

TAB 13

Practice Management Issues for Estates Practitioners

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Practice Management Issues for Estates and Trusts Practitioners

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This paper provides general information and guidance regarding particular aspects of the *Rules of Professional Conduct* and the By-Laws under the *Law Society Act*. It is not case-specific and each situation must be evaluated on its own facts, in the context of the *Rules* and By-Laws as a whole.

1. AUDIT REQUIREMENTS FOR ESTATE ADMINISTRATION MATTERS

Misappropriated or mismanaged estate funds may cause substantial financial loss for beneficiaries, co-trustees and/or the Compensation Fund. Accordingly, the Annual Report filed by lawyers requires detailed disclosure of trust assets over which the lawyer exercises authority as sole estate trustee.¹ This information permits Law Society auditors to anticipate the necessity of reviewing these types of files, books and records when attending to audit the books and records of a lawyer's practice.

1.1 Threshold

Generally-speaking, Spot Audit will examine the lawyer's estate administration files where:

- the lawyer is the estate trustee; or
- the lawyer has effective signing authority over the estate assets.

Where deficiencies or issues identified during a spot audit appear minor or inadvertent, the auditor typically affords the lawyer an opportunity to remedy deficiencies and errors, and ensures the lawyer is properly informed regarding best practices. Where more serious deficiencies and issues are identified, Spot Audit may refer the matter to the Professional Regulation Division of the Law Society for investigation of a possible regulatory breach.

1.2 Basic Estate Information

At minimum, the estate administration file should include:

- a notarial copy of the Will and each codicil;
- the Certificate of Appointment of Estate Trustee or a notarial copy;
- an inventory and valuation of original assets;
- a list of the current assets and their value;
- a list of beneficiaries and any co-estate trustees, their addresses and telephone numbers;

¹ Information is also required regarding trust assets over which the lawyer exercises authority as attorney for property or as solicitor for the estate trustee (see: Annual Report, Section F).

- the original or a court certified copy of any Orders or Judgements affecting the estate, for example, a Judgement on a passing of accounts;
- original beneficiary receipts, releases and/or approvals of executor compensation;
- invoices for solicitor's fees;
- separate dockets for estate trustee work performed by the lawyer and legal services provided by the lawyer;
- where appropriate or required by the *Trustee Act*, an investment plan and/or documentation of investment advice sought and received;
- copies of all T1 Returns for years prior to the date of death filed with Canada Revenue Agency ("CRA") by the estate trustee; the T1 terminal return; all T3 Returns for the estate; all CRA Notices of Assessment or Reassessment; and CRA clearance certificates;
- an affidavit of publication of a Notice to Creditors; and
- correspondence sent and received by the lawyer's office regarding the estate.

1.3 **Books and Records**

The estate trustee of an estate has a fiduciary duty to keep complete and accurate accounts of the assets under administration. This includes the original source documents which support the accounts.

By-law 9 under the *Law Society Act*² ("By-Law 9") requires lawyers to maintain financial records which record all money and other property received and disbursed in connection with the lawyer's professional business.³ The minimum records required to be maintained where a trust account is concerned are as follows.

² R.S.O. 1990, c. L.8, as amended.

³ Financial records may be entered and posted by hand or electronically. If entered by hand, they must be in ink. (By-Law 9, subsection 21(1)) If entered electronically, a paper copy must be produced promptly upon the Law Society's request. (By-Law 9, subsection 21(2)) Financial records are to be kept current at all times, with the monthly trust comparison completed by the 25th day of the following month. (By-Law 9, subsection 22(2)) Trust records must be retained for 10 years. (By-Law 9, subsection 23(2))

Trust Receipts Journal⁴

- A book of original entry recording all receipts which confirms for each receipt:
 - the date received;
 - the payor;
 - the method of payment;
 - the amount; and
 - the client for whom the money is received.

Trust Disbursements Journal⁵

- A book of original entry recording all disbursements which confirms for each disbursement:
 - the date of disbursement;
 - the payee;
 - the method of disbursement;
 - the number or a similar identifier of the document used to disburse the money;
 - the amount disbursed; and
 - the client on whose behalf the money was disbursed.

Client Ledger Accounts⁶

- A separate client trust ledger account for each client which records all money received and disbursed and any unexpended balance.

Trust to Trust Transfers⁷

- A record of all transfers of money between clients' trust ledger accounts and explaining the purpose of the transfer.

Monthly Trust Reconciliations⁸

⁴ By-Law 9, subsection 18(1).

⁵ By-Law 9, subsection 18(2).

⁶ By-Law 9, subsection 18(3).

⁷ By-Law 9, subsection 18(4).

⁸ By-Law 9, subsection 18(8).

- A record showing a comparison made monthly of:
 - the total balances held in the lawyer's trust account or accounts; and
 - the total of all unexpended client trust balances according to the financial records;

together with

- a record of the reasons for any differences between the totals, and
- the following records to support the comparison:
 - a detailed listing made monthly showing each client with a trust balance and the amount of their trust balance; and
 - a detailed reconciliation made monthly of each trust bank account.

Client Trust Property Listing⁹

- A record of all property, other than money, held in trust for clients which:
 - describes each property;
 - confirms the date upon which the licensee took possession of the property;
 - identifies the immediate predecessor in possession;
 - confirms the value of the property;
 - identifies the client for whom the property is held;
 - confirms the date the property is given away by the lawyer; and
 - identifies the person to whom possession of the property is given by the lawyer.

which two ledgers must be reconciled monthly, supported by:

- a monthly listing of the principal balances of all mortgages held in trust by the lawyer; and
- a monthly listing of all investors and the principal balance outstanding of their mortgage investments.

Source Documents¹⁰

- All bank statements or passbooks.
- All cancelled cheques, including certified cheques.
- Detailed duplicate deposit slips.
- Signed electronic trust transfer requisitions and signed printed confirmations of electronic trust transfers.

⁹ By-Law 9, subsection 18(9).

¹⁰ By-Law 9, subsections 18(10) and (11), section 12.

Where the lawyer is estate trustee or has control of the assets of the estate as estate solicitor, he or she will likely open a separate trust bank account in the name of the estate or in his or her name in trust for the estate and keep running accounts for the estate in court format. In these circumstances, provided the estate accounts are:

- complete,
- kept current at all times, and
- record the information required by By-Law 9,

the solicitor estate trustee may, but need not, also:

- enter estate transactions in the trust receipts and disbursements journals; and
- maintain a client ledger account for the estate,

in his or her firm's accounting program. All estate trust accounts must be reconciled monthly, and the other books required by By-Law 9 should include estate transactions and assets.

Where the solicitor estate trustee holds the estate assets in his mixed trust account, estate receipts and disbursements will be entered in his or her firm's accounting program in order to allow for proper monthly reconciliation of the mixed trust account.

1.4 Deficiencies/Issues

Deficiencies or issues which Law Society auditors come across from time to time, or which may result in a complaint to the Law Society regarding the lawyer's professional conduct, include the following.

- Delay in administration of the estate. Sometimes, other service issues are identified, for example, failure to file tax returns or late filing resulting in penalties to the estate.
- Incomplete accounting records or missing source documents.
- Not keeping separate dockets for solicitor's work and estate trustee work.¹¹
- Not rendering *detailed* legal accounts, *i.e.* – sufficient to confirm the charges are for solicitor's work and not estate trustee work.¹²
- Charging for estate trustee work at the solicitor's hourly rate.¹³

¹¹ *Rooney Estate v. Stewart Estate*, [2007] O.J. No. 3944 (Ont. S.C.J.).

¹² *Ibid.*

¹³ *Ibid.*

- Including in invoices for legal services estate trustee work while the solicitor-estate trustee or the client-estate trustee(s) take compensation without adjustment.¹⁴
- Pre-taking estate trustee compensation.¹⁵
- Improper or inappropriate calculation of compensation¹⁶, for example:
 - using 5% of the gross value of the original assets to calculate compensation instead of 2½% of receipts and 2½% of disbursements;
 - taking a care and management fee where the will contemplates no ongoing testamentary trusts;
 - not excluding the value of specific transactions before applying the percentages to the receipts and/or disbursements, for example:
 - internal transfers or book entries;
 - disbursements in payment of executor compensation;
 - disbursements in payment of legal fees where the solicitor is the estate trustee;
 - *in specie* distributions of estate assets to beneficiaries; and
 - not adjusting the amount of compensation for accounting fees paid for preparation of income tax returns.
- High risk investments. An example would be a private mortgage or unsecured loan. Additional regulatory concern arises in respect of these investments where the lawyer is in a conflict of interest, for example, where he or she is related to the borrower or acted for lender and borrower in the transaction.¹⁷

¹⁴ *Ibid.*

¹⁵ *Re Knoch* (1982), 12 E.T.R. 162 (Ont. Surr. Ct.), held that an executor may not pay himself executor compensation until the amount and payment of his compensation is approved either by the court or by all of the residuary beneficiaries of the estate. This is, of course, subject to specific authorization to pre-take compensation in the Will. In *Re Tigert Estate* (2002), 48 E.T.R. (2d) 301 (Ont. S.C.J.), an executor who pre-took executor compensation was ordered to pay the estate interest on all pre-taken compensation pending court determination of his compensation.

¹⁶ For a review of the principles for calculating executor compensation, see Rintoul, *Executor's Compensation* in Theriault (ed.), *Widdifield on Executors and Trustees* (6th ed.) (Thomson Canada Ltd.: Toronto, 2006).

¹⁷ See *Rules of Professional Conduct*, Rules 2.04(3), 2.04(6.1), 2.04(11) and 2.04(12).

2. THE CLIENT IDENTIFICATION AND VERIFICATION RULES

2.1 General Professional Obligations

Rule 2.02(5) of the *Rules of Professional Conduct* prohibits a lawyer from knowingly assisting in or encouraging criminal, illegal, fraudulent or dishonest conduct on the part of a client. The commentary to that Rule cautions lawyers to be on guard against becoming the tool or dupe of an unscrupulous client.

2.2 Background to Amendment of By-Law 7.1¹⁸

In 2000, the Canadian Parliament passed the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*¹⁹ (the “*Act*”). Under the *Act*, regulated persons and entities are required to report suspicious transactions and transactions involving more than \$ 10,000.00 in cash to the Financial Transactions and Reports Analysis Centre of Canada (“FINTRAC”). FINTRAC may disclose information it receives to the police. Reporting persons are prohibited from informing their client a report has been made.

Initially, the regulations under the *Act* required lawyers to report to FINTRAC in accordance with the *Act*. The Federation of Law Societies and the Law Society of British Columbia commenced an application challenging the constitutionality of imposing these reporting obligations on lawyers. Lawyers have a fundamental duty to keep confidential a client’s affairs and to maintain an undivided loyalty to a client. Accordingly, application of the *Act* to lawyers would compromise the independence of the bar and the integrity of the justice system. An interlocutory injunction was granted and upheld by the British Columbia Court of Appeal and the Supreme Court of Canada.

As a result of the injunction, the Attorney General of Canada suspended application of the *Act* to all Canadian lawyers (including Quebec notaries), pending final judicial determination of the constitutional challenge. That matter has not been heard.

Parliament has passed amendments to the *Act* which exempt lawyers from the obligation to report transactions to FINTRAC. New regulations under the *Act* impose obligations on lawyers to identify and verify the identity of their clients. Under the terms of the injunction, the new regulations, in so far as they affect lawyers, have no force until consented to by the Federation of Law Societies. Discussions between the Federation and the federal government in this regard are continuing.

¹⁸ This discussion is a brief and selective summary of the policy and legislative background portions of the *Report to Convocation*, dated April 24, 2008, and the *Report to Convocation* dated January 29, 2009, submitted by the Professional Regulation Committee and prepared by the Law Society Policy Secretariat (Policy Counsel: Jim Varro). For a more detailed discussion of these matters, reference may be had to these *Reports*.

¹⁹ S.C. 2000, c. 17.

Meanwhile, the Federation of Law Societies has taken its own measures to address lawyers' and paralegals' obligations to prevent crime and fraud, including money laundering. In 2005, the By-Laws under the *Law Society Act* were amended to reflect the Federation of Law Societies' "no cash" model rule.²⁰ In early 2008, the Federation of Law Societies finalized a model rule regarding client identification and verification. Amendments to By-Law 7.1 under the *Law Society Act* ("By-Law 7.1") reflecting the Federation's model rule became effective December 31, 2008.

2.3 Part III of By-Law 7.1

Part III of By-Law 7.1 imposes four types of obligations on licensees as follows:

- 2.3.1 To **identify** the licensee's client and any third party for whom the client acts or whom the client represents ("third parties").²¹
- 2.3.2 To take reasonable steps to **verify** the identity of the client and third parties in specified circumstances.
- 2.3.3 To **keep a record** of information and a copy of documents gathered for a specified period of time.
- 2.3.4 To refuse services or **withdraw** completely in specified circumstances.

2.4 Application²²

A licensee must comply with Part III of By-Law 7.1 each time:

- he or she is retained to provide professional services,
- after December 31, 2008,
- to a new or existing client,

²⁰ See By-Law 9, Part III.

²¹ This language is a clarification of the language in an earlier version of the By-Law. Essentially, third parties are persons who are instructing or directing, or have the authority to instruct or direct the client. See: *Client Identification and Verification Requirements for Lawyers*, Appendix 9: *Questions and Answers*, Question #4 published by the Law Society of Upper Canada on its website.

²² By-Law 7.1, section 21 and subsection 22(2).

unless:

- 2.4.1 the licensee is acting on behalf of his or her employer;
- 2.4.2 the licensee is acting as agent for another licensee or Canadian lawyer who has already complied with the client identification and verification requirements;
- 2.4.3 the client is referred to the licensee by another licensee or a Canadian lawyer who has already complied with the client identification and verification requirements; or
- 2.4.4 the licensee is acting as duty counsel or is providing summary advice under the *Legal Aid Services Act, 1998* (Ontario) or as duty counsel through a not-for-profit organization (provided the client verification rules are not triggered in the particular circumstances).

In the circumstances described in 2.4.2 and 2.4.3, the licensee will wish, at minimum, to have the principal or referring licensee/lawyer expressly confirm his or her prior compliance with the client identification and verification rules.²³

2.5 Client Identification²⁴

When Part III of By-Law 7.1 applies, upon the licensee's retainer to provide professional services to a client, the licensee is required to *identify* the client and each third party by obtaining the following information:

- full name;
- business address and business telephone number, if applicable;
- for an individual, his or her home address, telephone number and occupation;
- for an organization other than a financial institution, public body or reporting issuer²⁵, the organization's incorporation or business identification number and the place it was issued, if applicable, and a general description of its business(es) and activity(ies); and
- for an organization, the name, position and contact information for each individual who gives instructions regarding the matter for which the licensee is retained.²⁶

²³ *Supra*, footnote 21, Question # 7.

²⁴ By-Law 7.1, paragraph 22(1)(a) and subsections 23(1) and 23(2.1).

²⁵ "financial institution", "public body" and "reporting issuer" are each defined in By-Law 7.1, section 20.

The information may be obtained on the licensee's behalf by an employee or another licensee at the licensee's firm.

2.6 Verification of Client's Identity

2.6.1 Two Basic Obligations²⁷

When Part III of By-Law 7.1 applies, and the licensee engages in or gives instructions in respect of the receipt, payment or transfer of funds²⁸, the licensee must take reasonable steps to ***obtain additional information*** regarding his or her client and each third party as follows:

- For an organization other than a securities dealer, the name and occupation(s) of each director; and
- For an organization, the name, address and occupation(s) of each person who owns 25% or more of the organization or the shares of the organization.

In addition, the licensee must take reasonable steps to ***verify the identity*** of:

- the client;
- each third party; and
- where the client or third party is an organization, each instructing individual,

by reference to independent source documents, data or information which the licensee reasonably considers to be independent and reliable.

The additional information may be obtained by an employee or another licensee at the licensee's firm either:

- on behalf of the licensee; or

²⁶ This includes only the individuals actually instructing the licensee in the matter, and not all those individuals authorized to do so by the organization. If the individual(s) instructing the licensee on behalf of the organization changes, the licensee must identify the new instructing individual(s) at that time. Subject to Rule 2.02(5) and the commentary thereto and the dictates of ordinary prudence, the licensee is not required to look behind an individual's assertion that he or she is authorized by the organization to instruct the lawyer in the matter. *Supra*, footnote 21, Questions #23 and # 24.

²⁷ By-Law 7.1, paragraph 22(1)(b) and subsections 23(2), 23(2.1), 23(3), 23(4), 23(11) and 23(12).

²⁸ By-Law 7.1, section 20 defines "funds" as cash, currency, securities, negotiable instruments and other financial instruments that indicate a person's title or interest in them.

- in the context of a previous matter, if the organization's identity has also been *verified* previously in accordance with the By-Law.

The licensee complies with the requirement to take reasonable steps to *verify* the identity of a client, a third party or an organization's instructing individual, if:

- an employee or another licensee at the licensee's firm verifies the person's identity on behalf of the licensee;
- in the case of an individual, the licensee has previously verified the individual's identity in accordance with By-Law 7.1 and the licensee recognizes the individual;
- in the case of an organization, the licensee, an employee at the licensee's firm or another licensee at the licensee's firm has previously obtained the additional information and verified the organization's identity as required by By-Law 7.1; or
- an individual acting as agent for the licensee complies with the requirements of By-Law 7.1, provided that, prior to the agent acting, the licensee and the agent enter into a written agreement specifying the steps the agent will take on the licensee's behalf in order to verify the person's identity.

2.6.2 Timing of Verification²⁹

Verification of an individual's identity in accordance with the By-Law, including the identity of an individual instructing the licensee on behalf of an organization, must take place *immediately* after the licensee first engages in or gives instructions in respect of the receipt, payment or transfer of funds.³⁰ Verification of an organization's identity in accordance with the By-Law must take place *within 60 days* of the date the licensee first engages in or gives instructions in respect of the receipt, payment or transfer of funds.

2.6.3 Independent Source Documents³¹

The By-Law gives examples of independent source documents as follows:

²⁹ By-Law 7.1, subsections 23(5) and 23(6).

³⁰ Verification of the identity of the individual instructing the licensee on behalf of an organization must take place where the individual has changed since the last receipt, payment or transfer of funds. *Supra*, note 21, Question 48.

³¹ By-Law 7.1, subsection 23(7).

- for individuals, an original government issued identification that is valid and has not expired, for example, a driver's licence, birth certificate, provincial health card, passport or similar record;
- for a corporation or legislatively created or registered society, 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; and
- for unregistered organizations, for example, trusts and partnerships, a copy of the organization's constating documents or any similar record that confirms the organization's existence.

2.6.4 Attestations³²

Where the licensee will not be receiving instructions from an individual client face to face, the licensee meets the client verification requirements, if he or she obtains an attestation as follows:

- if the client whose identity is being verified is present in Canada, the attestation of a person entitled to administer oaths and affirmation in Canada or a member of one of the regulated professions listed in paragraph 23(9)1.ii. of the By-Law; or
- if the client whose identity is being verified is not present in Canada, an individual with whom the licensee has entered into a written agreement which specifies the steps the individual will take on the licensee's behalf to comply with the verification requirements.

The form of an attestation is specified in subsection 23(10) of By-Law 7.1 and a copy of the sample which appears on the Law Society's website is attached at Schedule A. A copy of a sample form of agreement which appears on the Law Society's website is attached at Schedule B.

2.6.5 Exempt Clients³³

Neither the specified additional information nor verification of identity is required in respect of a client who is a financial institution; a public body; or a reporting issuer.

³² By-Law 7.1, subsections 23(8) and 23(9).

³³ By-Law 7.1, subsection 22(4). See also the definitions of "financial institution", "public body" and "reporting issuer" in section 20.

2.6.6 Exempt Transactions³⁴

Neither the specified additional information nor verification of identity is required where funds are:

- paid to or received from a financial institution, public body or reporting issuer³⁵;
- received from the trust account of another licensee or Canadian lawyer;
- received from a peace officer, law enforcement agency or other public official acting in an official capacity,
- paid or received pursuant to a court order;
- paid on account of a fine or penalty;
- paid or received as a settlement in a proceeding;
- paid or received for professional fees, disbursements, expenses or bail; or
- paid, received or transferred by electronic funds transfer.

2.7 Recordkeeping Obligation³⁶

The licensee must obtain a copy of each document used by the licensee, an employee or another licensee at the licensee's firm, or the licensee's agent to verify the client or third party's identity.

The records establishing the licensee's compliance with the client identification and verification rules must be retained for the longer of:

- the duration of the solicitor-client relationship; and
- six years following completion of the work for which the licensee was retained.

³⁴ By-Law 7.1, subsection 22(3).

³⁵ *i.e.* – from the financial institution's own funds. *Supra*, note 21, Question # 30.

³⁶ By-Law 7.1, subsections 23(13) and 23(14).

2.8 Obligation to Withdraw Services³⁷

If, in the course of complying with the client identification and verification rules, a licensee knows or ought to know that that he or she will be assisting a client in a fraud or other illegal conduct, he or she must immediately cease and not further engage in activities that will assist the client in the fraud or illegal activity. If the licensee cannot comply with this obligation, he or she must withdraw completely from the provision of professional services to the client.

2.9 Examples of the Operation of the Rules in an Estate Practice

2.9.1 Estate Planning

Example 1³⁸

A licensee is retained to draft a will and powers of attorney for a client. The licensee receives a retainer of \$ 500.00 plus GST. After completing the services and delivering an account to the client, the licensee transfers the money from his mixed trust account to his general account. In these circumstances, the licensee must *identify* his client upon his retainer, but need not take steps to *verify* his client's identity, because a payment to the licensee for fees and disbursements is an exempt transaction.

Example 2

A licensee is retained by an individual to establish an *inter vivos* trust. The trust will be settled with \$ 100,000.00. When the settlor and the trustees have signed the Trust Agreement, the licensee instructs the settlor to deliver the money to the trustees in accordance with the Trust Agreement.

In these circumstances, upon her retainer, the licensee must *identify* the settlor. Because the licensee will be arranging for a transfer of funds, she must also take reasonable steps to *verify* the settlor's identity.

2.9.2 Estate/Trust Administration

Example 3

A licensee is retained by the executor named in the will of a recently deceased person to assist the executor with administration of the estate. Shortly thereafter, the executor arranges for the deceased's bank to furnish the licensee with a bank draft payable to the funeral home, so that the licensee can pay the deceased's funeral expenses.

³⁷ By-Law 7.1, section 24.

³⁸ *Supra*, note 21, Question # 67.

Upon her retainer, the licensee must **identify** the executor. Because she will receive funds, the licensee must also take reasonable steps to **verify** the identity of the executor.

Example 4³⁹

The trustees of an *inter vivos* trust retain the licensee to provide an opinion concerning a proposed discretionary distribution. After receiving the licensee's opinion, the trustees make a distribution among several of the beneficiaries of the trust.

The licensee must **identify** the trustees upon his retainer. At no time did the licensee receive, pay or transfer or instruct or arrange for the receipt, payment or transfer of funds. Accordingly, there is no obligation to take steps to **verify** the trustees' identities.

Example 5⁴⁰

The estate trustee of an estate retains the licensee to advise with respect to the administration of the estate. A debtor of the estate arranges with his bank to wire the amount owed to the licensee's bank for deposit to his mixed trust account. The licensee is directed by the estate trustee to pay the monies to a beneficiary of the estate.

The licensee must **identify** the estate trustee upon his retainer. The receipt of funds by way of electronic funds transfer is an exempt transaction which does not trigger the verification requirements.⁴¹ However, because the licensee will pay those funds, he must take reasonable steps to **verify** the estate trustee's identity. The licensee is not required by By-Law 7.1 to identify or verify the identity of the beneficiary, who is not:

- a client of the licensee;
- someone who is instructing or directing the estate trustee; or
- someone who has the authority to instruct or direct the estate trustee.⁴²

³⁹ *Supra*, note 21, Question # 36.

⁴⁰ *Supra*, note 21, Question 61.

⁴¹ Provided the transfer of funds meets the definition of "electronic funds transfer" set out at section 20 of By-Law 7.1.

⁴² Depending on the circumstances, competent representation of the estate trustee, who is under a fiduciary duty to distribute the estate to the persons named in the will or entitled on an intestacy, may require the licensee to discuss with the estate trustee taking appropriate measures to verify the identity of the beneficiary. In some cases, the beneficiary may be directing the estate trustee or the licensee may also have a solicitor client relationship with the beneficiary. In these circumstances, the licensee would be obliged by the By-Law to take reasonable steps to verify the beneficiary's identity as well. *Supra*, note 21, Question 61.

2.9.3 Estate Litigation

Example 6

A licensee acts for a person who commences an action challenging the validity of a Will. The matter settles during mandatory mediation, resulting in Minutes of Settlement and an Order on consent dismissing the proceeding. Pursuant to the Minutes of Settlement, the licensee receives in trust the settlement funds. After delivering an account for services rendered, and in accordance with the terms of the licensee's retainer, the licensee deducts her fees from the settlement monies and pays the balance of the funds to her client.

The licensee is required to *identify* her client when she is retained to challenge the will. The licensee is not required to take steps to *verify* her client's identity, because the settlement funds are received and then paid pursuant to the terms of a settlement *in a proceeding*, both of which are exempt transactions.

3. JOINT RETAINER BY ESTATE TRUSTEES

The issue of joint retainer by more than one client in a matter arises not infrequently in an estates and trusts law practice. A couple may retain a lawyer to prepare their wills and powers of attorney. Estate litigators may be retained to act for more than one beneficiary or more than one challenger to a will (or several wills) signed by the deceased. The solicitor for two or more estate trustees may face practice challenges, especially if animosity exists or dispute develops among the estate trustees. Whenever a lawyer is retained by more than one client in a matter, he or she is required to comply with the joint retainer rules set out in the *Rules of Professional Conduct*. This section of this paper reviews those rules and discusses some of their implications in the context of the lawyer's joint retainer by two or more estate trustees in respect of the administration of the estate.

3.1 Duty to Avoid Conflicts of Interest

Rules 2.04(1) of the *Rules of Professional Conduct* defines a conflicting interest as one which:

- is likely to affect adversely the lawyer's judgement on behalf of, or loyalty to, a client or prospective client; or
- that the lawyer may be prompted to prefer to the interests of a client or prospective client.

Rule 2.04(3) prohibits the lawyer from *acting or continuing to act* in a matter where 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. Rule 2.04(2) makes clear that a lawyer shall not advise or represent more than one side of a dispute.

Under Rule 2.04(4), a lawyer who has acted for a client in a matter shall not act against the client (or persons who were associated with the client in the matter) in respect of:

- the same matter;
- a related matter; or
- any new matter, if the lawyer has obtained from the previous retainer relevant confidential information⁴³,

unless the client and the persons associated with the client in the first matter consent.

3.2 Joint Retainers

3.2.1 Pre-retainer Regulatory Obligations

Rules 2.04(6) and (7) of the *Rules of Professional Conduct* require a lawyer who is retained by more than one client in a matter to 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;
- if a conflict develops which cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely; and
- the lawyer has a continuing relationship with one or more them, if that is the case.

After providing this advice, the lawyer must obtain the clients' consent that he or she act for them⁴⁴, which consent should be signed by the clients or confirmed by the lawyer in writing.

The lawyer should take steps appropriate to the circumstances to ensure that each client's consent is informed, genuine and voluntary. Although the *Rules of Professional Conduct* do not generally require the lawyer to advise the clients to obtain independent legal advice ("ILA") about the joint retainer, commentary to Rule 2.04(6) advises the lawyer to recommend ILA about the joint retainer where one of the clients is less sophisticated or more vulnerable than the other. Where the lawyer has a continuing relationship with one or more of the clients, the lawyer is **required** to recommend ILA about the joint retainer for the other clients. The recommendation and, if applicable, the client's stated reasons for declining ILA should be documented by the lawyer.

⁴³ Rule 2.04(5) does permit the lawyer's partner or associate to act in the new matter against the former client, if the former client consents or the law firm establishes it is in the interests of justice that occurs.

⁴⁴ *Rules of Professional Conduct*, Rule 2.04(8).

3.2.2 During the Retainer

An essential element of competent representation of a client is timely and effective communication at all stages of the matter appropriate to the age and abilities of the client.⁴⁵ In the context of joint representation of estate trustees, this means that advice and reporting letters, and copies of third party correspondence, should be sent to each of the estate trustees. Advice and reporting letters should communicate at a level that all of the estate trustees will be able to understand. In accordance with the joint nature of the retainer, all information pertinent to the matter must be shared with, and instructions obtained from, all of the estate trustees.

Where clients have consented to a joint retainer, and a contentious issue arises between them, the lawyer shall not advise any of them on the contentious issue, and shall refer the clients to other lawyers, provided that:

- the lawyer may continue to advise and represent the clients with respect to non-contentious matters;
- the lawyer may encourage the clients to resolve the contentious issue between themselves, *without participation of the lawyer*, if no legal advice is required and the clients are sophisticated; and
- if the clients have agreed so in advance, the lawyer may advise one client about the contentious issue, and refer the others to another lawyer(s).

3.2.3 Post-Retainer

Joint instruction of former joint retainer clients is required regarding any delivery of the file to one of the former joint retainer clients or another solicitor. Although there can be no confidentiality among the joint clients, the lawyer must preserve their joint confidentiality where third parties are concerned. Joint waiver of confidentiality or privilege is required prior to disclosure of information to a third party.⁴⁶

3.3 Issues for Consideration

There are a number of issues the lawyer who contemplates accepting, or who has accepted, a joint retainer by two or more estate trustees may wish to consider, discuss with the clients, and confirm in writing or otherwise document.

⁴⁵ Rule 2.01(1)

⁴⁶ *Re Municipality of Central Elgin* 2003 CanLII 53776 (Ont. I.P.C.); *In re Teleglobe Communications Corp.* 493 F. 3d 345 (3rd Cir. 2007).

- Does the lawyer wish to act? Careful consideration of this issue is especially appropriate where one of the estate trustees is an existing client of the lawyer. If issues arise during the administration, will this client expect the lawyer to take his or her side? Will the lawyer be inclined to do so? What will the client's reaction be when the lawyer doesn't? What implications will this have for the other business the client has with the lawyer?
- The degree to which administration of the estate will be complicated, delayed or more expensive given the existence of multiple estate trustees. Concerns may include:
 - geography,
 - the nature and quality of the relationship between the estate trustees;
 - the nature and quality of the relationship between individual estate trustees and individual beneficiaries,
 - the age and health of each estate trustee,
 - relative degrees of sophistication, and
 - the potential for one or more of the estate trustees to find themselves in a conflict between their duty as an estate trustee and their interest as a beneficiary, dependent of the deceased or creditor of the estate.

Each executor should be advised of their right to renounce the appointment. Certainly, any executor who has a financial interest in the estate should receive ILA prior to renouncing the appointment. An executor with no financial interest in the estate should receive from the lawyer advice and information about the duties and responsibilities associated with the office, the work and time commitment which may be required, and the financial compensation which will be foregone upon renunciation.

Addressing these issues up front may present an opportunity to ensure an estate trustee with a financial stake in the estate establishes from the outset a relationship with another lawyer who may advise that person on an ongoing basis regarding their personal interests.

- The advisability of obtaining a Certificate of Appointment of Estate Trustee With a Will and opening an estate bank account which requires the signature of all of the estate trustees.
- How best to make clear the division of labour and financial ground rules from the outset, for example:
 - What work will the estate trustees complete?
 - What work will the solicitor complete?
 - What rate will the estate be charged for solicitor's work and what rate will the estate trustees be charged for estate trustee tasks they delegate to the lawyer?

- That the amount of estate trustee compensation the estate trustees may receive is dependent on several factors, most particularly the time they devote to administration matters.
- That, if amounts are paid from the estate to the lawyer or to an accountant and they are found to be amounts paid for estate trustee work, the court on a passing of accounts will most likely deduct the amounts from the estate trustees' compensation.
- How will the estate trustee compensation amount they receive be shared among them?
- The frequency with which the lawyer will render accounts for solicitor's work and accounts for estate trustee work. Will the lawyer require the estate trustees to pay estate trustee work accounts as rendered, or will the lawyer wait to be paid from the estate trustees' compensation? Will the lawyer require an irrevocable direction to secure payment of those amounts?
- At the time an issue or dispute arises between the estate trustees, what the lawyer can and cannot do. For example, is it a specific issue which may be resolved outside the joint retainer, while the administration proceeds? Is it a personality conflict or a disagreement which threatens to bring the administration to a halt? The lawyer should:
 - acknowledge in writing to the estate trustees the nature of the issue or dispute,
 - confirm that the lawyer cannot advise any of them with respect to the dispute,
 - outline what options may be open to the estate trustees' in order to resolve the dispute,
 - state what the lawyer proposes to do in the circumstances; and
 - if the lawyer proposes to continue to act for them in the administration, seek confirmation that those are the estate trustees' instructions.

Schedule A

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: _____

Schedule B

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 FACE⁴⁷

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]

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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).

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:

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]

Resources and Additional Information

For more information on **New client identification and verification requirements**, go to

<http://www.lsuc.on.ca/latest-news/a/hottopics/new-client-identification-and-verification-requirements/>