the roll-out of e-reg., the Law Society was asked to consider how these payments could be made from a licensee’s *trust* account.

#### ***Designation of Mixed Trust Account***

The designation of the licensee’s existing mixed trust account as the electronic registration bank account was determined not to be a viable alternative for two reasons:

- (1) The Law Society By-laws ( except in exceptional circumstances) do not permit non-lawyers to transact trust funds. In electronic registration, non-lawyers would be registering documents and thereby would be transacting trust funds; and
- (2) The Law Society By-laws prohibit a third party from having unilateral access to a lawyer’s trust account. In electronic registration, Teranet would have the authorization to debit the electronic registration bank account.

The Law Society was faced with the task of determining a method that would both preserve a comparable degree of protection and integrity over client funds in the trust account and provide flexibility for licensees.

In 1999, Convocation approved amendments to the By-Laws to permit the use of a special trust account for the payment of registration fees and land transfer taxes.

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## **Special Trust Account**

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### ***What is a special trust account ?***

The special trust account acts as a clearing account. From a banking perspective, this account resembles the mixed trust account commonly operated by lawyers. All the requirements and restrictions applicable to licensees' trust accounts apply to this account.

This account, however, has some special features. These features are contained in sections 15 and 16 of By-Law 9.

### ***Requirements and Restrictions of the Special Trust Account***

The following are some of the requirements and restrictions of the special trust account:

#### ***Deposit of Monies***

- (1) A licensee shall only deposit into the special trust account money received in trust for a client for the purposes of paying the document registration fees and land transfer tax - section 16 (1)(b)(i) of By-Law 9;
- (2) A licensee shall only deposit into the special trust account exact sums of money required to pay the document registration fees and land transfer tax related to the client's real estate transaction - section 16 (3), By-Law 9;
- (3) The money deposited into the special trust account must relate to a particular client(s) and his, her or their real estate transaction - section 16 (1)(b)(i), By-Law 9;

#### ***Length of Time that Monies may Remain on Deposit***

- (1) Money that is deposited into the special trust account shall not be kept in the account for more than five days - section 16 (4), By-Law 9;
- (2) If the money is not properly withdrawn from the account by Teranet within five days after the day on which it is paid into the account, the licensee shall transfer the money from that account into another trust account that is not a special trust account (eg. mixed trust account) - section 16 (4), By-Law 19;

### ***Errors relating to Deposits***

- (1) If more money than required to pay the document registration fees and land transfer tax, through inadvertence, is paid into the special trust account, the licensee shall transfer the excess money from the special trust account into another trust account that is not a special trust account- section 16 (3), By-Law 9;

### ***Authorization of Withdrawal by Teranet - Form 9B***

- (1) A licensee prior to authorizing Teranet to withdraw the document registration fees and land transfer tax from the special trust account, must prepare and sign an authorization form as evidence that the licensee has authorized the transfer of funds. The authorization form must be in Form 9B - sections 15 (5) and (6), By-Law 9;

### ***Confirmation from Teranet***

- (1) A licensee shall not authorize Teranet to withdraw document registration fees and land transfer tax from the special trust account unless Teranet agrees to provide the licensee with a confirmation of the withdrawal. The confirmation must be received by the licensee not later than 5 p.m. on the day immediately after the day on which the withdrawal is authorized by the licensee - sections 15 (2) and (3), By-Law 9 .
- (2) The confirmation shall contain the amount of money withdrawn from the special trust account, the time and date that the authorization to withdraw is received by Teranet and the time and date that the confirmation is sent to the licensee - section 15 (4), By-Law 9.

### ***Comparison of Authorization and Confirmation***

- (1) The licensee must reconcile the information contained in the written authorization (Form 9B) to that contained in the confirmation no later than 5 p.m. on the day immediately after the day on which the confirmation is sent to the licensee by:
    - producing a paper copy of the confirmation;
    - comparing the paper copy of the confirmation and the written authorization relating to the withdrawal (Form 9B) to verify that money was withdrawn from the special trust account by Teranet as authorized by the licensee;
    - indicating on the paper copy of the confirmation the name of the client and the file number if the paper copy does not contain this information; and
    - signing and dating the paper copy of the confirmation if the amounts reconcile. If the amounts do not reconcile, Teranet must be contacted immediately and the error must be corrected - section 15 (7), By-Law 9.
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## Payment of Registration Fees and Land Transfer Tax from the Special Trust Account

Registration fees and land transfer tax may be paid from the special trust account as follows:

**(1) *Receipt of Funds From Client***

When a licensee receives one cheque payable to the licensee or law firm in trust from the client which comprises closing funds and money required for the payment of registration fees and land transfer tax, the cheque must be deposited into the licensee's mixed trust account. The licensee then prepares a trust cheque drawn on his or her mixed trust account in the amount of the registration fees and land transfer tax and deposits this cheque into his or her special trust account.

If the licensee receives a separate cheque in the amount of the registration fees and land transfer tax from the client, then the licensee may deposit this cheque directly into the special trust account.

Monies deposited into the special trust account, however, may not be kept in this account for more than five days. If money is received more than five days prior to closing, the money must be deposited into the lawyer's mixed trust account and then transferred into the special trust account when required.

**(2) *Completion of Form 9B and Registration***

The licensee completes and signs Form 9B and submits instructions to Teranet for registration.

**(3) *Comparison of Form 9B to Confirmation***

The licensee prints the confirmation of registration and ensures that the amounts contained in Form 9B match those contained in the confirmation. The time requirement, contained in By-Law 9, for completion of this step must be complied with.

**(4) *Report to Client***

The licensee reports to the client and provides the client with a bill and full explanation of the transaction of trust funds.

*(Please refer to Appendix 1 - Diagram - Option 1 - Payment From New Mixed Trust Account)*

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## **General Account**

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Land transfer tax and registration fees may also be paid from a licensee's general account. A licensee may use either his or her existing general account or may set up a separate general account for this purpose. These expenses are treated like any other general client disbursements. Where a licensee has sufficient monies in his or her trust account to the credit of the client in a particular matter and where the licensee has properly incurred an expense on behalf of that client, the licensee may reimburse himself or herself by withdrawing from his or her mixed trust account the amount of the expense incurred and by depositing it into his or her general account.

### **Procedure when paying registration fees and land transfer tax from the general account**

Registration fees and land transfer tax may be paid from the general account as follows:

**(1) *Receipt of Funds from Client***

A licensee receives the client's money and deposits the money into the licensee's mixed trust account.

**(2) *Registration***

The licensee submits instructions to Teranet to electronically register the documents and by so doing authorizes Teranet to debit the general account.

**(3) *Transfer from the Mixed Trust Account to the General Account***

A trust cheque is prepared to the law firm in the amount of the land transfer tax and registration fees and is deposited into the licensee's general account. Please note that this transfer from the mixed trust account to the general account can only be done after Teranet has been authorized to withdraw funds from the general account.

**(4) *Report to the Client***

The licensee provides the client with a report and an account. Although it would be preferable for the licensee to send the client a disbursement account prior to reimbursing himself or herself for the expense incurred on behalf of the client, it is not a requirement.

Please note, it is permissible to prepare and deposit a single cheque payable to the licensee or law firm for disbursements incurred by the licensee relating to multiple transactions and multiple clients provided that the amount of the disbursement relating to each individual client is properly posted to that client ledger.

*(Please refer to Appendix 1 - Diagram - Option 2 - Payment From Lawyer's General Account)*

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**Which Option To Select - Trust Account or General Account**

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Both methods of payment are acceptable to the Law Society. A licensee should select the method that best suits his or her practice. A licensee may wish to consider the following in making a decision:

1. The firm's existing accounting procedures and systems;
2. The size of the firm (number of lawyers);
3. Whether the licensee will be using support staff ;
4. The manner in which the licensee conducts his or her practice;
5. The type of real estate practice that the licensee operates - volume, types of transactions handled by the licensee's office.
6. How easy will it be to do the banking - the distance and hours of operation of the bank.

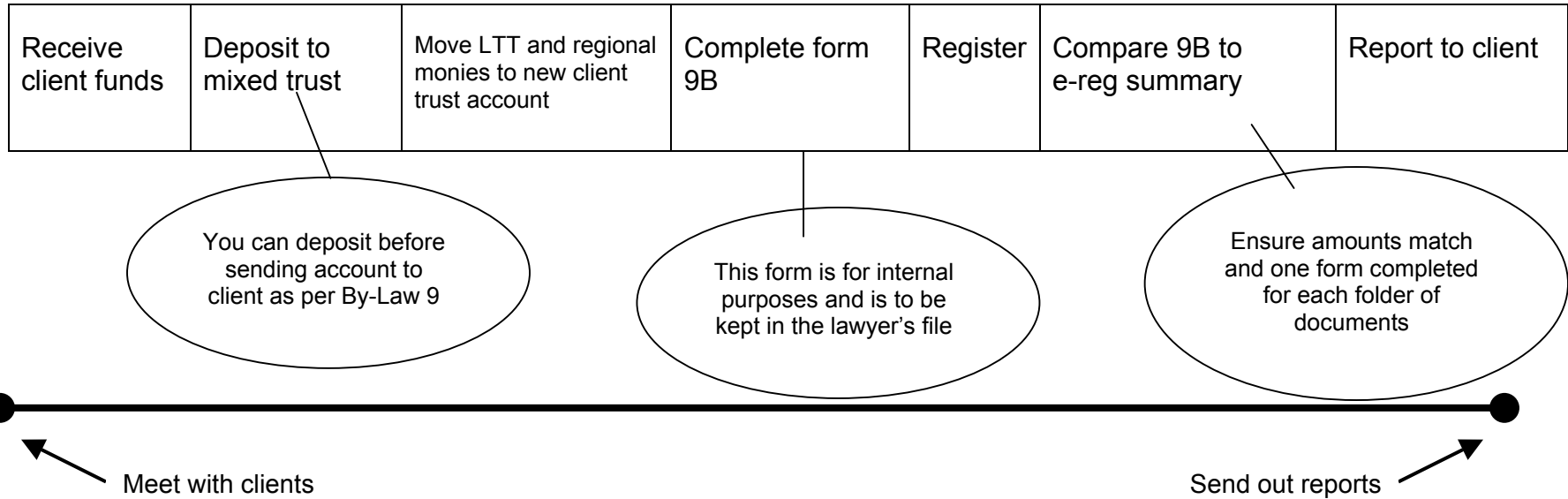
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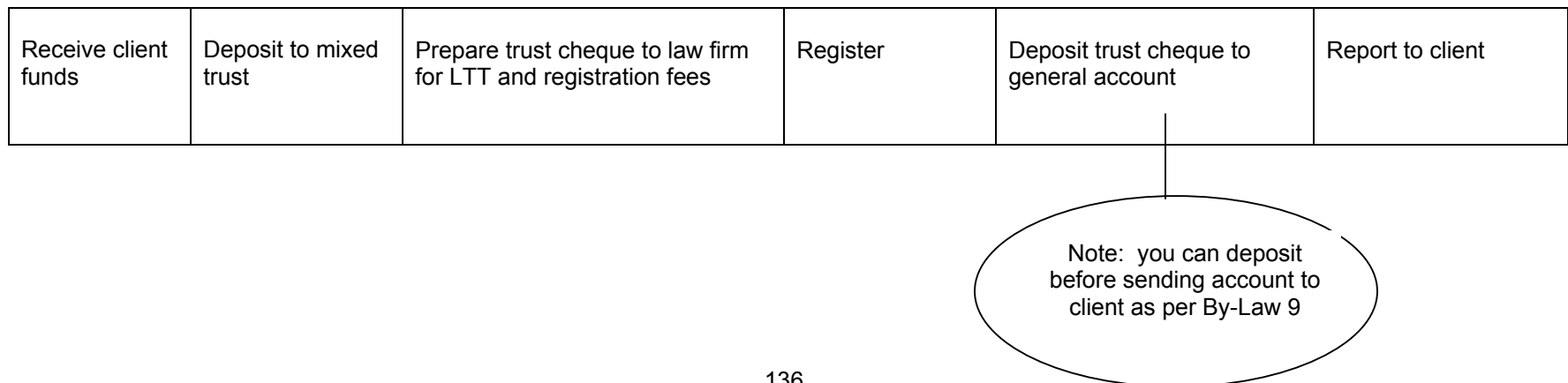


## PAYMENT OF LTT AND REGISTRATION FEES

### Option 1: Payment from New Mixed Trust Account



### Option 2: Payment from Lawyer's General Account



## **BY-LAW 9**

Made: May 1, 2007  
Amended: June 28, 2007  
January 24, 2008  
February 21, 2008  
March 20, 2009 (editorial changes)  
September 29, 2009 (editorial changes)

### **FINANCIAL TRANSACTIONS AND RECORDS**

#### **PART I**

#### **INTERPRETATION**

##### **Interpretation**

1. (1) In this By-Law,

“arm’s length” has the same meaning given it in the *Income Tax Act* (Canada);

“cash” means current coin within the meaning of the *Currency Act* (Canada), notes intended for circulation in Canada issued by the Bank of Canada pursuant to the *Bank of Canada Act* and current coin or banks notes of countries other than Canada;

“charge” has the same meaning given it in the *Land Registration Reform Act*;

“client” means a person or group of persons from whom or on whose behalf a licensee receives money or other property;

“firm of licensees” means,

- (a) a partnership of licensees and all licensees employed by the partnership,
- (b) a professional corporation established for the purpose of practising law in Ontario and all licensees employed by the professional corporation,
- (c) a professional corporation established for the purpose of providing legal services in Ontario and all licensees employed by the professional corporation, or
- (d) a professional corporation established for the purpose of practising law and

providing legal services in Ontario and all licensees employed by the professional corporation;

“holiday” means,

- (a) any Saturday or Sunday;
- (b) New Year’s Day, and where New Year’s Day falls on a Saturday or Sunday, the following Monday;
- (c) Family Day
- (d) Good Friday;
- (e) Easter Monday;
- (f) Victoria Day;
- (g) Canada Day, and where Canada Day falls on a Saturday or Sunday, the following Monday;
- (h) Civic Holiday;
- (i) Labour Day;
- (j) Thanksgiving Day;
- (k) Remembrance Day, and where Remembrance Day falls on a Saturday or Sunday, the following Monday;
- (l) Christmas Day, and where Christmas Day falls on a Saturday or Sunday, the following Monday and Tuesday, and where Christmas Day falls on a Friday, the following Monday;
- (m) Boxing Day; and
- (n) any special holiday proclaimed by the Governor General or the Lieutenant Governor;

“lender” means a person who is making a loan that is secured or to be secured by a charge, including a charge to be held in trust directly or indirectly through a related person or corporation;

“licensee” includes a firm of licensees;

“money” includes cash, cheques, drafts, credit card sales slips, post office orders and express and bank money orders;

“related” has the same meaning given it in the *Income Tax Act* (Canada);

“Teranet” means Teranet Inc., a corporation incorporated under the *Business Corporations Act*, acting as agent for the Ministry of Consumer and Business Services.

### **Time for doing an act expires on a holiday**

(2) Except where a contrary intention appears, if the time for doing an act expires on a holiday, the act may be done on the next day that is not a holiday.

### **When deemed in trust**

(3) For the purposes of subsections 9 (1), (2) and (3) and section 14, cash, cheques negotiable by the licensee, cheques drawn by the licensee on the licensee’s trust account and credit card sales slips in the possession and control of the licensee shall be deemed from the time the licensee receives such possession and control to be money held in a trust account if the cash, cheques or credit card sales slips, as the case may be, are deposited in the trust account not later than the following banking day.

## **PART II**

### **HANDLING OF MONEY BY BANKRUPT LICENSEE**

#### **Handling of money by bankrupt licensee**

2. (1) Subject to subsections (2) and (3), a licensee who is bankrupt within the meaning of the *Bankruptcy and Insolvency Act* (Canada) shall not receive from or on behalf of a person or group of persons any money or other property and shall not otherwise handle money or other property that is held in trust for a person or group of persons.

#### **Exception**

(2) A licensee who is bankrupt within the meaning of the *Bankruptcy and Insolvency Act* (Canada) may receive from or on behalf of a person or group of persons money,

- (a) in payment of fees for services performed by the licensee for the person or group;  
or
- (b) in reimbursement for money properly expended, or for expenses properly incurred, on behalf of the person or group.

### **Same**

(3) A licensee who is bankrupt within the meaning of the *Bankruptcy and Insolvency Act* (Canada) may apply in writing to the Society for permission to receive from or on behalf of a person or group of persons any money or other property, other than as permitted under subsection (2), or for permission to handle money or other property that is held in trust for a person or group of persons, and the Society may permit the licensee to do so, subject to such terms and conditions as the Society may impose.

## **PART II.1**

### **HANDLING OF MONEY BY LICENSEE WHOSE LICENCE IS SUSPENDED**

#### **Interpretation**

2.1 In this Part,

“suspended licensee” means a licensee who is the subject of a suspension order;

“suspension order” means an order made under the Act suspending a licensee’s licence to practise law in Ontario as a barrister and solicitor or to provide legal services in Ontario, regardless of whether the suspension begins when the order is made or thereafter.

#### **Handling of money by suspended licensee**

2.2 (1) Subject to subsection (2) and section 2.3, a suspended licensee shall not, during the suspension receive from or on behalf of a person or group of persons any money or other property and shall not otherwise handle money or other property that is held in trust for a person or group of persons.

#### **Exception**

(2) A suspended licensee may receive from or on behalf of a person or group of persons money,

- (a) in payment of fees for services performed by the suspended licensee for the person

or group; or

- (b) in reimbursement for money properly expended, or for expenses properly incurred, on behalf of the person or group.

### **Trust account**

- 2.3 (1) A suspended licensee shall, within 30 days of the beginning of the suspension,
- (a) withdraw from every trust account kept in the name of the suspended licensee, or in the name of the firm of licensees of which the suspended licensee is a partner or by which the suspended licensee is employed, and, as required, pay to the appropriate person,
    - (i) money properly required for payment to a person on behalf of a client,
    - (ii) money required to reimburse the suspended licensee for money properly expended, or for expenses properly incurred, on behalf of a client,
    - (iii) money required for or toward payment of fees for services performed by the suspended licensee, and
    - (iv) all other money that belongs to the suspended licensee or to a person other than a client;
  - (b) after complying with clause (a), withdraw from every trust account kept in the name of the suspended licensee, or in the name of the firm of licensees of which the suspended licensee is a partner or by which the suspended licensee is employed, all money belonging to a client and pay the money to,
    - (i) the client,
    - (ii) another licensee to whom the client has directed the suspended licensee to make payment, or
    - (iii) another licensee who has agreed with the suspended licensee to accept payment in the event that the suspended licensee is unable to comply with subclause (i) or (ii); and
  - (c) after complying with clauses (a) and (b),
    - (i) close every trust account that was kept in the name of the suspended licensee, and

- (ii) cancel or cause to be cancelled the suspended licensee's signing authority on every trust account that was kept in the name of the firm of licensees of which the suspended licensee is a partner or by which the suspended licensee is employed.

#### **Compliance with clause (1) (b) not required**

(2) A suspended licensee is not required to comply with clause (1) (b) if the client's file is transferred, in accordance with Part IV of By-Law 7.1, to another licensee in the firm of licensees of which the suspended licensee is a partner or by which the suspended licensee is employed.

#### **Application of sections of Part IV**

(3) Subsection 9 (3) and sections 10, 11 and 12 apply to the withdrawal of money from a trust account under this section.

#### **Report to Society on compliance**

(4) A suspended licensee shall, not later than thirty days after the suspension begins, complete and file with the Society, in a form provided by the Society, a report confirming and providing details of the suspended licensee's compliance with this section.

#### **Permission to be exempt from requirement**

2.4 A suspended licensee may apply in writing to the Society for an exemption from or a modification of a requirement mentioned in this Part, and the Society may exempt the suspended licensee from or modify the requirement, subject to such terms and conditions as the Society may impose.

### **PART III**

#### **CASH TRANSACTIONS**

##### **Definition**

3. In this Part,

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

“public body” means,

- (a) a department or agent of Her Majesty in right of Canada or of a province;
- (b) an incorporated city, metropolitan authority, town, township, village, county, district, rural municipality or other incorporated municipal body or an agent of any of them; and
- (c) an organization that operates a public hospital and that is designated by the Minister of National Revenue as a hospital under the *Excise Tax Act* (Canada) or agent of the organization.

### **Cash received**

4. (1) A licensee shall not receive or accept from a person, in respect of any one client file, cash in an aggregate amount of 7,500 or more Canadian dollars.

### **Foreign currency**

(2) For the purposes of this section, when a licensee receives or accepts from a person cash in a foreign currency the licensee shall be deemed to have received or accepted the cash converted into Canadian dollars at,

- (a) the official conversion rate of the Bank of Canada for the foreign currency as published in the Bank of Canada’s Daily Noon Rates that is in effect at the time the licensee receives or accepts the cash; or
- (b) if the day on which the licensee 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 licensee receives or accepts the cash.

### **Application**

5. Section 4 applies when, in respect of a client file, a licensee engages in or gives instructions in respect of the following activities:

- 1. The licensee receives or pays funds.
- 2. The licensee purchases or sells securities, real properties or business assets or entities.
- 3. The licensee transfers funds by any means.



## Exceptions

6. Despite section 5, section 4 does not apply when the licensee,
  - (a) receives cash from a public body, an authorized foreign bank within the meaning of section 2 of the *Bank Act* (Canada) in respect of its business in Canada or a bank to which the *Bank Act* (Canada) applies, a cooperative credit society, savings and credit union or caisse populaire that is regulated by a provincial Act, an association that is regulated by the *Cooperative Credit Associations Act* (Canada), a company to which the *Trust and Loan Companies Act* (Canada) applies, a trust company or loan company regulated by a provincial Act or 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;
  - (b) receives cash from a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity;
  - (c) receives cash pursuant to an order of a tribunal;
  - (d) receives cash to pay a fine or penalty; or
  - (e) receives cash for fees, disbursements, expenses or bail provided that any refund out of such receipts is also made in cash.

## PART IV

### TRUST ACCOUNT

#### TRUST ACCOUNT TRANSACTIONS

#### Money received in trust for client

7. (1) Subject to section 8, every licensee who receives money in trust for a client shall immediately pay the money into an account at a chartered bank, provincial savings office, credit union or a league to which the *Credit Unions and Caisses Populaires Act, 1994* applies or registered trust corporation, to be kept in the name of the licensee, or in the name of the firm of licensees of which the licensee is a partner, through which the licensee practises law or provides legal services or by which the licensee is employed, and designated as a trust account.

## **Interpretation**

(2) For the purposes of subsection (1), a licensee receives money in trust for a client if the licensee receives from a person,

- (a) money that belongs in whole or in part to a client;
- (b) money that is to be held on behalf of a client;
- (c) money that is to be held on a client's direction or order;
- (d) money that is advanced to the licensee on account of fees for services not yet rendered; or
- (e) money that is advanced to the licensee on account of disbursements not yet made.

## **Money to be paid into trust account**

(3) In addition to the money required under subsection (1) to be paid into a trust account, a licensee shall pay the following money into a trust account:

1. Money that may by inadvertence have been drawn from a trust account in contravention of section 9.
2. Money paid to a licensee that belongs in part to a client and in part to the licensee where it is not practical to split the payment of the money.

## **Money to be paid into trust account: money received before licence issued**

(3.1) If a licensee who holds a Class P1 licence receives from a person, prior to being issued the licence, money for services yet to be rendered to a client and the licensee does not perform the services for the client by May 2, 2010, the licensee shall on May 3, 2010 pay the money into a trust account.

## **Withdrawal of money from trust account**

(4) A licensee who pays into a trust account money described in paragraph 2 of subsection (3) shall as soon as practical withdraw from the trust account the amount of the money that belongs to him or her.

## **One or more trust accounts**

- (5) A licensee may keep one or more trust accounts.

### **Money not to be paid into trust account**

8. (1) A licensee is not required to pay into a trust account money which he or she receives in trust for a client if,
- (a) the client requests the licensee in writing not to pay the money into a trust account;
  - (b) the licensee pays the money into an account to be kept in the name of the client, a person named by the client or an agent of the client; or
  - (c) the licensee pays the money immediately upon receiving it to the client or to a person on behalf of the client in accordance with ordinary business practices.

### **Same**

- (2) A licensee shall not pay into a trust account the following money:
- 1. Money that belongs entirely to the licensee or to another licensee of the firm of licensees of which the licensee is a partner, through which the licensee practises law or provides legal services or by which the licensee is employed, including an amount received as a general retainer for which the licensee is not required either to account or to provide services.
  - 2. Money that is received by the licensee as payment of fees for services for which a billing has been delivered, as payment of fees for services already performed for which a billing will be delivered immediately after the money is received or as reimbursement for disbursements made or expenses incurred by the licensee on behalf of a client.

### **Record keeping requirements**

- (3) A licensee who, in accordance with subsection (1), does not pay into a trust account money which he or she receives in trust for a client shall include all handling of such money in the records required to be maintained under Part V.

### **Withdrawal of money from trust account**

9. (1) A licensee may withdraw from a trust account only the following money:
- 1. Money properly required for payment to a client or to a person on behalf of a client.

2. Money required to reimburse the licensee for money properly expended on behalf of a client or for expenses properly incurred on behalf of a client.
3. Money properly required for or toward payment of fees for services performed by the licensee for which a billing has been delivered.
4. Money that is directly transferred into another trust account and held on behalf of a client.
5. Money that under this Part should not have been paid into a trust account but was through inadvertence paid into a trust account.

### **Permission to withdraw other money**

(2) A licensee may withdraw from a trust account money other than the money mentioned in subsection (1) if he or she has been authorized to do so by the Society.

### **Limit on amount withdrawn from trust account**

(3) A licensee shall not at any time with respect to a client withdraw from a trust account under this section more money than is held on behalf of that client in that trust account at that time.

### **Manner in which certain money may be withdrawn from trust account**

10. A licensee shall withdraw money from a trust account under paragraph 2 or 3 of subsection 9 (1) only,

- (a) by a cheque drawn in favour of the licensee;
- (b) by a transfer to a bank account that is kept in the name of the licensee and is not a trust account; or
- (c) by electronic transfer.

### **Withdrawal by cheque**

11. A cheque drawn on a trust account shall not be,
- (a) made payable either to cash or to bearer; or

- (b) signed by a person who is not a licensee except in exceptional circumstances and except when the person has signing authority on the trust account on which a cheque will be drawn and is bonded in an amount at least equal to the maximum balance on deposit during the immediately preceding fiscal year of the licensee in all the trust accounts on which signing authority has been delegated to the person.

### **Withdrawal by electronic transfer**

12. (1) Money withdrawn from a trust account by electronic transfer shall be withdrawn only in accordance with this section.

### **When money may be withdrawn**

(2) Money shall not be withdrawn from a trust account by electronic transfer unless the following conditions are met:

1. The electronic transfer system used by the licensee must be one that does not permit an electronic transfer of funds unless,
  - i. one person, using a password or access code, enters into the system the data describing the details of the transfer, and
  - ii. another person, using another password or access code, enters into the system the data authorizing the financial institution to carry out the transfer.
2. The electronic transfer system used by the licensee must be one that will produce, not later than the close of the banking day immediately after the day on which the electronic transfer of funds is authorized, a confirmation from the financial institution confirming that the data describing the details of the transfer and authorizing the financial institution to carry out the transfer were received.
3. The confirmation required by paragraph 2 must contain,
  - i. the number of the trust account from which money is drawn,
  - ii. the name, branch name and address of the financial institution where the account to which money is transferred is kept,
  - iii. the name of the person or entity in whose name the account to which money is transferred is kept,
  - iv. the number of the account to which money is transferred,

- v. the time and date that the data describing the details of the transfer and authorizing the financial institution to carry out the transfer are received by the financial institution, and
  - vi. the time and date that the confirmation from the financial institution is sent to the licensee.
4. Before any data describing the details of the transfer or authorizing the financial institution to carry out the transfer is entered into the electronic trust transfer system, an electronic trust transfer requisition must be signed by,
- i. a licensee, or
  - ii. in exceptional circumstances, a person who is not a licensee if the person has signing authority on the trust account from which the money will be drawn and is bonded in an amount at least equal to the maximum balance on deposit during the immediately preceding fiscal year of the licensee in all trust accounts on which signing authority has been delegated to the person.
5. The data entered into the electronic trust transfer system describing the details of the transfer and authorizing the financial institution to carry out the transfer must be as specified in the electronic trust transfer requisition.

**Application of para. 1 of subs. (2) to sole practitioner**

(3) Paragraph 1 of subsection (2) does not apply to a licensee who practises law or provides legal services without another licensee as a partner, if the licensee practises law or provides legal services through a professional corporation, without another licensee practising law or providing legal services through the professional corporation and without another licensee or person as an employee, if the licensee himself or herself enters into the electronic trust transfer system both the data describing the details of the transfer and the data authorizing the financial institution to carry out the transfer.

**Same**

(4) In exceptional circumstances, the data referred to in subsection (3) may be entered by a person other than the licensee, if the person has signing authority on the trust account from which the money will be drawn and is bonded in an amount at least equal to the maximum balance on deposit during the immediately preceding fiscal year of the licensee in all trust accounts on which signing authority has been delegated to the person.

### **Additional requirements relating to confirmation**

(5) Not later than the close of the banking day immediately after the day on which the confirmation required by paragraph 2 of subsection (2) is sent to a licensee, the licensee shall,

- (a) produce a printed copy of the confirmation;
- (b) compare the printed copy of the confirmation and the signed electronic trust transfer requisition relating to the transfer to verify whether the money was drawn from the trust account as specified in the signed requisition;
- (c) indicate on the printed copy of the confirmation the name of the client, the subject matter of the file and any file number in respect of which money was drawn from the trust account; and
- (d) after complying with clauses (a) to (c), sign and date the printed copy of the confirmation.

### **Same**

(6) In exceptional circumstances, the tasks required by subsection (5) may be performed by a person other than the licensee, if the person has signing authority on the trust account from which the money will be drawn and is bonded in an amount at least equal to the maximum balance on deposit during the immediately preceding fiscal year of the licensee in all trust accounts on which signing authority has been delegated to the person.

### **Electronic trust transfer requisition**

(7) The electronic trust transfer requisition required under paragraph 4 of subsection (2) shall be in Form 9A.

### **Definitions**

13. (1) In this section,

“closing funds” means the money necessary to complete or close a transaction in real estate;

“transaction in real estate” means,

- (a) a charge on land given for the purpose of securing the payment of a debt or the performance of an obligation, including a charge under the *Land Titles Act* and a mortgage, but excluding a rent charge, or

- (b) a conveyance of freehold or leasehold land, including a deed and a transfer under the *Land Titles Act*, but excluding a lease.

**Withdrawal by electronic transfer: closing funds**

(2) Despite section 12, closing funds may be withdrawn from a trust account by electronic transfer in accordance with this section.

**When closing funds may be withdrawn**

(3) Closing funds shall not be withdrawn from a trust account by electronic transfer unless the following conditions are met:

1. The electronic transfer system used by the licensee must be one to which access is restricted by the use of at least one password or access code.
2. The electronic transfer system used by the licensee must be one that will produce immediately after the electronic transfer of funds a confirmation of the transfer.
3. The confirmation required by paragraph 2 must contain,
  - i. the name of the person or entity in whose name the account from which money is drawn is kept,
  - ii. the number of the trust account from which money is drawn,
  - iii. the name of the person or entity in whose name the account to which money is transferred is kept,
  - iv. the number of the account to which money is transferred, and
  - v. the date the transfer is carried out.
4. Before the electronic transfer system used by the licensee is accessed to carry out an electronic transfer of funds, an electronic trust transfer requisition must be signed by,
  - i. the licensee, or
  - ii. in exceptional circumstances, a person who is not the licensee if the person has signing authority on the trust account from which the money will be drawn and is bonded in an amount at least equal to the maximum balance on deposit during the immediately preceding fiscal year of the licensee in



all trust accounts on which signing authority has been delegated to the person.

5. The data entered into the electronic transfer system describing the details of the electronic transfer of funds must be as specified in the electronic trust transfer requisition.

#### **Additional requirements relating to confirmation**

- (4) Not later than 5 p.m. on the day immediately after the day on which the electronic transfer of funds is carried out, the licensee shall,
  - (a) produce a printed copy of the confirmation required by paragraph 2 of subsection (3);
  - (b) compare the printed copy of the confirmation and the signed electronic trust transfer requisition relating to the transfer to verify whether the money was drawn from the trust account as specified in the signed requisition;
  - (c) indicate on the printed copy of the confirmation the name of the client, the subject matter of the file and any file number in respect of which money was drawn from the trust account; and
  - (d) after complying with clauses (a) to (c), sign and date the printed copy of the confirmation.

#### **Same**

- (5) In exceptional circumstances, the tasks required by subsection (4) may be performed by a person other than the licensee, if the person has signing authority on the trust account from which the money will be drawn and is bonded in an amount at least equal to the maximum balance on deposit during the immediately preceding fiscal year of the licensee in all trust accounts on which signing authority has been delegated to the person.

#### **Electronic trust transfer requisition: closing funds**

- (6) The electronic trust transfer requisition required under paragraph 4 of subsection (3) shall be in Form 9C.

#### **Requirement to maintain sufficient balance in trust account**

14. Despite any other provision in this Part, a licensee shall at all times maintain sufficient balances on deposit in his or her trust accounts to meet all his or her obligations with respect to money held in trust for clients.

## AUTOMATIC WITHDRAWALS FROM TRUST ACCOUNTS

### **Authorizing Teranet to withdraw money from trust account**

15. (1) Subject to subsection (2), a licensee may authorize Teranet to withdraw from a trust account described in subsection 16 (1) money required to pay the document registration fees and the land transfer tax, if any, related to a client's real estate transaction.

### **Conditions**

(2) A licensee shall not authorize Teranet to withdraw from a trust account described in subsection 16 (1) money required to pay the document registration fees and the land transfer tax, if any, related to a client's real estate transaction unless Teranet agrees to provide to the licensee in accordance with subsection (3) a confirmation of the withdrawal that contains the information mentioned in subsection (4).

### **Time of receipt of confirmation**

(3) The confirmation required under subsection (2) must be received by the licensee not later than 5 p.m. on the day immediately after the day on which the withdrawal is authorized by the licensee.

### **Contents of confirmation**

- (4) The confirmation required under subsection (2) must contain,
- (a) the amount of money withdrawn from the trust account;
  - (b) the time and date that the authorization to withdraw money is received by Teranet;  
and
  - (c) the time and date that the confirmation from Teranet is sent to the licensee.

### **Written record of authorization**

(5) A licensee who authorizes Teranet to withdraw from a trust account described in subsection 16 (1) money required to pay the document registration fees and the land transfer tax, if any, related to a client's real estate transaction shall record the authorization in writing.

## Same

(6) The written record of the authorization required under subsection (5) shall be in Form 9B and shall be completed by the licensee before he or she authorizes Teranet to withdraw from a trust account described in subsection 16 (1) money required to pay the document registration fees and the land transfer tax, if any, related to a client's real estate transaction.

## Additional requirements relating to confirmation

- (7) Not later than 5 p.m. on the day immediately after the day on which the confirmation required under subsection (2) is sent to a licensee, the licensee shall,
- (a) produce a paper copy of the confirmation, if the confirmation is sent to the licensee by electronic means;
  - (b) compare the paper copy of the confirmation and the written record of the authorization relating to the withdrawal to verify whether money was withdrawn from the trust account by Teranet as authorized by the licensee;
  - (c) indicate on the paper copy of the confirmation the name of the client and any file number in respect of which money was withdrawn from the trust account, if the confirmation does not already contain such information; and
  - (d) after complying with clauses (a) to (c), sign and date the paper copy of the confirmation.

## Special trust account

- 16 (1) The trust account from which Teranet may be authorized by a licensee to withdraw money shall be,
- (a) an account at a chartered bank, provincial savings office, credit union or league to which the *Credit Unions and Caisses Populaires Act, 1994* applies or a registered trust corporation kept in the name of the licensee or in the name of the firm of licensees of which the licensee is a partner, through which the licensee practises law or by which the licensee is employed, and designated as a trust account; and
  - (b) an account into which a licensee shall pay only,
    - (i) money received in trust for a client for the purposes of paying the document registration fees and the land transfer tax, if any, related to the client's real estate transaction; and

- (ii) money properly withdrawn from another trust account for the purposes of paying the document registration fees and the land transfer tax, if any, related to the client's real estate transaction.

### **One or more special trust accounts**

(2) A licensee may keep one or more trust accounts of the kind described in subsection (1).

### **Payment of money into special trust account**

(3) A licensee shall not pay into a trust account described in subsection (1) more money than is required to pay the document registration fees and the land transfer tax, if any, related to a client's real estate transaction, and if more money is, through inadvertence, paid into the trust account, the licensee shall transfer from the trust account described in subsection (1) into another trust account that is not a trust account described in subsection (1) the excess money.

### **Time limit on holding money in special trust account**

(4) A licensee who pays money into a trust account described in subsection (1) shall not keep the money in that account for more than five days, and if the money is not properly withdrawn from that account by Teranet within five days after the day on which it is paid into that account, the licensee shall transfer the money from that account into another trust account that is not a trust account described in subsection (1).

### **Interpretation: counting days**

(5) In subsection 16 (4), holidays shall not be counted in determining if money has been kept in a trust account described in subsection 16 (1) for more than five days.

### **Application of ss. 9, 11, 12 and 14**

17. Sections 9, 11, 12 and 14 apply, with necessary modifications, to a trust account described in subsection 16 (1).

## **PART V**

### **RECORD KEEPING REQUIREMENTS**

## REQUIREMENTS

### **Requirement to maintain financial records**

18. Every licensee shall maintain financial records to record all money and other property received and disbursed in connection with the licensee's professional business, and, as a minimum requirement, every licensee shall maintain, in accordance with sections 21, 22 and 23, the following records:

1. A book of original entry identifying each date on which money is received in trust for a client, the method by which money is received, the person from whom money is received, the amount of money received and the client for whom money is received in trust.
2. A book of original entry showing all disbursements out of money held in trust for a client and identifying each date on which money is disbursed, the method by which money is disbursed, including the number or a similar identifier of any document used to disburse money, the person to whom money is disbursed, the amount of money which is disbursed and the client on whose behalf money is disbursed.
3. A clients' trust ledger showing separately for each client for whom money is received in trust all money received and disbursed and any unexpended balance.
4. A record showing all transfers of money between clients' trust ledger accounts and explaining the purpose for which each transfer is made.
5. A book of original entry showing all money received, other than money received in trust for a client, and identifying each date on which money is received, the method by which money is received, the amount of money which is received and the person from whom money is received.
6. A book of original entry showing all disbursements of money, other than money held in trust for a client, and identifying each date on which money is disbursed, the method by which money is disbursed, including the number or a similar identifier of any document used to disburse money, the amount of money which is disbursed and the person to whom money is disbursed.
7. A fees book or a chronological file of copies of billings, showing all fees charged and other billings made to clients and the dates on which fees are charged and other billings are made to clients and identifying the clients charged and billed.

8. A record showing a comparison made monthly of the total of balances held in the trust account or accounts and the total of all unexpended balances of funds held in trust for clients as they appear from the financial records together with the reasons for any differences between the totals, and the following records to support the monthly comparisons:
  - i. A detailed listing made monthly showing the amount of money held in trust for each client and identifying each client for whom money is held in trust.
  - ii. A detailed reconciliation made monthly of each trust bank account.
9. A record showing all property, other than money, held in trust for clients, and describing each property and identifying the date on which the licensee took possession of each property, the person who had possession of each property immediately before the licensee took possession of the property, the value of each property, the client for whom each property is held in trust, the date on which possession of each property is given away and the person to whom possession of each property is given.
10. Bank statements or pass books, cashed cheques and detailed duplicate deposit slips for all trust and general accounts.
11. Signed electronic trust transfer requisitions and signed printed confirmations of electronic transfers of trust funds.
12. Signed authorizations of withdrawals by Teranet and signed paper copies of confirmations of withdrawals by Teranet.

### **Record keeping requirements if cash received**

19 (1) Every licensee who receives cash shall maintain financial records in addition to those required under section 18 and, as a minimum additional requirement, shall maintain, in accordance with sections 21, 22 and 23, 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 and any file number in respect of which cash is received and containing the signature of the licensee or the person authorized by the licensee to receive cash and of the person from whom cash is received.

### **No breach**

(2) A licensee does not breach subsection (1) if a receipt does not contain the signature of the person from whom cash is received provided that the licensee has made reasonable efforts to obtain the signature of the person from whom cash is received.

### **Record keeping requirements if mortgages and other charges held in trust for clients**

20. Every licensee who holds in trust mortgages or other charges on real property, either directly or indirectly through a related person or corporation, shall maintain financial records in addition to those required under section 18 and, as a minimum additional requirement, shall maintain, in accordance with sections 21, 22 and 23, the following records:

1. A mortgage asset ledger showing separately for each mortgage or charge,
  - i. all funds received and disbursed on account of the mortgage or charge,
  - ii. the balance of the principal amount outstanding for each mortgage or charge,
  - iii. an abbreviated legal description or the municipal address of the real property, and
  - iv. the particulars of registration of the mortgage or charge.
2. A mortgage liability ledger showing separately for each person on whose behalf a mortgage or charge is held in trust,
  - i. all funds received and disbursed on account of each mortgage or charge held in trust for the person,
  - ii. the balance of the principal amount invested in each mortgage or charge,
  - iii. an abbreviated legal description or the municipal address for each mortgaged or charged real property, and
  - iv. the particulars of registration of each mortgage or charge.
3. A record showing a comparison made monthly of the total of the principal balances outstanding on the mortgages or charges held in trust and the total of all principal balances held on behalf of the investors as they appear from the financial records together with the reasons for any differences between the totals, and the following records to support the monthly comparison:

- i. A detailed listing made monthly identifying each mortgage or charge and showing for each the balance of the principal amount outstanding.
- ii. A detailed listing made monthly identifying each investor and showing the balance of the principal invested in each mortgage or charge.

### **Financial records to be permanent**

21. (1) The financial records required to be maintained under sections 18, 19 and 20 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.

### **Paper copies of financial records**

(2) If a financial record is entered and posted by mechanical or electronic means, a licensee shall ensure that a paper copy of the record may be produced promptly on the Society's request.

### **Financial records to be current**

22. (1) Subject to subsection (2), the financial records required to be maintained under sections 18, 19 and 20 shall be entered and posted so as to be current at all times.

### **Exceptions**

(2) The record required under paragraph 8 of section 18 and the record required under paragraph 3 of section 20 shall be created within twenty-five days after the last day of the month in respect of which the record is being created.

### **Preservation of financial records required under ss. 18 and 19**

23. (1) Subject to subsection (2), a licensee shall keep the financial records required to be maintained under sections 18 and 19 for at least the six year period immediately preceding the licensee's most recent fiscal year end.

### **Same**

(2) A licensee shall keep the financial records required to be maintained under paragraphs 1, 2, 3, 8, 9, 10 and 11 of section 18 for at least the ten year period immediately preceding the licensee's most recent fiscal year end.

### **Preservation of financial records required under s. 20**



(3) A licensee shall keep the financial records required to be maintained under section 20 for at least the ten year period immediately preceding the licensee's most recent fiscal year end.

### **Record keeping requirements when acting for lender**

24. (1) Every licensee who acts for or receives money from a lender shall, in addition to maintaining the financial records required under sections 18 and 20, maintain a file for each charge, containing,

- (a) a completed investment authority, signed by each lender before the first advance of money to or on behalf of the borrower;
- (b) a copy of a completed report on the investment;
- (c) if the charge is not held in the name of all the lenders, an original declaration of trust;
- (d) a copy of the registered charge; and
- (e) any supporting documents supplied by the lender.

### **Exceptions**

- (2) Clauses (1) (a) and (b) do not apply with respect to a lender if,
  - (a) the lender,
    - (i) is a bank listed in Schedule I or II to the *Bank Act* (Canada), a licensed insurer, a registered loan or trust corporation, a subsidiary of any of them, a pension fund, or any other entity that lends money in the ordinary course of its business,
    - (ii) has entered a loan agreement with the borrower and has signed a written commitment setting out the terms of the prospective charge, and
    - (iii) has given the licensee a copy of the written commitment before the advance of money to or on behalf of the borrower;
  - (b) the lender and borrower are not at arm's length;
  - (c) the borrower is an employee of the lender or of a corporate entity related to the lender;

- (d) the lender has executed the Investor/Lender Disclosure Statement for Brokered Transactions, approved by the Superintendent under subsection 54 (1) of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, and has given the licensee written instructions, relating to the particular transaction, to accept the executed disclosure statement as proof of the loan agreement;
- (e) the total amount advanced by the lender does not exceed \$6,000; or
- (f) the lender is selling real property to the borrower and the charge represents part of the purchase price.

**Requirement to provide documents to lender**

(3) Forthwith after the first advance of money to or on behalf of the borrower, the licensee shall deliver to each lender,

- (a) if clause (1) (b) applies, an original of the report referred to therein; and
- (b) if clause (1) (c) applies, a copy of the declaration of trust.

**Requirement to add to file maintained under subs. (1)**

(4) Each time the licensee or any licensee of the same firm of licensees does an act described in subsection (5), the licensee shall add to the file maintained for the charge the investment authority referred to in clause (1) (a), completed anew and signed by each lender before the act is done, and a copy of the report on the investment referred to in clause (1) (b), also completed anew.

**Application of subs. (4)**

- (5) Subsection (4) applies in respect of the following acts:
  - 1. Making a change in the priority of the charge that results in a reduction of the amount of security available to it.
  - 2. Making a change to another charge of higher priority that results in a reduction of the amount of security available to the lender's charge.
  - 3. Releasing collateral or other security held for the loan.
  - 4. Releasing a person who is liable under a covenant with respect to an obligation in connection with the loan.

### **New requirement to provide documents to lender**

(6) Forthwith after completing anew the report on the investment under subsection (4), the licensee shall deliver an original of it to each lender.

### **Requirement to add to file maintained under subs. (1): substitution**

(7) Each time the licensee or any other licensee of the same firm of licensees substitutes for the charge another security or a financial instrument that is an acknowledgment of indebtedness, the licensee shall add to the file maintained for the charge the lender's written consent to the substitution, obtained before the substitution is made.

### **Exceptions**

(8) The licensee need not comply with subsection (4) or (7) with respect to a lender if clause (2) (a), (b), (c), (e) or (f) applied to the lender in the original loan transaction.

### **Investment authority: Form 9D**

(9) The investment authority required under clause (1) (a) shall be in Form 9D.

### **Report on investment: Form 9E**

(10) Subject to subsection (11), the report on the investment required under clause (1) (b) shall be in Form 9E.

### **Report on investment: alternative to Form 9E**

(11) The report on the investment required under clause (1) (b) may be contained in a reporting letter addressed to the lender or lenders which answers every question on Form 9E.

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**Form 9A**

**Electronic Trust Transfer Requisition**

Requisition (*number*)

Amount of funds to be transferred: (*Specify amount.*)

Re:

(*Specify name of client.*)

(*Specify file reference number.*)

Reason for payment: (*Give reason for payment.*)

Trust account to be debited:

Name of financial institution: (*Specify name.*)

Account number: (*Specify number.*)

Name of recipient: (*Specify name.*)

Account to be credited:

Name of financial institution: (*Specify name.*)

Branch name and address: (*Specify name and address.*)

Account number: (*Specify number.*)

Person requisitioning electronic trust transfer: (*Print the person's name.*)

(*Date*) (*Signature of person requisitioning electronic trust transfer*)

Additional transaction particulars:

(*This section should be completed by the person entering the details of the transfer, after he or she has entered the details of the transfer, and by the person authorizing the transfer at the computer terminal, after he or she has authorized the transfer.*)

Person entering details of transfer:

Name: (*Print person's name.*)

(*Signature of person entering details of transfer.*)

Person authorizing transfer at computer terminal:

Name: *(Print person's name.)*

*(Signature of person authorizing transfer at computer terminal.)*

[SAMPLE]  
**FORM 9A**  
**ELECTRONIC TRUST TRANSFER REQUISITION**

Requisition #ET001

Amount of funds to be transferred: **\$593.05**

Re: **Noir purchase from Blanc, 123 Main St., Anytown**

Client: **Nicky Noir**

File No.: **07-43**

Reason for payment: **Fees (\$500) disbursements (\$54.25) and GST (\$38.80) billed to client**

Trust account to be debited:

Name of financial institution: **Bank of Ontario**

Account number: **123456789**

Name of recipient: **Leslie Lawyer, General Account**

Account to be credited:

Name of financial institution: **Bank of Ontario**

Branch name and address: **20 Downtown St., Anytown, ON Z9Y 2T2**

Account number: **987654321**

Person requisitioning electronic trust transfer: **Leslie Lawyer**

**August 29, 2007**

*Leslie Lawyer*

Additional transaction particulars:

Person entering details of transfer:

Name: **Sandy Secretary**

**Sandy Secretary**

Person authorizing transfer at computer terminal:

Name: **Bobby Bookkeeper**

**Bobby Bookkeeper**

**Form 9B**

**Authorization of Withdrawal by Teranet**

Authorization (*number*)

Amount of funds to be withdrawn: (*Specify amount.*)

Re:

(*Specify name of client.*)

(*Specify file reference number.*)

Reason for withdrawal: (*Give reason for withdrawal, e.g., payment of land transfer tax, document registration fees.*)

Trust account to be debited:

Name of financial institution: (*Specify name.*)

Account number: (*Specify number.*)

Person authorizing withdrawal: (*Print the person's name.*)

(*Date*) (*Signature of person authorizing withdrawal*)

[SAMPLE]

**FORM 9B**

**AUTHORIZATION OF WITHDRAWAL BY TERANET**

Authorization **TW001**

Amount of funds to be withdrawn: **\$2,366.40**

Re: **Noir purchase from Blanc, 456 Route St., Anytown**

Client: **Nicky Noir**

File No. **03-43**

Reason for withdrawal: **LTT (\$2,225.00), Reg'n fees - Transfer/Charge (\$70.70 x 2)**

Trust account to be debited:

Name of financial institution: **Bank of Ontario**

Account number: **456789123**

Person authorizing withdrawal: **Leslie Lawyer**

**August 15, 2007**

*Leslie Lawyer*



**Form 9C**

**Electronic Trust Transfer Requisition: Closing Funds**

Requisition (*number*)

Amount of funds to be transferred: (*Specify amount.*)

Re:

(*Specify name of client.*)

(*Specify file reference number.*)

Reason for payment: (*Give reason for payment.*)

Trust account to be debited:

Name of financial institution: (*Specify name.*)

Account number: (*Specify number.*)

Name of recipient: (*Specify name.*)

Account to be credited:

Name of financial institution: (*Specify name.*)

Branch name and address: (*Specify name and address.*)

Account number: (*Specify number.*)

Person requisitioning electronic trust transfer: (*Print the person's name.*)

(*Date*) (*Signature of person requisitioning electronic trust transfer*)

Person carrying out electronic trust transfer:

Name: (*Print person's name.*)

(*Signature of person carrying out electronic trust transfer.*)

**[SAMPLE]  
FORM 9C  
ELECTRONIC TRUST TRANSFER REQUISITION: CLOSING FUNDS**

Requisition #ETCR001

Amount of funds to be transferred: \$134,716.83

Re: **Noir purchase from Blanc, 456 Route St., Anytown**

Client: **Nicky Noir**

File No.: **07-43**

Reason for payment: **Balance due on closing payable to solicitor for vendor**

Trust account to be debited:

Name of financial institution: **Bank of Ontario**

Account number: **123456789**

Name of recipient: **Sydney Solicitor, Barrister & Solicitor**

Account to be credited:

Name of financial institution: **Bank of Ontario**

Branch name and address: **Pine & Cedar, 32 Pine St., Anytown**

Account number: **987654321**

Person requisitioning electronic trust transfer: **Leslie Lawyer**

**August 15, 2007**

*Leslie Lawyer*

Person carrying out electronic trust transfer:

Name: **Sandy Secretary**

**Sandy Secretary**

## Form 9D

### Investment Authority

*(Note to lawyer: This form is required in a private mortgage transaction whether or not the mortgage was arranged by you. Please have your client complete every point on this form, with "n/a" being noted if the point is not applicable. This form may be entered on a word processor. For the definition of mortgage broker and other terms found in the clause of the Lawyers' Professional Indemnity Company Policy found at the bottom of this form, please refer to the policy.)*

To: *(Specify name of lawyer or law firm.)*

I *(or we)* instruct you to act on my *(or our)* behalf, on my *(or our)* mortgage investment *(or investments)* of *(specify amount)*, the details, conditions and disclosures of which are set out below.

A. Details about the investment:

1. Name and address of borrower *(or borrowers)*: *(specify)*
2. Name and address of guarantor *(or guarantors)* *(if any)*: *(specify)*
3. Legal description and municipal address of real property: *(specify)*
4. Type of property: *(specify, e.g., residence, vacant land, etc.)*
5. (a) Principal amount of mortgage or charge: *(specify)*
5. (b) Amount of loan to be advanced by me *(or us)*: *(specify)*
6. Rank of mortgage or charge is first *(or specify other rank)*.
7. My *(or our)* investment of *(specify amount)* represents *(specify percentage)* of the total loan to the borrower *(or borrowers)*.
8. (a) I am *(or we are)* satisfied that the approximate value of the property is *(specify amount)*.
8. (b) I *(or we)* used the following means to determine the approximate value of the property: *(specify)*.
8. (c) Including my *(or our)* mortgage amount, the percentage of the value of the property that is mortgaged *(or /encumbered)* is *(specify percentage)*.

9. (a) The term of loan is *(specify term of loan in months, years, etc.)*.
9. (b) The due date of loan is *(specify date)*.
9. (c) The loan is amortized over *(specify number of years)*.
10. The interest rate is *(specify interest rate)* calculated semi annually, not in advance *(or specify how interest rate is calculated)*.
11. Particulars of amounts and due dates *(monthly, quarterly, etc.)* of payments of principal and interest: *(specify)*
12. Particulars and amounts of any bonus or holdback or any other special terms: *(specify)*
13. (a) The mortgage is to be registered in the name *(or names)* of *(specify name or names)*.
13. (b) After completion of the mortgage transaction, a collection or administration fee of *(specify amount)* per instalment is payable by the investor *(or investors)* *(or borrower)* *(or borrowers)* to *(specify recipient of fee)*.
13. (c) If the mortgage is held in trust, the dates on which payments are to be made by the trustee *(if applicable)* to me *(or us)* are: *(specify dates)*
14. Particulars of disbursements made for legal, brokerage or other fees or commissions in connection with the placement of the loan, including the names of recipients and amounts paid, are: *(specify)*

B. Conditions:

1. *(Instructions: Clauses (a) and (b) below refer to information which each investor may require from the lawyer. If you require the information referred to in a clause, initial the clause.)*

The information which I *(or we)* require from you as my *(or our)* lawyer before you complete the transaction and make the advance is as follows:

- (a) If my *(or our)* investment will be in a position other than a first mortgage or charge, details, including amounts, of all existing encumbrances outstanding.
- (b) If the mortgage or charge is a syndicated mortgage, and a prospectus is necessary, a copy of the prospectus. We acknowledge and accept that you as my *(or our)* lawyer express no opinion as to the necessity for or validity of a prospectus.

2. *(Instructions: Each investor to complete and initial clause (a) and, if clause (a) is answered in the affirmative, to complete (if necessary) and initial clause (b) and to initial clause (c).)*

(a) I (or we) instruct you to obtain a current and independent appraisal of the subject property and provide it to me (or us) before you complete this mortgage transaction. *(Specify yes or no.)*

(b) The appraisal is to be paid by me (or us) or *(specify name of person who is to pay for appraisal)*.

(c) I (or we) have been advised and accept that you as my (or our) lawyer do not express an opinion as to the validity of the appraisal.

C. Disclosure:

1. I (or we) acknowledge being advised by you as my (or our) lawyer that you do not have any direct or indirect interest in the borrower (or borrowers). *(Specify yes or no and indicate the date on which the lawyer advised you that he or she has no direct or indirect interest in the borrower or borrowers.)*

*(If the lawyer has an interest in the borrower or borrowers, he or she is unable to act for you on this loan (Rule 2.06 of the Rules of Professional Conduct).*

*(Warning:*

1. *You are cautioned that the responsibility for assessing the financial merits of the mortgage investment rests with the investor or investors at all times. The lawyer's responsibility is limited to ensuring the mortgage is legally registered on title in accordance with the investor's or investors' instructions. The lawyer is not permitted to personally guarantee the obligations of the borrower or borrowers nor the suitability of the property as security for the mortgage investment.*

2. *Any loss you may suffer on this mortgage investment will not be insured under the lawyer's professional liability policy if the lawyer has acted as a mortgage broker or has helped to arrange it.\*)*

I (or we) hereby acknowledge receipt of a copy of this form prior to the advance of funds to or on behalf of the borrower (or borrowers). I (or we) further acknowledge having read and understood the above warnings.

Investor (or Investors):

*(Specify full name of the investor (or full names of the investors) and specify the investor's (or each investor's) address.)*

*(Signature of the investor (or of each investor))*

*(Date of signature)*

*\*(Pursuant to clause (g) of Part III of the Professional Liability Insurance Policy for Lawyers, the policy does not apply “to any CLAIM directly or indirectly arising as a result of the INSURED acting as a MORTGAGE BROKER or as an intermediary arranging any financial transaction usual to mortgage lending; or to any CLAIM arising from circumstances where the INSURED has provided PROFESSIONAL SERVICES in conjunction with the above”.)*

[SAMPLE]  
**FORM 9D**  
**INVESTMENT AUTHORITY**

*(Note to lawyer: This form is required in a private mortgage transaction whether or not the mortgage was arranged by you. Please have your client complete every point on this form, with "n/a" being noted if the point is not applicable. This form may be entered on a word processor. For the definition of mortgage broker and other terms found in the clause of the Lawyers' Professional Indemnity Company Policy found at the bottom of this form, please refer to the policy.)*

To: *(Specify name of lawyer or law firm)* **Leslie Lawyer**

I *(or we)* instruct you to act on my *(or our)* behalf, on my *(or our)* mortgage investment *(or investments)* of *(specify amount)* **\$40,000.00**, the details, conditions and disclosures of which are set out below.

A. D DETAILS ABOUT THE INVESTMENT:

1. Name and address of borrower *(or borrowers)*: *(specify)*  
**Terry Taylor, 123 Main St., Anytown, ON Z9Y 8X7**
2. Name and address of guarantor *(or guarantors)* *(if any)*: *(specify)*  
**Kerry Taylor, 987 Townline Rd., Anytown, ON Z9Y 6W5**
3. Legal description and municipal address of real property: *(specify)*  
**Lot 10, Plan 20, Town of Anytown, County of Plenty  
123 Main St., Anytown, ON, Z9Y 8X7**
4. Type of property: *(specify, e.g., residence, vacant land, etc.)* **Residence**
5. (a) Principal amount of mortgage or charge: *(specify)* **\$40,000.00**  
(b) Amount of loan to be advanced by me *(or us)*: *(specify)* **\$40,000.00**
6. Rank of mortgage or charge is first *(or specify other rank)* **2nd (after payout and discharge of existing second mortgage)**
7. My *(or our)* investment of *(specify amount)* **\$40,000.00** represents *(specify percentage)* **100%** of the total loan to the borrower *(or borrowers)*.
8. (a) I am *(or we are)* satisfied that the approximate value of the property is *(specify amount)* **\$250,000.00**  
(b) I *(or we)* used the following means to determine the approximate value of the property: *(specify)* **Arm's length sale of property for \$250,000 in February 2007**

- (c) Including my (or our) mortgage amount, the percentage of the value of the property that is mortgaged (or /encumbered) is (specify percentage) **66% (after payout of existing second mortgage)**
9. (a) The term of loan is (specify term of loan in months, years, etc.) **1 Year.**  
 (b) The due date of loan is (specify date) **July 31, 2008.**  
 (c) The loan is amortized over (specify number of years) **15 Years.**
10. The interest rate is (specify interest rate) **7.5%** calculated semi annually, not in advance (or specify how interest rate is calculated).
11. Particulars of amounts and due dates (monthly, quarterly, etc.) of payments of principal and interest: (specify) **\$370.80 on the last day of each month**
12. Particulars and amounts of any bonus or holdback or any other special terms: (specify) **N/A**
13. (a) The mortgage is to be registered in the name (or names) of (specify name or names).  
**Kim Kirby**  
 (b) After completion of the mortgage transaction, a collection or administration fee of (specify amount) **N/A** per instalment is payable by the investor (or investors) (or borrower) (or borrowers) to (specify recipient of fee) **N/A.**  
 (c) If the mortgage is held in trust, the dates on which payments are to be made by the trustee (if applicable) to me (or us) are: (specify dates) **N/A**
14. Particulars of disbursements made for legal, brokerage or other fees or commissions in connection with the placement of the loan, including the names of recipients and amounts paid, are: (specify) **Legal fees \$400.00, Disbursements \$45.00, GST \$31.15, payable to Leslie Lawyer**

**B. C ONDITIONS:**

1. (Instructions: Clauses (a) and (b) below refer to information which each investor may require from the lawyer. If you require the information referred to in a clause, initial the clause.)

The information which I (or we) require from you as my (or our) lawyer before you complete the transaction and make the advance is as follows:

- (a) If my (or our) investment will be in a position other than a first mortgage or charge, details, including amounts, of all existing encumbrances outstanding.  
**“KK”**
- (b) If the mortgage or charge is a syndicated mortgage, and a prospectus is necessary, a copy of the prospectus. We acknowledge and accept that you as my (or our) lawyer express no opinion as to the necessity for or validity of a prospectus.



2. *(Instructions: Each investor to complete and initial clause (a) and, if clause (a) is answered in the affirmative, to complete (if necessary) and initial clause (b) and to initial clause (c).)*
- (a) I *(or we)* instruct you to obtain a current and independent appraisal of the subject property and provide it to me *(or us)* before you complete this mortgage transaction. *(Specify yes or no.)* **No “KK”**
- (b) The appraisal is to be paid by me *(or us)* or *(specify name of person who is to pay for appraisal).* **N/A**
- (c) I *(or we)* have been advised and accept that you as my *(or our)* lawyer do not express an opinion as to the validity of the appraisal. **N/A**

C. D DISCLOSURE:

1. I *(or we)* acknowledge being advised by you as my *(or our)* lawyer that you do not have any direct or indirect interest in the borrower *(or borrowers)*. *(Specify yes or no and indicate the date on which the lawyer advised you that he or she has no direct or indirect interest in the borrower or borrowers.)* **Yes, July 8, 2007**
- (If the lawyer has an interest in the borrower or borrowers, he or she is unable to act for you on this loan (Rule 7, Rules of Professional Conduct).)*

*(Warning:*

- 1. You are cautioned that the responsibility for assessing the financial merits of the mortgage investment rests with the investor or investors at all times. The lawyer's responsibility is limited to ensuring the mortgage is legally registered on title in accordance with the investor's or investors' instructions. The lawyer is not permitted to personally guarantee the obligations of the borrower or borrowers nor the suitability of the property as security for the mortgage investment.*
- 2. Any loss you may suffer on this mortgage investment will not be insured under the lawyer's professional liability policy if the lawyer has acted as a mortgage broker or has helped to arrange it.)\**

I *(or we)* hereby acknowledge receipt of a copy of this form prior to the advance of funds to or on behalf of the borrower *(or borrowers)*. I *(or we)* further acknowledge having read and understood the above warnings.

Investor *(or Investors)*: **Kim Kirby**  
**456 Avenue Rd., Anytown, ON Z9Y 4V3**

*(Specify full name of the investor (or full names of the investors) and specify the investor's (or each investor's) address.)*

*(Signature of the investor (or of each investor))*      **Kim Kirby**

*(Date of signature)* **July 30, 2007**

*\*(Pursuant to clause (g) of Part III of the Professional Liability Insurance Policy for Lawyers, the policy does not apply “to any CLAIM directly or indirectly arising as a result of the INSURED acting as a MORTGAGE BROKER or as an intermediary arranging any financial transaction usual to mortgage lending; or to any CLAIM arising from circumstances where the INSURED has provided PROFESSIONAL SERVICES in conjunction with the above.”)*

**Form 9E**  
**Report On The Investment**

*(Note to lawyer: In all private mortgage transactions, whether or not the mortgage was arranged by you, you must complete this form, or, alternatively, you must complete a reporting letter which includes responses to all numbered items in this form. If you complete this form, you must complete every numbered item on this form, with "n/a" being entered if the numbered item is not applicable. If you complete a reporting letter, you must respond to all numbered items in this form in your reporting letter. If a numbered item is not applicable, you must include it in your reporting letter and indicate that it is not applicable. After completion, an original of this form, or the reporting letter, must be delivered forthwith to each lender. This form may be entered on a word processor. For the definition of mortgage broker and other terms found in the clause of the Lawyers' Professional Indemnity Company Policy found at the bottom of this form, please refer to the policy.)*

To: *(Specify name and address of investor.)*

A. Details about the investment:

1. Name and address of borrower *(or borrowers): (specify)*
2. Name and address of guarantor *(or guarantors) (if any): (specify)*
3. Legal description and municipal address of real property: *(specify)*
4. Type of property: *(specify, e.g., residence, vacant land, etc.)*
5. (a) Principal amount of mortgage or charge: *(specify)*
5. (b) Amount of loan advanced by you: *(specify)*
6. Rank of mortgage or charge is first *(or specify other rank)*.
7. Your investment of *(specify amount)* represents *(specify percentage)* of the total of this loan to the borrower *(or borrowers)*.
8. Date principal advanced: *(specify)*
9. (a) The term of loan is *(specify term of loan in months, years, etc.)*.
9. (b) The due date of the loan is *(specify date)*.
9. (c) The loan is amortized over *(specify number of years)*.

10. The interest rate is (*specify interest rate*) calculated semi annually, not in advance (*or specify how interest rate is calculated*).
11. Particulars of amounts and due dates (*monthly, quarterly, etc.*) of payments of principal and interest: (*specify*)
12. Particulars and amounts of any bonus or holdback or any other special terms: (*specify*)
13. Details of any existing encumbrances, including rank on title, balances outstanding, mortgage name and maturity dates: (*specify*)
14. In those instances in which the mortgage or charge is a collateral security, or if the mortgage or charge is collaterally secured, the details of other security are: (*specify*)
15. (a) Particulars of disbursements made for legal, brokerage or other fees or commissions in connection with the placement of the loan, including the names of recipients and amounts paid, are: (*specify*)
15. (b) Alternatively, I have advised I cannot confirm what independent commissions or fees are being charged to the borrower.
16. Registration number, date of registration and land registry office location: (*specify*)
17. Insurance particulars (*where relevant*): (*specify*)

B. Conditions And Disclosure:

In accordance with your Form 9D [Investment Authority] request for information and disclosures prior to the advance of your money, I advise that I have previously provided you with the requested information and disclosures as follows:

1. Particulars of existing encumbrances outstanding: (*Specify yes or no, and if yes, specify date on which particulars were provided.*)
2. In the case of a syndicated mortgage where a prospectus was required, a copy of the prospectus: (*Specify yes or no, and if yes, specify date on which prospectus was provided.*)

I advised and you acknowledged that I gave no opinion as to the necessity or validity of a prospectus.

3. Independent appraisal: (*Specify yes or no, and if yes, specify date on which independent appraisal was provided.*)

I advised and you acknowledged that I gave no opinion as to the necessity or validity of an appraisal.

4. Any loss you may suffer on this mortgage investment will not be insured under the lawyers' professional liability policy if the lawyer has acted as a mortgage broker or has helped to arrange it.\*

I advised and you acknowledged having read and understood this warning.

*(Warning: You are cautioned that the responsibility for assessing the financial merits of the mortgage investment rests with the investor at all times. The lawyer's responsibility is limited to ensuring the mortgage is legally registered on title in accordance with the investor's instructions. The lawyer is not permitted to personally guarantee the obligations of the borrower or borrowers nor the suitability of the property as security for the mortgage investment.)*

*(Name of lawyer or law firm)*

*(Address of lawyer or law firm)*

*(Signature of lawyer)*

*(Date of signature)*

*\*(Pursuant to clause (g) of Part III of the Professional Liability Insurance Policy for Lawyers, the policy does not apply "to any CLAIM directly or indirectly arising as a result of the INSURED acting as a MORTGAGE BROKER or as an intermediary arranging any financial transaction usual to mortgage lending; or to any CLAIM arising from circumstances where the INSURED has provided PROFESSIONAL SERVICES in conjunction with the above".)*

[SAMPLE]  
**FORM 9E**  
**REPORT ON THE INVESTMENT**

*(Note to lawyer: In all private mortgage transactions, whether or not the mortgage was arranged by you, you must complete this form, or, alternatively, you must complete a reporting letter which includes responses to all numbered items in this form. If you complete this form, you must complete every numbered item on this form, with "n/a" being entered if the numbered item is not applicable. If you complete a reporting letter, you must respond to all numbered items in this form in your reporting letter. If a numbered item is not applicable, you must include it in your reporting letter and indicate that it is not applicable. After completion, an original of this form, or the reporting letter, must be delivered forthwith to each lender. This form may be entered on a word processor. For the definition of mortgage broker and other terms found in the clause of the Lawyers' Professional Indemnity Company Policy found at the bottom of this form, please refer to the policy.)*

To: *(Specify name and address of investor.)*

**Kim Kirby**  
**456 Avenue Rd., Anytown, ON Z9Y 4V3**

A. D DETAILS ABOUT THE INVESTMENT:

1. Name and address of borrower *(or borrowers): (specify)*  
**Terry Taylor, 123 Main St., Anytown, ON Z9Y 8X7**
2. Name and address of guarantor *(or guarantors) (if any): (specify)*  
**Kerry Taylor, 987 Townline Rd., Anytown, ON Z9Y 6W5**
3. Legal description and municipal address of real property: *(specify)*  
**Lot 10, Plan 20, Town of Anytown, County of Plenty**  
**123 Main St., Anytown, ON, Z9Y 8X7**
4. Type of property: *(specify, e.g., residence, vacant land, etc.)* **Residence**
5. (a) Principal amount of mortgage or charge: *(specify)* **\$40,000.00**  
(b) Amount of loan advanced by you: *(specify)* **\$40,000.00**
6. Rank of mortgage or charge is first *(or specify other rank)*. **2nd (after payout and discharge of existing second mortgage)**
7. Your investment of *(specify amount)* **\$40,000.00** represents *(specify percentage)* of the total of this loan to the borrower *(or borrowers)*. **100%**
8. Date principal advanced: *(specify)* **JULY 31, 2007**

9. (a) The term of loan is *(specify term of loan in months, years, etc.)*. **1 Year**  
 (b) The due date of the loan is *(specify date)*. **July 31, 2008**  
 (c) The loan is amortized over *(specify number of years)*. **15 Years**
10. The interest rate is *(specify interest rate)* calculated semi annually, not in advance *(or specify how interest rate is calculated)*. **7.5%**
11. Particulars of amounts and due dates *(monthly, quarterly, etc.)* of payments of principal and interest: *(specify)* **\$370.80 on the last day of each month.**
12. Particulars and amounts of any bonus or holdback or any other special terms:  
*(specify)* **N/A**
13. Details of any existing encumbrances, including rank on title, balances outstanding, mortgagee name and maturity dates: *(specify)* **Existing first mortgage, balance of \$121,945.74 at August 1, 2007, payable to Ontario Bank, Maturing February 1, 2009.**
14. In those instances in which the mortgage or charge is a collateral security, or if the mortgage or charge is collaterally secured, the details of other security are:  
*(specify)* **N/A**
15. (a) Particulars of disbursements made for legal, brokerage or other fees or commissions in connection with the placement of the loan, including the names of recipients and amounts paid, are: *(specify)* **Legal fees \$400.00, disbursements \$45.00, GST \$31.15, payable to Leslie Lawyer.**  
 (b) Alternatively, I have advised I cannot confirm what independent commissions or fees are being charged to the borrower. **N/A**
16. Registration number, date of registration and land registry office location: *(specify)*  
**Registration No. 987321, July 31, 2007, LRO for County of Plenty, Anytown**
17. Insurance particulars *(where relevant)*: *(specify)* **Ontario Insurance Company, Homeowners Policy No. 789123**

**B. C ONDITIONS AND DISCLOSURE:**

In accordance with your Form 18A [Investment Authority] request for information and disclosures prior to the advance of your money, I advise that I have previously provided you with the requested information and disclosures as follows:

1. Particulars of existing encumbrances outstanding: *(Specify yes or no, and if yes, specify date on which particulars were provided.)* **Yes, July 8, 2007**

2. In the case of a syndicated mortgage where a prospectus was required, a copy of the prospectus: *(Specify yes or no, and if yes, specify date on which prospectus was provided.)* **No, N/A**

I advised and you acknowledged that I gave no opinion as to the necessity or validity of a prospectus.

3. Independent appraisal: *(Specify yes or no, and if yes, specify date on which independent appraisal was provided.)* **No, N/A**

I advised and you acknowledged that I gave no opinion as to the necessity or validity of an appraisal.

4. Any loss you may suffer on this mortgage investment will not be insured under the lawyers' professional liability policy if the lawyer has acted as a mortgage broker or has helped to arrange it.\*

I advised and you acknowledged having read and understood this warning.

*(Warning: You are cautioned that the responsibility for assessing the financial merits of the mortgage investment rests with the investor at all times. The lawyer's responsibility is limited to ensuring the mortgage is legally registered on title in accordance with the investor's instructions. The lawyer is not permitted to personally guarantee the obligations of the borrower or borrowers nor the suitability of the property as security for the mortgage investment.)*

*(Name of lawyer or law firm)*

**Leslie Lawyer**

*(Address of lawyer or law firm)*

**10 Downtown St.  
Anytown, ON Z9Y 2T1**

*(Signature of lawyer)*

***Leslie Lawyer***

*(Date of signature)*

**August 22, 2007**

*\*(Pursuant to clause (g) of Part III of the Professional Liability Insurance Policy for Lawyers, the policy does not apply "to any CLAIM directly or indirectly arising as a result of the INSURED acting as a MORTGAGE BROKER or as an intermediary arranging any financial transaction usual to mortgage lending; or to any CLAIM arising from circumstances where the INSURED has provided PROFESSIONAL SERVICES in conjunction with the above".)*



# ONTARIO LAWYERS GAZETTE

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## NOTICE TO THE PROFESSION

# Real Estate Transactions – Use of Third Party Service Providers by Lenders to Process Residential Mortgages

IT HAS COME TO THE SOCIETY'S ATTENTION THAT SOME INSTITUTIONAL mortgage lenders have launched programs in which third party service providers process residential mortgages on behalf of the lender. The tasks performed by the third party service provider in these transactions may include instructing the lawyer on behalf of the lender, preparing the mortgage document, providing the mortgage advance to the lawyer and administering the reporting after closing.

The Society cautions members that some of the requirements imposed on lawyers retained to act in these transactions are inconsistent with the lawyers' obligations under the *Rules of Professional Conduct (Rules)* which can be accessed through the Law Society Web site at: [http://www.lsuc.on.ca/services/RulesProfCondpage\\_en.jsp](http://www.lsuc.on.ca/services/RulesProfCondpage_en.jsp).

Prior to accepting retainers to act in such transactions, lawyers must ensure that they are in a position to exercise independent professional judgment on behalf of clients, avoid conflicts of interest, practise competently and comply with their ethical obligations under the *Rules* and in law.

Lawyers who accept retainers to act in transactions involving third party service providers and fail to meet their ethical obligations may be guilty of professional misconduct. Lawyers engaged in these transactions must be particularly vigilant about the following issues.

## Avoidance of Conflicts of Interest

Rule 2.04 provides that lawyers have a duty to avoid conflicts of interest. Typically in residential real estate transactions, the lawyer acting for the

borrower in the transaction also acts for the institutional lender (bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business). The lawyer is able to act for both parties in the transaction because the interests of the parties are aligned. In transactions where lenders use third party service providers to process mortgages, the interests of the parties may diverge and the lawyer who acts in the transaction may be placed in a conflict of interest position. The following are some aspects of these lender programs that could place the lawyer in such a position:

- the terms of the mortgage and transaction have not been fully and adequately disclosed to the borrower at the time of the loan commitment. For example, the borrower has not been made aware that the mortgage will be processed through a third party or that the borrower must purchase title insurance for the lender from a specific title insurer at a specific cost;
- mortgage processing fees to be paid by the borrower to the third party are not adequately disclosed to the borrower or are hidden within other charges to be paid by the borrower;
- the fee payable by the borrower for the lender's title insurance policy is

- higher than the fee that would normally be payable for similar insurance from that title insurer;
- the borrower is required to purchase a lender's title insurance policy from a title insurer designated by the lender and the fee payable by the borrower for a combined lender and purchaser policy from that title insurer is higher than the fee payable for such insurance from other insurers;
  - the program creates incentives for the lawyer or borrower to purchase title insurance coverage from a specific title insurer;
  - the lawyer is instructed to describe mortgage processing fees payable to the third party by the borrower in a manner that could mislead the borrower;
  - the lender and/or the third party requires that the lawyer disclose confidential information regarding the business and affairs of the borrower client to the third party without the borrower's consent;
  - the borrower is required to authorize the lender to make the mortgage advance payable to the third party service provider rather than to the lawyer in trust;
  - the transaction has been structured in such a way that it would be in the borrower's best interest to obtain financing from another source.

### **Professional Independence**

A lawyer must be in a position to exercise independent professional judgment on behalf of clients. Rule 2.02 provides that a lawyer has a duty to be honest and candid when advising clients. Furthermore, the lawyer cannot be influenced by the lawyer's self-interest. Some lender programs require or encourage lawyers to enter into agreements with the third party service provider in which the lawyer agrees to handle transactions on certain terms and

conditions in exchange for certain benefits to the lawyer. Lawyers who enter into such agreements must ensure that the terms of the agreement do not prohibit them from meeting their ethical obligations.

A lawyer must be in a position to make full disclosure to the client of the existence of the relationship between the lawyer and the third party service provider and of the provisions of the agreement with the third party service provider. Pursuant to Rule 2.04, prior to accepting the retainer the lawyer must disclose the lawyer's conflicting interest to the client and must obtain the client's informed consent.

Furthermore the lawyer must be in a position to act in the best interests of the client and without interference from the third party. It would be improper for a lawyer to enter into an agreement with a third party service provider in which the lawyer agrees to misrepresent facts to the client, to perform tasks that are inconsistent with the lawyer's duty to the client or to handle transactions in a pre-determined manner notwithstanding that it may not be in the client's best interest to proceed in that manner.

### **Referral Fees**

Rule 2.08 provides that it is improper for a lawyer to give any financial or other reward to any person who is not a lawyer for the referral of clients. Some lender programs encourage lawyers to enter into agreements with the third party service provider whereby the lawyer agrees to pay the third party fees in exchange for

the referral of clients. **Such arrangements are contrary to the Rules.**

### **Unauthorized Practice**

A lawyer should consider whether the services being rendered by the third party service provider in the transaction are legal services. If so, pursuant to Rule 6.07, the lawyer has an obligation to assist in preventing the unauthorized practice of law. In such circumstances it would be improper for the lawyer to agree that the third party service provider may perform legal services in the transaction without the supervision or direction of the lawyer.

### **Risk Management**

Lawyers, prior to accepting retainers to act in transactions involving third party service providers, should clarify what their duties and obligations are to the third party service provider. Is the third party service provider also the lawyer's client? How will conflicts between the lender and the third party service provider be resolved?

In addition it would be prudent for the lawyer to clarify with the lender client prior to accepting the retainer whether the mortgage advance will be paid to the lawyer by the lender or by the third party service provider. Where the mortgage advance is being paid by the third party, lawyers should consider liability issues and the consequences for the lawyer and his or her clients if the mortgage advance is not made or if the advance is made and subsequently dishonoured. ■

### **Contact the Law Society**

Ontario lawyers who may be involved in such transactions and have concerns, should contact the Law Society at 416 947-3369 or at 1 800 668-7380, ext. 3369. They can also refer to the *Rules of Professional Conduct* available on the Law Society's website.

## Commentary

Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. If the conduct, whether within or outside the professional sphere, is such that knowledge of it would be likely to impair the client's trust in the lawyer, the Society may be justified in taking disciplinary action.

Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity.

“consent” means

- (a) a consent in writing, provided that where more than one person consents, each may sign a separate document recording his or her consent, or
- (b) an oral consent, provided that each person giving the oral consent receives a separate letter recording his or her consent;

“independent legal advice” means a retainer where

- (a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction,
- (b) the client's transaction involves doing business with
  - (i) another lawyer,
  - (ii) a corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded, or
  - (iii) a client of the other lawyer,
- (c) the retained lawyer has advised the client that the client has the right to independent legal representation,
- (d) the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from the other lawyer,

**Joint Retainer - Sample Form Acknowledgment and Consent For Use in Real Estate Transactions**

*(You should use your discretion and amend the form to suit the circumstances of the individual transaction)*

You have asked me/us to act as your solicitor (s) in the above (purchase, sale, mortgage, matter).

As you know I (we) have also been asked to act as solicitor(s) to \_\_\_\_\_ the (purchasers) (mortgagors) (mortgagees) (vendors) in the above matter.

In acting for more than one party, no information received in connection with the matter from one party can be treated as confidential so far as any of the others are concerned.

If a conflict develops that cannot be resolved, I (we) cannot continue to act for both or all of you and may have to withdraw completely.

*or alternatively where applicable*

I (we) confirm your agreement that if an issue contentious between you and \_\_\_\_\_ arises, I (we) may continue to advise \_\_\_\_\_ about the contentious matter and that I (we) will refer you to another lawyer.

*and where applicable*

I (we) confirm that you are aware that I (we) act regularly for and have a continuing relationship with \_\_\_\_\_ and that I (we) have recommended that you obtain independent legal advice about the joint retainer prior to retaining me (us).

If you still wish me (us) to act on your behalf in the above matter, please confirm your instructions by signing and returning the enclosed copy of this letter.

Yours very truly,

I acknowledge that I have read and understood the above letter. I consent to \_\_\_\_\_ acting on my behalf notwithstanding the conflict.

DATED at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ 2003.

\_\_\_\_\_  
(Signed)  
cc. copy to \_\_\_\_\_ for signing and return.

**DEALING WITH THE JOINT RETAINER RULE WHERE THE CLIENT'S CONSENT IS REQUIRED  
SUBRULES 2.04(6)-(10): PRACTICE TIPS**

The “joint retainer rule” [subrules 2.04 (6) to (10)] imposes duties on a lawyer *both* prior to accepting a joint retainer *and* during the course of the joint retainer. A joint retainer is one in which the lawyer accepts employment from more than one client in a matter or transaction. The following are some practice tips to assist you in dealing with the rule:

***PRIOR TO ACCEPTING A RETAINER***

**CONSIDER**

- Who are your clients?
- Is this a matter or transaction in which you are considering accepting employment from more than one client?

**If yes, advise each client that:**

- you have been asked to act for both or all of them,
- no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and
- if a conflict develops that cannot be resolved, you cannot continue to act for both or all of them and you may have to withdraw completely.

**OBTAIN THE CONSENT OF EACH CLIENT BY:**

- having the client execute a written consent, or
- obtaining the client's oral consent and sending a letter to the client recording his or her consent separately.

**YOU SHOULD RECOMMEND THAT THE CLIENT OBTAIN INDEPENDENT LEGAL ADVICE ABOUT THE JOINT RETAINER IF:**

- the client is more vulnerable or less sophisticated than the other or others.
- there are any other reasons why the client should obtain such advice.

**IF YOU HAVE A CONTINUING RELATIONSHIP WITH ANY OF THE CLIENTS FOR WHOM YOU ACT REGULARLY, YOU SHALL**

- advise the other client or clients of the continuing relationship and recommend that the other client or clients obtain independent legal advice about the joint retainer.

**CONSIDER OBTAINING THE AGREEMENT OF ALL CLIENTS THAT IF A CONTENTIOUS ISSUE ARISES YOU MAY CONTINUE TO ADVISE ONE OF THEM ABOUT THE CONTENTIOUS MATTER AND SHALL REFER THE OTHER OR OTHERS TO ANOTHER LAWYER.**

**YOU SHOULD AVOID ACTING FOR MORE THAN ONE CLIENT, EVEN THOUGH ALL PARTIES CONCERNED MAY CONSENT IF**

- it is likely that an issue contentious between the clients will arise or their interests, rights or obligations will diverge as the matter progresses.

**DURING THE RETAINER**

**WHERE CLIENTS HAVE CONSENTED TO A JOINT RETAINER AND A CONTENTIOUS ISSUE BETWEEN THEM OR SOME OF THEM ARISES, YOU SHALL**

- not advise any of them on the contentious issue unless the clients have previously agreed that you may continue to advise one of them about the contentious matter.
  - Where there is no such agreement, you shall refer the clients to other lawyers, unless legal advice is not required **and** the clients are sophisticated, in which case, the clients may settle the contentious issue by direct negotiation and without your participation.
- where the parties have previously agreed that you may continue to advise one of them about the contentious matter, refer the other client or clients to another lawyer.

**INDEPENDENT LEGAL ADVICE - RULE 1.02 DEFINITIONS  
GIVING INDEPENDENT LEGAL ADVICE PURSUANT  
TO THE RULES OF PROFESSIONAL CONDUCT: PRACTICE TIPS**

***PRIOR TO ACCEPTING THE RETAINER***

Consider whether you can give independent legal advice

1. Do you have a conflicting interest with respect to the client's transaction, that is,
  - do you have an interest that would be likely to affect adversely your judgment on behalf of, or loyalty to, the client or prospective client, or
  - do you have an interest that you might be prompted to prefer to the interests of the client or the prospective client?

If yes, you cannot give independent legal advice.

2. If no, does the client's transaction involve doing business with
  - another lawyer,
  - a corporation or other entity in which the other lawyer has an interest and the corporation is not a corporation or other entity whose securities are publicly traded, or
  - a client of the other lawyer?
3. If yes, you must advise the client that the client has the right to *independent legal representation*.

Independent legal representation means a retainer where the retained lawyer has no conflicting interest with respect to the client's transaction and ***will act as the client's lawyer in relation to the matter.***

4. If the client is content to waive the right to *independent legal representation*, you must obtain the client's express waiver of the right to independent legal representation and the client must elect to receive no legal representation or to receive legal representation from the other lawyer.

It would be prudent to confirm the client's instructions in writing.

**DURING THE RETAINER**

**YOU MAY NOW PROCEED TO PROVIDE THE CLIENT WITH INDEPENDENT LEGAL ADVICE.**

**YOU SHALL**

1. explain the legal aspects of the transaction to the client,
2. satisfy yourself that the client appears to understand the advice given, and
3. inform the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of the proposed investment from a business point of view.

**PLEASE NOTE THAT WHERE A CLIENT ELECTS TO WAIVE INDEPENDENT LEGAL REPRESENTATION AND TO RELY ON INDEPENDENT LEGAL ADVICE ONLY, THE RETAINED LAWYER HAS A RESPONSIBILITY THAT SHOULD NOT BE LIGHTLY ASSUMED OR PERFUNCTORILY DISCHARGED.**



**Joint Retainer - Sample Form Acknowledgment and Consent For Use in Real Estate Transactions**

*(You should use your discretion and amend the form to suit the circumstances of the individual transaction)*

You have asked me/us to act as your solicitor (s) in the above (purchase, sale, mortgage, matter).

As you know I (we) have also been asked to act as solicitor(s) to \_\_\_\_\_ the (purchasers) (mortgagors) (mortgagees) (vendors) in the above matter.

In acting for more than one party, no information received in connection with the matter from one party can be treated as confidential so far as any of the others are concerned.

If a conflict develops that cannot be resolved, I (we) cannot continue to act for both or all of you and may have to withdraw completely.

*or alternatively where applicable*

I (we) confirm your agreement that if an issue contentious between you and \_\_\_\_\_ arises, I (we) may continue to advise \_\_\_\_\_ about the contentious matter and that I (we) will refer you to another lawyer.

*and where applicable*

I (we) confirm that you are aware that I (we) act regularly for and have a continuing relationship with \_\_\_\_\_ and that I (we) have recommended that you obtain independent legal advice about the joint retainer prior to retaining me (us).

If you still wish me (us) to act on your behalf in the above matter, please confirm your instructions by signing and returning the enclosed copy of this letter.

Yours very truly,

I acknowledge that I have read and understood the above letter. I consent to \_\_\_\_\_ acting on my behalf notwithstanding the conflict.

DATED at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ 2003.

\_\_\_\_\_  
(Signed)  
cc. copy to \_\_\_\_\_ for signing and return.

**DEALING WITH THE JOINT RETAINER RULE WHERE THE CLIENT'S CONSENT IS REQUIRED  
SUBRULES 2.04(6)-(10): PRACTICE TIPS**

The "joint retainer rule" [subrules 2.04 (6) to (10)] imposes duties on a lawyer *both* prior to accepting a joint retainer *and* during the course of the joint retainer. A joint retainer is one in which the lawyer accepts employment from more than one client in a matter or transaction. The following are some practice tips to assist you in dealing with the rule:

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- you have been asked to act for both or all of them,
- no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and
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- having the client execute a written consent, or
- obtaining the client's oral consent and sending a letter to the client recording his or her consent separately.

**YOU SHOULD RECOMMEND THAT THE CLIENT OBTAIN INDEPENDENT LEGAL ADVICE ABOUT THE JOINT RETAINER IF:**

- the client is more vulnerable or less sophisticated than the other or others.
- there are any other reasons why the client should obtain such advice.

**IF YOU HAVE A CONTINUING RELATIONSHIP WITH ANY OF THE CLIENTS FOR WHOM YOU ACT REGULARLY, YOU SHALL**

- advise the other client or clients of the continuing relationship and recommend that the other client or clients obtain independent legal advice about the joint retainer.

**CONSIDER OBTAINING THE AGREEMENT OF ALL CLIENTS THAT IF A CONTENTIOUS ISSUE ARISES YOU MAY CONTINUE TO ADVISE ONE OF THEM ABOUT THE CONTENTIOUS MATTER AND SHALL REFER THE OTHER OR OTHERS TO ANOTHER LAWYER.**

**YOU SHOULD AVOID ACTING FOR MORE THAN ONE CLIENT, EVEN THOUGH ALL PARTIES CONCERNED MAY CONSENT IF**

- it is likely that an issue contentious between the clients will arise or their interests, rights or obligations will diverge as the matter progresses.

**DURING THE RETAINER**

**WHERE CLIENTS HAVE CONSENTED TO A JOINT RETAINER AND A CONTENTIOUS ISSUE BETWEEN THEM OR SOME OF THEM ARISES, YOU SHALL**

- not advise any of them on the contentious issue unless the clients have previously agreed that you may continue to advise one of them about the contentious matter.
  - Where there is no such agreement, you shall refer the clients to other lawyers, unless legal advice is not required **and** the clients are sophisticated, in which case, the clients may settle the contentious issue by direct negotiation and without your participation.
- where the parties have previously agreed that you may continue to advise one of them about the contentious matter, refer the other client or clients to another lawyer.

**INDEPENDENT LEGAL ADVICE - RULE 1.02 DEFINITIONS  
GIVING INDEPENDENT LEGAL ADVICE PURSUANT  
TO THE RULES OF PROFESSIONAL CONDUCT: PRACTICE TIPS**

***PRIOR TO ACCEPTING THE RETAINER***

Consider whether you can give independent legal advice

1. Do you have a conflicting interest with respect to the client's transaction, that is,
  - do you have an interest that would be likely to affect adversely your judgment on behalf of, or loyalty to, the client or prospective client, or
  - do you have an interest that you might be prompted to prefer to the interests of the client or the prospective client?

If yes, you cannot give independent legal advice.

2. If no, does the client's transaction involve doing business with
  - another lawyer,
  - a corporation or other entity in which the other lawyer has an interest and the corporation is not a corporation or other entity whose securities are publicly traded, or
  - a client of the other lawyer?
3. If yes, you must advise the client that the client has the right to *independent legal representation*.

Independent legal representation means a retainer where the retained lawyer has no conflicting interest with respect to the client's transaction and ***will act as the client's lawyer in relation to the matter.***

4. If the client is content to waive the right to *independent legal representation*, you must obtain the client's express waiver of the right to independent legal representation and the client must elect to receive no legal representation or to receive legal representation from the other lawyer.

It would be prudent to confirm the client's instructions in writing.

**DURING THE RETAINER**

**YOU MAY NOW PROCEED TO PROVIDE THE CLIENT WITH INDEPENDENT LEGAL ADVICE.**

**YOU SHALL**

1. explain the legal aspects of the transaction to the client,
2. satisfy yourself that the client appears to understand the advice given, and
3. inform the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of the proposed investment from a business point of view.

**PLEASE NOTE THAT WHERE A CLIENT ELECTS TO WAIVE INDEPENDENT LEGAL REPRESENTATION AND TO RELY ON INDEPENDENT LEGAL ADVICE ONLY, THE RETAINED LAWYER HAS A RESPONSIBILITY THAT SHOULD NOT BE LIGHTLY ASSUMED OR PERFUNCTORILY DISCHARGED.**

## **BY-LAW 7.1**

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### **OPERATIONAL OBLIGATIONS AND RESPONSIBILITIES**

#### **PART I**

##### **SUPERVISION OF ASSIGNED TASKS AND FUNCTIONS**

###### **Interpretation**

1. (1) In this Part,

“non-licensee” means an individual who,

- (a) in the case of the assignment of tasks and functions by a licensee who holds a Class L1 licence, is not a licensee who holds a Class L1 licence and, in the case of the assignment of tasks and functions by a licensee who holds a Class P1 licence, is not a licensee,
- (b) is engaged by a licensee to provide her or his services to the licensee, and
- (c) expressly agrees with the licensee that the licensee shall have effective control over the individual’s provision of services to the licensee;

“catastrophic impairment” means a catastrophic impairment within the meaning of the *Statutory Accident Benefits Schedule*;

“claim” means a claim for statutory accident benefits within the meaning of the *Insurance Act*;

“impairment” means an impairment within the meaning of the *Statutory Accident Benefits Schedule*;

“law firm” means a law firm within the meaning of section 29 of By-Law 4 [Licensing], except the reference to clause 61.0.1 (a) in that definition shall be read as a reference to clauses 61.0.1 (a) and (c);

“*Statutory Accident Benefits Schedule*” means the *Statutory Accident Benefits Schedule* within the meaning of the *Insurance Act*.

**Interpretation: “effective control”**

(2) For the purposes of subsection (1), a licensee has effective control over an individual’s provision of services to the licensee when the licensee may, without the agreement of the individual, take any action necessary to ensure that the licensee complies with the *Law Society Act*, the by-laws, the Society’s rules of professional conduct and the Society’s policies and guidelines.

**Application: provision of legal services by student**

2. (1) This Part does not apply to the provision of legal services by a student under the supervision of a licensee pursuant to subsection 34 (1) of By-Law 4.

**Application: provision of legal services by law student**

(2) This Part, subject to necessary modifications, does apply to the provision of legal services by a law student under the supervision of a licensee pursuant to subsection 34 (2) or (3) of By-Law 4.

**Assignment of tasks, functions: general**

3. (1) Subject to subsection (2), a licensee may, in accordance with this Part, assign to a non-licensee tasks and functions in connection with the licensee’s practice of law or provision of legal services in relation to the affairs of the licensee’s client.

**Assignment of tasks, functions: affiliation**

(2) A licensee who is affiliated with an entity under By-Law 7 may, in accordance with this Part, assign to the entity or its staff, tasks and functions in connection with the licensee’s practice of law or provision of legal services in relation to the affairs of the licensee’s client only if the client consents to the licensee doing so.

**Assignment of tasks, function: direct supervision required**

4. (1) A licensee shall assume complete professional responsibility for her or his practice of law or provision of legal services in relation to the affairs of the licensee’s clients and shall directly supervise any non-licensee to whom are assigned particular tasks and functions in connection with the licensee’s practice of law in relation to the affairs of each client.

- (2) Without limiting the generality of subsection (1),
  - (a) the licensee shall not permit a non-licensee to accept a client on the licensee's behalf;
  - (b) the licensee shall maintain a direct relationship with each client throughout the licensee's retainer;
  - (c) the licensee shall assign to a non-licensee only tasks and functions that the non-licensee is competent to perform;
  - (d) the licensee shall ensure that a non-licensee does not act without the licensee's instruction;
  - (e) the licensee shall review a non-licensee's performance of the tasks and functions assigned to her or him at frequent intervals;
  - (f) the licensee shall ensure that the tasks and functions assigned to a non-licensee are performed properly and in a timely manner;
  - (g) the licensee shall assume responsibility for all tasks and functions performed by a non-licensee, including all documents prepared by the non-licensee; and
  - (h) the licensee shall ensure that a non-licensee does not, at any time, act finally in respect of the affairs of the licensee's client.

**Assignment of tasks, functions: prior express instruction and authorization required**

- 5. (1) A licensee shall give a non-licensee express instruction and authorization prior to permitting the non-licensee,
  - (a) to give or accept an undertaking on behalf of the licensee;
  - (b) to act on behalf of the licensee in respect of a scheduling or other related routine administrative matter before an adjudicative body; or
  - (c) to take instructions from the licensee's client.

**Assignment of tasks, functions: prior consent and approval**

- (2) A licensee shall obtain a client's consent to permit a non-licensee to conduct routine negotiations with third parties in relation to the affairs of the licensee's client and shall approve the results of the negotiations before any action is taken following from the negotiations.

**Assignment of tasks, functions: mediation of ancillary issues relating to catastrophic impairment claims**



5.1 (1) Despite clause 6 (1) (c), a licensee who holds a Class L1 licence may permit a non-licensee who holds a Class P1 licence to participate in mediation of ancillary issues relating to a claim of an individual who has or appears to have a catastrophic impairment, but only if the non-licensee is employed by the licensee or by the law firm of which the licensee is a member.

(2) For the purposes of subsection (1), ancillary issues do not include issues relating to the determination of whether an impairment is a catastrophic impairment.

### **Tasks and functions that may not be assigned: general**

6. (1) A licensee shall not permit a non-licensee,
- (a) to give the licensee's client legal advice;
  - (b) to act on behalf of a person in a proceeding before an adjudicative body, other than on behalf of the licensee in accordance with subsection 5 (1), unless the non-licensee is authorized under the *Law Society Act* to do so;
  - (c) to conduct negotiations with third parties, other than in accordance with subsection 5 (2);
  - (d) to sign correspondence, other than correspondence of a routine administrative nature; or
  - (e) to forward to the licensee's client any document, other than a routine document, that has not been previously reviewed by the licensee.

### **Tasks and functions that may not be assigned by Class L1 licensee**

(2) A licensee who holds a Class L1 licence shall not permit a non-licensee to use the licensee's personalized specially encrypted diskette in order to access the system for the electronic registration of title documents.

### **Collection letters**

7. A licensee shall not permit a collection letter to be sent to any person unless,
- (a) the letter is in relation to the affairs of the licensee's client;
  - (b) the letter is prepared by the licensee or by a non-licensee under the direct supervision of the licensee;
  - (c) if the letter is prepared by a non-licensee under the direct supervision of the licensee, the letter is reviewed and approved by the licensee prior to it being sent;
  - (d) the letter is on the licensee's business letterhead; and

- (e) the letter is signed by the licensee.

## **PART II**

### **OBLIGATIONS RESULTING FROM SUSPENSION**

#### **Interpretation**

8. In this Part,

“existing client” means,

- (a) a person who is a client of a suspended licensee when a suspension order is made against the licensee, or
- (b) a person who becomes a client of the suspended licensee after the suspension order is made but before the suspension begins;

“former client” means a person who was a client of a suspended licensee before a suspension order was made against the licensee but who was not a client when the order was made;

“prospective client” means a person who seeks to retain a suspended licensee after the suspension order is made the licensee but before the suspension begins;

“suspended licensee” means a licensee who holds a Class L1 licence or a Class P1 licence and who is the subject of a suspension order;

“suspension order” means an order made under the Act suspending a licensee’s licence to practise law in Ontario as a barrister and solicitor or to provide legal services in Ontario, regardless of whether the suspension begins when the order is made or thereafter.

#### **Notice requirements before suspension begins**

9. (1) A suspended licensee shall before the suspension begins, but not later than the date on which the suspension begins,

- (a) notify every existing client, on whose matters the work will not be completed by the suspended licensee before the suspension begins, of the suspension order and that,
  - (i) the suspended licensee will be unable to complete the work,
  - (ii) the client will need to retain another licensee to complete the work, and

- (iii) the suspended licensee, subject to any rights that the suspended licensee may have over the client's file, will transfer the file to the licensee, if any, retained by the client to complete the work or will return the file to the client; and
- (b) notify every existing client and former client for whom the suspended licensee performs or has performed the work described in subsection 14 (1) of the name and contact information of the licensee to whom the suspended licensee has given possession of the client's documents and files.

**Compliance with subclauses (1) (a) (i) to (iii) not required**

(2) A suspended licensee is not required to comply with the notice requirements mentioned in subclauses (1) (a) (i) to (iii) if the only work remaining to be completed on the client's matter is work mentioned in section 12 or 13, but, in such a case, the suspended licensee shall, before the suspension begins, notify the client of the name and contact information of the licensee retained by the suspended licensee to complete the work.

**Notice requirements: during suspension**

10. A suspended licensee shall, during the suspension,
- (a) notify all persons who contact the suspended licensee's place of business of the suspension order; and
  - (b) notify any existing client or former client who contacts the suspended licensee's place of business of the name and contact information of another licensee who has been given possession of the clients' documents and files.

**Notice requirements: prospective clients**

11. A suspended licensee, at the time a prospective client seeks to retain the suspended licensee, shall notify the prospective client of the suspension order.

**Work remaining on file: final report to client**

12. If, on the date the suspension begins, the only work remaining for a suspended licensee to complete on a client's matter is a final report to the client, the suspended licensee shall, before the suspension begins, retain another licensee, who is authorized to do so, to review the client's file and to complete and send the final report to the client.

**Work remaining on file: fulfillment of undertakings**

13. If, on the date the suspension begins, the only work remaining for a suspended licensee to complete on a client's matter is the fulfillment of one or more undertakings given by the

suspended licensee, the suspended licensee shall retain another licensee or person, who is authorized to do so, to take all steps necessary to fulfill the undertakings.

**Additional requirements: preparation of will, power of attorney, corporate records**

14. (1) This section applies to a suspended licensee who performs or has performed any of the following work for a client:

1. Preparation of a will.
2. Preparation of a power of attorney.
3. Preparation of, or preparation and continued maintenance of, corporate records.

**Requirement re original documents**

- (2) A suspended licensee shall, before the suspension begins,
  - (a) return to the client all original documents; or
  - (b) transfer the client's file, including all original documents, to another licensee who is authorized to perform any requisite work.

**Real estate law: direction re Teranet access disk**

15. A suspended licensee who has access to the Teranet system shall, on or before the date the suspension begins, complete and file with the Society, in a form provided by the Society, a direction authorizing the Society to take all steps necessary to cancel the suspended licensee's Teranet access disk for the period of the suspension.

**Return of photo identification card**

16. A suspended licensee shall, on or before the date the suspension begins, return to the Society any photo identification card issued to her or him by the Society.

**Students**

17. A suspended licensee, who has accepted a person into service under articles of clerkship where the period of service includes any or all of the period of the suspension, shall, before the suspension begins,

- (a) notify the person of the suspension order and that the suspended licensee will not be able to retain the person in service under articles of clerkship after the suspension begins;

- (b) arrange for another licensee, who is authorized and approved by the Society to do so, to accept the person into service under articles of clerkship after the suspension begins; and
- (c) arrange with the Society for the person's service under articles of clerkship to be transferred from the suspended licensee to the other licensee effective the date on which the suspension begins.

### **Report to Society on compliance**

18. A suspended licensee shall, not later than thirty days after the suspension begins, complete and file with the Society, in a form provided by the Society, a report confirming and providing details of the suspended licensee's compliance with this Part.

### **Permission to be exempt from requirement**

19. A suspended licensee may apply in writing to the Society for an exemption from or a modification of a requirement mentioned in this Part, and the Society may exempt the suspended licensee from or modify the requirement, subject to such terms and conditions as the Society may impose.

## **PART III**

### **CLIENT IDENTIFICATION AND VERIFICATION**

#### **Definitions**

20. In this Part,

“electronic funds transfer” means the transfer of funds from one financial institution or financial entity to another initiated by the transmission, through any electronic, magnetic or optical device, telephone instrument or computer, of instructions for the transfer of funds, where the record of the transfer includes a reference number, the name of the financial institution or financial entity sending the funds, the name of the financial institution or financial entity receiving the funds, the date of the transfer of the funds, the amount of funds transferred, the currency of the funds transferred, the name of the holder of the account from which the funds transferred are drawn and the name of the holder of the account to which the funds transferred are deposited;

“financial entity” means a financial entity headquartered and operating in a country that is a member of the Financial Action Task Force on Money Laundering;

“financial institution” means,

- (a) a bank to which the *Bank Act* (Canada) applies,

- (b) an authorized foreign bank within the meaning of section 2 of the *Bank Act* (Canada) in respect of its business in Canada,
- (c) a cooperative credit society, savings and credit union, credit union or caisse populaire that is regulated by an Act of a province or territory of Canada,
- (d) an association that is regulated by the *Cooperative Credit Associations Act* (Canada),
- (e) a company to which the *Trust and Loan Companies Act* (Canada) applies,
- (f) a loan or trust corporation regulated by an Act of a province or territory of Canada,
- (g) a ministry, department or agent of the government of Canada or of a province or territory of Canada if the ministry, department or agent accepts deposit liabilities in the course of providing financial services to the public, or
- (h) a subsidiary of an entity mentioned in clauses (a) to (g) where the financial statements of the subsidiary are consolidated with the financial statements of the entity;

“funds” means cash, currency, securities, negotiable instruments and other financial instruments that indicate a person’s title or interest in them;

“lawyer” means an individual who is authorized to practise law in a province or territory of Canada outside Ontario;

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

“proceeding” means a proceeding before an adjudicative body;

“public body” means,

- (a) a ministry, department or agent of the government of Canada or of a province or territory of Canada,
- (b) a municipality incorporated by or under an Act of a province or territory of Canada, including a city, town, village, metropolitan or regional municipality, township, district, county, rural municipality, any other incorporated municipal body and an agent 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* and any similar body incorporated under the law of another province or territory,

- (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) a body incorporated by or under an Act of Canada or of a province or territory of Canada for a public purpose, or
- (f) a subsidiary of an entity mentioned in clauses (a) to (e) where the financial statements of the subsidiary are consolidated with the financial statements of the entity;

“reporting issuer” means,

- (a) a reporting issuer within the meaning of an Act of a province or territory of Canada in respect of the securities law of the province or territory,
- (b) a corporation whose shares are traded on a stock exchange designated under section 262 of the *Income Tax Act* (Canada) and that operates in a country that is a member of the Financial Action Task Force on Money Laundering, or
- (c) a subsidiary of an entity mentioned in clause (a) or (b) where the financial statements of the subsidiary are consolidated with the financial statements of the entity;

“securities dealer” means a person authorized under an Act of a province or territory of Canada to engage in the business of dealing in securities or any other financial instruments or to provide portfolio management or investment advising services.

### **Application of Part**

21. This Part applies only to matters in respect of which a licensee is retained to provide her or his professional services after this Part comes into force regardless of whether the client is a new or existing client.

### **Application of client identification and verification requirements**

22. (1) Subject to subsections (2), (3) and (4), a licensee shall,
- (a) when the licensee is retained to provide her or his professional services to a client, comply with the client identification requirements set out in subsection 23 (1); and
  - (b) when the licensee engages in or gives instructions in respect of the receiving, paying or transferring of funds,
    - (i) comply with the client identification requirements set out in subsection 23 (2), and

- (ii) comply with the client verification requirements set out in subsection 23 (4).

### **Exemption re certain licensees**

(2) A licensee is not required to comply with the client identification and verification requirements set out in section 23 if,

- (a) the licensee is engaged in the activities described in subsection (1) on behalf of her or his employer;
- (b) the licensee is engaged in the activities described in subsection (1) as agent for another licensee or a lawyer who has already complied with the client identification and verification requirements set out in section 23;
- (c) the licensee is engaged in the activities described in subsection (1) for a client referred to the licensee by another licensee or a lawyer who has already complied with the client identification and verification requirements set out in section 23; or
- (d) the licensee is engaged in the activities described in subsection (1), other than the activities described in clause (1) (b), as a duty counsel under the *Legal Aid Services Act, 1998*, as a duty counsel providing professional services through a duty counsel program operated by a not-for-profit organization or as a provider of legal aid services through the provision of summary advice under the *Legal Aid Services Act, 1998*.

### **Exemptions re certain funds**

(3) A licensee is not required to comply with the client identification requirements set out in subsection 23 (2) or the client verification requirements set out in subsection 23(4) in respect of funds,

- (a) paid to or received from a financial institution, public body or reporting issuer;
- (b) received from the trust account of another licensee or a lawyer;
- (c) received from a peace officer, law enforcement agency or other public official acting in an official capacity;
- (d) paid or received pursuant to a court order;
- (e) paid to pay a fine or penalty;
- (f) paid or received as a settlement in a proceeding;



- (g) paid or received for professional fees, disbursements, expenses or bail; or
- (h) paid, received or transferred by electronic funds transfer.

### **Exemptions re certain clients**

(4) A licensee is not required to comply with the client identification requirements set out in subsection 23 (2) or the client verification requirements set out in subsection 23 (4) in respect of any of the following clients:

- 1. A financial institution.
- 2. A public body.
- 3. A reporting issuer.

### **Client identification**

23. (1) When a licensee is retained to provide her or his professional services to a client, the licensee shall obtain the following information about the client:

- 1. The client's full name.
- 2. The client's business address and business telephone number, if applicable.
- 3. If the client is an individual, the client's home address and home telephone number.
- 4. 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.
- 5. If the client is an individual, the client's occupation or occupations.
- 6. If the client is an organization, other than a financial institution, public body or reporting issuer, the general nature of the type of business or businesses or activity or activities engaged in by the client.
- 7. If the client is an organization, the name, position and contact information for each individual who gives instructions with respect to the matter for which the licensee is retained.
- 8. If the client is acting for or representing a third party, information about the third party as set out in paragraphs 1 to 7, as applicable.

## **Same**

(2) When a licensee is engaged in the activities described in clause 22 (1) (b) and the client or any third party that the client is acting for or representing is an organization, in addition to complying with the client identification requirements set out in subsection (1), the licensee shall make reasonable efforts to obtain the following information about the client and the third party:

1. The name and occupation or occupations of each director of the organization, other than an organization that is a securities dealer.
2. The name, address and occupation or occupations of each person who owns twenty-five percent or more of the organization or of the shares of the organization.

## **Client identification, identification by others in licensee's firm**

(2.1) A licensee complies with the identification requirements set out in subsections (1) and (2) if an employee of the licensee's firm or another licensee who practises law or provides legal services through the licensee's firm, acting on behalf of the licensee, complies with the requirements.

## **Client identification, previous identification**

(3) A licensee complies with the identification requirements set out in subsection (2) if the licensee or another individual acting on behalf of the licensee under subsection (2.1) has previously complied with the identification requirements and has also previously complied with the verification requirements set out in subsection (4) in respect of the organization.

## **Client verification requirements**

(4) When a licensee is engaged in the activities described in clause 22 (1) (b), the licensee shall take reasonable steps to verify the identity of the client and any third party that the client is acting for or representing using what the licensee reasonably considers to be reliable, independent source documents, data or information.

## **Timing of verification, individuals**

(5) A licensee shall verify the identity of an individual mentioned in subsection (1), including an individual mentioned in paragraph 7, immediately after first engaging in the activities described in clause 22 (1) (b).

## **Timing of verification, organizations**

(6) A licensee shall verify the identity of an organization mentioned in subsection (1) by not later than 60 days after first engaging in the activities described in clause 22 (1) (b).

## **Examples of independent source documents**

(7) The following are examples of independent source documents for the purposes of subsection (4):

1. If the client or third party is an individual, an original government issued identification that is valid and has not expired, including a driver's licence, birth certificate, provincial or territorial health card (if such use of the card is not prohibited by the applicable provincial or territorial law), passport or similar record.
2. 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, which includes the names of the organization's directors, if 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.
3. If the client or third party is an organization other than a corporation or society, such as a trust or partnership which is not registered in any government registry, 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.

## **Client verification, non-face-to-face**

(8) When a licensee is engaged in the activities described in clause 22 (1) (b) and the licensee is not receiving instructions from an individual face-to-face, the licensee complies with the verification requirements set out in subsection (4) if the licensee obtains an attestation from a person described in subsection (9) that the person has seen the appropriate independent source documents.

## **Persons from whom attestations may be accepted**

(9) For the purposes of section (8), a licensee may obtain an attestation from the following persons:

1. If the client whose identity is being verified is present in Canada,
  - i. a person entitled to administer oaths and affirmations in Canada, or
  - ii. any of the following persons:
    - A. a dentist,
    - B. a physician,
    - C. a chiropractor,
    - D. a judge,
    - E. a magistrate or a justice of the peace,
    - F. a lawyer,
    - G. a licensee (in Ontario)
    - H. a notary (in Quebec),
    - I. a notary public,
    - J. an optometrist,
    - K. a pharmacist,
    - L. an accountant,
    - M. a professional engineer,
    - N. a veterinarian,
    - O. a police officer,
    - P. a nurse,
    - Q. a school principal.
2. If the client whose identity is being verified is not present in Canada, a person acting on behalf of the licensee under clause (11) (b).

**Attestation, form**

(10) For the purposes of subsection (8), an attestation shall be endorsed on a legible photocopy of the document and shall include,

- (a) the name, occupation 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 document seen by the person providing the attestation.

**Client verification, use of agent, etc.**

(11) A licensee complies with the verification requirements set out in subsection (4) if,

- (a) an employee of the licensee's firm or another licensee who practises law or provides legal services through the licensee's firm, acting on behalf of the licensee, complies with the requirements; or
- (b) an individual who is not an individual mentioned in clause (a), acting on behalf of the licensee, complies with the requirements, provided that the licensee and the individual, prior to the individual acting on behalf of the licensee, enter into a written agreement specifying the steps that the individual will be taking on behalf of the licensee to comply with the verification requirements.

**Client verification, previous verification**

(12) A licensee complies with the verification requirements set out in subsection (4),

- (a) in the case of an individual mentioned in subsection (1), if the licensee has previously complied with the verification requirements set out in subsection (4) in respect of the individual and recognizes the individual; and
- (b) in the case of an organization mentioned in subsection (1), the licensee or an individual acting on behalf of the licensee under subsection (11) has previously complied with the identification requirements set out in subsection (2) and the verification requirements set out in subsection (4) in respect of the organization.

**Copies to be obtained**

(13) The licensee shall obtain a copy of every document used to verify the identity of any individual or organization for the purposes of subsection (4), including a copy of every document used by an individual acting on behalf of the licensee under subsection (11).

**Record retention**

(14) The licensee shall retain a record of the information obtained for the purposes of subsections (1) and (2) and copies of all documents received for the purposes of subsection (4) for the longer of,

- (a) the duration of the licensee 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 licensee was retained.

### **Criminal activity, duty to withdraw at time of taking information**

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

- (a) immediately cease to and not further engage in any activities that would assist the client in fraud or other illegal conduct; and
- (b) if the licensee is unable to comply with clause (a), withdraw from the provision of the licensee's professional services to the client.

### **Commencement**

25. This Part comes into force on December 31, 2008.

## **PART IV**

### **WITHDRAWAL OF SERVICES**

#### **Application of Part**

26. This Part applies to all matters in respect of which a licensee is retained to provide her or his professional services to a client, including matters in respect of which the licensee was retained before this Part came into force and matters in respect of which the licensee is retained after that time regardless of whether the client is a new or existing client.

#### **Criminal activity, duty to withdraw after being retained**

27. If a licensee while retained by a client knows or ought to know that he or she is or would be assisting the client in fraud or other illegal conduct, the licensee shall,

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

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

## Notice to the Profession - July 23, 2004

### Law Society warning to real estate practitioners re: fraud

The Law Society of Upper Canada is aware of increasing instances of fraud in relation to mortgage loan transactions. These frauds usually involve either complicit or fraudulent purchasers, and/or real estate agents, mortgage brokers and unfortunately, in some cases, lawyers.

Typically, mortgage fraud involves the use of false identities and the artificial inflation of property values. Both these elements can be present in the same transaction.

### Use of False Identity

The Law Society has identified two predominant ways false identity is used to perpetrate mortgage fraud:

- Identities of purchasers and mortgagors in real estate transactions are created by appropriating the identity particulars of real persons.
- Impostors pose as lawyers representing fictitious purchasers. These impostors appropriate and use the identities of lawyers in good standing with the Law Society to fraudulently secure mortgage loans on properties for fictitious purchasers. In these instances, the contact information provided to the vendor's lawyer is fake.

In one situation, a wholly fictitious law firm was fabricated together with contact information.

Lawyers are reminded that it is important to verify the identity of new clients by requesting and copying identity information, including photo identification, for their file. If concerned about the identity of a lawyer acting in a transaction, lawyers should consider verifying that the address and phone number of that lawyer match the information on file with the Law Society. This can be done easily by searching through the [Law Society's online member directory](#). Lawyers may also contact the Law Society at 416-947-3315 or toll-free at 1-800-668-7380, ext.3315.

Lawyers should be vigilant about protecting their personal information. Lawyers and their staff must safeguard their diskettes and pass phrases used to access the electronic registration of title documents system in accordance with subrules 5.01(7) and (8) of the [Rules of Professional Conduct](#). You can review these subrules online.



## **Artificial Inflation of Property Values**

Often in fraudulent mortgage transactions, the true market value of the property is artificially inflated to deceive the mortgage lender. This is commonly accomplished in two ways:

- "Flips" - In these cases there will be an immediate resale to a complicit purchaser of the property at a substantially higher value and only the resale particulars are disclosed to the mortgage lender.
- "Misrepresentations of Purchase Price" - The documentation submitted to the lender for the purpose of obtaining financing indicates a higher purchase price than the actual purchase price. For example, the agreement of purchase and sale may indicate that a deposit was paid where in fact no deposit was paid, or the purchaser receives a substantial credit against the purchase price on closing for repairs/renovations, and the lender is not made aware of this.

The Law Society has developed reference materials and planned a continuing legal education (CLE) program to help lawyers involved in real estate transactions avoid becoming the tool or dupe of unscrupulous clients. The [reference materials](#) are available on the Law Society's website.

The Law Society is very concerned about the increasing incidence of lawyer involvement in fraudulent real estate transactions and has allocated additional resources to address this issue. The Law Society is also working with other institutions, agencies and authorities in an effort to identify ways to prevent, detect, and counteract fraudulent activity. Lawyers with questions may contact the Law Society at 416-947-3315 or toll-free at 1-800-668-7380, ext.3315. LAWPRO has also recently published a special report on fraud, which can be accessed online at: [www.lawpro.ca](http://www.lawpro.ca).

## **DUE DILIGENCE IN MORTGAGE OR LOAN TRANSACTIONS**

Mortgage fraud is a serious and growing problem in Ontario. In many cases, mortgage fraud involves the use of false identities (title fraud) and the artificial inflation of property values (value fraud). Title fraud occurs when a property is fraudulently transferred from its true registered owner and/or a fraudulent mortgage is registered on the property. In these types of transactions, a fraudster usually misappropriates the identity of the true registered owner. Value fraud occurs when the value of a property is inflated to deceive a mortgage lender in order to obtain a higher mortgage amount than would otherwise be available.

For consumers, the purchase of a home often represents their single largest investment. Over the course of the past year there have been a number of court cases dealing with the rights of innocent homeowners to have title restored to their names and fraudulent mortgages set aside. In the recent case of *Rabi v. Rosu*, the Ontario Superior Court of Justice commented on the impersonal nature of mortgage lending and borrowing in this day and age and stated that in the circumstances of that case more care should have been exercised in advancing a sum in excess of one quarter of a million dollars.

The completion of a real estate transaction usually involves the participation of a number of parties in the transaction such as a lawyer, a lender and its agents, a real estate agent or broker, a mortgage agent or broker and others. In order to properly protect the public, the Law Society maintains that it is imperative that all of the parties involved in the transaction exercise care to detect and deter fraud at all stages in the transaction and particularly at the early stages of the transaction when the borrower first makes contact with the lender or its agent to obtain mortgage financing or executes an agreement of purchase and sale to buy or sell property. It is essential that there be checks and balances throughout the entire process of the transaction.

The Law Society has prepared this document to outline the steps required of a lender to ensure that adequate care is exercised in the funding of mortgage or loan transactions and the steps required of a lawyer acting for a lender in such transactions.

### **LENDER DUE DILIGENCE**

The following is a list of the steps required of a lender in a mortgage or loan transaction to detect and deter fraud.

#### ***Checking Identification***

Prior to instructing the lawyer to act in a mortgage or loan transaction, the lender or a licensed mortgage broker or agent on behalf of the lender should:

- meet personally with the borrower(s) and obtain two pieces of original identification for each borrower, one of which must be government issued photo identification;
- examine the original identification obtained for irregularities and retain photocopies or document particulars of the identification; and

- check the information contained in the mortgage loan application using other sources such as credit reporting agencies and employer references.

If there are irregularities or suspicious circumstances that cannot be adequately explained, the lender must not proceed with the transaction.

### ***Verification of the Transaction***

Prior to instructing the lawyer to act in a mortgage or loan transaction, the lender or its agent must:

- take steps to verify that the registered owner is in fact selling or mortgaging the property. These steps should include at a minimum an on-site visit of the property or an on-site appraisal. Other steps that may be taken, depending on the circumstances, would include obtaining utility or realty tax bills, reviewing the MLS listing of the property or a phone call to the owner using the 411 listing;
- satisfy itself as to the value of the property. Depending on the circumstances, these steps could include reviewing the agreement of purchase and sale for discrepancies, reviewing the MLS listing of the property, attending at the property or conducting an on site appraisal; and
- review the application and supporting documentation such as the agreement of purchase and sale and amendments. If there are suspicious circumstances that cannot be adequately explained, the lender must not proceed with the transaction.

When instructing the lawyer to act in a mortgage or loan transaction, the lender must:

- provide the lawyer with a copy of the agreement of purchase and sale and all addenda and amendments obtained by the lender in the course of its decision to finance the transaction so that the lawyer may compare these documents to the documents or information in the lawyer's file;
- provide the lawyer with the name and contact information of an individual at the lending institution who can provide the lawyer with informed instructions on short notice.

### ***Timely Registration of Discharge of Mortgages***

Where the lender does not instruct the borrower's lawyer to register the discharge of mortgage after the mortgage has been paid out, the lender must register on title the discharge of mortgage document no later than 60 days after the mortgage has been paid in full and provide particulars of the registration to the lawyer for the borrower or to the borrower directly if the borrower is not represented by a lawyer.

## **LAWYER DUE DILIGENCE**

The following is a list of the steps that a lawyer must or should take when acting for a lender in a mortgage or loan transaction to detect and deter fraud.

### ***Duty to avoid becoming the Tool or Dupe of an Unscrupulous Client***

When advising a client, a lawyer has a duty not to knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment.

A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activity such as mortgage fraud.

Before accepting a retainer or during a retainer if a lawyer has suspicions or doubts about whether he or she might be assisting the client in dishonesty, fraud, crime or illegal conduct, the lawyer should:

- make reasonable inquiries to obtain information about the client, and about the subject matter and objectives of the retainer;
- make a record of the results of these inquiries; and
- disclose his or her concerns to all of the clients in the retainer.

Despite having taken these steps, in certain circumstances the lawyer may have to withdraw completely from representing the client.

### ***Checking Identification***

The lawyer should undertake steps to verify that the person retaining the lawyer and/or signing documents under the lawyer's supervision has reasonable identification to substantiate that he or she is the named client/party and should retain details or information in the file about the identification obtained.

### ***Title Search***

When doing a title search of the property, the lawyer should review:

- all documents on title affecting the client's interest in the property;
- the values revealed by arms-length transfers in the recent past, to determine if there have been any suspicious changes in value; and
- the pattern of inactive or deleted instruments on the parcel register and inquire about any suspicious patterns of transfers or discharges.

The lawyer should retain notes on the search of title with respect to every real estate file and should report the results of the title search and due diligence process and in particular

any suspicious patterns of transfers or discharges and/or any suspicious changes in values revealed by the due diligence process to the purchaser/borrower if the lawyer is acting for the purchaser/borrower, the lender if the lawyer is acting for the lender and the title insurer.

***Disclosure to the Clients on Joint Retainers***

Where the lawyer acts for both the borrower and the lender in the mortgage transaction, the lawyer must disclose to the borrower and lender in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

Depending on the circumstances of the transaction, this information might include:

- the fact that there is a flip (the property is being re-sold the same day or within a short period of time at a higher price);
- the fact that there are amendments to the agreement of purchase and sale, either formal or otherwise, changing the terms of the agreement upon which the lender has based its mortgage transaction. Examples include purchase price reductions, extra deposits payable, renovation or other credits, cash-backs or other credits to the purchaser, changing the parties to the transaction, changing the purchase price, adding subsequent mortgages, changing the amount payable on closing and changing the manner of taking title;
- the fact that the mortgage documentation is to be executed under a power of attorney where this fact is not apparently known to the lender;
- information about the circumstances of the agreement of purchase and sale upon which the lender has based its mortgage transaction and which could affect the lender's ultimate decision to advance funds. Examples include: the vendor named in the agreement of purchase and sale is not the registered owner of the property at the time of the agreement of purchase and sale, the use of counter cheques and identification irregularities;
- information about the transaction or purchaser that is inconsistent with the information shown in the mortgage commitment such as changes in the mortgagor's economic circumstances, changes in the mortgagor's employment, changes in the mortgagor's marital status and evidence of inaccurate appraisals;
- the fact that the mortgage advance exceeds the balance due or actually paid on closing; and
- the direct payment of the deposit or down-payment to the vendor.

***Execution of Documents***

Prior to registering electronic documents, the lawyer should obtain and retain in the lawyer's file the client's written authorization.

***Timely Reporting to the Lender Client***

A lawyer who acts for a lender in a mortgage transaction must provide a final report on the transaction together with the duplicate registered mortgage to the lender within 60 days of the registration of the mortgage or within such other time period as instructed by the lender.

## Qs & As - Fraud in Real Estate Transactions: Some Ethical Issues

### Dishonesty or Fraud by the Client

**A lawyer acts for a purchaser in a real estate transaction. The lender is separately represented. During the course of the transaction the lawyer discovers that the purchaser is committing a fraud on the mortgagee. May the lawyer continue to act for the client?**

The *Rules of Professional Conduct (Rules)* specifically prohibit lawyers from assisting in any dishonesty or fraud. Subrule 2.02(5) provides that a lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct or instruct the client on how to violate the law and avoid punishment. The commentary to the subrule warns lawyers to guard against becoming the tool or dupe of an unscrupulous client or persons associated with such a client.

Where in the course of a transaction a lawyer determines that the client is committing a fraud, the lawyer cannot assist in the fraud. In this regard, subrule 2.09 (7) provides that where during the course of the retainer it becomes clear to the lawyer that the lawyer's continued employment will lead to a breach of the *Rules*, the lawyer must withdraw from representing the client.

**What if the lawyer suspects that the client is committing a real estate fraud?**

Where a lawyer suspects that a client may be engaged in a fraud, the lawyer may wish to discuss these concerns with the client. If the lawyer is unsatisfied with the client's explanation, the lawyer should assess whether withdrawing from representing the client is appropriate. Subrule 2.09(2) provides that where there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

### Disclosure to Third Parties

**A lawyer acts for a purchaser in a real estate transaction. During the course of the retainer, the lawyer determines that the client is engaged in a real estate fraud and withdraws from representing the client.**

**May the lawyer disclose the information that he has learned in the course of the retainer to a third party?**

Lawyers have a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.

A lawyer who discovers during the course of a retainer that a client has committed or is committing a fraud may only disclose confidential information about the client to a third party if the disclosure is permitted or justified under the *Rules*. Subrules 2.03(1) – (5)

outline the circumstances in which a lawyer may or must disclose confidential information.

A lawyer must disclose confidential information where disclosure is required by law or by order of a tribunal of competent jurisdiction.

A lawyer may disclose confidential information where:

- the client has expressly authorized the lawyer to disclose the information;
- the client has impliedly authorized the lawyer to disclose the information;
- the lawyer believes upon reasonable grounds that there is an imminent risk to an identifiable person or group of death or serious bodily harm (including serious psychological harm that substantially interferes with health or well-being) and where it is necessary to do so to prevent the death or harm. The lawyer should disclose the information pursuant to a judicial order where practicable and must not disclose more information than is required;
- it is alleged that the lawyer or the lawyer's associates or employees are guilty of a criminal offence involving a client's affairs, civilly liable with respect to a matter involving a client's affairs, guilty of malpractice or misconduct in order to defend against the allegations. The lawyer, however, must not disclose more information than is required;
- disclosure is necessary to establish or collect the lawyer's fees.

Furthermore where a lawyer discloses confidential information in accordance with the *Rules*, the lawyer must ensure that he or she does not disclose more information than is required.

#### **Disclosure Obligations in a Joint Retainer**

**A lawyer acts for both the borrower and the institutional lender in a mortgage transaction. During the course of the retainer, the lawyer discovers that the borrower misrepresented the purchase price of the property to the lender. What are some of the lawyer's ethical obligations to the lender when acting in a joint retainer?**

A lawyer who acts for both the borrower and the lender in a mortgage transaction is acting in a joint retainer and must comply with subrules 2.04(6) B (10). In a joint retainer the lawyer has a duty to act in the best interests of all of the clients in the retainer and must use care not to prefer the interests of one of the clients to those of the others. Furthermore, no information received from one client in connection with the matter can be treated as confidential so far as any of the other clients in the retainer are concerned. Where a lawyer acts for both the lender and borrower in a mortgage transaction and the lawyer obtains information that is relevant to the lender's decision to advance funds to the borrower, the lawyer must disclose this information to all of the clients in the joint retainer. If upon disclosure of the information a conflict develops that cannot be resolved, the lawyer cannot continue to act for both clients and may have to withdraw completely.



Additionally if one of the clients in the joint retainer instructs the lawyer to take steps that are inconsistent with the lawyer's obligations to the other clients in the retainer, the lawyer cannot continue to act for all of the clients and may have to withdraw completely.

#### **Release of Contents of File to a Client in a Joint Retainer**

**A lawyer acted for a purchaser/borrower and a lender in a mortgage transaction. After closing the lender advises the lawyer that the purchaser/borrower misrepresented the purchase price of the property to the lender and the lender will be selling the property under power of sale. The lender requests that the lawyer provide the lender with copies of all documents, correspondence and information in the file relating to the transaction. May the lawyer release the requested information to the lender?**

The lawyer acted for both the lender and the borrower in the mortgage transaction. In a joint retainer there is no confidentiality as between the parties to the retainer [subrules 2.04(6)-(10)]. The lawyer is therefore entitled to release information from the file to the lender. When acting in a joint retainer, however, the lawyer also has a duty to keep an even hand as between the clients and must not prefer the interests of one of the clients to those of the others. It would therefore be prudent for the lawyer to advise the borrower of the lender's request and to make copies of the information to be provided to the lender also available to the borrower. Where the file contains original documents that belong to both clients, it would be prudent for the lawyer to require a written direction from both parties authorizing the release of such documents to one of the parties or alternatively a court order authorizing the release of the documents.

#### **Lawyer is the Tool or Dupe of an Unscrupulous Client**

**A lawyer acted for both the lender and borrower in a mortgage transaction. After closing, the lawyer learns that her borrower client was engaged in a fraud and that the lawyer was duped by the client. What are some of the lawyer's ethical obligations in these circumstances?**

Subrule 6.09(2) provides that a lawyer shall give prompt notice of any circumstance that the lawyer may reasonably expect to give rise to a claim to an insurer or other indemnitor so that the client's protection from that source will not be prejudiced. Additionally, where the lawyer discovers an error or omission in connection with a matter for which a lawyer is responsible, that is or may be damaging to a client and that cannot be rectified readily, the lawyer must promptly inform the client and follow the procedure set out in subrule 6.09(1).

#### **Obligation to Report Misconduct of a Lawyer**

**A lawyer acts for a vendor in a real estate transaction. During the course of the retainer the lawyer discovers that the lawyer on the other side of the transaction is or may be engaged in a real estate fraud. Does the lawyer have an obligation to report the misconduct of the other lawyer to the Law Society?**

Where a lawyer becomes aware that another lawyer is assisting a client in or is engaged in a real estate fraud, the lawyer may have a duty to report that lawyer to the Society.

The *Rules* provide that in certain situations lawyers must report to the Society the misconduct of other lawyers unless to do so would be unlawful or a breach of solicitor-client privilege. These situations are set out in subrule 6.01(3) and include:

- the misappropriation or misapplication of trust monies;
- the abandonment of a law practice;
- participation in serious criminal activity related to a lawyer's practice;
- the mental instability of a lawyer of such a serious nature that the lawyer's clients are likely to be severely prejudiced; and
- any other situation where a lawyer's clients are likely to be severely prejudiced.

The lawyer should review the facts of the particular situation as well as the provisions of the subrule in order to make a determination. The commentary to subrule 6.01(3) provides that in certain circumstances it would be proper for a lawyer to report the misconduct of another lawyer even if the breach is minor in nature. The commentary states that evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is therefore proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of the *Rules*.

Where a lawyer is in doubt whether a report should be made to the Society, the lawyer may wish to seek guidance from the Practice Advisory department of the Law Society either directly or indirectly through another lawyer.

### **Identity Fraud**

**A lawyer acts for a vendor of a property. The vendor provides the lawyer with the name and contact information of the purchaser's lawyer. The lawyer recalls having had dealings with the purchaser's lawyer in the past and notes that the purchaser's lawyer's address is different than his previous address. In fact the lawyer's recollection is that the purchaser's lawyer practised in a different city.**

**What are some of the steps that the lawyer might consider taking to protect her client?**

The address and phone number of the purchaser's lawyer can be verified by matching it with the information on file with the Law Society. This may be done by searching through the Law Society's online member directory at: [www.lsuc.on.ca/search.jsp](http://www.lsuc.on.ca/search.jsp). If there is a discrepancy, the lawyer may wish to contact the other lawyer at the telephone number or address on file with the Law Society to confirm that he or she is acting on the transaction.

### **What if the lawyer discovers that he or she is the victim of the identity theft?**

Where a lawyer discovers that he or she is the victim of an identity theft, in addition to pursuing any available legal remedies and/or reporting the matter to the appropriate law enforcement authority, the lawyer should report the identity theft to the Law Society by calling 416-947-3315 or toll-free at 1-800-668-7380, ext. 3315. Lawyers may also wish to report it to LAWPRO.

### **Lawyer Subpoenaed to Testify About a Client Matter**

#### **What are the lawyer's ethical obligations if the lawyer is subpoenaed to testify as a witness regarding a client matter?**

Provided that the subpoena has been issued by order of a tribunal of competent jurisdiction, the lawyer must obey the order requiring his or her attendance at the hearing. Once sworn as a witness, and if ordered by the court, the lawyer must answer proper questions relating to confidential information.

Subrule 2.03(2) mandates disclosure of confidential information if required by law or by order of a tribunal of competent jurisdiction.

However the ethical rule regarding confidentiality must be distinguished from the evidentiary rule of lawyer and client privilege concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the source of the information or the fact that others may share the knowledge.

Where the lawyer believes that the information requested is not only confidential, but also privileged, then the lawyer must assert solicitor-client privilege on behalf of the client. If the lawyer is correct, and the tribunal accepts the lawyer's assertion that the information is privileged (and not subject to any exceptions to the privilege), then the information must and will not be disclosed. If the tribunal does not readily accept the lawyer's opinion, or requires further submissions to satisfy itself that the information is protected by solicitor-client privilege, then legal argument will be required to determine whether the information is privileged.

Whereas the determination of whether confidential information must be disclosed is made with reference to the *Rules of Professional Conduct*, the determination of whether confidential information is also privileged information, and therefore not subject to disclosure, is made by reference to case law.

If at the hearing the client is represented by counsel, then the client's own lawyer will be available to make submissions on the legal issue of solicitor-client privilege. If the client is not represented, or not a party to the proceeding, then the lawyer should consider having his or her own counsel available to address the tribunal on the issue of solicitor-client privilege.

The subpoenaed lawyer should have his or her own counsel at the hearing because the lawyer appears as a witness at the hearing and not as an advocate. Subrule 4.02(2) of

the *Rules of Professional Conduct* generally prohibits a lawyer who testifies to appear in the same proceeding as an advocate:

“Subject to any contrary provisions of the law or discretion of the tribunal before which a lawyer is appearing, a lawyer who appears as an advocate shall not testify before the tribunal unless permitted to do so by the rules of court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.”

In summary, when a lawyer is called to testify as a witness, the lawyer should take the following general steps:

- (1) Review the order compelling the lawyer’s attendance and comply with the requirement to attend and to bring any documents to the hearing.
- (2) If the client is not a party to the proceeding, or is not represented by counsel, the lawyer should retain his or her own counsel to:
  - attend at the hearing to be available to make submissions to the court on the issue of solicitor-client privilege; and
  - advise the lawyer as to his or her legal obligation to disclose information which may be subject to solicitor-client privilege.
- (3) Once sworn as a witness and asked to answer questions, the lawyer should ensure that if confidential information is to be disclosed, the tribunal has clearly ordered the disclosure.
- (4) The lawyer should not disclose more information than is required.
- (5) If the lawyer is asked to disclose information that the lawyer believes is privileged information, the lawyer must assert the privilege on behalf of the client.
- (6) If there is any disagreement on whether the information requested is subject to solicitor-client privilege, counsel for the client, or in cases where the client is not a party, counsel for the lawyer may then make submissions as to the admissibility of the information requested.
- (7) If the lawyer is under any doubt as to his legal obligation to disclose information which he or she believes is subject to the legal doctrine of solicitor-client privilege, then the lawyer should seek legal advice from his or her own counsel.

### **Practice Tips to Fight Fraud**

LAWPRO has developed a number of practice tips to assist lawyers to fight fraud. These include:

- obtaining photo identification of borrowers and retaining evidence of confirmation of identity in the file;
- keeping the lender informed when acting for the lender;
- questioning unusual directions;

- obtaining title insurance;
- safeguarding Personal Security Packages (PSPs) used to access the e-reg™ in accordance with the *Rules of Professional Conduct*;
- implementing procedures within the law firm to ensure that lawyers and staff do not share their PSPs; and
- implementing appropriate internal controls within the law firm for handling and documenting all types of financial transactions.

A more detailed discussion of these practice tips and other useful information on real estate fraud is contained in the June 2004 issue of the LAWPRO magazine "*The Many Faces of Fraud*" which may be found at: [www.lawpro.ca](http://www.lawpro.ca).



*Legal information and support  
designed for you*

*Please note that this information is not a substitute for the member's own research, analysis and judgment. The Law Society of Upper Canada does not provide substantive legal advice or opinions.*

*Last updated July 2004*

## Mortgage Fraud

1. **Mortgage Fraud scenarios that may help lawyers identify red flag indicators**  
*Mortgage fraud poses a serious and growing problem, not just for the Law Society and lawyers, but also for all parties involved in a real estate transaction. Consequently, real estate lawyers need to be attuned to possible indicators of fraud at the outset of their involvement in any real estate transaction. In most cases, mortgage fraud involves the use of false identities (as in title fraud) and the artificial inflation of property values (value fraud).*

**Title fraud** occurs when a property is fraudulently transferred from its true registered owner and/or a fraudulent mortgage is registered on the property. In these types of transactions, the true registered owner's identity is often misappropriated by the fraudster.

Sometimes in these transactions, the identity of the purchaser or mortgagor is also falsified. Fraudsters may pose as purchasers, or may appropriate and use the identities of lawyers to secure mortgage loans on properties for fictitious purchasers.

In such cases, false contact information and photo identification is provided to the lawyer by the client.

**Value fraud** occurs when the value of a property is inflated to deceive a mortgage lender in order to obtain a higher mortgage amount than would otherwise be available.

Occasionally, there are elements of both title fraud and value fraud in one transaction. While it may not always be possible for the lawyer to spot a fraudulent transaction, there are steps the lawyer can take to help manage risk and identify fraudulent transactions.

It is essential that lawyers familiarize themselves with the possible indicators of mortgage fraud and take steps within their practices to ensure they do not become the tools or dupes of unscrupulous clients - or third parties associated with the clients.

To help lawyers recognize possible red flag indicators of fraud in transactions, the Law Society's mortgage fraud investigation team has compiled the following scenarios. Some are based on real cases the team has investigated.

**2. Title Fraud Scenario: Identify Theft**

The fraudster's uncle owned his home free and clear. The fraudster told Lawyer A that his uncle wanted to transfer his home to his son, the fraudster's cousin, who, coincidentally, had the exact same name as the fraudster.

The fraudster told Lawyer A that his uncle was ill and unable to come to the lawyer's office to sign the papers.

The fraudster brought Lawyer A a forged authorization that he claimed his uncle had signed. Lawyer A arranged to transfer the uncle's property into the fraudster's name, believing it was being transferred to the fraudster's cousin.

Lawyer A had known the fraudster for a long time, so didn't mind helping him out with this family matter.

The fraudster then went to the bank and mortgaged his uncle's property for \$250,000, using Lawyer B to place the mortgage.

The mortgage went into default and the uncle and his lawyer looked to Lawyer A for an explanation. The uncle explained that he had no children and had not spoken with his nephew, the fraudster, for many years.

**COMMENTS:**

- Lawyer A should not have allowed the fraudster to take documents away from the office to have them signed.
- Lawyer A should have insisted that the uncle and cousin provide instructions directly.
- Lawyer A should have reviewed the documents with the uncle and cousin and obtained identification from them prior to completing the transaction.
- Lawyer A should have insisted on following the formalities regarding the review and signature of documents - regardless of the fact that the transaction involved members of the same family and involved a person with whom the lawyer had a longstanding relationship.
- Lawyer B might have questioned why the client had not placed the mortgage at the same time that the Transfer was registered and why the client was retaining a different lawyer to do the mortgage transaction.

**3. Value Fraud Scenario: Resale and Additional Deposit**

An Agreement of Purchase and Sale was entered into between a purchaser and vendor at a purchase price of \$189,900 on December 8. The agreement provided for a deposit of \$500 payable to the vendor's solicitor. In this case, the same real estate broker represented both the vendor and the purchaser.

Lawyer A acted for the purchaser and also on behalf of the bank regarding a first mortgage to assist on the purchase. Lawyer B acted for the vendor.

The title search conducted by Lawyer A indicated that the vendor had originally purchased the property on November 17 for \$106,000 and that Lawyer B also acted on that purchase and on behalf of the bank regarding the first mortgage.

Lawyer A did not advise the bank that the property had been sold less than one month earlier for \$106,000.

On December 20, the parties signed an Amendment to the Agreement of Purchase and Sale, which was not prepared by either lawyer and which provided that the purchaser would *pay the vendor directly* a further deposit of \$12,500 on or before December 25.

On December 30, Lawyer A received a fax containing two receipts. The first indicated that the purchaser had paid a further deposit of \$14,000 directly to the vendor on December 20. The second receipt indicated that the purchaser had paid a further deposit of \$12,500 to the vendor on December 24.

Lawyer A did not advise the bank that deposits were being paid to the vendor instead of the broker. Nor did Lawyer A advise the bank that additional deposits (\$12,500 and \$14,000) were being paid.

The balance due on closing on the Statement of Adjustments was \$163,108.71. The purchaser was credited with deposits totaling \$27,000 (\$500 plus \$14,000 plus \$12,500).

On closing, the bank advanced mortgage funds in the net amount of \$170,367.19 to Lawyer A, in trust.

The mortgage advance of \$170,367.10 was greater than the balance due on closing of \$163,108.71. The purchaser did not pay any funds on closing.

Lawyer A closed the transaction on January 4 and registered a Transfer Deed of Land from the vendor to the purchaser indicating a consideration of \$189,900 and a mortgage in favour of the bank in the principal amount of \$175,182.75.

The mortgage went into default on April 1 and the property was later sold under Power of Sale for \$130,000.

#### **COMMENTS:**

The following are some of the red flag indicators that - if identified - could have alerted the lawyer involved in the transaction.

- The initial deposit of \$500 was extremely low.
- The Agreement of Purchase and Sale was amended to provide for further deposits payable *directly to the vendor* rather than to the real estate broker.



- The property was sold less than one month earlier for a sum substantially less than the sale price in this transaction.
- The purchaser was not required to pay any funds on closing.
- The mortgage advance exceeded the balance due on closing and the purchaser was paid excess monies on closing.

Lawyer A had a duty to act in the best interests of both clients in the retainer, and to disclose all information that might be reasonably considered material to the lender's decision to lend or not to lend. In this scenario, Lawyer A failed to advise the bank that:

- The property had been sold approximately one month earlier for a sum that was \$83,900 less than the purchase price in this transaction.
- The Agreement of Purchase and Sale had been amended.
- Further deposits were being paid prior to closing directly to the vendor.
- The amount payable on closing was less than the mortgage advance.

#### 4. **Value Fraud Scenario: Property Flip**

An Agreement of Purchase and Sale was entered into on January 20, between Purchaser A and Vendor A, for a purchase price of \$115,000 with a deposit of \$1,000 made payable to the vendor.

There was no agent for the purchaser or vendor, and Lawyer A acted for both parties.

The closing date was originally set for February 6. The transaction was completed on February 7.

On January 20, an Agreement of Purchase and Sale was entered into by Purchaser A (now Vendor B) and Purchasers B at a gross sale price of \$493,000, with a deposit of \$10,000 made payable to Vendor B.

Again, there was no agent for the purchasers or vendor, and Lawyer A acted for all parties - including the bank - with respect to the mortgage.

The closing date was also originally set for February 6 and the transaction was completed on February 7.

An acknowledgment was signed by Vendor B and Purchasers B, acknowledging that Purchasers B were paying \$378,000 *more* than Vendor B was paying for the property.

A mortgage was obtained for \$455,901.75 and the bank made a net advance of \$442,558.86.

Lawyer A electronically signed the first Transfer indicating a consideration of \$115,000 for both Vendor A and Purchaser A, and submitted it for electronic registration on February 7.

Lawyer A signed the second Transfer indicating a consideration of \$493,000 on behalf of both Vendor B and Purchasers B and submitted it for electronic registration on February 7.

Lawyer A signed the Charge on behalf of Purchasers B and submitted it for electronic registration on February 7.

Both Transfers were registered the same day, within minutes of each other, for two different amounts.

The proceeds of sale from the second transaction, on the direction of Vendor B, were paid to various parties, who were not parties to the transaction.

This entire transaction became the subject matter of a complaint to the Law Society by the mortgagee. The complaint led to a Law Society Discipline action against Lawyer A.

#### **COMMENTS:**

The following are some of the red flag indicators that - if identified - could have alerted the lawyer involved in the transaction.

- Both transactions were private sales.
- There was a substantial escalation in the sale price of the property over a very short period of time.
- Deposits were paid *directly to the vendors*.
- The lawyer was asked to act for all parties (vendors, purchasers, lender) in two transactions involving some of the same parties and closing on the same day at different sale prices.
- The lawyer was instructed to make the proceeds of sale payable to third parties who were not parties to the transaction.
- Lawyer A was also acting for the bank in the second transaction, but failed to advise the bank of the red flag indicators of fraud set out in the scenario.

#### **5. Avoid being duped by unscrupulous clients. Red flags that should prompt questions and due diligence when dealing with real estate transactions**

To help lawyers recognize potential fraudulent transactions, the Law Society's mortgage fraud investigation team has compiled a list of significant indicators or "red flags" that should prompt further review of any transaction in which they appear.

While this list of indicators is not exhaustive, it summarizes many of the major issues/concerns the team has seen in its investigations of lawyers for mortgage fraud and related allegations.

The fact that one or more of the following red flags appears in any transaction does not necessarily mean that the transaction is improper, or that a fraud is being perpetrated. However, when a real estate and/or mortgage transaction exhibits one or more of these red flags, a lawyer should apply extra diligence.

Lawyers have a duty to advise their clients, including lenders, of any information discovered through the evolution of the transaction that in the lawyer's reasonable opinion would affect the decision of the clients to complete the transaction.

Lawyers must use their professional expertise in advising their clients about all aspects of the transaction.

- Two or more Agreements of Purchase and Sale for the same property and closing on the same day - or within a few days of one another, at different sale prices.
- Substantial escalation in the sale price of a property over a relatively short period of time.
- Short closings, coupled with excessive urgency to complete the transaction.
- The same lawyer acting for all parties, except the legitimate vendor.
- Instructions and information, such as title information, coming from a third party.
- The purchaser provides no or minimal funds on closing, such that only the mortgage advance is required to complete the legitimate purchase.
- The purchase funds come through a last-minute "gift letter," "promissory note," or second mortgage, or some other source or arrangement - and this fact is not already known to the lender and is not part of the mortgage commitment and instructions to the solicitor.
- The presence of the same purchasers, vendors, real estate agency and mortgage broker in multiple transactions.
- The lawyer receives an unusual volume of transactions from the same purchasers, vendors, real estate agency and mortgage broker.
- The lawyer is offered higher than usual legal fees for acting on transactions.
- The client does not wish to sign an acknowledgment and direction authorizing the lawyer to electronically sign and register a document.
- Last-minute registrations under Power of Attorney.
- Last-minute transfers contemplating "Trustee" arrangements such as "Trustee to beneficial owner" at NIL consideration, followed immediately by the registration of a mortgage and the advance of mortgage proceeds.
- The lawyer is instructed to address or send the reporting letter to a third party.

- Agreements of Purchase and Sale, and/or amendments to Agreements of Purchase and Sale in which deposits are payable directly to the vendor and not to the real estate agent or the vendor's lawyer.
- Additional deposits or other credits to the purchaser contained in amendments to the Agreement of Purchase and Sale and/or not supported by written agreement.
- The net mortgage advance received exceeds the balance on closing on Statement of Adjustments.
- The lawyer receives instructions to pay excess mortgage proceeds to third parties not related to the transactions.

#### 6. **Checking identification**

If a lawyer is concerned about the identity of another lawyer acting in a real estate transaction, the lawyer should check that the address and phone number of the other lawyer matches the information on file with the Law Society. Simply go to the Law Society's online Member Directory. Members may also contact the Law Society at 416-947-3315 or 1-800-668-7380, ext. 3315.

Lawyers should always remember the importance of obtaining and keeping photo identification of their clients in their files.

#### 7. **Apply Professional Judgment**

Lawyers are retained by the parties to a real estate transaction to apply their professional judgment to all aspects of the transaction as it may affect their clients. This includes the mortgagee client.

While the Law Society's [\*Rules of Professional Conduct\*](#) allow lawyers in some circumstances to act for more than one party to a real estate and/or mortgage transaction, the lawyer undertaking such a retainer, including acting for a purchaser and a mortgage lender, must be vigilant not to favour the interests of one client over those of the other clients in the retainer.

If a lawyer has suspicions about whether he or she may be assisting the client in fraud or illegal conduct, the lawyer cannot turn a blind eye. In such circumstances, the lawyer should make reasonable inquiries to obtain information about the client, the subject matter and purpose of the retainer, and should make a record of these inquiries.

There will be situations where, in order to meet ethical obligations, the lawyer will have no option but to withdraw from representing the client.

## Q & As - Preventing money laundering

### 1. Why have these amendments been made to LSUC's By-laws and Rules of Professional Conduct?

Following the repeal of the provisions in the regulations under Part I of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* - which subjected lawyers to the client identification, recordkeeping, reporting and internal compliance requirements - the government has advised that it intends to implement a new regime for lawyers which would better reflect their duties. Recognizing that lawyers support efforts to eradicate money laundering, the Federation of Law Societies proposed that each law society in Canada adopt regulations that would assist in preventing money laundering. To that end, the Federation adopted a model rule. The By-law and Rule amendments implement the Federation's model rule.

### 2. Are lawyers exempt from the reporting and record keeping requirements of the money laundering legislation?

In March 2003, the federal government repealed the provisions in the regulations under Part I of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* that subjected lawyers to the client identification, recordkeeping, reporting and internal compliance requirements.

### 3. What has happened with the constitutional challenge relating to the money laundering legislation?

The hearing of the application has been adjourned sine die. Please see the Federation of Law Societies website for more information.

### 4. What is the definition of cash?

For the purposes of By-law 9, cash means

- current coin within the meaning of the *Currency Act*
- notes intended for circulation in Canada issued by the Bank of Canada pursuant to the *Bank of Canada Act*, and
- current coin or bank notes of countries other than Canada.

### 5. How much cash am I permitted to accept from my client?

You are permitted to accept less than \$7,500 Canadian in the aggregate from a person in respect of any one client file.

**6. If I am acting for more than one client on a file, how much cash am I permitted to accept?**

You are entitled to accept less than \$7,500 Canadian in the aggregate, as the receipt relates to one client file.

**7. If my client provides me with \$15,000 Canadian in cash for three unrelated investments, am I permitted to accept the cash?**

You are permitted to accept the cash as it is being paid for three separate client matters, so long as the amount of each investment does not itself exceed \$7,500 Canadian.

**8. What are the restrictions on the receipt of foreign currency?**

If you receive foreign currency, you will be deemed to have received it in amount as converted into Canadian funds in accordance with a formula set out in By-law 9, 4 (2).

If the amount of foreign currency as converted exceeds \$7,500 Canadian in the aggregate, you are prohibited from accepting it unless you fall into one of the exceptions set out in s. 5.6 of By-law 9 (see question 10 below for the exceptions).

**9. To which types of transactions does the prohibition against accepting cash in excess of \$7,500 in the aggregate apply?**

The prohibition applies when in respect of a client file a member engages in or gives instruction in respect of the following activities:

- the member receives or pays funds
- the member purchases or sells securities, real properties or business assets or entities
- the member transfers funds by any means

**10. Are there any exceptions to the prohibition against accepting cash in excess of \$7,500 in the aggregate?**

Yes. The prohibition does not apply when the member

- a. receives cash from a public body, 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, a cooperative credit society, savings and credit union or caisse populaire that is regulated by a provincial Act, an association that is regulated by the *Cooperative Credit Associations Act*, a company to which the *Trust and Loan Companies Act* applies, a trust company or loan company

regulated by a provincial Act or 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;

- b. receives cash from a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity;
- c. receives cash pursuant to an order of a tribunal;
- d. receives cash to pay a fine or penalty;
- e. receives cash for fees, disbursements, expenses or bail, provided that any refund out of such receipts is also made in cash.

### **11. How do I refund money to my client in cash?**

The funds could be withdrawn in cash from your trust account (general account if refunding billed fees or paid disbursements) by way of a withdrawal slip. To create a better audit trail, however, you may wish to consider issuing a cheque payable to yourself, noting the client file number, and that it is a cash withdrawal. If you choose to use a withdrawal slip, in order to document the withdrawal, you should request a duplicate copy of the withdrawal slip for your records. In addition, when the cash is refunded to the client, you should obtain a receipt from the client and/or have a witness present to document the transfer of cash. Whichever method of withdrawal you choose, you should consider obtaining the client's written instructions prior to making the withdrawal.

### **12. What is the definition of a public body?**

A public body means

- a. a department or agent of Her Majesty in right of Canada or of a province;
- b. an incorporated city, metropolitan authority, town, township, village, county, district, rural municipality or other incorporated municipal body or an agent of any of them;
- c. an organization that operates a public hospital that is designated by the Minister of National Revenue as a hospital under the Excise Tax Act or an agent of the organization.

### **13. If I do accept cash in accordance with the By-laws, are there any additional record keeping or reporting requirements?**

Yes. You will also be required to maintain a book of duplicate receipts with each of the receipts identifying the following:

- a. the date on which the cash is received
- b. the person from whom the cash is received

- c. the amount of cash received
- d. the client for whom the cash is received
- e. any file number in respect of which the cash is received.

The receipt must also contain the signature of the member or person authorized by the member to receive cash, and the signature of the person from whom the cash is received.

You should also note that you must now record the method of receipt of funds in both the trust and general receipts journal.

**14. Is there a specific format for these additional records? Do you have a precedent?**

There is no prescribed format or precedent for these additional records. Suggested guidelines and format examples for law firm books and records are available on line in the Bookkeeping Guide.

**15. Do these additional record-keeping requirements apply to the receipt of any amount of cash?**

These additional records are required any time a member receives cash in respect of a client matter, regardless of the amount.

**16. How long must these additional records be maintained?**

These additional records must be maintained for at least the six-year period immediately preceding the member's most recent fiscal year end.

**17. What if the person from whom the cash is received refuses to sign the receipt as required by the By-law?**

A. When a member receives cash in respect of a client matter he or she is obliged to make reasonable efforts to obtain the signature of the person from whom the cash is received. The inability of the lawyer to secure the signature after making reasonable efforts to obtain the signature is not a bar to accepting the cash.

**18. What actions constitute reasonable efforts to obtain the signature of the person providing the cash?**

The lawyer should consider explaining to the individual providing the cash:

- a. the lawyer's obligations under the By-law, and
- b. the rationale for the requirement.



If after that explanation the individual still refuses to sign, the lawyer has discharged his or her obligation under the By-law.

**19. Can I refuse to accept cash from my client or others?**

A. Neither the Rules of Professional Conduct nor the By-laws stipulate that a lawyer must accept cash from a client. This is a policy issue that should be decided by the firm and communicated to the client at the outset of the retainer. Lawyers may also wish to consider including as a term of their written retainer the form in which payment of retainers and fees will be accepted by them.

**20. If I choose never to accept cash, are there any changes to my record keeping or reporting requirements?**

Yes. The books of original entry for trust and general receipts must now include a notation as to the method by which money has been received (By-law 9, s. 18(1) and 18 (5)). The books of original entry for trust and general disbursements always contained a requirement to show the method by which money is disbursed (By-law 9, s. 18(2) and 18(6)).

**21. If I have suspicions as to the legality of my client's transaction, what are my obligations?**

Before accepting the retainer, or during the retainer, if a lawyer has suspicions or doubts as to whether he or she might be assisting the client in dishonesty, fraud, crime or illegal conduct, the lawyer should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer - including verifying who are the legal or beneficial owners of property and business entities, verifying who has control of the business entities, and clarifying the nature and purpose of a complex or unusual transaction where the purpose is not clear. The lawyer should make a record of the results of these inquiries.

**22. What should I do if I am unable to obtain information necessary for me to satisfy myself as to the propriety of my client's transaction?**

If you are unable to satisfy yourself as to the propriety of the client's transaction for which you have been retained, you should consider whether it would be appropriate to withdraw from your representation of the client. In making that decision, you should review your obligations under Rule 2.09 of the *Rules of Professional Conduct*.



## **Real Estate Fraud Being Creative and Fighting Back**

Real estate fraud is a serious issue. Lawyers should consider implementing procedures within their firms to fight fraud. The following is a list of steps that a lawyer can take to fight fraud. This list is not exhaustive nor is it intended to replace the lawyer's professional judgment. With the exception of those steps that a lawyer must take in order to comply with legal or regulatory requirements (Rules of Professional Conduct or By-Laws), a lawyer should take steps and implement procedures to fight fraud best suited to the lawyer's practice and the circumstances of the individual client file.

Consider taking some of these steps to fight fraud.

### **Hiring Practices**

- ❑ Verify past employment.
- ❑ If there are gaps in the employment history, obtain explanations for those gaps.
- ❑ Check the details of the resume and call the references.
- ❑ In appropriate circumstances, do background checks.

### **Accounting Controls**

#### **Cheques**

- ❑ Never sign a blank cheque.
- ❑ Never sign a cheque with no payee or no amount stated.
- ❑ Carefully review cheques before signing.
- ❑ Develop a policy where requests for cheques are accompanied by a signed cheque requisition evidencing approval.
- ❑ Establish a policy to always issue receipts for all cash and cheques received.
- ❑ Keep cheques in a secure location and allow access only to authorized staff.

- ❑ Stamp incoming cheques “for deposit only” and whenever possible deposit cheques the same day that the cheque is received.
- ❑ Stamp original copies of invoices “paid” to prevent a person from using the invoice more than once to obtain payment.
- ❑ Number cheques in order and check the sequence.
- ❑ Number receipts in order and check the sequence.

### **Bookkeeping**

- ❑ Regularly review your books and records including source documents such as deposit books and cancelled cheques.
- ❑ Do not let accounting records fall into arrears.
- ❑ Reconcile your accounts within the required time period (by the 15<sup>th</sup> day of the month following) and look at all original bank statements, cheques including cheque numbers, deposit books, computer print outs or ledger sheets as part of the process.
- ❑ Periodically check the clients’ trust ledger looking for unusual or incorrect items.
- ❑ Ensure that you have adequate documentation in the file for trust transfers - for example, written instructions from the client authorizing the transfer of funds to another client.

### **Segregation of Duties and Handling of Money**

- ❑ If possible when assigning duties separate the duties of staff so that one person does not have complete control of the process. For example, assign the task of opening the mail and receiving deliveries to one person and the duty to make deposits to another person.
- ❑ If possible separate the tasks of creating and posting cheques and reconciling cheques and receipts.
- ❑ If practicable, have two signing authorities for cheques over a certain amount of money.

### **Supervision of Staff**

- ❑ Set an example by acting ethically.
- ❑ Periodically conduct spot reviews of files.
- ❑ Have a policy of keeping a copy of cheques relating to a matter in the file so that multiple staff sees the cheques.

- ❑ Have bank statements delivered to you unopened.

## **Electronic Registration – Personal Security Package (PSP)**

- ❑ Implement policies in your firm to safeguard your PSP(diskette and pass phrase used to access the electronic registration system) and all PSPs issued under your Teraview account.
- ❑ Train staff to ensure they understand the importance of not sharing PSPS and safeguarding their PSPs.
- ❑ Review disbursements made through your Teraview account.
- ❑ Develop policies requiring staff to report to you any misuse of PSPs by anyone who has a PSP under your account.
- ❑ Take steps to cancel PSPs belonging to persons no longer with your firm.
- ❑ Periodically review disbursements made through your Teraview account looking for any unusual disbursements or activity.

## **Joint Retainers**

- ❑ If you are acting in a joint retainer ensure that you act in the best interests of both clients throughout the retainer and that you do not prefer the interest of one client to the other.
- ❑ If you are acting for both a borrower and a lender in a mortgage transaction, disclose to the lender all information that you know and that in your reasonable opinion may be material to the lender's decision to lend or not to lend.

This information might include:

- ❑ the fact that there is a flip (the property is being re-sold the same day or within a short period of time at a higher price)
- ❑ the fact that there are amendments to the agreement of purchase and sale, either formal or otherwise, changing the terms of the agreement upon which the lender has based its mortgage transaction. Examples include:

- ❑ purchase price reductions
  - ❑ extra deposits payable
  - ❑ renovation or other credits
  - ❑ cash-backs or other credits to the purchaser
  - ❑ changing the parties to the transaction
  - ❑ changing the purchase price
  - ❑ adding subsequent mortgages
  - ❑ adding a vendor take back mortgage
  - ❑ changing the amount payable on closing and
  - ❑ changing the manner of taking title
  
- ❑ the fact that the mortgage documentation is to be executed under power of attorney where this fact is not apparently known to the lender
  
- ❑ information about the circumstances of the agreement of purchase and sale upon which the lender has based its mortgage transaction and which could affect the lender's ultimate decision to advance funds. Examples include:
  - ❑ the vendor named in the agreement of purchase and sale is not the registered owner of the property at the time of the agreement of purchase and sale
  - ❑ the actual deposit being paid
  - ❑ the actual date of closing
  - ❑ the actual proceeds of sale expected by the vendor
  - ❑ the use of counter cheques
  - ❑ identification irregularities
  
- ❑ information about the transaction or purchaser that is inconsistent with the information shown in the mortgage commitment. Examples include:

- ❑ changes in the mortgagor's economic circumstances
  - ❑ changes in the mortgagor's employment
  - ❑ changes in the mortgagor's marital status and
  - ❑ evidence of inaccurate appraisals
- ❑ mortgage surpluses - the fact that the mortgage advance exceeds the balance due or actually paid on closing
- ❑ the direct payment of the deposit or down-payment to the vendor.

## **Be on Guard against Becoming the Tool or Dupe of an Unscrupulous Client**

- ❑ If you have suspicions or doubts that you might be assisting a client in dishonesty, fraud or illegal conduct:
  - ❑ make reasonable inquiries about the client
  - ❑ make reasonable inquiries about the subject matter and purpose of the retainer
  - ❑ make notes of the results of these inquiries
  - ❑ disclose your concerns to all of the clients in the retainer
  - ❑ if appropriate withdraw from representing the client (s).
- ❑ Clarify the nature and purpose of a complex or unusual transaction where the purpose is not clear and make notes to the file.
- ❑ Make efforts to know your client.

- ❑ Make it a practice whenever possible or practicable for you to meet personally with the client and attend to the signing of the closing documents.
- ❑ Undertake steps to verify that the person retaining you and/or signing documents under your supervision has reasonable identification to substantiate that he or she is the named client/party and retain details or information in the file about the identification obtained.
- ❑ If you are acting for a corporation or an organization, ensure that the person giving instructions for the organization or corporation is acting within that person's actual or ostensible authority.
- ❑ If you are acting for a corporation, request and review the original minute books of the corporation.
- ❑ If you are concerned about the identity of a lawyer acting in a transaction, verify that the address and phone number of that lawyer match the information on file with the Law Society.

## **Closing Transactions and Due Diligence**

- ❑ Develop and use checklists of red flag indicators to assist you to identify transactions that could involve real estate fraud;
- ❑ Review instructions from the lender carefully as soon as possible upon receipt and develop a list of requirements. If you are unable to meet the requirements immediately notify the clients.

- Review when doing a title search:
  - all documents on title affecting the client's interest in the property and retain notes on the search of title with respect to every real estate file
  - the values revealed by arms-length transfers in the recent past, to determine if there have been any suspicious changes in value
  - the pattern of inactive or deleted instruments on the parcel register and inquire about any suspicious patterns of transfers or discharges.
  
- Report the results of the title search and due diligence process and in particular any suspicious patterns of transfers or discharges and/or any suspicious changes in values revealed by the due diligence process to the purchaser/borrower if you are acting for the purchaser/borrower, the lender if you are acting for the lender and the title insurer.
  
- Prior to registering electronic documents, obtain and retain in your file the client's written authorization.
  
- Develop a policy that whenever possible only a lawyer in your firm will sign for completeness documents that require electronic registration.
  
- Carefully review documents before they are signed.



- ❑ Develop checklists of red flag indicators of real estate fraud for use by staff so that files containing certain indicators are brought to your attention immediately.
- ❑ Train staff to look for indicators of real estate fraud in real estate files and to bring those files to your immediate attention.
- ❑ Discuss title insurance options with your clients including coverage for fraud so that they fully understand the scope of the coverage available and if the client decides not to obtain title insurance, obtain a written waiver from the client.
- ❑ Where title insurance is being obtained, issue the title insurance policy as soon as possible after closing to insure that an issued policy exists should the client need to make a claim.
- ❑ Where title insurance has been obtained, compare the issued policy carefully to the draft policy or binder/commitment received before closing to ensure that there are no discrepancies in coverage.

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- i. Some of the practice tips included in this article have been adapted from an article entitled “*Is there a crook in the firm?*” written by Susan Elliott for the Law Society Program, *Fighting Real Estate Fraud* presented on October 19, 2004, and from the LAWPRO publication, “*The Many Faces of Fraud*”, published June, 2004.

*This information is not a substitute for the member’s own research, analysis and judgment. The Law Society of Upper Canada does not provide substantive legal advice or opinions.*



# Protecting the public in real estate matters

## *Current and recent initiatives*

Lawyers play an important role in real estate matters and are uniquely positioned to help protect homebuyers and the integrity of Ontario's land registry system.

The Government of Ontario has recognized this by ensuring that a lawyer is involved with the registration of a transfer of a real estate title. Government transfers and transfers of easements are exempt from this requirement. The government will be moving forward with the necessary Regulations to implement their new registration requirements for transfers of title.

The Law Society, on the recommendations of its Real Estate Issues Working Group (see below), has implemented a number of public protection initiatives. These include:

### **1. Amendments to the *Rules of Professional Conduct* requiring that there be two lawyers for transactions involving a transfer of title.**

Following consultations with the profession on new rules for real estate practice, Convocation (the Law Society's Board of Directors) approved Rule 2.04.1 of the *Rules of Professional Conduct* requiring that there be two lawyers for transfers of title, one lawyer for the transferee (buyer) and one lawyer for the transferor (vendor). The two lawyers may practice in the same law firm so long as the general rules on conflicts of interest in Rule 2.04 are observed. The new 'two-lawyer rule' strengthens public protection in the electronic land registration system. The amendments will come into effect March 31, 2008.

In certain limited circumstances one lawyer may represent both the transferor and the transferee in a transfer of title to real property provided there is no violation of the conflicts of interest rule 2.04. These exceptions are as follows:

- a transfer where the transferor and the transferee are the same and the change is being made to effect a change in legal tenure;
- a transfer being registered to give effect to a severance of land prior to the expiry of a consent under the *Planning Act* or pursuant to a municipal by-law;
- a transfer from an estate trustee to a person who is beneficially entitled;
- a transfer where the transferor and the transferee are related persons as defined in section 251 of the *Income Tax Act (Canada)*;
- the lawyer practices law in a remote location where there are no other lawyers that either the transferor or the transferee could without undue inconvenience retain for the transfer.

In addition no law statements will be required for transfers involving a government body including a municipality or for transfers of easements.

### **2. Insurance changes.**

All lawyers who practice real estate require fraud insurance coverage. Coverage is provided under the LAWPRO policy.

### **3. Residential Real Estate Transactions Guidelines.**

The Real Estate Issues Working Group developed Residential Real Estate Transactions Guidelines that are designed to inform and educate the profession on the generally accepted standards of practice by lawyers involved in residential real estate transactions and to demonstrate the inherent value in retaining a lawyer for real estate transactions.

#### 4. Amendments to *Rules of Professional Conduct* regarding disclosure requirements and reports on mortgage transactions.

Amendments to rules 2.02 and 2.04 of the *Rules of Professional Conduct* require a lawyer acting for a borrower and lender to make full disclosure of material facts to the lender and borrower and to provide final reports to lenders within 60 days of the registration of a mortgage. The amendments were made to reduce the risk of mortgage fraud in real estate transactions.

#### About the Real Estate Issues Working Group:

The Working Group on Real Estate Issues was formed in 2005 to focus on issues arising in real estate practice that relate to the Law Society's regulatory responsibilities and public protection mandate. The aim of the group is to manage real estate matters in a comprehensive way through the united efforts of real estate practitioners, the organized bar (CDLPA and the OBA) and the Law Society. The working group was formalized as a working group of the Law Society's Professional Development and Competence Committee in 2007.

Mortgage fraud, standards of practice and facilitating the public's access to lawyers knowledgeable about real estate law are examples of the issues being addressed.

*Current members of the working group are:*

Bencher Brad Wright – co-chair

Don Thomson – Toronto practitioner – co-chair

Bencher Bob Aaron

Clare Brunetta – County and District Law Presidents' Association (CDLPA)

Sally Burks – Ottawa practitioner

Ray Leclair – Ontario Bar Association

Greg Mulligan – Orillia practitioner

Bencher Nick Pustina

Bencher Alan Silverstein

#### About the Government's new process for access to the Ontario Electronic Land Registration System:

The Government of Ontario is actively responding to the public's concerns regarding real estate fraud with a wide range of consumer protection measures – including new processes and criteria for access for registration purposes to the Ontario Electronic Land Registration System.

The Law Society has been working with the government in support of their initiatives.

The government will be rolling out its new process for the registration of transfers of title. Under the new process, registration of transfers will be restricted – a lawyer will be required to sign transfers for completeness with few exceptions, for instance, government transfers are exempt.

All lawyers engaged in land transactions are required to apply to the Ministry of Government and Consumer Services for authorization to access the system for registration purposes. Lawyers in good standing meet the government's new criteria for access. Application information is available on the Ministry of Government and Consumer Services website.

#### Additional information:

- See the Law Society's *Rules of Professional Conduct*.
- See the [Professional Regulation Committee report](#) to February Convocation for more information on the two lawyer rule.
- Visit the [LAWPRO website](#) for more information on real estate fraud insurance.
- The Residential Real Estate Transactions Guidelines are posted in the [Resource Centre](#) of the Law Society website, under Real Estate Practice Resources.
- More information on the new process for access to the Ontario Electronic Land Registration System is available on the Ministry of Government and Consumer Services [website](#).

## **Section 251 of the *Income Tax Act***

### Definition of "related persons"

(2) For the purpose of this Act, "related persons" , or persons related to each other, are

(a) individuals connected by blood relationship, marriage or common-law partnership or adoption;

(b) a corporation and

(i) a person who controls the corporation, if it is controlled by one person,

(ii) a person who is a member of a related group that controls the corporation, or

(iii) any person related to a person described in subparagraph 251(2)(b)(i) or 251(2)(b)(ii); and

(c) any two corporations

(i) if they are controlled by the same person or group of persons,

(ii) if each of the corporations is controlled by one person and the person who controls one of the corporations is related to the person who controls the other corporation,

(iii) if one of the corporations is controlled by one person and that person is related to any member of a related group that controls the other corporation,

(iv) if one of the corporations is controlled by one person and that person is related to each member of an unrelated group that controls the other corporation,

(v) if any member of a related group that controls one of the corporations is related to each member of an unrelated group that controls the other corporation, or

(vi) if each member of an unrelated group that controls one of the corporations is related to at least one member of an unrelated group that controls the other corporation.

### Corporations related through a third corporation

(3) Where two corporations are related to the same corporation within the meaning of subsection 251(2), they shall, for the purposes of subsections 251(1) and 251(2), be deemed to be related to each other.

### Relation where amalgamation or merger

(3.1) Where there has been an amalgamation or merger of two or more corporations and the new corporation formed as a result of the amalgamation or merger and any predecessor corporation would have been related immediately before the amalgamation or merger if the new corporation were in existence at that time, and if the persons who were the shareholders of the new corporation immediately after the amalgamation or merger were the shareholders of the new corporation at that time, the new corporation and any such predecessor corporation shall be deemed to have been related persons.

#### Amalgamation of related corporations

(3.2) Where there has been an amalgamation or merger of 2 or more corporations each of which was related (otherwise than because of a right referred to in paragraph 251(5)(b)) to each other immediately before the amalgamation or merger, the new corporation formed as a result of the amalgamation or merger and each of the predecessor corporations is deemed to have been related to each other.

#### Definitions concerning groups

(4) In this Act,  
"related group"  
«*groupe lié*»

"related group" means a group of persons each member of which is related to every other member of the group;

"unrelated group"  
«*groupe non lié*»

"unrelated group" means a group of persons that is not a related group.

#### Control by related groups, options, etc.

(5) For the purposes of subsection 251(2) and the definition "Canadian-controlled private corporation" in subsection 125(7),

(a) where a related group is in a position to control a corporation, it shall be deemed to be a related group that controls the corporation whether or not it is part of a larger group by which the corporation is in fact controlled;

(b) where at any time a person has a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently,

(i) to, or to acquire, shares of the capital stock of a corporation or to control the voting rights of such shares, the person shall, except where the right is not exercisable at that time because the exercise thereof is contingent on the death, bankruptcy or permanent

disability of an individual, be deemed to have the same position in relation to the control of the corporation as if the person owned the shares at that time,

(ii) to cause a corporation to redeem, acquire or cancel any shares of its capital stock owned by other shareholders of the corporation, the person shall, except where the right is not exercisable at that time because the exercise thereof is contingent on the death, bankruptcy or permanent disability of an individual, be deemed to have the same position in relation to the control of the corporation as if the shares were so redeemed, acquired or cancelled by the corporation at that time;

(iii) to, or to acquire or control, voting rights in respect of shares of the capital stock of a corporation, the person is, except where the right is not exercisable at that time because its exercise is contingent on the death, bankruptcy or permanent disability of an individual, deemed to have the same position in relation to the control of the corporation as if the person could exercise the voting rights at that time, or

(iv) to cause the reduction of voting rights in respect of shares, owned by other shareholders, of the capital stock of a corporation, the person is, except where the right is not exercisable at that time because its exercise is contingent on the death, bankruptcy or permanent disability of an individual, deemed to have the same position in relation to the control of the corporation as if the voting rights were so reduced at that time; and

(c) where a person owns shares in two or more corporations, the person shall as shareholder of one of the corporations be deemed to be related to himself, herself or itself as shareholder of each of the other corporations.

[Blood relationship, etc.](#)

(6) For the purposes of this Act, persons are connected by

(a) blood relationship if one is the child or other descendant of the other or one is the brother or sister of the other;

(b) marriage if one is married to the other or to a person who is so connected by blood relationship to the other;

(b.1) common-law partnership if one is in a common-law partnership with the other or with a person who is connected by blood relationship to the other; and

(c) adoption if one has been adopted, either legally or in fact, as the child of the other or as the child of a person who is so connected by blood relationship (otherwise than as a brother or sister) to the other.

NOTE: Application provisions are not included in the consolidated text; see relevant amending Acts. R.S., 1985, c. 1 (5th Supp.), s. 251; 1994, c. 7, Sch. II, s. 195; 1998, c. 19, s. 242; 2000, c. 12, ss. 140, 142; 2001, c. 17, s. 192.

# 2010

## Real Estate Civil Litigation Levy Surcharge & Exemption Forms

**This booklet includes the following:**

- Question-and-answer sections
- Real Estate Transaction Summary Forms and Civil Litigation Transaction Summary Forms, which must be returned quarterly to LAWPRO® with payment
- Exemption Forms which must be completed and returned by April 30, 2010, if you are exempt from paying the Real Estate Transaction Levy Surcharge or the Civil Litigation Transaction Levy Surcharge in 2010

# CONTENTS

Real Estate Transaction Levy Surcharge .....	1
Civil Litigation Transaction Levy Surcharge .....	9

## Capitalized Words

Throughout this book, certain words have been capitalized to indicate they have a specific meaning as defined in LawPRO POLICY 2010-01.

**COMPLETE THE APPLICABLE FORMS IN THIS BOOKLET AND SEND A COPY WITH YOUR REMITTANCE (IF APPLICABLE) TO LAWPRO®.**

**ALL CHEQUES ARE TO BE MADE PAYABLE TO:**

**THE LAW SOCIETY OF UPPER CANADA.**

**FILINGS ARE COMPLETE ONLY WHEN THEY ARE ACCOMPANIED BY PAYMENT IN FULL OF TRANSACTION LEVY SURCHARGES DUE FOR A SPECIFIC QUARTER.**

**ORIGINAL FORMS REMAIN IN THIS BOOKLET FOR YOUR PERMANENT RECORDS.**

**Note: You can also file your forms and make payment by electronic funds transfer or credit card online at [www.lawpro.ca](http://www.lawpro.ca).**

Lawyers' Professional Indemnity Company (LAWPRO®)

250 Yonge Street

Suite 3101, P.O. Box 3

Toronto, Ontario M5B 2L7

Tel: (416) 598-5899 or 1-800-410-1013

Fax: (416) 599-8341 or 1-800-286-7639

E-mail: [service@lawpro.ca](mailto:service@lawpro.ca)

[www.lawpro.ca](http://www.lawpro.ca)



Real Estate  
Transaction Levy  
Surcharge

**2010**

**Original forms remain in this  
booklet for your permanent  
records. Send a copy with  
your remittance to LAWPRO.**



## How much is the real estate transaction levy surcharge and who must pay it?

Pursuant to By-Law 6, a LAWYER or firm that acts for one or more parties on a real estate transaction (as defined in paragraph A of Endorsement No. 2 of Policy No. 2010-001), must pay The Law Society of Upper Canada a real estate transaction levy surcharge of \$65 per transaction, **inclusive of all taxes**.

## How is the transaction levy surcharge calculated when I remit it to the Law Society and when I disburse the surcharge to my clients?

### Remitting the surcharge to the Law Society

In 2010, as in the previous ten years, the transaction levy surcharges are considered insurance premium and therefore are **NOT** subject to GST. However, they are subject to PST. The total amount that is to be remitted to the **Law Society** therefore is **\$65 per transaction**.

Surcharge	\$60.19
PST	4.81
<b>Total</b>	<b><u>\$65.00</u></b>

### Calculating the surcharge when it is disbursed to clients

Because you are required to remit \$65 to the Law Society per transaction, and therefore are out of pocket \$65, you may disburse the full \$65 to your clients. As do your other disbursements, this expense attracts GST, at the rate of five per cent, as calculated below.

Surcharge	\$65.00	
GST	3.25	(remit directly to C.R.A.)
<b>Total</b>	<b><u>\$68.25</u></b>	

**NOTE:** The Ontario government has announced plans to harmonize its provincial sales tax ("PST") with the federal government's goods and services tax ("GST") effectively July 1, 2010. Updated information concerning the application of this harmonized sales tax ("HST") to transaction levy surcharges will be available on the LawPRO website at [www.lawpro.ca](http://www.lawpro.ca) once further details become known.

## Does the real estate transaction surcharge apply to transactions where a title policy is issued?

The real estate transaction levy surcharge will **NOT** apply to title-insured real estate transactions provided the following conditions are met:

- the real estate transaction closes on or after January 1, 1998;
- a title insurance policy(ies) is(are) issued in favour of all of the transferees and chargees obtaining an interest in or charge against the land which is the subject of the real estate transaction, provided that:
  - (a) the LAWYER does not act for the transferor in respect of the transaction;
  - (b) the title insurer(s) issuing the title insurance policy(ies) has(have) in all cases entered into a Release and Indemnity Agreement with LAWYERS of the Law Society of Upper Canada, in a form acceptable to the Law Society of Upper Canada, wherein the title insurer(s) irrevocably agrees(agree) to:
    - (i) indemnify and save harmless the LAWYER from and against any claims arising under the title insurance policy(ies), except for the LAWYER'S gross negligence or willful misconduct; and
    - (ii) release its right to maintain a claim against the LAWYER(S) acting as LAWYER(S) for the transferee(s), chargee(s) and/or the title insurer(s), except for the LAWYER'S gross negligence or willful misconduct; and
  - (c) the LAWYER(S) is(are) not obliged to pay any deductible amount to the title insurer(s) in respect of one or more claims made under the title insurance policy(ies) where the deductible amount is or may be the subject of recovery under the POLICY.

Through its website, the Law Society advises of those title insurers who have entered into such a release and indemnity agreement in a form satisfactory to the Law Society.

LAWYERS and law firms should be certain to ensure that a title insurance policy(ies) for the transaction is (are) actually issued after filing a title insurance application. Where no title insurance policy(ies) is (are) issued, a real estate transaction levy surcharge shall apply.

## Who may file documentation on a LAWYER'S behalf?

LAWYERS may delegate to their firms the responsibility of completing and remitting to LawPRO the real estate transaction summary form along with the quarterly payments. However, it remains the responsibility of the individual LAWYER to ensure that the real estate surcharge forms are submitted accurately and on time to LawPRO.

## When are levy surcharge payments due to the Law Society?

The real estate transaction levy surcharges payable by a LAWYER under Endorsement No. 2 of Policy No. 2010-001 shall be accumulated and paid quarterly within thirty days of the quarterly period ending on the last day of March, June, September and December.

## When do I have to file an exemption form?

LAWYERS who are exempt from paying the real estate transaction levy surcharge must file the exemption form once every year, by April 30th. LAWYERS admitted into practice after that date should file the exemption form within 30 days of the next quarterly period ending on the last day of June, September or December. The exemption form is on page 7 of this booklet.

## Who can I contact if I have any questions regarding the above information?

All questions can be directed to LawPRO's customer service department toll-free at 1-800-410-1013 or locally at (416) 598-5899 or via e-mail to [service@lawpro.ca](mailto:service@lawpro.ca).

# REAL ESTATE TRANSACTION SUMMARY FORM

RE10-1  
Revised  
Feb. 01, 2010

For Quarter Ending March 31, 2010 Due April 30, 2010

## YOU MUST SUBMIT THIS FORM EVEN IF YOU HAVE NO TRANSACTIONS TO REPORT IN THIS PERIOD.

For your transaction levy filing to be considered complete, LAWPRO must have received a copy of this form **and payment in full** of the amount indicated in Item 2 – **Total Surcharge Payable**. Filings consisting of only a completed surcharge form without payment will not be complete. Please note, no cheques post-dated beyond the due date will be accepted.

### 1. General Information (print or type)

Firm number\*:  (Sole practitioners may enter Law Society number)

Name of Law Firm, Association or Sole Practitioner: \_\_\_\_\_

Managing Partner, Association LAWYER or Sole Practitioner: \_\_\_\_\_

Firm contact: \_\_\_\_\_

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

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_ E-mail: \_\_\_\_\_

### 2. Transactions

Record the total number of transactions which qualify for payment of the real estate levy surcharge. Include in the total number of real estate transactions those real estate transactions for which no title insurance policy(ies) were actually issued, even though an application for title insurance may have initially been filed.

For files opened on or after January 1, 2010 # transactions  x \$65.00 = \$

For files opened before January 1, 2010 # transactions  x \$50.00 = \$

**Total Payable** \$

### 3. List of LAWYERS

Please list the name and Law Society number of all LAWYERS whose transactions are included in this Real Estate Transaction Summary Form, including those LAWYERS who are **not exempt** from the Real Estate Transaction Surcharge but who nonetheless had zero transactions during this quarter. **Use page 8 of this booklet to list additional LAWYERS if needed.**

**Law Society #**

**Name**

### 4. Declaration

I hereby certify on behalf of all the LAWYERS listed on this form or on the attached schedule, that the above information is correct.

\_\_\_\_\_ Date

\_\_\_\_\_ Signature of Managing Partner, LAWYER on behalf of Association, or Sole Practitioner

A) **Copy this form.**

B) **Attach cheque(s) made payable to:**

The Law Society of Upper Canada

Note: No cheques post-dated beyond the due date will be accepted.

C) **Forward copy and cheque(s) to:**

Lawyers' Professional Indemnity Company  
250 Yonge Street, Suite 3101, P. O. Box 3  
Toronto, ON M5B 2L7

\* Firm number is the number used by your firm to e-file LAWPRO insurance forms.

# REAL ESTATE TRANSACTION SUMMARY FORM

RE10-2  
Revised  
Feb. 01, 2010

For Quarter Ending June 30, 2010 Due July 31, 2010

## YOU MUST SUBMIT THIS FORM EVEN IF YOU HAVE NO TRANSACTIONS TO REPORT IN THIS PERIOD.

For your transaction levy filing to be considered complete, LAWPRO must have received a copy of this form **and payment in full** of the amount indicated in Item 2 – **Total Surcharge Payable**. Filings consisting of only a completed surcharge form without payment will not be complete. Please note, no cheques post-dated beyond the due date will be accepted.

### 1. General Information (print or type)

Firm number\*:  (Sole practitioners may enter Law Society number)

Name of Law Firm, Association or Sole Practitioner: \_\_\_\_\_

Managing Partner, Association LAWYER or Sole Practitioner: \_\_\_\_\_

Firm contact: \_\_\_\_\_

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

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_ E-mail: \_\_\_\_\_

### 2. Transactions

Record the total number of transactions which qualify for payment of the real estate levy surcharge. Include in the total number of real estate transactions those real estate transactions for which no title insurance policy(ies) were actually issued, even though an application for title insurance may have initially been filed.

For files opened on or after January 1, 2010 # transactions  x \$65.00= \$

For files opened before January 1, 2010 # transactions  x \$50.00= \$

**Total Payable** \$

### 3. List of LAWYERS

Please list the name and Law Society number of all LAWYERS whose transactions are included in this Real Estate Transaction Summary Form, including those LAWYERS who are **not exempt** from the Real Estate Transaction Surcharge but who nonetheless had zero transactions during this quarter. **Use page 8 of this booklet to list additional LAWYERS if needed.**

**Law Society #**

**Name**

### 4. Declaration

I hereby certify on behalf of all the LAWYERS listed on this form or on the attached schedule, that the above information is correct.

\_\_\_\_\_ Date

\_\_\_\_\_ Signature of Managing Partner, LAWYER on behalf of Association, or Sole Practitioner

A) **Copy this form.**

B) **Attach cheque(s) made payable to:**  
The Law Society of Upper Canada

Note: No cheques post-dated beyond the due date will be accepted.

C) **Forward copy and cheque(s) to:**

Lawyers' Professional Indemnity Company  
250 Yonge Street, Suite 3101, P. O. Box 3  
Toronto, ON M5B 2L7

\* Firm number is the number used by your firm to e-file LAWPRO insurance forms.

# REAL ESTATE TRANSACTION SUMMARY FORM

RE10-3

For Quarter Ending September 30, 2010 **Due October 31, 2010**

**YOU MUST SUBMIT THIS FORM EVEN IF YOU HAVE NO TRANSACTIONS TO REPORT IN THIS PERIOD.**

For your transaction levy filing to be considered complete, LAWPRO must have received a copy of this form **and payment in full** of the amount indicated in Item 2 – **Total Surcharge Payable**. Filings consisting of only a completed surcharge form without payment will not be complete. Please note, no cheques post-dated beyond the due date will be accepted.

**1. General Information** (print or type)

Firm number\*:  (Sole practitioners may enter Law Society number)

Name of Law Firm, Association or Sole Practitioner: \_\_\_\_\_

Managing Partner, Association **LAWYER** or Sole Practitioner: \_\_\_\_\_

Firm contact: \_\_\_\_\_

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

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_ E-mail: \_\_\_\_\_

**2. Transactions**

Record the total number of transactions which qualify for payment of the real estate levy surcharge. Include in the total number of real estate transactions those real estate transactions for which no title insurance policy(ies) were actually issued, even though an application for title insurance may have initially been filed.

**Total Transactions & Surcharge Payable**

#  x \$65.00 = \$

**3. List of LAWYERS**

Please list the name and Law Society number of all **LAWYERS** whose transactions are included in this Real Estate Transaction Summary Form, including those **LAWYERS** who are **not exempt** from the Real Estate Transaction Surcharge but who nonetheless had zero transactions during this quarter. **Use page 8 of this booklet to list additional LAWYERS if needed.**

**Law Society #**

**Name**

**4. Declaration**

I hereby certify on behalf of all the **LAWYERS** listed on this form or on the attached schedule, that the above information is correct.

\_\_\_\_\_ Date

\_\_\_\_\_ Signature of Managing Partner, **LAWYER** on behalf of Association, or Sole Practitioner

A) **Copy this form.**

B) **Attach cheque(s) made payable to:**

The Law Society of Upper Canada

Note: No cheques post-dated beyond the due date will be accepted.

C) **Forward copy and cheque(s) to:**

Lawyers' Professional Indemnity Company  
250 Yonge Street, Suite 3101, P. O. Box 3  
Toronto, ON M5B 2L7

\* Firm number is the number used by your firm to e-file LAWPRO insurance forms.

# REAL ESTATE TRANSACTION SUMMARY FORM

RE10-4

For Quarter Ending December 31, 2010 Due January 31, 2011

## YOU MUST SUBMIT THIS FORM EVEN IF YOU HAVE NO TRANSACTIONS TO REPORT IN THIS PERIOD.

For your transaction levy filing to be considered complete, LAWPRO must have received a copy of this form **and payment in full** of the amount indicated in Item 2 – **Total Surcharge Payable**. Filings consisting of only a completed surcharge form without payment will not be complete. Please note, no cheques post-dated beyond the due date will be accepted.

### I. General Information (print or type)

Firm number\*:  (Sole practitioners may enter Law Society number)

Name of Law Firm, Association or Sole Practitioner: \_\_\_\_\_

Managing Partner, Association LAWYER or Sole Practitioner: \_\_\_\_\_

Firm contact: \_\_\_\_\_

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

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_ E-mail: \_\_\_\_\_

### 2. Transactions

Record the total number of transactions which qualify for payment of the real estate levy surcharge. Include in the total number of real estate transactions those real estate transactions for which no title insurance policy(ies) were actually issued, even though an application for title insurance may have initially been filed.

**Total Transactions & Surcharge Payable**

#  x \$65.00 = \$

### 3. List of LAWYERS

Please list the name and Law Society number of all LAWYERS whose transactions are included in this Real Estate Transaction Summary Form, including those LAWYERS who are **not exempt** from the Real Estate Transaction Surcharge but who nonetheless had zero transactions during this quarter. **Use page 8 of this booklet to list additional LAWYERS if needed.**

**Law Society #**

**Name**

### 4. Declaration

I hereby certify on behalf of all the LAWYERS listed on this form or on the attached schedule, that the above information is correct.

\_\_\_\_\_ Date

\_\_\_\_\_ Signature of Managing Partner, LAWYER on behalf of Association, or Sole Practitioner

A) **Copy this form.**

B) **Attach cheque(s) made payable to:**

The Law Society of Upper Canada

Note: No cheques post-dated beyond the due date will be accepted.

C) **Forward copy and cheque(s) to:**

Lawyers' Professional Indemnity Company  
250 Yonge Street, Suite 3101, P. O. Box 3  
Toronto, ON M5B 2L7

\* Firm number is the number used by your firm to e-file LAWPRO insurance forms.

To e-file this form and your payment, visit MY LAWPRO at [www.lawpro.ca](http://www.lawpro.ca)

# 2010 EXEMPTION

## FROM REAL ESTATE TRANSACTION LEVY SURCHARGE

### QUARTERLY FILINGS

#### Due April 30, 2010

REX10

**IF YOU DO NOT PRACTISE REAL ESTATE, YOU MAY EXEMPT YOURSELF FROM FILING QUARTERLY BY FILING THIS EXEMPTION FORM.**

#### 1. General Information (print or type)

Firm number\*:  (Sole practitioners may enter Law Society number)

Name of Law Firm, Association or Sole Practitioner: \_\_\_\_\_

Managing Partner, Association LAWYER or Sole Practitioner: \_\_\_\_\_

Firm contact: \_\_\_\_\_

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

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_ E-mail: \_\_\_\_\_

#### 2. Exemption Information

The following LAWYER(S) of the above firm, association or sole practice claim exemption from payment of the transaction levy surcharge in respect of real estate on the grounds that the individual(s) are **not** engaged in transactions in the above area of law. (Use page 8 of this booklet to list additional LAWYERS, if needed.)

#### Law Society #

#### Name

#### 3. Declaration

I hereby certify on behalf of all the LAWYERS listed on this form or on the attached schedule, that the above information is correct.

\_\_\_\_\_ Date

\_\_\_\_\_ Signature of Managing Partner, LAWYER on behalf of Association, or Sole Practitioner

A) **Copy this form.**

B) **Forward copy to:**

Lawyers' Professional Indemnity Company  
250 Yonge Street, Suite 3101, P. O. Box 3  
Toronto, ON M5B 2L7

\* Firm number is the number used by your firm to e-file LAWPRO insurance forms.

To e-file this form and your payment, visit MY LAWPRO at [www.lawpro.ca](http://www.lawpro.ca)





**STEPS TO ASSIST IN COMPLYING WITH THE TWO-LAWYER  
REQUIREMENT FOR TRANSFERS OF TITLE TO REAL PROPERTY -  
RULE 2.04.1**

- Determine whether two lawyers in your firm are being requested to act for, or represent both the transferor and the transferee with respect to a transfer of title to real property.
- If so, determine whether there is a conflict of interest that would preclude lawyers of the same firm from acting for both the transferor and the transferee in the transaction or whether this is a situation where it would not be prudent for lawyers of the same firm to accept such a retainer. If there is such a conflict, then the lawyers in the same firm either cannot or should not act for both parties. If there is no such conflict, then the lawyers in the same firm may act provided that they comply with the joint retainer rules [2.04(6)-(10)]
- Before accepting the joint retainer, the lawyers must advise both the transferor and the transferee that
  - The lawyers have been asked to act for both or all of them;
  - No information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned; and
  - If a conflict develops that cannot be resolved, you cannot continue to act for both or all of them and may have to withdraw completely
- If the clients are agreeable to retaining you on these conditions, the lawyers must obtain each client's informed consent by:
  - Having the client sign a written consent; or
  - Obtaining the client's oral consent and then sending that client a letter confirming his or her consent.
  - If one of the clients in the joint retainer is more vulnerable or less sophisticated than the other(s), you should consider having this client obtain independent legal advice before accepting the joint retainer.
  - If you have a continuing relationship with one of the clients for whom you act regularly, before accepting the joint retainer, the lawyers must advise the other client(s) of the continuing relationship and recommend that the other client(s) obtain independent legal advice about the joint retainer.
- Once you accept the joint retainer, each lawyer must assume complete professional responsibility for all documents that the lawyer electronically signs using the electronic land registration system and must comply with Rule 2.04 on conflicts of interest.

**Appendix 9 – Questions and answers on the following topics:**

1. Identifying the Client
2. Verifying the Identity of the Client
3. Verifying the identity of a Client – Non Face to Face Meetings
4. Practice Specific Issues
5. Recordkeeping
6. Withdrawal from Representation



## CLIENT IDENTIFICATION AND VERIFICATION REQUIREMENTS FOR LAWYERS

### INTRODUCTION

The new client identification and verification requirements came into effect on December 31, 2008. Part III of By-Law 7.1 contains four main requirements:

- identifying the client and certain third parties
- verifying the identity of the client and certain third parties
- maintaining records, and
- withdrawing from representation in appropriate circumstances.

Identifying the client means obtaining certain basic information about your client and any third party directing, instructing or who has the authority to direct or instruct your client such as a name and address. You must obtain this information whenever you are retained to provide legal services to a client unless an exemption applies. Some of this information is likely information that you were obtaining prior to the implementation of the By-Law as part of your file opening process.

Verifying the identity of a client means actually looking at an original identifying document from an independent source to ensure that your clients and any third parties are who they say they are. You are only required to verify the identity of your client and such third parties if you are involved in a funds transfer activity, that is, ***you engage in or instruct with respect to the payment, receipt or transfer of funds***. You are not required to identify and/or verify the identity of your client and such third parties in all situations. The By-Law contains certain exemptions which are outlined in the Qs & As below. To determine whether you are required to verify identity or whether an exemption applies, you must look at each funds transaction separately. For example, if you are acting for a purchaser and receive closing funds from the purchaser and you later pay out the closing funds to the vendor, you must consider the receipt and payment of funds separately. Both transactions would need to be exempt in order for you not to be required to verify the identity of your client.

To determine whether you are required to comply with the client identification and verification requirements consider.

**1. Are you being retained to provide legal services to a client?**

If yes, you must identify your client and any third party instructing or directing your client or who has the authority to instruct or direct your client unless an exemption to the client identification requirement applies.

**2. Are you engaging in or instructing with respect to the receipt, payment or transfer of funds?**

If, yes, you must verify the identity of your client and any third party directing or instructing your client or who has the authority to direct or instruct your client unless an exemption applies.

**3. If you are required to verify the identity of an organization, you must also verify the identity of the individual giving you instructions on behalf of the organization and you must use reasonable efforts to obtain certain identifying information about the directors of the organization and certain shareholders.**

**4. If you are required to verify the identity of an individual who you are not meeting face to face, you must obtain an attestation from a commissioner of oaths or guarantor or you must have an agent verify identity on your behalf.**

**Appendix 1** outlines the steps for identifying individuals and organizations.

**Appendix 2** outlines the steps for verifying the identity of an individual.

**Appendix 3** outlines the steps for verifying the identity of an organization.

**Appendix 4** contains a sample attestation for situations where you are required to verify the identity of an individual **who is present in Canada** and who you are not meeting face to face.

**Appendix 5** contains a sample agreement for situations where you are required to verify the identity of an individual and you retain an agent to do this on your behalf.

**Appendix 6** contains sample file forms

**Appendix 7** contains background information on the new requirements and information on the Federal Regulations

**Appendix 8** contains steps to assist lawyers in complying with the new client identification and verification requirements

**Appendix 9 – Questions and answers on the following topics:**

1. Identifying the Client
2. Verifying the Identity of the Client
3. Verifying the identity of a Client – Non Face to Face Meetings
4. Practice Specific Issues
5. Recordkeeping
6. Withdrawal from Representation



The Law Society of  
Upper Canada

Barreau  
du Haut-Canada

## **IDENTIFYING INDIVIDUALS AND ORGANIZATIONS<sup>1</sup>**

*(For use by lawyers to assist them to determine whether they are required to identify their client and if so, the steps that they are required to take)*

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- 1. First, determine whether you are being retained to provide legal services to a client?**
  
- 2. If yes, determine whether an exemption to the client identification requirement applies?**
  - **The exemptions are:**
    - ❑ you are providing legal services to your employer, for example as in-house counsel;
    - ❑ you are acting as an agent for another lawyer (an individual authorized to practise law anywhere in a province or territory of Canada) or a paralegal licensed by the Law Society of Upper Canada, who has already identified the client;
    - ❑ you are acting for a client who has been referred to you by another lawyer (an individual authorized to practise law anywhere in a province or territory of Canada) or a paralegal licensed by the Law Society of Upper Canada who has already identified the client; or
    - ❑ you are providing legal services as a duty counsel under the *Legal Aid Services Act, 1998*, as a duty counsel providing professional services through a duty counsel program operated by a not-for-profit organization or as the provider of legal aid services through the provision of summary advice under the *Legal Aid Services Act, 1998*.

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<sup>1</sup> This document has been prepared to assist lawyers to comply with the client identification and verification requirements of By-Law 7.1. Lawyers should refer to the by-law for a more detailed outline of their obligations. Please note that some of the terminology used to delineate the lawyer's obligations is specifically defined in the By-Law.

- 3. If an exemption applies, you are not required to identify your client. If no exemption applies, you are required to identify your client and any third party instructing or who has the authority to instruct your client.**
- 4. To identify an individual you must obtain and keep a record of:**
  - the individual's full name
  - home address and telephone number,
  - occupation, and
  - business address and telephone number, if applicable.
- 5. To identify an organization (a corporation, partnership, fund, trust, association etc.) you must obtain and keep a record of :**
  - the organization's full name
  - business address and telephone number
  - for organizations other than a financial institution, public body or reporting issuer, the organization's incorporation or business identification number and place of issuance of the number if the organization has a number and the general nature of the organization's business
  - the name, position and contact information of the individual giving you instructions on behalf of the organization
- 6. Retain a record of the information that you obtain for the longer of:**
  - six years following completion of the work for which you were retained
  - the duration of the lawyer and client relationship and for as long as it is necessary for the purpose of providing service to the client



## **VERIFYING THE IDENTITY OF AN INDIVIDUAL<sup>2</sup>**

*(This document has been prepared to assist lawyers to determine whether they are required to verify the identify of an individual and if so, the steps that they are required to take)*

---

- 1. Determine whether you are retained to provide legal services to a client?**
- 2. If yes, determine whether you will engage in or instruct with respect to the receipt, payment or transfer of funds?**
- 3. If yes, determine with respect to each funds transaction if an exemption to the requirement to verify identity applies?**

**The exemptions are:**

- you are providing legal services to your employer, for example as in-house counsel
- you are acting as an agent for another lawyer (an individual authorized to practise law anywhere in a province or territory of Canada) or a paralegal licensed by the Law Society of Upper Canada, who has already verified the identity of the client
- you are acting for a client who has been referred to you by another lawyer (an individual authorized to practise law anywhere in a province or territory of Canada) or a paralegal licensed by the Law Society of Upper Canada who has already verified the identity of the client
- you are providing legal services as a duty counsel under the *Legal Aid Services Act, 1998*, as a duty counsel providing professional services

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<sup>2</sup> This document has been prepared to assist lawyers to comply with the client identification and verification requirements of By-Law 7.1. Lawyers should refer to the by-law for a more detailed outline of their obligations. Please note that some of the terminology used to delineate the lawyer's obligations is specifically defined in the By-Law.



through a duty counsel program operated by a not-for-profit organization or as the provider of legal aid services through the provision of summary advice under the *Legal Aid Services Act, 1998*.

- funds are being paid to or received from a financial institution, public body (government) or reporting issuer (public company)
  - funds are being received from the trust account of another lawyer (an individual authorized to practise law anywhere in a province or territory of Canada) or a paralegal licensed by the Law Society of Upper Canada
  - funds are being received from a peace officer, law enforcement agency or other public official acting in an official capacity
  - funds are being received or paid pursuant to a court order
  - funds are being paid to pay a fine or penalty
  - funds are being paid or received as a settlement in a proceeding before an adjudicative body
  - funds are being paid for professional fees, disbursements, expenses or bail
  - funds are being paid, received or transferred by electronic funds transfer
  - you have previously verified the identity of an individual and you recognize the individual
  - the client and/or third party is an organization and you or an employee of your firm or a lawyer or paralegal in your firm licensed by the Law Society of Upper Canada have previously identified the organization by obtaining the name and occupations of each director of the organization and the name, address and occupations of each person who owns 25% or more of the organization or of the shares of the organization and have verified the identity of that organization including the individuals authorized to give instructions on behalf of the organization with respect to the matter.
- 4. If an exemption applies, you are not required to verify the identity of your client. If no exemption applies, you must verify the identity of your client and any third party instructing or having the authority to instruct your client.**
- 5. To verify the identity of an individual, either before or when you act or give instructions regarding the receiving, paying or transferring of funds obtain and review an original government issued identification of that individual that is valid and has not expired such as a:**

- Driver's Licence
- Birth Certificate
- Passport, or
- Other similar record

**6. If the individual is present in Canada and you are not meeting face to face with him or her, you must verify that individual's identity by one of the following methods:**

- Obtain an attestation from a commissioner of oaths or other approved person<sup>3</sup> who has verified the individual's identity by looking at an appropriate identity document, or
- Retain an agent to verify the identity of that individual on your behalf and prior to the agent acting on your behalf enter into a written agreement with that agent specifying the steps that he or she will be taking on your behalf to comply with the verification requirements

**7. If the individual is not present in Canada and you are not meeting face to face with him or her, you must verify that person's identity by:**

- Retaining an agent to verify the identity of that individual on your behalf and prior to the agent acting on your behalf entering into a written agreement with that agent specifying the steps that he or she will be taking on your behalf to comply with the verification requirements

**Sample Form Attestation – Appendix 4**

**Sample Agreement – Appendix 5**

**8. Retain a record of the information that you obtain and copies of the documents you receive to verify identity for the longer of:**

- six years following completion of the work for which you were retained
- the duration of the lawyer and client relationship and for as long as it is necessary for the purpose of providing service to the client

**Sample File Form – Appendix 6**

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<sup>3</sup> Subsection 23(9) designates the following persons as persons who may provide an attestation: a person entitled to administer oaths and affirmations in Canada, a dentist, a physician, a chiropractor, a judge, a magistrate or justice of the peace, a lawyer, a licensee (Ontario), a notary (Quebec), a notary public, an optometrist, a pharmacist, an accountant, a professional engineer, a veterinarian, a police officer, a nurse or a school principal.



*For Use When Verifying the Identity of an Organization*

**VERIFYING THE IDENTITY OF AN ORGANIZATION<sup>4</sup>**

*(This document has been prepared to assist lawyers to determine whether they are required to verify the identity of an organization and if so, the steps that they are required to take. An “organization” means a body corporate, partnership, fund, trust, co-operative or an unincorporated association”.)*

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- 1. Determine whether you are retained by an organization to provide legal services to a client?**
- 2. If yes, determine whether you will engage in or instruct with respect to the receipt, payment or transfer of funds?**
- 3. If yes, determine with respect to each funds transaction if an exemption to the requirement to verify identity applies? The exemptions are as follows:**
  - you are providing legal services to your employer, for example as in-house counsel
  - you are acting as an agent for another lawyer (an individual authorized to practise law anywhere in a province or territory of Canada) or a paralegal licensed by the Law Society of Upper Canada, who has already verified the identity of the client
  - you are acting for a client who has been referred to you by another lawyer (an individual authorized to practise law anywhere in a province or territory of Canada) or a paralegal licensed by the Law Society of Upper Canada who has already verified the identity of the client

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<sup>4</sup> This document has been prepared to assist lawyers to comply with the client identification and verification requirements of By-Law 7.1. Lawyers should refer to the by-law for a more detailed outline of their obligations. Please note that some of the terminology used to delineate the lawyer’s obligations is specifically defined in the By-Law.

- you are providing legal services as a duty counsel under the *Legal Aid Services Act, 1998*, as a duty counsel providing professional services through a duty counsel program operated by a not-for-profit organization or as the provider of legal aid services through the provision of summary advice under the *Legal Aid Services Act, 1998*.
  - funds are being paid to or received from a financial institution, public body (government) or reporting issuer (public company)
    - funds are received from the trust account of another lawyer (an individual authorized to practise law anywhere in a province or territory of Canada) or a paralegal licensed by the Law Society of Upper Canada
  - funds are being received from a peace officer, law enforcement agency or other public official acting in an official capacity
  - funds are being received or paid pursuant to a court order
  - funds are being paid to pay a fine or penalty
  - funds are being paid or received as a settlement in a proceeding before an adjudicative body
  - funds are being paid for professional fees, disbursements, expenses or bail
  - funds are being paid, received or transferred by electronic funds transfer
  - you have previously verified the identity of an individual and you recognize the individual
  - the client and/or third party is an organization and you or an employee of your firm or a lawyer or paralegal of your firm licensed by the Law Society of Upper Canada has previously identified the organization by obtaining the name and occupations of each director of the organization and the name, address and occupations of each person who owns 25% or more of the organization or of the shares of the organization and has verified the identity of that organization including the individuals authorized to give instructions on behalf of the organization with respect to the matter.
- 4. If an exemption applies, you are not required to verify the identity of your client. If no exemption applies, you must verify the identity of your client (other than financial institutions, public bodies or reporting issuers) and any third party instructing your client or who has the authority to instruct your client.**

- 5. To verify the identity of an organization either before or when you act or give instructions on behalf of the client regarding the receiving, paying or transferring of funds, you must obtain and review an original government issued identification of the individual giving instructions on behalf of the organization that is valid and has not expired such as a:**
- Driver's Licence
  - Birth Certificate
  - Passport, or
  - Other similar record
- 6. In addition if the organization is a corporation or other organization created or registered pursuant to legislative authority, no later than 60 days after you first act or give instructions regarding the receiving, paying or transferring of funds obtain and review a written confirmation from a government registry as to the existence, name and address of the organization including the names of the directors such as:**
- a certificate of corporate status issued by a public body (e.g. government)
  - a copy of a record obtained from a public body that the organization is required to file annually under applicable legislation (e.g. annual government filings), or
  - a copy of a similar record obtained from a public body that confirms the organization's existence
- 7. If the organization is a trust, partnership or other organization which is not registered in any government registry, no later than 60 days after you first act or give instructions regarding the receiving, paying or transferring of funds, review a copy of the organization's constating documents or similar record that confirms its existence as an organization such as:**
- a trust agreement
  - a partnership agreement
  - articles of association, or
  - other similar record that confirms the organization's existence as an organization

**8. Make reasonable efforts to obtain:**

- the name and occupation or occupations of each director of the organization unless the organization is a securities dealer
- the name, address and occupation or occupations of each person who owns 25% or more of the organization or of the shares of the organization

**9. Retain a record of the information that you obtain and copies of the documents you receive to verify identity for the longer of:**

- six years following completion of the work for which you were retained
- the duration of the lawyer and client relationship and for as long as it is necessary for the purpose of providing service to the client

**Sample File Form – Appendix 6**

## SAMPLE FORM

### ATTESTATION FOR VERIFICATION OF IDENTITY WHEN THE CLIENT OR THIRD PARTY IS PRESENT IN CANADA AND IS NOT INSTRUCTING THE LAWYER FACE TO FACE

The following sample form document has been prepared to assist lawyers to comply with their professional obligations when obtaining attestations from a commissioner of oaths or other guarantor where the individual whose identity is being verified is present in Canada, but is not meeting with the lawyer face to face. This sample form should be modified to suit the circumstances of the particular matter or transaction.

#### Instructions

**The Attestor should photocopy the identity document being used to verify identity and ensure that it is legible, unexpired and shows the name of the person whose identity is being verified, the number of the document, the name of the issuing authority, the date of issue and a photograph of the person.**

**The Attestor will print the following attestation on this photocopy and date and sign the attestation.**

I, the Attestor named below, hereby certify to [ *name of lawyer receiving the attestation*] that I met with [ *insert name of person* ] on [ *insert date* ] and verified this person's identity by examining the original of this person's identity document, of which a photocopy is contained on this page. The photograph in the identity document is a true likeness of the said person and to the best of my knowledge and belief, the identity document that I examined is valid and unexpired.

Attested to by me at \_\_\_\_\_, on \_\_\_\_\_, 2008

Signature of Attestor: \_\_\_\_\_

Printed Name of Attestor: \_\_\_\_\_

Title or Profession of Attestor: \_\_\_\_\_

Address of Attestor for Service: \_\_\_\_\_

Telephone Number of Attestor: \_\_\_\_\_

## SAMPLE FORM

### VERIFICATION OF IDENTITY AGREEMENT WHERE THE CLIENT OR THIRD PARTY IS NOT PRESENT IN CANADA AND IS NOT INSTRUCTING THE LAWYER FACE TO FACE<sup>7</sup>

This sample form agreement in letter format may be used by lawyers retaining agents to verify the identity of clients or third parties where the client or third party is not in Canada and is not instructing the lawyer face to face. In this sample form agreement, the identity of an individual is being verified by the examination of the person's driver's licence or passport. Although the by-law does not require the agent to examine more than one piece of identification, depending on the circumstances of the file, a lawyer may want an agent to examine more than one piece of identification. This sample form agreement should be modified to suit the circumstances of the matter or transaction. Furthermore, if the person is also signing other documents in the presence of the agent, such as an acknowledgment and direction authorizing the lawyer to electronically sign and submit title documents for registration, the lawyer may wish to modify this agreement to set out the additional obligations of the agent.

*[Firm Letterhead]*

*[Delivery Method]*

*[Name and Address of the Agent]*

Dear *[Agent]*:

Re: *[Insert the name of the client "our client"]*  
*[Insert the nature of the matter or transaction]*

We are acting in the above-noted matter and would like to retain you to verify the identity of our client. In this regard, we will require that you meet with our client and take the following steps to verify our client's identity:

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Please note that in situations where the client is an individual present in Canada and is not instructing the lawyer face to face, the lawyer has the option of obtaining either an Attestation (Appendix 4) or a Verification of Identity Agreement (Appendix 5).



1. Examine the original, valid and unexpired passport or driver's licence (identity document) of our client
2. Make a legible photocopy of this identity document and ensure that it contains our client's name, the number of the document, the name of the issuing authority, the date of issue and our client's photograph.
3. Print and certify on this photocopy as follows:

I, the Attestor named below, hereby certify to [ *name of lawyer receiving the attestation*] that I met with [ *insert name of person* ] on [ *insert date* ] and verified this person's identity by examining the original of the person's identity document, of which a photocopy is reproduced on this page, and which copy legibly shows the name of the person, the number of the identity document, the name of the issuing authority, the date of issue, and a photograph that is a true likeness of the said person. To the best of my knowledge and belief, the identity document that I examined is valid and unexpired.

Attested to by me at [ *Insert Place of Signature* ], on  
 , 2008

Signature of Attestor: \_\_\_\_\_

Printed Name of Attestor: \_\_\_\_\_

Title or Profession of Attestor: \_\_\_\_\_

Address of Attestor for Service: \_\_\_\_\_

Telephone Number of Attestor: \_\_\_\_\_

4. Date and sign the photocopy containing the above certification in the spaces set out for the date and signature and return it to us no later than [ *insert date* ].

Any amendments to these instructions must be approved in writing by our firm.

If you are agreeable to verifying the identity of our client on the terms and conditions set out in this letter, please confirm your agreement by signing two copies of this letter on the signature line below and return one copy to the undersigned.

Yours truly,

**Signature of Lawyer**

*[Insert the name of the Lawyer]*

I hereby agree to verify the identity of the person referred to above on the terms and conditions set out in the above letter.

Dated at *[Insert location]* on *[Insert date]*.

**Signature of the Agent**

*[Insert the Name of the Agent]*

**[LAW FIRM NAME]**  
BARRISTERS AND SOLICITORS

**VERIFICATION OF IDENTITY**

*(For use where the client or the third party is an individual)*

Name: \_\_\_\_\_

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

Phone No: \_\_\_\_\_

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

Business Phone No: \_\_\_\_\_

Occupation(s) \_\_\_\_\_

**Original Document Reviewed – Copy Attached**

- Driver's Licence
- Birth Certificate
- Passport
- Other (specify type) \_\_\_\_\_

Meeting Date Identity Verified: \_\_\_\_\_

Identity Verified By: \_\_\_\_\_

Date File Reviewed by Lawyer: \_\_\_\_\_

Name of Lawyer: \_\_\_\_\_

**[LAW FIRM NAME]**  
BARRISTERS AND SOLICITORS

**VERIFICATION OF IDENTITY**

*(For use where the client or the third party is an organization)*

Name: \_\_\_\_\_

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

Business Phone No: \_\_\_\_\_

Incorporation or  
Business Identification No: \_\_\_\_\_

Place of Issue of No: \_\_\_\_\_

Type of Business or  
Activity : \_\_\_\_\_

**Person Authorized to Instruct**

Name: \_\_\_\_\_

Position: \_\_\_\_\_

Phone No: \_\_\_\_\_

Original Document Reviewed – Copy Attached

- Driver's Licence
- Birth Certificate
- Passport
- Other (specify type) \_\_\_\_\_

Names and Occupation(s) of Directors

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Names, Addresses and Occupation(s) of Owners or Shareholders owning a 25% interest or more of the organization or shares in the organization

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**Original Document Reviewed – Copy Attached**

- Certificate of Corporate Status
- Annual Filings of the Organization (specify type) \_\_\_\_\_
- Partnership Agreement
- Trust Agreement
- Articles of Association
- Other (specify type) \_\_\_\_\_

Meeting Date Identity Verified: \_\_\_\_\_

Identity Verified By: \_\_\_\_\_

Date File Reviewed by Lawyer: \_\_\_\_\_

Name of Lawyer: \_\_\_\_\_

## **COMPLYING WITH THE NEW CLIENT IDENTIFICATION AND VERIFICATION OF IDENTITY REQUIREMENTS OF BY-LAW 7.1**

### **BACKGROUND INFORMATION ON THE NEW REQUIREMENT**

Lawyers by virtue of their trust accounts are targets for those wishing to launder money. Amendments to By-Law 7.1 on client identification and verification were approved by Convocation on April 24, 2008 and come into effect on December 31, 2008. These amendments are contained in Sections 20 – 27 of the By-Law. The new requirements are based on a Model Rule developed by the Federation of Law Societies of Canada as a part of its initiative to fight fraud. Law Societies across Canada are in the process of implementing the Model Rule within their regulatory regimes to create a national, uniform standard for client identification and verification requirements.

### **MONEY LAUNDERING AND TERRORIST FINANCING**

By way of background, as a result of growing global concern in 2000, the Government of Canada passed legislation known as the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (the “Act”). Under the Act, regulated persons and entities are required to report suspicious transactions and certain other financial transactions. Reporting persons are prohibited from “tipping off” their client about having made the report. Despite concerns expressed by the Federation of Law Societies, in November 2001 the federal government promulgated Regulations making the Act applicable to lawyers and requiring legal counsel to secretly report suspicious transactions to the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), a federal agency. The Federation and the Law Society of British Columbia, supported by the Canadian Bar Association, initiated proceedings in the Supreme Court of British Columbia challenging the constitutionality of the legislation and seeking interlocutory relief from the application of the Regulations to legal counsel. The Federation contended that the legislation required lawyers to act as secret agents of the state, collecting information about clients against their interests and reporting to a government agency. The Supreme Court of British Columbia agreed with these concerns and granted an interim injunction such that legal counsel were not required to report “suspicious transactions” pending a full hearing on the merits of the case. The BC Court of Appeal and the Supreme Court of Canada denied the government’s application for a stay of the Order. Similar Orders were granted in other provinces and territories across Canada.

As a result of these interlocutory Orders, in May 2002 the Attorney General of Canada agreed to suspend the application of the legislation to all Canadian lawyers (including Quebec notaries), pending a final decision on the merits of the constitutional challenge to the legislation. The hearing of the challenge has now been adjourned generally, and all lawyers in Canada remain exempt from the legislation by virtue of the injunction. The federal government indicated that following consultations with the legal profession, the government intended to put in place a new regulatory regime for lawyers that more appropriately reflected their duties.

In the interim the Federation independently of the litigation, has launched its own initiatives to fight fraud.

## **NO- CASH RULE**

In 2004, the Federation adopted a “No-Cash” Model Rule. All Law Societies across Canada have implemented rules restricting lawyers from receiving cash in amounts of \$7,500.00 or more. The adoption of the No-Cash Rule rendered unnecessary the obligation under the *Act* that the federal government sought to impose on lawyers, to report transactions involving \$10,000.00 or more in cash.

## **BILL C-25**

In October 2006, the federal government introduced Bill C-25 that made a series of amendments to the *Act*. Bill C-25 includes provisions (sections 6 and 6.1) enhancing the client identification, recordkeeping and reporting requirements in the *Act*. In June 2007, new client identification and verification regulations under these provisions were published by the Department of Finance. The regulations purport to regulate how lawyers and others should identify and verify the identity of clients. The regulations were published in final form in December 2007 and with respect to the legal profession, come into force in December 2008. Attached is a summary of the Regulations as applicable to lawyers. However, the injunction discussed earlier states that any new regulations do not apply to the legal profession unless the Federation of Law Societies consents.

The Federation’s Model Rule on Client Identification and Verification in many respects codifies the steps that a prudent lawyer would take in the normal course to verify a client’s identity. The Model Rule respects the threshold between constitutional and unconstitutional requirements imposed on lawyers when it comes to gathering information from clients: a lawyer must obtain and keep all information needed to serve the client, but must not obtain any information which serves only to provide potential evidence against the client in a future investigation or prosecution by state authorities. Like the adoption of the No-Cash Rule, national implementation of the Model Rule on Client Identification and Verification will demonstrate that responsible self-governance by the law societies makes federal regulation of the legal profession on this subject matter unnecessary.

## **NEW FEDERAL REGULATIONS ON CLIENT IDENTIFICATION AND VERIFICATION AS APPLICABLE TO LAWYERS<sup>8</sup>**

The following is a summary of the obligations of lawyers under the Federal Regulations on Client Identification and Verification published in final form in December 2007. The injunction discussed earlier states that any new regulations do not apply to the legal profession unless the Federation of Law Societies consents.

### **1. CLIENT IDENTIFICATION AND VERIFICATION**

The new Regulations require a lawyer to identify a client whenever the lawyer receives \$3,000 or more in the course of the lawyer's business activities. Funds received from a public body or a publicly-traded company with minimum net assets of \$75 million and which is located in a country that is a member of the FATF are exempt. The new Regulations also exempt lawyers from the requirements when the funds are received by the lawyer from the trust account of another lawyer.

Individual clients must be identified by referring to a government-issued identification document (e.g. a birth certificate, driver's license, provincial health insurance card, passport or similar document). If the client is an organization, the lawyer must rely on identifying documents such as a certificate of corporate status, trust or partnership agreements and articles of association. The new Regulations require additional identification procedures where the client who is an individual is not physically present, and permit the identification to be done by an agent or mandatary. For such non-face-to-face situations, the Regulations require combinations of two methods of identification set out in Schedule 7. For example, an attestation by a commissioner of oaths in Canada about the identity of the person and reference to identifying information in a credit file on the person would suffice.

Information required to be obtained during the identification process includes:

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<sup>8</sup> The new regulations relevant to the legal profession include provisions from:

- the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, Registration SOR/2002-184, May 9, 2002,
- amendments to those Regulations made by *Regulations Amending Certain Regulations Made Under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (2007-1) Registration SOR/2007-122 June 7, 2007 (published in Part II of the *Canada Gazette*, June 27, 2007), which generally come into force on June 23, 2008,
- amendments to those Regulations made by *Regulations Amending Certain Regulations Made Under The Proceeds Of Crime (Money Laundering) And Terrorist Financing Act* (2007-2) published in Part II of the *Canada Gazette* on December 26, 2007 as SOR/2007-293, December 13, 2007, and
- amendments to those Regulations made by *Regulations Amending Certain Regulations Made Under The Proceeds Of Crime (Money Laundering) And Terrorist Financing Act* (2008-1) published in Part II of the *Canada Gazette* on February 20, 2008 as SOR/2008-21, January 31, 2008.



- (a) For a client who is an individual, the name, address and date of birth of the person;
- (b) For a client that is a corporation, the corporate name and address and the name of its directors. “Reasonable efforts” must be made to obtain the occupation of its directors and the name, address and occupation of any person who owns or control 25% or more of the corporation;
- (c) For a client that is an entity other than a corporation, confirmation of its existence. The same reasonable efforts must be made to obtain the name, address and occupation of any person who owns or control 25% or more of the entity.

The new Regulations require the lawyer to document the inability to obtain through the “reasonable efforts” the specified information in b. and c.

When confirming the existence of a not-for-profit organization, a lawyer must determine whether it is a registered charity or solicits charitable financial donations.

For corporations or other organizations, the verification (the existence of the organization) must be confirmed within 30 days of the transaction. Individual clients’ identity must be confirmed at the time of the transaction.

Under the new Regulations, a lawyer is not required to re-identify clients unless he or she has doubts about the veracity of the previously obtained client information.

## **2. RECORD KEEPING**

The new Regulations include very detailed record-keeping requirements. Various records, described below, must be kept for a period of five years.

A lawyer must keep a “receipt of funds record”, a defined term in the new Regulations, when he or she has received \$3000 or more, except when the funds are received from a financial institution or public body. While parts of this record may already exist within a law office, it must include the following information:

- name, address and birth date of the person providing the funds,
- if the client is a person, the nature of the person’s principal business or occupation,
- if the client is an organization, the address and nature of the organization’s principal business,
- date of the transaction,
- account number affected by the transaction,
- type of account,
- full name of the person or entity who holds the account,
- monetary currency of the transaction,
- purpose and details of the transaction,
- if cash is received, how the funds are received, and
- amount and currency of the funds received.

If the client is a corporation, a lawyer must also include with the receipt of funds record a copy of the part of the official corporate records that contains any provisions relating to the power to bind the corporation in respect of the transactions with the lawyer.

The new Regulations indicate that the receipt of funds record is to contain the information specified if the information is not readily obtainable from other records that the lawyer keeps under the Regulations.

The new Regulations exempt lawyers from this record keeping requirement when the funds are received by the lawyer from the trust account of another lawyer. In such cases the lawyer must keep a record of that fact and is not required to include in the receipt of funds record the number and type of the account affected by the transaction or the name of the person or organization who holds the account.

For identification of an individual, a lawyer must keep a record of the following information or keep the required document, as the case may be, which information relates to the methods required under the new Regulations for individual identity verification:

- for the birth certificate, driver's license, provincial health insurance card, passport or similar document, the type and reference number of the record and the place issued;
- with respect to the methods described in Schedule 7,
  - for the cleared cheque, the name of the financial entity and account number,
  - for confirmation of the deposit account, the name of the financial entity, number of the account and the date of the confirmation,
  - for the identification product, its name, the entity offering it, the search reference number and the date it was used to ascertain identity,
  - for the credit file, the name of the company and date consulted,
  - for the attestation, the attestation.

For corporate identity, where the identifying document is in electronic form, a lawyer must keep a record that sets out the corporation's registration number, the type of record referred to and the source of the electronic version of the record (a similar record is required for other organizations). Where the above information has been ascertained by referring to a paper copy of a record, a lawyer must keep the record or a copy of it.

At the time the existence of an organization is confirmed, if the lawyer has obtained the information about direct or indirect ownership and control described above, he or she must record it. As discussed earlier, where the lawyer is unable to obtain the above information, he or she must keep a record of the reasons the information could not be obtained.

Where the entity is a not-for-profit organization a lawyer must keep a record of whether it is a registered charity or solicits charitable financial donations.

The records required under the new Regulations must be kept in a form that can be provided to an authorized person within 30 days after a request is made to examine

them under section 62 of the Act. Section 62 gives FINTRAC authority to examine records of those who are subject to the Regulations.<sup>9</sup>

### **Note on Sections 62 to 65.1 of the Act**

These sections effectively authorize warrantless searches of law offices for the purpose of ensuring compliance with the Regulations. The sections are based on *Criminal Code* provisions that have been struck down as unconstitutional by the Supreme Court of Canada. As such, these sections do not comply with the stringent requirements established by the Court in *Lavallee, Rackel & Heintz v. Canada*.<sup>10</sup> Bill C-25, amending legislation in respect of the Act, which received Royal Assent in December 2006, did not include amendments to sections 62 to 65 to address this issue despite the apparent intention of the Department of Finance to do so. The following appeared in the Department's June 2005 consultation paper, referenced earlier:

#### **6.17 Documents Protected by Solicitor-Client Privilege**

Reference: PCMLTFA, sections 62 to 65

##### ***Amendment***

Amend the compliance provisions that allow FINTRAC to examine documents to bring the PCMLTFA into conformity with the principles set out by the Supreme Court of Canada in its decision in the case of *Lavallee, Rackel & Heintz* in respect of solicitor-client privilege.

##### ***Explanation***

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<sup>9</sup> Section 62 of the Act reads:

- 62.** (1) An authorized person may, from time to time, examine the records and inquire into the business and affairs of any person or entity referred to in section 5 for the purpose of ensuring compliance with Part 1, and for that purpose may
- (a) at any reasonable time, enter any premises, other than a dwelling-house, in which the authorized person believes, on reasonable grounds, that there are records relevant to ensuring compliance with Part 1;
  - (b) use or cause to be used any computer system or data processing system in the premises to examine any data contained in or available to the system;
  - (c) reproduce any record, or cause it to be reproduced from the data, in the form of a printout or other intelligible output and remove the printout or other output for examination or copying; and
  - (d) use or cause to be used any copying equipment in the premises to make copies of any record.

Assistance to Centre

(2) The owner or person in charge of premises referred to in subsection (1) and every person found there shall give the authorized person all reasonable assistance to enable them to carry out their responsibilities and shall furnish them with any information with respect to the administration of Part 1 or the regulations under it that they may reasonably require.

<sup>10</sup> *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink*, [2002] 3 S.C.R. 209.

In a 2002 decision in the case of *Lavallee, Rackel & Heintz*, the Supreme Court of Canada set out principles that should be followed to protect solicitor-client privilege when the police seize documents from law offices under warrants. The proposed amendments would ensure that the compliance provisions under the PCMLTFA allowing FINTRAC to examine documents are consistent with these principles.

The Federation of Law Societies of Canada, in its responding to the consultation paper in September 2005, affirmed the need to address this issue:

The Federation supports the proposal in section 6.17 of the Consultation Paper to amend sections 62 to 65 of the Act to conform with the principles established by the Supreme Court of Canada on seizure of solicitor and client privileged documents. These sections are modeled closely on those in the *Criminal Code*, which have been struck down as unconstitutional by the Supreme Court. The Court, in confirming that privilege does not come into being by an assertion of a privilege claim, but exists independently, found that by the operation of s. 488.1 of the *Criminal Code*, the “constitutionally protected right” of privilege could be violated by the mere failure of counsel to act, without instruction from or communication with the client. The Federation agrees that the Act must be amended to ensure that solicitor and client privilege is protected.

The application of sections 62 to 65.1 as currently framed in the Act to the legal profession would create serious problems for the protection of solicitor and client privilege and confidentiality.

### **3. COMPLIANCE**

The new Regulations require lawyers or law firms to establish detailed compliance and review programs. The following is an overview of the requirements.

A lawyer or law practice must implement a program to ensure compliance with the new Regulations by:

- designating a person in the law practice – who, where the program is being implemented by a person, may be that person (e.g. a sole practitioner) – who is to be responsible for the implementation of the program;
- developing and applying written compliance policies and procedures that are approved by the law practice’s managing partner, as the case may be, and are kept up to date;
- assessing and documenting, in a manner that is appropriate for a law practice, the risk of money laundering or terrorist financing, taking into consideration
  - the clients and the business relationships of the law practice,
  - the services and service delivery methods of the law practice,
  - the geographic location of the activities of the lawyer, and

- any other relevant factor;
- if the law practice has employees, agents or other persons authorized to act on its behalf, developing and maintaining a written ongoing compliance training program for those employees, agents or persons;
- instituting and documenting a review of the policies and procedures, the risk assessment and the training program for the purpose of testing their effectiveness, which review is required to be carried out every two years by an internal or external auditor of law practice, or by the law practice itself if it does not have such an auditor.

For the purposes of the compliance program, the law practice must report the following in written form to the managing partner, as the case may be, 30 days after the assessment described above:

- the findings of the review referred to in e above;
- any updates to the policies and procedures made within the reporting period; and
- the status of the implementation of those policies and procedures and their updates.

If a law practice considers the risk of money laundering or terrorist financing in the course of its activities to be high, the lawyer or law practice must develop and apply written policies and procedures for taking reasonable measures to keep client identification information up to date and mitigating the risks.



## **STEPS TO ASSIST LAWYERS IN COMPLYING WITH THE NEW CLIENT IDENTIFICATION AND VERIFICATION REQUIREMENTS - BY-LAW 7.1<sup>1</sup>**

By-Law 7.1 talks about identification and verification of the identity of a client. This involves identifying and verifying the identity of both the client and also certain third parties associated with the client. Identification refers to the basic information that you need to get about your client and third party to know who they are whenever you are retained, such as their name and address. Verification of identity is required only when you are acting for a client or giving instructions on behalf of a client regarding the receiving, payment or transferring of funds.

The following steps have been prepared to assist lawyers to understand their obligations under the new requirements.

### **STEP 1 – IDENTIFY THE CLIENT AND CERTAIN THIRD PARTIES**

- When you are retained to provide legal services, you must identify your client and any third party for whom your client acts or represents unless:
  - you are providing the legal services on behalf of your employer;
  - you are acting as agent for another lawyer authorized to practice law in a province or territory of Canada or a paralegal licensed by the Law Society of Upper Canada who has already identified the client; or
  - you are acting for a client who has been referred to you by another lawyer authorized to practice law in a province or territory of Canada or a paralegal licensed by the Law Society of Upper Canada who has already identified the client, or
  - you are acting as duty counsel under the *Legal Aid Services Act, 1998* or as duty counsel providing professional services through a duty counsel program operated by a not-for-profit organization or you are providing legal services through the provision of summary advice under the *Legal Aid Services Act, 1998* [Section 22, By-Law 7.1]

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<sup>1</sup> This document has been prepared to assist lawyers to comply with the client identification and verification requirements of By-Law 7.1. Lawyers should refer to the by-law for a more detailed outline of their obligations. Please note that some of the terminology used to delineate the lawyer's obligations is specifically defined in the By-Law.

- ❑ In order to identify the client and/or third party, you must obtain and keep a record of certain information about that client and/or third party.
- ❑ If the client and/or third party is an individual, you must obtain and keep a record of that person's:
  - full name
  - business address and phone number, if any
  - home address and home telephone number
  - occupation or occupations [Subsection 23(1), By-Law 7.1].
- ❑ If the client and/or third party is an organization<sup>2</sup> (e.g. corporation, partnership, or trust) you must obtain and keep a record of:
  - the organization's full name
  - the organization's business address and phone number, if any
  - the organization's incorporation or business identification number and the place of issue of its incorporation or business identification number, if any, unless the organization is a financial institution, public body or reporting issuer (public company)<sup>3</sup>
  - the general nature of the type of business or businesses or activity or activities engaged in by the organization unless the organization is a financial institution, government body or reporting issuer,
  - the name, position and contact information of each individual who provides you with instructions with respect to the matter on behalf of the organization [Subsection 23(1), By-Law 7.1]

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<sup>2</sup> The term "organization" is defined as a body corporate, partnership, fund, trust, cooperative or an unincorporated association [Section 20, By-Law 7.1].

<sup>3</sup> The terms "financial institution", "public body" and "reporting issuer" are defined in section 20 of By -Law 7.1. A "financial institution" includes certain banks, credit unions, loan and trust companies, government entities providing certain financial services to the public, some other similar entities and certain subsidiaries of these entities. A "public body" includes a ministry, department or agent of the government of Canada or of a province or territory of Canada, a municipality and some other similar bodies. A "reporting issuer" includes a reporting issuer within the meaning of an Act of a province or territory of Canada in respect of the securities law of the province or territory, a corporation whose shares are traded on a stock exchange designated under section 262 of the *Income Tax Act* (Canada) and that operates in a country that is a member of the Financial Action Task Force on Money Laundering and certain subsidiaries of these entities.

## STEP 2 – VERIFY THE IDENTITY OF THE CLIENT AND CERTAIN THIRD PARTIES

- Furthermore if you act for or give instructions on behalf of the client regarding the receiving, paying or transferring of funds<sup>4</sup> you must also take reasonable steps to verify the identity of that client and any third party for whom your client acts or represents unless an exception applies.

You are not required to verify identity if one of the following exceptions applies:  
[Subsection 22 (1), By-Law 7.1]

- you engage in these activities on behalf of your employer [Subsection 22 (2), By-Law 7.1]
- you are acting as agent for another lawyer authorized to practice law in a province or territory of Canada or a paralegal licensed by the Law Society of Upper Canada who has already identified and verified the identity of the person [Subsection 22 (2), By-Law 7.1]
- you are acting for a client referred to you by another lawyer authorized to practice law in a province or territory of Canada or a paralegal licensed by the Law Society of Upper Canada who has already identified and verified the identity of the person [Subsection 22 (2), By-Law 7.1]
- the funds being received are:
  - from a financial institution
  - from a public body
  - from a reporting issuer (public company)
  - from the trust account of another lawyer authorized to practice law in a province or territory of Canada or a paralegal licensed by the Law Society of Upper Canada
  - received pursuant to a court order
  - received as a settlement in a proceeding before an adjudicative body<sup>5</sup>
  - from a peace officer, law enforcement agency or other public official acting in their official capacity, or
  - for professional fees, disbursements, expenses or bail [Subsection 22(3), By-Law 7.1]
- the funds being paid are being paid :
  - to a financial institution

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<sup>4</sup> The term “funds” includes cash, currency, securities, negotiable instruments (e.g. cheques, bank drafts, money orders and promissory notes) and any other financial instruments that indicate a person’s title or interest in such funds [Section 20 of By-Law 7.1].

<sup>5</sup> An “adjudicative body” is defined in Section 1 of the *Law Society Act* as any body that, after the presentation of evidence or legal argument by one or more persons, makes a decision that affects a person’s legal interests, rights or responsibilities and, without limiting the generality of the foregoing, includes a federal or provincial court, a tribunal established under an Act of Parliament or under an Act of the Legislature of Ontario to conduct an inquiry or inquest and an arbitrator.



- to a public body
  - to a reporting issuer (public company)
  - pursuant to a court order or to pay a fine or penalty
  - as a settlement in a proceeding before an adjudicative body , or
  - for professional fees, disbursements, expenses or bail [Subsection 22(3), By-Law 7.1]
- you pay, receive or transfer funds by electronic funds transfer<sup>6</sup> [Subsection 23(3)]
  - you have previously verified the identity of an individual and you recognize the individual [Subsection 23(12), By-Law 7.1], or
  - the client and/or third party is an organization and you have previously identified the organization by obtaining the name and occupations of each director of the organization and the name, address and occupations of each person who owns 25% or more of the organization or of the shares of the organization and you have verified the identity of that organization including the individuals authorized to give instructions on behalf of the organization with respect to the matter. [Subsection 23(12), By-Law 7.1].

In addition when you act for a financial institution, public body or reporting issuer (public company) you are not required to verify the identity of that client [Subsection 22(4)].

- If you are required to verify the identity of a client or third party, you must do so by looking at an original identifying document, from an independent source, that you reasonably believe to be reliable. The type of document that you will examine will differ depending on whether the person is an individual or an organization and also depending on the type of organization involved. [Subsection 23(4), By-Law 7.1].
- If the client and/or third party is an individual you must verify that individual's identity either before or when you act or give instructions on behalf of the client regarding the receiving, paying or transferring of funds . You may do this by obtaining and reviewing an original government issued identification of that person that is valid and has not expired such as a:
  - Driver's Licence
  - Birth Certificate
  - Provincial or Territorial Health Card, where permitted<sup>7</sup>
  - Passport, or
  - Other similar record [Subsection 23(5) and 23(7) of By-Law 7.1]

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<sup>6</sup> The term "electronic funds transfer" is defined in section 20 of the By-Law.

<sup>7</sup> A provincial or territorial health card may only be used to verify identity if the use of the card is not prohibited by the applicable provincial or territorial law. In Ontario, subsection 34 (4 ) of the *Personal Health Information Protection Act, 2004* provides: "No person shall require the production of another person's health card, but a person who provides a provincially funded health resource to a person who has a health card may require the production of the health card." The term "health card" is defined in subsection 34(1) of the *Act* as "a card provided to an insured person within the meaning of the *Health Insurance Act* by the General Manager of the Ontario Health Insurance Plan".

- If the client and/or third party is a corporation or society or other organization created or registered pursuant to legislative authority you must verify its identity no later than 60 days after first engaging in the funds transfer activity. You may verify the identity of this organization by obtaining and reviewing a written confirmation from a government registry as to the existence, name and address of the organization including the names of the organization's directors such as:
  - a certificate of corporate status issued by a public body (e.g. government)
  - a copy of a record obtained from a public body that the organization is required to file annually under applicable legislation (e.g. annual government filings), or
  - a copy of a similar record obtained from a public body that confirms the organization's existence [Subsection 23(6) and 23(7) of By-Law 7.1]
  
- If the client and/or third party is a trust, partnership or other organization which is not registered in any government registry, you must verify its identity no later than 60 days after first engaging in the funds transfer activity. You may verify the identity of this organization by obtaining and reviewing a copy of the organization's constating documents such as:
  - a trust agreement
  - a partnership agreement
  - articles of association, or
  - other similar record that confirms the organization's existence as an organization [Subsections 23(6) and 23(7), By-Law 7.1].
  
- In addition, where the client or third party is an organization and you are required to verify its identity, you must take two additional steps.
  - First, you must verify the identity of the individual providing you with instructions with respect to the matter on behalf of the organization, either before or when you act or give instructions on behalf of the client regarding the receiving, paying or transferring of funds, unless you have previously identified and verified the identity of that individual [Subsection 23(5), By-Law 7.1]
  
  - Second, you must make reasonable efforts to obtain:
    - the name and occupation or occupations of each director of the organization unless the organization is a securities dealer
    - the name, address and occupation or occupations of each person who owns 25% or more of the organization or of the shares of the organization [Subsection 23(2), By-Law 7.1]
  
- In addition, if you are required to verify the identity of an individual and you are not meeting with that individual face to face, you must have another person verify the identity of that individual by using one of two methods depending on whether the individual whose identity is being verified is present in Canada:

- In this regard, if the individual is **present in Canada**, you may obtain an attestation from a person entitled to administer oaths and affirmations in Canada (a commissioner of oaths) or from another designated person<sup>8</sup>. This person (the attestor) will verify the identity of the individual by looking at an appropriate identity document and provide you with an attestation. The attestation consists of a legible photocopy of the independent source identity document signed by the attestor and on which the attestor has indicated:
  - his or her name, occupation and address;
  - the type and number of the document looked at by that person to verify identification [Subsections 23(8) – (10), By-Law 7.1]

**Appendix 4 contains a sample form attestation.**

- Alternatively if the individual whose identity is being verified is **not present in Canada** or if you choose not to obtain an attestation, you may retain an agent to verify the identity of the individual, but prior to the agent acting on your behalf you must enter into a written agreement with that agent specifying the steps that he or she will be taking on your behalf to comply with the verification requirements [Subsections 23(8)-(11), By-Law 7.1].

**Appendix 5 contains a sample form verification of identity agreement.**

- Obtain a copy of every document that you have used to verify the identity of an individual or organization including copies of documents used by persons acting on your behalf to verify identity [Subsection 23(13), By-Law 7.1].

**Appendix 3 contains forms that you may use to assist you in identifying and verifying the identity of a client or third party.**

### STEP 3 – RETAIN RECORDS

- Retain a record of the information that you obtain and copies of the documents you receive to identify and verify the identity of an individual or organization including attestations and agreements with agents for the longer of:
  - six years following completion of the work for which you were retained
  - the duration of the lawyer and client relationship and for as long as it is necessary for the purpose of providing service to the client [Subsection 23(14) of By-Law 7.1]

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<sup>8</sup> Subsection 23(9) designates the following persons as persons who may provide an attestation: a person entitled to administer oaths and affirmations in Canada, a dentist, a physician, a chiropractor, a judge, a magistrate or justice of the peace, a lawyer, a licen see (Ontario), a notary (Quebec), a notary public, an optometrist, a pharmacist, an accountant, a professional engineer, a veterinarian, a police officer, a nurse or school principal.

#### **STEP 4 – WITHDRAW IF APPROPRIATE**

- If you know or ought to know that you would be assisting a client in fraud or other illegal conduct, you must immediately cease engaging in any activities that would assist the client in such conduct and, if you are unable to do so, you must withdraw from representing the client [Section 24, By-Law 7.1, and Rules 2.02 (5) and 2.09 of the Rules of Professional Conduct].



## **CLIENT IDENTIFICATION AND VERIFICATION REQUIREMENTS** **QUESTIONS AND ANSWERS**

The following Q&A have been prepared to assist lawyers to interpret and better understand the new requirements:

### **IDENTIFYING THE CLIENT**

**1. What does “identifying my client” mean?**

Identifying your client means obtaining certain basic information about your client and any third party directing, instructing or who has the authority to direct or instruct your client such as a name and address.

**2. In what circumstances am I required to identify my client?**

You must identify your client whenever you are retained to provide legal services, except:

- i. when you provide legal services to your employer, for example as in-house counsel;
- ii. when you are acting as an agent for another lawyer (an individual authorized to practise law anywhere in a province or territory of Canada) or a paralegal licensed by the Law Society of Upper Canada, who has already identified the client;
- iii. when you are acting for a client who has been referred to you by another lawyer (an individual authorized to practise law anywhere in a province or territory of Canada) or a paralegal licensed by the Law Society of Upper Canada who has already identified the client; or
- iv. when you are providing legal services as a duty counsel under the *Legal Aid Services Act, 1998*, as a duty counsel providing professional services through a duty counsel program operated by a not-for-profit organization or as the provider of legal aid services through the provision of summary advice under the *Legal Aid Services Act, 1998*.

**3. I was acting for a client in a matter before December 31, 2008 and the matter is continuing. Do I have to identify this client in accordance with By-Law 7.1?**

If the matter is the same, you are not required to identify the client. However, if you take on a new matter for this client you must comply with the identification and verification requirements.

**4. Do I have to identify anyone other than my client?**

Yes, in some circumstances. You must identify any third party who is directing or instructing your client or who has the authority to direct or instruct your client. When your client or the third party is an organization, such as a company or a public body, you must also identify the person or persons giving instructions on behalf of the organization.

**5. I have been retained by another lawyer to do work for her client. Do I have to identify the client?**

If the other lawyer is a member of the bar in one of the provinces or territories of Canada and has identified the client in accordance with the By-Law, you do not have to do so.

**6. Another lawyer has referred one of her clients to me. Do I have to identify the client?**

No, you do not have to identify the client provided the other lawyer is licensed to practice law in a Canadian jurisdiction and has already identified the client in accordance with the By-Law.

**7. What are my obligations in determining whether a lawyer for whom I am acting as agent or a lawyer who has referred a client to me has taken the necessary steps to identify that client?**

You are expected to exercise due diligence to satisfy yourself that the other lawyer has already identified the client. This would involve asking the other lawyer to confirm that he or she has complied with the requirements of the By-Law.

**8. I have been retained by a client and another lawyer in my firm has already identified that client. Am I permitted to rely on this identification?**

Yes, you may rely on the identification information obtained by another lawyer in your firm provided that the information continues to be current.

**9. I am providing summary legal advice to a client over the phone. Am I required to identify the client?**

Yes, you are required to identify the client unless an exemption applies. For example, if you are providing legal aid services through the provision of summary advice under the *Legal Aid Services Act, 1998*, then an exemption would apply.

**10. What if I am not billing the client for the summary advice, am I still required to identify my client?**

Yes, unless an exemption applies.

**11. I have been contacted by a prospective client and after speaking briefly to the client about her matter and without providing any legal advice, I**

**determine that I will not accept the retainer. Am I required to identify that prospective client?**

No, as you have not been retained to provide legal services.

**12. I am retained to notarize or commission a document for someone that I am not otherwise retained to represent. Am I required to verify this person's identity?**

Simply notarizing or commissioning a document will not in and of itself, trigger the client identification obligations under the By-Law. If, however, you are providing legal advice or representation, you must comply with the By-Law.

**13. At the request of the court, I assist an unrepresented person in court. Am I required to identify that person?**

If a lawyer at the request of the court assists an unrepresented party in court, the lawyer is not required to identify the client. However, if the representation continues beyond the court's direction, the lawyer would be required to comply with the By-Law.

**14. I am providing summary legal advice through a duty counsel program operated by a not-for-profit organization. Am I required to identify the client?**

No, there is an exemption when you act as a duty counsel providing professional services through a duty counsel program operated by a not-for-profit organization.

**15. What information must I obtain to identify an individual?**

You must obtain and record:

- the individual's full name
- home address and telephone number,
- occupation, and
- business address and telephone number, if applicable.

**16. What information must I obtain to identify a client or third party that isn't an individual, such as a company or a public body?**

When your client is an organization (a corporation, partnership, fund, trust, co-operative or an unincorporated association) you must get and record its:

- full name
- business address and its business telephone number.

In addition, except for when your client is a financial institution (e.g. bank), public body (e.g. government) or reporting issuer (e.g. public company), you must also obtain and record:

- the organization's incorporation or business identification number and where it was issued if applicable, and
- the general nature of its business.

Finally, if you are required to identify an organization, you must record the name, position and contact information of the person or persons giving you instructions in the matter on behalf of the organization.

**17. What information do I have to get from a client or third party that is a “financial institution” within the meaning of the By-Law to identify it?**

You must obtain the financial institution’s full name, address and telephone number. In addition you must record the name, position and contact information of the individual(s) giving you instructions on behalf of the financial institution.

**18. The definition of “reporting issuer” in the By-Law refers to a corporation whose shares are traded on a stock exchange designated under section 262 of the *Income Tax Act* (Canada) and that operates in a country that is a member of the Financial Action Task Force on Money Laundering. Where may I obtain information on these corporations?**

Section 262 of the *Income Tax Act* provides that the Minister of Finance may designate a stock exchange or part of a stock exchange for the purposes of the *Act*. The Department of Finance Canada publishes a list of the [Designated Stock Exchanges](#)

[Financial Action Task Force on Money Laundering \(FATF\) members](#) that are countries.

**19. I am required to obtain and record my client’s occupation. What do I do if the individual doesn’t have an occupation or doesn’t want to tell me what it is?**

You are required to obtain this information. If your client doesn’t want to answer the question, you should explain that all lawyers are required to ask all clients for this information and that you need it to properly represent him or her. If the client refuses to provide this information, you must advise the client that you will be in breach of the requirements unless you obtain it and your professional obligations do not permit you to act in such circumstances. If your client is unemployed or not actively engaged in an occupation, you may simply record this and continue to act for the client.

Note that 'occupation' does not need to be 'employment'. If your client is retired, a homemaker, a volunteer caregiver or otherwise occupied, you should record that information.

**20. In order to identify my client, I am required to obtain the organization’s business or incorporation number. What are some examples of business or incorporation numbers that could be used to satisfy this requirement?**

- Ontario Business Corporation Numbers



- Canadian Business Corporation Numbers
- GST/HST Numbers

If you wish to confirm the GST/HST number of a business, visit the

[Canada Revenue Agency website](#).

- [European Common Union Value Added Tax \(VAT\)](#)

**21. If my client or third party is unable to provide some of the identification information required, for example an address or a phone number, am I obliged to withdraw?**

Where a client or third party is unable to provide the information, for example where they have no address because they are homeless, or do not have a telephone number, the lawyer is not obliged to withdraw. This situation is to be distinguished from one in which the client refuses to provide the information. Where the information does not exist, the lawyer should make a record of that fact.

**22. I have been retained by a law firm to provide a legal opinion on an issue arising in a matter for which they are acting for a client. Do I have to identify the law firm's client?**

At the commencement of the retainer, you should determine who your clients are in the matter. If you are acting for both the law firm and its client, you must identify both. In circumstances where you act for the law firm alone, but the law firm's client is instructing the law firm with respect to the particular matter for which you are retained, you must identify the law firm as a client and the law firm's client as a third party instructing the law firm.

**23. The corporation I have been retained by has authorized several people to instruct counsel. Do I have to identify all of them?**

No. The By-Law requires you to identify the individual(s) actually giving you instructions. If the individual giving you instructions changes, you must identify that individual at that time.

**24. Do I have an obligation to look behind the assertion that an individual is authorized to instruct me on behalf of an organizational client?** The By-Law does not require that you investigate such an assertion. You should always exercise prudence, however, and if you have concerns about the assertion it would be advisable to make further inquiries to satisfy yourself that the individual is indeed authorized to instruct you.

## VERIFYING THE IDENTITY OF THE CLIENT

### 25. What does “verifying the identity of my client” mean?

Verifying the identity of a client means actually looking at an original identifying document from an independent source to ensure that your clients and any third parties are who they say they are.

### 26. In what circumstances do I have to verify my client’s identity?

You are only required to verify the identity of your client and any third party instructing or directing your client or who has the authority to instruct or direct your client when you are retained to provide legal services to a client and you are involved in a funds transfer activity, that is, ***when you engage in or give instructions in respect of the receipt, payment or transfer of funds.***

### 27. Does every financial transaction trigger the verification requirement?

No. There are a number of situations where you are not required to verify the identity of the client and third party even though you are engaged in a funds transfer activity.

These situations include the following:

- you are providing legal services to your employer, for example as in-house counsel;
- you are acting as an agent for another lawyer (an individual authorized to practise law anywhere in a province or territory of Canada) or a paralegal licensed by the Law Society of Upper Canada, who has already identified the client;
- you are acting for a client who has been referred to you by another lawyer (an individual authorized to practise law anywhere in a province or territory of Canada) or a paralegal licensed by the Law Society of Upper Canada who has already identified the client; or
- you are providing legal services as a duty counsel under the *Legal Aid Services Act, 1998*, as a duty counsel providing professional services through a duty counsel program operated by a not-for-profit organization or as the provider of legal aid services through the provision of summary advice under the *Legal Aid Services Act, 1998*.
- the funds are being paid to or are being received from a financial institution, public body (government) or reporting issuer (public company)
- the funds are being received from the trust account of another lawyer (an individual authorized to practise law anywhere in a province or territory of Canada) or a paralegal licensed by the Law Society of Upper Canada
- the funds are being received from a peace officer, law enforcement agency or other public official acting in an official capacity

- the funds are being paid or received pursuant to a court order
- the funds are being paid to pay a fine or penalty
- the funds are being paid or received as a settlement in a proceeding before an adjudicative body
- the funds are being paid for professional fees, disbursements, expenses or bail
- the funds are being paid, received or transferred by electronic funds transfer
- you have previously verified the identity of an individual and you recognize the individual
- the client and/or third party is an organization and either you or an employee of your firm or another lawyer or paralegal of your firm licensed by the Law Society of Upper Canada has previously identified the organization by obtaining the name and occupations of each director of the organization and the name, address and occupations of each person who owns 25% or more of the organization or of the shares of the organization and has verified the identity of that organization including the individual(s) giving you instructions on behalf of the organization with respect to the matter.

When your client is a financial institution, public body or reporting issuer, you are not required to verify the identity of that client and any third party instructing, directing or who has the authority to instruct or direct your client. The terms “financial institution”, “public body” and “reporting issuer” are defined terms in the By-Law.

**28. If I determine that an exemption applies when I receive funds, may I rely on this same exemption when I pay out the money?**

No, you are required to look at each transfer of funds transaction separately. For example if you are acting for a lender and receive mortgage funds from that lender and you later pay out the mortgage funds to a borrower, you must consider the receipt and payment of monies separately. Both transactions would need to be exempt in order for you not to be required to verify the identity of your client.

**29. What does the term “funds” mean?**

“Funds” means cash, currency, securities, negotiable instruments and other financial instruments that indicate a person’s title or interest in them.

**30. What is caught by the exemption for funds “paid by a financial institution”?**

This exemption is meant to cover a financial institution’s own funds, for example those advanced pursuant to a mortgage or loan agreement. ***Cheques, whether regular or certified, bank drafts or other forms of payment from your clients or third parties are not included in the exemption unless they are the financial institution’s own funds.*** The term “financial institution” is defined in

section 20 of the By-Law. It includes certain banks, credit unions, trust companies, certain subsidiaries of these entities and other entities.

**31. The lawyer who referred the client to me identified the client, but I have now learned that the matter will involve a financial transaction. Do I have to verify the client's identity?**

Unless the referring lawyer has also verified the client's identity, you must do so.

**32. I have acted for an individual client in the past and have already verified the client's identity. Do I have to do it again?**

As long as you recognize the individual and have previously verified the individual's identity in accordance with the By-Law, you do not have to verify the identity of an individual more than once.

**33. My client is a corporation or a partnership. Do I have to verify its identity again if I have already done so?**

No, you don't have to verify the identity of a client that is an organization if you have already done so. This exception also applies to verifying the identity of the person(s) instructing you on behalf of your corporate client if the person is the same person and to obtaining names of directors and owners. It is, however, recommended that you exercise due diligence in ascertaining whether there has been any change in the identity or ownership of the corporation and in determining that the instructing individual is still authorized to act in that capacity.

**34. Are funds received from the trust account of a lawyer licensed to practise law in another part of Canada exempt?**

Yes. There is an exemption for funds received from the trust account of a lawyer licensed in any jurisdiction in Canada. It does not, however, apply to funds from the trust account of a lawyer licensed in a foreign jurisdiction.

**35. I settled a matter for my client after sending a demand letter, but before commencing a proceeding. Are the settlement monies exempt?**

No. For this exemption to apply, a legal action must have been commenced before a court, statutory tribunal or arbitrator.

**36. My client has come to me for tax advice in connection with some investments. Is this a situation in which I have to verify my client's identity?**

The verification obligations apply when you are engaged in or give instructions in respect of a funds transfer transaction. Simply providing legal advice about a money matter does not trigger the verification obligations unless you are also giving instructions for the movement of the money.

**37. How do I verify the identity of my client?**

You are required to take reasonable steps to verify the identify of your client and any third party directing or instructing your client by looking at what you reasonably consider to be reliable, independent source documents, data or information. Generally speaking you will look at an identity document from an independent source to verify identity. The type of document you will look at will differ depending on whether the person is an individual or an organization and also based on the type of organization.

**38. Section 23(4) of By-Law 7.1 talks about taking “reasonable steps” to verify a client’s identity. What will be considered to be “reasonable steps”?**

The answer depends a lot on the context. The By-Law directs lawyers to rely on what they reasonably consider to be reliable, independent source documents, data and information and sets out a number of examples. Lawyers are expected to make a reasonable effort to obtain such documents and information.

**39. How do I verify the identity of an individual?**

To verify the identity of an individual, you may look at a government issued driver’s licence, passport or birth certificate that is valid and has not expired. You must also retain a copy of the document for your records.

**40. Am I required to look at photo identification in order to verify the identity of an individual?**

In order to comply with the By-Law you are not required to obtain photo identification. However, if you suspect fraud, dishonesty or other illegal conduct, you are required to make reasonable inquiries to satisfy yourself that you are not assisting the client in such conduct. Such inquiries might include looking at photo identification.

**41. How do I verify the identity of an organization such as a corporation or other company?**

You are only required to verify the identity of a corporation if it is not a reporting issuer (public company), financial institution or public body.

If the organization is a corporation or an organization created or registered under federal or provincial law, you may obtain written confirmation of its existence from a government registry. This confirmation should also include the name and address of the organization and, where applicable, the names of its directors. In this regard, you could obtain a certificate of corporate status, a corporate profile report and/or an annual filing of the corporation.

If the organization is a trust, partnership or an association you will need to obtain some sort of formal record that confirms its existence as an organization. This could include a copy of the trust or partnership agreement or articles of association. It might also include the GST/HST registration information or information relating to the organization’s business licence.

If you are required to verify the identity of an organization, you must also take the following additional steps:

- i. verify the identity of the individuals who provide you with instructions with respect to the matter on behalf of the organization
- ii. make reasonable efforts to obtain:
  - the name and occupation or occupations of each director of the organization unless the organization is a securities dealer

- the name, address and occupation or occupations of each person who owns 25% or more of the organization or of the shares of the organization

**42. If I am required to verify the identity of an individual, when must I do this?**

If the person is an individual, you must verify his or her identity **before or when you engage or give instructions** in respect of the receipt, payment or transfer of funds. The same is true for verifying the identity of the individual providing you with instructions on behalf of a corporation or other organization.

**43. Do I have to verify the identity of my corporate client before I can act for them where the payment, receipt or transfer of funds is involved?**

You have 60 days from the time you engage in or give instructions or act on behalf of your client to receive, pay or transfer funds to verify its identity. However, you must verify the identity of the individual providing you with instructions on behalf of the corporation **before or when** you engage in the funds transfer activity.

**44. What happens if I have verified the identity of the individual instructing me on behalf of the organization but after the funds have moved I am unable to verify the identity of the organization in the 60-day window?**

You have an obligation to take all reasonable steps to verify your client's identity. Although you have 60 days within which to comply with the verification requirements in this situation, you should satisfy yourself as to the identity of the organization as early as possible in the retainer. If, despite having taken all reasonable steps, you are unable to do so, you will not be in breach of this requirement.

**45. I did the legal work to incorporate a company prior to the implementation of the By-Law and am now acting for that company on another matter. May I rely on documents already in my possession to identify the client and verify its identity or must I rely on documents from a government registry?**

As long as the documents are current, relying on documents in your possession that you obtained from an independent source is fine. The documents referred to in the By-Law are examples of independent, reliable documents, but the list is not exhaustive. Appropriate documents from non-governmental sources may also be sufficiently reliable.

**46. My client is a law firm partnership that is reluctant to provide me with a copy of the partnership agreement. What should I do?**

Looking at the partnership agreement is only one way to verify the client's identity. You may be able to obtain proof of the firm's identity through a government registry such as by conducting a partnership registration search or confirming the GST/HST number of the partnership.

**47. I am acting for a trust. How do I verify its identity?**

The documentation you will need to consult to verify the identity of a trust will vary depending on the nature of the trust. Examples of appropriate documentation might include the trust agreement or other documents establishing the trust, documents amending the trust, and documents identifying the trustees who are the instructing parties for the trust.

**48. I have acted for a corporate client on a number of matters and have complied with the identification requirements. Someone new is now giving me instructions on behalf of the client. Do I have to verify that person's identity?**

Yes. In every case involving the receipt, payment or transfer of funds, you must verify the identity of the person instructing you unless you have previously verified the identity of that individual.

## **VERIFICATION OF IDENTITY – NON FACE-TO-FACE MEETINGS**

**49. I am a lawyer in Ottawa and my client who is an individual is in Calgary. I will not be meeting face to face with my client. Are there any special rules for verifying her identity?**

Yes, when you are required to verify the identity of an individual who is present in Canada, but you cannot meet with him or her, you may verify the individual's identity by having a commissioner of oaths or a guarantor certify that they have verified the client's identity by looking at an independent source identity document such as a drivers licence or passport that is valid and has not expired. Subsection 23(9) of By-Law 7.1 contains a list of persons (guarantors) who may provide the attestations.

**50. What does providing an attestation involve?**

The person looking at the document (commissioner of oaths or guarantor) will have to provide you with a legible photocopy of the document that they have signed and on which they have included their name, profession and address and have identified the type and number of the identification document provided by the client. This is called an attestation in the By-Law.

**Appendix 4** contains a sample form attestation.

**51. Who can provide an attestation?**

An attestation may be provided by a commissioner of oaths or a guarantor authorized to provide the attestation. The list of guarantors includes such professionals as lawyers, Quebec notaries, doctors, dentists, pharmacists, professional engineers and veterinarians. It also includes nurses and school principals. You must exercise due diligence in ascertaining that the person providing the attestation is a member of one of these professions.

**52. What is the other method of verifying the identity of a client who is an individual and whom I cannot meet in person?**

If the individual, whose identity is being verified, **is outside of Canada** or if you choose not to use a commissioner of oaths or guarantor where the individual is in Canada, you will have to engage an agent to conduct the verification for you. If you use an agent, prior to the agent taking steps on your behalf you must have an agreement in writing with the agent outlining the steps that he or she will take on your behalf to verify identity and the agent must provide you with the information he or she obtains. The agent may provide the information in the form of an attestation.

**Appendix 5** contains a sample form agreement that you may use when retaining an agent.

**53. Must the agent be a lawyer or a notary?**

Not necessarily. Any reliable person may act as an agent.

**54. May I rely on a faxed copy of an attestation?**

Yes, but it would be prudent to obtain a copy of the original for your records.

**55. My client is a Canadian lawyer and the matter that I am acting for her on involves a financial transaction. I am not meeting with her in person. Do I have to verify her identity?**

Yes. In such cases you will have to either use a guarantor or a commissioner of oaths to obtain an attestation to verify your client's identity or you may engage an agent to obtain the attestation unless an exemption to the verification of identity requirement in the By-Law applies.

**56. I am acting for an organization located outside of Canada. Do I have to use an agent to verify the identify of the organization?**

No. You will have to use an agent to verify the identity of the instructing individual(s) if he or she is not located in Canada, but you may verify the identify the organization through documents.

**57. My client is acting for a third party. I will not be meeting that party in person. How do I verify the identity of the third party?**

If the third party is an organization, you may rely on documents to verify its identify. To identify an individual you will have to use either the attestation method if the individual is present in Canada or arrange for an agent to take the necessary steps to verify the identity by entering into an agreement with that agent. Which method you may use, depends on where the third party is located. If the person is in Canada, you may use either the attestation method or an agent. If located outside of Canada, you will have to rely on an agent.

## **PRACTICE SPECIFIC ISSUES**

### **THIRD PARTIES**

**58. My client is representing someone else. What are my obligations?**

The By-Law obliges you to identify third parties when they are directing or instructing your client or when they have the authority to direct or instruct your client, for example as a principal instructs an agent. When your client is acting for a third party in this way, you must obtain the same information for that third party as you would if they were your client.

**59. My client is acting on behalf of a minor. Do I have to identify the minor?**

No. A minor does not have legal capacity and so cannot be formally directing or instructing the client.



**60. I am acting for the vendor in a real estate transaction. My client has directed me to pay a portion of the proceeds of the sale to another party who is not my client. Do I have to verify the identity of that other party?**

You are not required to verify the identity of a third party to which funds are paid unless the party also directs, instructs or has the authority to direct or instruct your client with respect to the transaction. In such a case, that party would be a third party pursuant to the By-Law whose identity must be verified.

**61. I am acting for a living trust that makes ongoing disbursements to the beneficiaries of the trust. Am I required to identify and verify the identity of the beneficiaries of the trust?**

You are only required to verify the identity of your clients and any third party instructing or having the authority to instruct your client. If the beneficiaries of the trust are also your clients in the matter or if the beneficiaries are third parties directing your client or who have the authority to direct your client with respect to the matter, then you must also identify and verify their identity.

## **BUSINESS**

**62. I have been retained by a group of individuals engaged in a joint venture. I have determined that there is a financial transaction that is not exempted under the By-Law. Do I have to verify the identity of all of the parties to the joint venture?**

Yes. By definition a joint venture is not an independent legal entity, but rather a collection of organizations or individuals that have joined together for some common purpose. In such a case, each of the parties to the joint venture would be a client.

**63. I am acting for a client with respect to the completion of a commercial transaction. I have prepared the necessary documentation to complete the transaction, but the closing funds will not be flowing through my trust account as my client will be paying these directly to the other side in accordance with the agreement and closing documentation. Is this a situation in which I have to verify my client's identity?**

Yes, unless an exemption applies. The verification obligations apply whenever you engage in or give instructions in respect of the transfer of funds. Although funds are not passing through your trust account in this transaction, you are instructing with respect to the transfer of funds when you instruct on how the funds will flow to complete the transaction, which may include the preparation of documents containing such instructions.

**64. My client, a private corporation, has retained me with respect to a transaction which will involve the issuance or transfer of shares. Am I required to verify the identity of my client?**

It may be common to think of the payment of funds for a transaction in terms of cash or cheque. However, the client identification and verification requirements will also be triggered when the activity involves issuing or transferring shares. "Funds" is a defined term in the By-Law and includes securities and negotiable instruments. When a lawyer prepares share certificates or share transfers

regardless of whether monies are being paid for the shares or share transfer, the lawyer is engaged in the receiving, paying or transferring of funds. In such circumstances unless an exemption applies, the lawyer is required to verify the identity of the client and any third party directing or authorized to direct the client.

## **CLASS ACTIONS**

**65. I have been retained to act in a class action. Is it sufficient if I identify the representative plaintiff or am I required to identify all of the members of the class?**

For the purposes of the By-Law, it is sufficient to identify the representative plaintiff.

## **EMPLOYMENT**

**66. I am acting for a union on a grievance. Do I have to identify the grievor?**

No. Except in rare cases, it is the union that has carriage of a grievance. The grievor, while clearly an interested party, is not instructing the union and as such is not a third party within the meaning of the By-Law. This would be true even in the case of a group or policy grievance where a large number of union members have a stake in the outcome of the matter. Where a grievor does have carriage of the grievance and is instructing the union as to how to proceed, the obligation to identify that person and, in appropriate cases, to verify their identity, would apply.

## **ESTATES AND TRUSTS**

**67. I have been retained by an individual to prepare her will. I have received a retainer, but am not handling any other funds. Am I required to identify and verify the identity of my client?**

In these circumstances, you are obliged to identify your client, but you are not required to verify her identity. There is an exemption in the By-Law for funds received for professional fees and disbursements.

**68. I have been retained by an estate trustee to administer an estate. Am I required to verify the identity of the beneficiaries of the estate when I pay out funds to the beneficiaries?**

When you act for an estate trustee and you handle funds, unless an exemption applies, you are required to verify the identity of your client, the estate trustee. Generally you are not obliged to verify the identity of the beneficiaries of the estate in these circumstances as the beneficiaries are not your clients, nor are they in a position to direct your client. However, there may be situations in which the beneficiary is instructing the client, as in a case involving litigation over the settlement of an estate for example. In that case the beneficiary would have to be identified and his or her identity verified as a third party unless an exception applies. Similarly if you act for a beneficiary of an estate, then you are obliged to identify and verify the identity of the beneficiary in accordance with the By-Law.

## REAL ESTATE

**69. I am acting for a developer of a new condominium project and am holding in trust the monies paid as deposits by the purchasers of the condominium units. I am not acting for the purchasers. Do I have to verify the identify of the purchasers?**

No, provided that the purchasers are not your clients nor are they directing or in a position to direct your client. If the purchasers are your clients or if they are directing or in a position to direct your client, then you would need to verify their identity unless an exemption applies.

**70. I am acting for a lender and collecting mortgage payments from the borrower on her behalf. Do I have to identify or verify the identity of the borrower?**

No. You are only obliged to verify the identity of your client and any third party who is directing or in a position to direct your client.

**71. I act for a purchaser and a lender bank in a real estate transaction. I receive funds to close the transaction as follows:**

- a portion of the funds by certified cheque or bank draft from the purchaser; and
- a portion of the funds (the mortgage proceeds) from the lender by bank draft.

**Whose identity must I verify?**

Both the Bank and the purchaser are your clients in the transaction and therefore you must verify the identity of both unless an exemption applies.

If the Bank is a “financial institution” as defined in the By-Law, you are not required to verify its identity as an exemption applies. The term “financial institution” is defined in Section 20 of the By-Law and includes a bank to which the Bank Act (Canada) applies and certain other entities.

There is no exemption relating specifically to cheques or bank drafts received from a purchaser. Therefore unless one of the other exemptions in the By-Law applies, you are required to verify the identity of the purchaser either before or when you receive the purchaser’s funds.

**72. If I am acting for a purchaser in a real estate transaction, am I required to verify the identity of the purchaser when I pay out funds to close the transaction?**

If you have previously verified the identity of the purchaser, for example when you received closing funds, then you are not required to verify the identify of the purchaser again. If you have not previously verified the identity of the purchaser, for example an exemption applied when you received the closing funds, then you would have to verify the identity of the purchaser when you pay out the closing funds unless an exemption applies.

**73. If I am acting for a vendor in a real estate transaction, am I required to verify the identity of the vendor when I receive closing funds?**

Yes, unless an exemption applies. For example, if funds are received by certified cheque from the purchaser's lawyer's trust account or by "electronic funds transfer" as defined in the By-Law, an exemption applies and you are not required to verify the identity of your vendor client with respect to this transaction.

**74. If I am acting for a vendor in a real estate transaction am I required to verify the identity of the vendor when I pay out closing funds?**

If you have not previously verified the identity of your vendor client, for example if an exemption applied when you received funds, you would be required to verify the vendor client's identity when you pay out funds unless an exemption applies.

**75. I am acting in a real estate transaction where documents are being signed by power of attorney. Whose identity do I need to verify when I deal with funds – the donor and/or the donee?**

If you are retained by the donee of a power of attorney, you are required to verify the identity of the donee. The donee acts pursuant to the power of attorney document and generally speaking in these circumstances the donor of the power of attorney would not be considered a third party instructing or having the authority to instruct your client.

However, if you are also retained by the donor in the transaction such as in a situation where you are obtaining instructions from both the donor and the donee, then you would be required to verify the identity of both clients.

Powers of attorney are sometimes used to effect fraud or illegal activity. In the event that you suspect fraud or dishonesty, you have an obligation to do further investigation and in certain circumstances you may have to withdraw completely. In addition, if the transaction involves a mortgage and you are acting for the lender in the transaction, you should review and follow the instructions of the lender client with regards to the use of powers of attorney in the transaction.

**76. I act for a lender regarding a syndicated mortgage, whose identity do I verify?**

A syndicated mortgage means a mortgage having more than one investor. These mortgages are sometimes held in trust by a lawyer or by one of the individual investors in trust for the remaining investors.

If you act for an investor trustee of a syndicated mortgage, you must identify and verify the identity of the trustee and the remaining investor participants if they are your clients or if they are directing or in a position to direct your client.

**77. You are acting on behalf of a Condominium Corporation and you receive instructions from the property manager to collect arrears of common expenses and to register a Notice of Lien. You subsequently receive payment from the owner of the unit. You determine that no exemption to the requirement to verify identity applies. Whose identity do you need to verify in these circumstances?**

You must verify the identity of your client, the Condominium Corporation and the property manager, who is the individual giving you instructions on behalf of the Condominium Corporation.

In order to verify the existence of the Condominium Corporation, you could conduct a sub-search of title to the unit within the Condominium Plan to ascertain that no Order of Termination has been registered against the unit within the Plan. In addition, you could obtain the G.S.T. number for the Condominium Corporation, if available, to verify its identity.

To verify the identity of the property manager, you may obtain, review and keep a copy of that person's driver's licence or an original identifying document from an independent source.

## **RECORD KEEPING REQUIREMENTS**

**78. Do I have to document the steps I take to verify my client's identity?**

Yes. The By-Law requires that you obtain a copy of every document you rely on to verify a client's identity. You must also record the information you obtain to identify your client and any information and copies of documents you rely on to identify the directors and owners of 25 % or more of any client that is a company or other organization.

**79. Do I have to keep identification and verification information in a separate file or can I keep it with my client files?**

The information and documents obtained to identify your client may be kept in your client file or in a separate file if that is your preference. There is no requirement that it be maintained in a separate file.

**80. Can I keep identification and verification information in electronic form?**

Yes, as long as a paper copy can be readily produced.

**81. How long do I have to retain client identification and verification information?**

You have to keep the information for the longer of the duration of your professional relationship with the client and for as long as is necessary to provide service to the client, or six years following completion of the work the client retained you to do for them.

**82. Do I have to verify the identity of clients I was already working for when this By-Law came into force?**

The requirements do not apply to matters for which you were already retained when the By-Law came into effect, but it does apply to all new matters. That

means that you will have to take the necessary steps in accordance with the By-Law to identify and verify the identity of all clients for any matters for which you are retained after the By-Law comes into force even if you have acted for the client in the past or have a general retainer agreement with the client.

**83. What, if anything, do I need to record when I am relying on an exemption to the identification or verification requirements?**

The requirements do not oblige you to make any record when you are relying on an exemption. Bearing in mind that if asked by the Law Society, you must be able to demonstrate that you relied on a valid exemption, it would be prudent to note the reason identification or verification was not required.

## **WITHDRAWAL OF SERVICES**

**84. My client was very evasive when I tried to get the necessary information to identify her and to verify his identity. What do I do?**

If you know or ought to know that your client is trying to get you to assist her in something illegal or dishonest, you have a duty to refuse to act for her in that matter. The duty applies whether your suspicions are aroused during the identification and verification process or at any time during your retainer.

**85. I need advice about a specific situation that is not addressed in these questions. What should I do?**

If you have any unanswered questions or concerns about compliance with the By-Law you should contact the Law Society Practice Management Helpline through the Resource Centre at 416 947-3315 or toll-free in Ontario, 1-800 668-7380 ext.3315



## **GUIDELINES ON POWERS OF ATTORNEY IN REAL ESTATE TRANSACTIONS**

With the prevalence of real estate fraud in the marketplace, it is important that real estate lawyers implement practices and procedures in their firms to recognize and fight fraud. In recent years, powers of attorney have been used in real estate transactions to perpetrate fraud. Forged powers of attorney have been used to fraudulently mortgage properties or transfer title out of the true registered owner's name. An example of such a situation is contained in the recent case of *Reviczky v. Meleknia*, 2007 CanLII 56494 (ON S.C.).

These *Guidelines* have been prepared to assist lawyers to avoid becoming the tool or dupe of unscrupulous persons when dealing with real estate transactions involving powers of attorney. These *Guidelines* are not intended to replace a lawyer's professional judgment or to establish a rigid approach to the practice of law or the conduct of a real estate transaction. Subject to those provisions of the *Guidelines* that incorporate legal, by-law or *Rules of Professional Conduct* requirements, a lawyer should consider the circumstances of the individual transaction and choose and recommend to the client the practice and procedure that best suits the transaction. In appropriate circumstances, the lawyer may deviate from the *Guidelines*. Whether a lawyer has provided quality service will depend upon the circumstances of each individual transaction.

1. To the extent that lawyers are able, they should avoid the use of Powers of Attorney. The use of Powers of Attorney should be the exception and not the rule.
2. When a Power of Attorney is required for a transaction and there is no pre-existing Power of Attorney, the lawyer should:
  - prepare the Power of Attorney himself or herself,
  - meet with the donor to review and sign the Power of Attorney, and
  - establish in a diligent manner that the donor is the person he or she claims to be.
3. Where a Power of Attorney is required for a transaction, lawyers for all parties should:
  - review the Power of Attorney to ensure that it was drawn and executed in accordance with the governing legislation, and
  - note any restrictions on the powers granted.
4. If the transaction is title insured, the lawyer should ensure that the title insurer will permit the use of the Power of Attorney. If the transaction includes a charge/mortgage or other encumbrance, the lawyer for the borrower should ensure well before closing that the lender will accept documents signed under the authority of a Power of Attorney.

5. Prior to submitting a document for registration signed under the authority of a Power of Attorney, lawyers should:
  - review the contents of the document with the donee,
  - obtain the donee's written approval of the contents of the document,
  - obtain the donee's written authority to register the document, and
  - establish in a diligent manner that the donee is the person he or she claims to be.
6. Lawyers should use their best efforts to register the Power of Attorney on title and to provide a copy of the registered Power of Attorney to the other side well in advance of the closing date.
7. Lawyers must also comply with the client identification and verification requirements of the Law Society of Upper Canada, By-Law 7.1.
8. Absent notice of fraud or other suspicious circumstances, lawyers may rely on Powers of Attorney that have been drawn and executed in accordance with the governing legislation.
9. Absent adverse knowledge, lawyers may rely on the law statements made by another lawyer in any document executed under the authority of a Power of Attorney .
10. Before accepting a retainer or during a retainer, if a lawyer has suspicions or doubts about whether the lawyer would be assisting the client in dishonesty, fraud, crime or illegal conduct, the lawyer should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer, and should make a record of the results of these inquiries. If a lawyer reasonably suspects that he or she would be assisting the client in dishonesty, fraud, crime or illegal conduct, the lawyer must immediately cease to engage in activities that would assist the client in such conduct and, depending on the circumstances, may have to withdraw completely from representing the client.

### **Other Resources**

1. **Appendix 1 – File Form - Tips when registering documents signed under the authority of a Power of Attorney when the lawyer has not prepared the Power of Attorney.**
2. **Appendix 2 - File Form - Tips when receiving documents signed under the authority of a Power of Attorney.**
3. **Ontario Regulation 19/99, Land Registration Reform Act**  
[http://www.e-laws.gov.on.ca/html/regs/english/elaws\\_regs\\_990019\\_e.htm](http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_990019_e.htm)
4. **Ministry of Government and Consumer Services, Bulletin 2009-01**  
[http://www.teraview.ca/mcbs/downloads/Bulletin\\_2009-01.pdf](http://www.teraview.ca/mcbs/downloads/Bulletin_2009-01.pdf)
5. Article entitled "Powers of Attorney and Solicitors' Liability: The Case Law", **LAWPRO Practice Pro Magazine, Volume 7, Issue 2 - Summer 2008, pages 9-11**  
[http://www.practicepro.ca/Lawpromag/LawPROmagazine7\\_2\\_Aug2008.pdf](http://www.practicepro.ca/Lawpromag/LawPROmagazine7_2_Aug2008.pdf)



6. **Reviczky v. Meleknia, 2007 CanLII 56494 (ON S.C.)**  
<http://www.canlii.org/en/on/onsc/doc/2007/2007canlii56494/2007canlii56494.html>
7. **Substitute Decision Act, 1992**  
[http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_92s30\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_92s30_e.htm)
8. **Powers of Attorney Act**  
[http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_90p20\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90p20_e.htm)



**REAL ESTATE TRANSACTION**  
**DOCUMENTS SIGNED UNDER POWER OF AUTHORITY**

*(For use where lawyer has not prepared the Power of Attorney, but is electronically signing documents under the authority of the power of attorney)*

File: Re:

=====

**Date Completed**

- Have you reviewed the original or notarial or certified copy of the Power of Attorney document to ensure that it meets formal requirements?
- Are there any restrictions in the Power of Attorney on the powers granted?

If so, do they prevent the donor from using the Power of Attorney in the manner proposed?

- Have you confirmed with the donee that:
  - the Power of Attorney is still in full force and effect and whether the donor is still living
  - the donor (principal) had the capacity to give the Power of Attorney when giving it and was at least 18 years of age when the Power of Attorney was executed
  - the donee (attorney) is the lawful party named in the Power of Attorney
  - the donee is acting within the scope of the authority granted under the Power of Attorney, and
  - the Power of Attorney was lawfully given and has not been revoked?

- Have you asked why the Power of Attorney is being used to complete the transaction?

Indicate the reason(s):

**Date Completed**

- Are there any suspicious circumstances that would require you to make further inquiries?

If so, indicate below:

If applicable, list the particulars of inquiries made and the results thereof.

- Have you notified the title insurer that documents are being signed under Power of Attorney?

If so, has the title insurer consented to its use?

- Have you notified the lender or its solicitor that a Power of Attorney is being used?

If so, has the lender consented to its use?

- If you are acting for the lender, have you reviewed and complied with the lender's instructions?

- Have you reviewed with the donee the contents of the documents to be signed under the authority of a Power of Attorney including all statements in the documents, and have you obtained the donee's written approval of the contents and his or her consent that you electronically sign and register the documents?

- Have you established in a diligent manner that the donee is the person he or she claims to be?

- Have you also complied with the provisions of By-Law 7.1 regarding identifying and verifying the identity of the client?



**REAL ESTATE TRANSACTION**  
**DOCUMENTS SIGNED UNDER POWER OF AUTHORITY**

*(For use where lawyer is acting for a party in a real estate transaction and the other side is signing documents under the authority of the Power of Attorney)*

File: Re:

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**Date Completed**

- Have you reviewed the agreement of purchase and sale and other relevant documents to determine if the transaction is being completed with the use of a Power of Attorney?
- Have you obtained a copy of the Power of Attorney?
- Have you confirmed with the other side that the copy is a copy of the original or notarial or certified copy of the original?
- Have you requisitioned the delivery of a registered copy of the Power of Attorney?
- Have you reviewed the Power of Attorney to ensure that there are no restrictions in the Power of Attorney on the powers granted that would prevent the Power of Attorney from being used in the manner proposed?
- Have you reviewed the Power of Attorney to ensure that it meets formal requirements?
- Have you reviewed the documents to be registered under the authority of the Power of Attorney?
- Are there any suspicious circumstances that would require you to make further inquiries?

If so, indicate below:

If applicable, list the particulars of inquiries made and the results thereof.

# Show me the money



## Funds handling – and the benefits of wire transfers

The recent increase in the number of frauds – many involving counterfeit financial instruments – have been a wake-up call to the bar on two fronts:

- First – fraudsters are targeting all lawyers, not only real estate practitioners. For more on this, see the article ***Fraud: A growing problem affecting all lawyers*** in this issue.
- Second – that there is some confusion about how financial instruments move through the Canadian payments system and how lawyers can verify that funds deposited to their trust accounts are “good” – that is, final and irrevocable.

The following article is based on interview responses provided to LawPRO Magazine by three experts in the field of funds transfer: Martin Scisizzi of Borden Ladner Gervais LLP, Mike Seto of Teranet, and Pierre Roach, Vice President of Payment Services with the Canadian Payments Association.

The principal conclusions to be drawn from the interviews are as follows:

### **1. FUNDS CLEARED THROUGH THE CONVENTIONAL SYSTEM – THE AUTOMATED CLEARING SETTLEMENT SYSTEM (ACSS) – ARE NOT “GOOD” THE MINUTE THEY HIT YOUR TRUST ACCOUNT.**

**IN FACT, IN CERTAIN CIRCUMSTANCES, THESE FUNDS COULD BE SUBJECT TO RETURN FOR WEEKS OR EVEN MONTHS.**

**Pierre:** There is a distinction between a payment item “having cleared” and the payment being final or good funds. Clearing refers to the exchange of paper and electronic payment items between financial institutions (FI) and the reconciliation of balances among participating FIs.

Cheques and other paper payment items are generally cleared overnight following the day of deposit (as explained above, this

does not necessarily equate to “good funds” or funds being final and irrevocable). Settlement occurs on the morning of the next business day through the major financial institutions’ settlement accounts at the Bank of Canada.

Bank drafts and certified cheques cannot normally be returned through the clearing system and are final in most instances; however, there are certain exceptions. If either of these items has been materially altered after it was issued (e.g. change of payee or amount), it can be returned through the clearing system for up to 90 days after the date of receipt by the drawee FI.

An item bearing a forged endorsement can be returned for up to six years (prior to June 2008, the return period was unlimited). In the rare event of the drawee financial institution’s default, they could also be subject to return until they are settled the following morning.

**Martin:** Upon deposit of a certified cheque or bank draft for collection, the payee is normally given immediate provisional credit by his bank for the full amount of the instrument. Generally speaking, the collecting bank has the right of “chargeback” by reversing or eliminating the provisional credit where the cheque or bank draft received by it for collection has been dishonoured.

If the drawee bank wishes to dishonour a cheque or other payment instrument (other than a certified cheque or bank draft), it is required to return the item “no later than the business day following receipt by the first organizational unit of the drawee (the bank on which the cheque is drawn) that is able to make or act upon a decision to dishonour the item.” This is usually a branch. A certified cheque or bank draft, strictly speaking, cannot be returned except for “material alterations” or a forged endorsement.

As the clearing process reaches every branch of every deposit-taking financial institution in the country, the time required to present an item physically to a branch of account varies from a day or two for branches in major centres to as long as eight to 10 days for those in more remote locales. It also depends on whether there are intervening statutory holidays.

As a result, generally speaking, it would not be safe to withdraw funds which have been provisionally credited for at least eight to 10 days. Cheques drawn on U.S. banks can take as long as 30 days to clear.

## 2. THE OTHER FUNDS HANDLING SYSTEM OPERATED BY THE CPA – THE LARGE VALUE TRANSFER SYSTEM (LVTS) – ADDRESSES LAWYERS’ NEED TO KNOW THAT FUNDS IN THEIR TRUST ACCOUNTS ARE “FINAL AND IRREVOCABLE.”

**Mike:** LVTS was introduced in 1999 and is currently the settlement process behind all wire payments between Canadian financial institutions transacting in Canadian funds. (Care should be exercised in relation to inter-branch wires; while a financial institution may use similar message formats (SWIFT), these transactions do not typically go through LVTS and do not automatically attract the same benefits.)

A bit of a misnomer, LVTS is not limited to large value transactions. Payments of just several dollars can be made through this system. However, in 2005, the CPA reported that 89 per cent of the total value of transactions cleared and settled through its systems were made through LVTS (compared to about 1 per cent of the number of transactions).

The unique aspects of LVTS are:

- 1) Funds from a completed transaction are backed by pledged collateral and ultimately guaranteed by the Bank of Canada. To participate in LVTS transactions, financial institutions must pledge security to the Bank of Canada to cover the net balances of transactions made during the day. As a consequence, the Bank of Canada guarantees all completed transactions, backed by collateral pledged by financial institutions.
- 2) Once completed, transactions are irrevocable. Each LVTS transaction passes through controls operated by the CPA, that ensure there is sufficient collateral to back it. If controls are successfully passed, including sufficient security remaining, the transaction is completed **irrevocably** (and evidenced by a Payment Confirmation Reference Number – or “PCRN”). The payment is final.<sup>1</sup>

- 3) Timeliness. Typically, it takes under one minute for the CPA to complete a LVTS transaction from the initiation by a financial institution; therefore the claim of “near real-time processing.”

In the early days of LVTS, financial institutions were batching their transactions, thereby frustrating the benefits of near real time processing to wire customers. More recently, all of the major banks have introduced online commercial banking suites that include an online wire service (i.e. LVTS) and have been processing transactions individually. However, it is important to note that all of the banks have various and differing internal regulatory processes that may result in manual processing. This may delay a financial institution in processing a LVTS transaction but regardless, LVTS processing is far faster end to end than ACSS.

### COST ISSUES

The practical disadvantage of LVTS is its cost. A transaction usually costs \$10-\$15 for the entity making the payment and another \$10 to the party receiving payment. This varies slightly between financial institutions. (Not overly onerous when compared to the cost of obtaining certified cheques – around \$12 – and potential courier costs for delivery, but many firms have successfully negotiated with their banks to waive certification fees.) Additionally, if online services are used, some institutions require set up costs (some implement security devices with users) and others have monthly service charges.

An LVTS payment will not completely assure you that the underlying transaction is good (i.e. although the payment transaction is final and irrevocable, if there is a problem with the making of the payment itself – e.g. money laundering – there could be a claim that results in a reversal outside of the actual payment process). But it should provide a situation where your trust account will not be short due to a fraudulent instrument.

**Pierre:** A clear benefit for beneficiaries is that LVTS payments are final and irrevocable, once received by the beneficiary’s FI. In addition, the receipt of “good funds” can generally be confirmed the same day (with the potential exception of payments sent towards the end of the day).

As a sender of LVTS payments, one caution is to ensure you are dealing with a legitimate party as a beneficiary. Since payments are final once sent, they could not be stopped or reversed through the clearing system in the event of a scam. However, this issue is not unique to LVTS.

<sup>1</sup> As provided under the Payment Clearing and Settlement Act, S.C.1996, c.6 and the LVTS BY Law, sections 42 and 43 (available: [http://www.cdnpay.ca/systems/lvts\\_overview.asp](http://www.cdnpay.ca/systems/lvts_overview.asp))

## RISK MANAGEMENT RECOMMENDATIONS

**Pierre:** As a payment recipient, the best option from an irrevocability perspective is to request payment by wire transfer through the Large Value Transfer System (LVTS). LVTS payments are final and irrevocable as soon as they are received by the beneficiary's FI.

At a minimum, you should be very cautious about accepting items that have been endorsed over to another party, as there could be a risk of forged endorsement. Only accepting certified cheques directly from the account holder, or confirming the key details such as payee and amount with the account holder can avoid the risk of material alteration.

**Martin:** The reality is that certified cheques will continue to be the predominant method of payment. Given this, lawyers should ask their bank to "call" certified cheques – that is, have your bank call the bank that certified the cheque to confirm the details on the cheque and the certification. This is not bullet-proof, but is a measure of insurance.

**Mike:** It's all about risk. The firm must make its decision cognizant of its willingness to assume risk, its knowledge about the client/entity making the payment and the amount. Mindful that most payments do not go astray, there will be circumstances in which lawyers can continue to use certified cheques that will not be subject to return.

However, in situations involving identifiable risk factors (a new and unfamiliar client, client pushing to complete deal quickly, funds moving offshore or other circumstances that are unusual or suspicious), the minimum that should be done is to check with your financial institution as to whether it is safe to withdraw from the deposit (note the absence of reference to "clearing" or "settling"). Expect, however, a response indicating upwards of several days.

If timeliness is an issue, consider a wire. Return the certified cheque or other instrument and kindly ask the payor to wire funds to your account. By using LVTS, risks associated with paper instruments (e.g. forged endorsements and fraudulent instruments) are avoided. While this may not prevent a claim down the road that the payment itself should never have been made, this should prevent you from having to deal with a shortage in your trust account.

**LawPRO:** If you have decided that wiring funds as LVTS payments is the way to go, be sure to also consider the following:

- You may not be able to get confirmation of the receipt of "good funds" where the transaction is occurring late in the business day. The earlier in the day you can move funds and close your transaction, the better.
- Although the CPA can do its part of an LVTS transaction very quickly, your instructions have to be sent to your individual financial institution to initiate the transfer, and then by the FI through the LVTS. Contact your financial institution to review its on-line or other systems for initiating and receiving wire transfers, and the costs per transaction and/or per month. You need to be confident that delays or mistakes are unlikely in the handling by the financial institutions at either end of the process.
- Is it enough for you to confirm receipt of a wire transfer by reference to your on-line banking system? Ask your financial institution for advice, including whether wire transactions as line items on a statement are referenced in a specifically identifiable way on which you can rely.
- Ask your financial institution if it uses true LVTS wires for inter-branch wires or if it will offer the same protections against reversibility as LVTS regardless of the clearing system that it uses.
- Don't forget that the Law Society of Upper Canada's By-law 9 contains requirements related to electronic transfers of trust funds. You must keep those requirements in mind when evaluating any electronic system for wiring funds.